

MARGARET KAWADZA
and
SHILLA RIMAYI
and
TSITSI BABRA MUWOYO
and
LINDA ZULU
and
MICAH KAWADZA
and
M. MOTSI N.O
versus
TITUS KAWADZA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15, 16, 17 FEBRUARY 2017 AND 2 MARCH 2017

Civil Trial

Ms P Dube for the plaintiffs
I Mafirekureva for the 1st defendant

MATHONSI J: This matter commenced as an urgent chamber application filed by the first five plaintiffs on 30 January 2012 against the two defendants seeking interim relief against the first defendant. They were apprehensive that as the house in dispute, stand 302 Matsheumhlope Township 7 of stand 186A Matsheumhlope Bulawayo (the house) was registered in the name of the first defendant who had suddenly started asserting ownership of it, he was capable of disposing of the house which they regarded as a family home. They sought to interdict that conduct.

On 15 February 2012 this court, per CHEDA AJ, granted a provisional order interdicting the first defendant from evicting the first plaintiff from the house and securing all the movable property at the house pending the finalization of the matter. They sought a final order preventing

the first defendant from alienating the house until the estate of their late mother Christine Kawadza has been wound up.

The confirmation of the provisional order was vehemently opposed by the first defendant who asserted that the house in question belongs to him alone and as such he is at liberty to deal with it as he pleased and to evict anyone in occupation thereof as he pleased. It was upon a realization that the application was replete with disputed facts which could not be resolved without the aid of *viva voce* evidence that the parties sought a referral of the matter to trial. By court order dated 18 March 2013 the court application was converted into action proceedings with the papers filed allowed to stand as pleadings. By a further court order dated 26 May 2016, the sixth plaintiff who is the executor dative of the estate of the late Christine Kawadza was joined as such.

The late Micah Shoniwa Kawadza (senior) and his late wife Christine Kawadza had a big family of eight children boasting of four girls and four boys. We have been informed that one of them is now deceased, leaving seven of them five of which are plaintiffs in this matter and one is the antagonist Titus Kawadza the first defendant herein. Micah Shoniwa Kawadza was employed by Air Zimbabwe as a bus driver. He passed away in 1983 leaving behind a widow and the huge family I have referred to. They lived in a four roomed house in Tshabalala high density suburb which may have been anything but comfortable for such a large group.

In July 1984, after the death of the man of the house, the large family was able to move into a more spacious suburban house in Matsheumhlope being the house in dispute. At the time that the family, by then headed by the widow Christine Kawadza, moved to the new house it was registered in the name of Nigel Molife who held title by Deed of Transfer No. 1560/80.

More than two years later in November 1986, the house was transferred into the name of Titus Kawadza by Deed of transfer No 3563/86 at the same time that Mortgage Bond No. 3936/86 in the sum of \$17500-00 was registered on the property in favour of Central Africa Building Society (Cabs). It is how and indeed why the house was transferred into the name of Titus Kawadza, the first defendant herein, which has brought what was otherwise a well-knit and united family on a collision course and is the subject of this litigation.

The plaintiffs say that house was purchased by their late mother in 1984, who later passed away in 1999, using their late father's pension after it had been released by Air Zimbabwe that

year. The pension had been used as a deposit after which their mother and all her children contributed in one way or the other to pay off the balance initially due to Nigel Molife in terms of a Deed of Sale with their mother and later to Cabs after a loan had been obtained from that finance institution to pay off what remained due to Molife.

The first defendant on the other hand says he single handedly entered into a sale agreement with Molife in 1984, paid the requisite deposit of \$2000-00 (Zimbabwe currency) and thereafter paid the balance on his own without any assistance from any member of the family. In 1986 when he was struggling to pay the instalments due to Molife he approached Cabs on his own and secured a loan to pay off Molife. He thereafter started paying off the loan which he eventually finished off, albeit with assistance from his niece Sharon Kawadza, who cleared what was outstanding.

At the pretrial conference of the parties held before a judge only one issue was identified for trial. It is: “Who is the rightful owner of stand 302 Matsheumhlope Township of stand 186A Matsheumhlope Bulawayo?” It is that issue alone which I have been called upon to decide and nothing else.

Four witnesses testified on behalf of the plaintiffs. In the order of the presentation of their evidence they are Tsitsi Barbara Muwoyo, the third plaintiff, Shilla Rimayi, the second plaintiff, Margaret Kawadza, the first plaintiff and Micah Kawadza, the fifth plaintiff. The sixth plaintiff who is the executor dative of the estate of the late Christine Kawadza filed a notice to abide by the decision of the court.

The essence of their evidence is that when their father died on 28 October 1983 he left the large family living at the township house in Tshabalala Bulawayo except for Shilla Rimayi the eldest who had married and moved out to her own residence. The following year, 1984, his pension was released by Air Zimbabwe who employed their father as a driver. When that happened their mother gathered the family and informed them that it was her desire to use the pension to purchase a bigger house in the eastern suburbs which was to be a family home instead of dividing the pension among all the beneficiaries. All of them were intrigued by the prospect of upgrading themselves from the township to the suburbs and supported the idea.

Indeed when the pension was released to her in March 1984 their mother again advised them of that development. In the company of Tsitsi Barbara who by then was always accompanying

their mother as she was not employed but attending Speciss College, she proceeded to John Pocock and Company, a firm of estate agents in Bulawayo in search of a house. Tsitsi Barbara added that upon arrival there they were attended to by one Lawrence Phiri, an agent, who informed them that John Pocock was indeed selling a house belonging to Nigel Molife being No. 13 Colleen Road Matsheumhlope Bulawayo. He suggested that they view the house and if they liked it, they could do business.

Tsitsi Barbara and her mother proceeded to the address given and were able to view the house from outside. They were not let inside. Notwithstanding their limited view, they liked the house and their mother decided to buy it. The witnesses are no longer sure who signed the deed of sale between their mother and the first defendant although Tsitsi Barbara was of the view that it is their mother who signed it with the first defendant also present.

After the agreement was signed, Tsitsi said their mother who had the cash paid the deposit about April 1984. The first defendant did not pay anything towards the deposit. He was, at that time training as an apprentice at National Railways of Zimbabwe. The deed of sale signed at John Pocock was misplaced over the years and none of the parties could produce it.

At that point their mother informed them that the pension money was only enough to cover a deposit. The family would have to assist her in paying off the balance due to Molife in instalments. Those who were employed then were the first defendant, the fourth plaintiff and with time the fifth plaintiff and indeed the last born Fortune who is based in the United Kingdom. Tsitsi got employed in 1985 and so did Micah. With that virtually everybody chipped in to assist their mother to pay the instalments due to Molife.

Even then the Molife account was a source of unending problems for the family which struggled to pay it off. Molife and his wife would regularly phone demanding payment. Eventually he demanded that the whole balance be paid in full as he had lost patience with them. It is then in 1986 that their mother approached the first defendant who was the only one with a stable job which assured him a payslip, a requirement for one to apply for a loan at the time. He requested the first defendant to apply for a loan and then take out a stop order on his salary in order to service the loan.

The first defendant would have none of it. While he was eventually persuaded to obtain a loan to pay off Molife, he set his own conditions. The plaintiff's testified that the first defendant

had told them and their mother that he would apply for a loan from Cabs but all the members of the family would be required to contribute to repay the loan. He was not going to have the whole instalment deducted from his salary by stop order because the loan was for the purchase of a family house. Her mother accepted those terms and a loan was secured from Cabs to pay off Molife.

They explained that it is as a result of that that the house was transferred to the first defendant. Cabs gave the loan to the first defendant. It required him to have title in order to register a mortgage bond on the Deed of Transfer. The first defendant agreed to that but only on condition that they all contributed when it came to servicing the loan. The family then agreed that all of them would do so which they did right up to the time that the loan was cleared by Sharon Kawadza the daughter of the first plaintiff.

In that regard the first defendant took transfer merely as a nominee of their mother on condition that the mother was the owner of the house which would be paid for by all the family members, which they did. For all intents and purposes the house belongs to their mother for whom they made the contributions. Micah even added that the first defendant himself also contributed towards the repayment like everybody else.

To make the point that it was the family members who repaid the loan, the plaintiffs produced exhibits 1 and 3 containing receipts and invoices initially in the name of "Mr N Molife" whose Cabs account was 9030160171 where instalments of \$200-00 were deposited in terms of the deed of sale. Later after the Cabs loan which paid off Molife, receipts show that payments were made into a Cabs account number 8030148614 in the name of "Mr T Kawadza," who is the first defendant.

In addition to that the plaintiffs produced a bundle of bills from City of Bulawayo and Zimbabwe Electricity Supply Authority in the name of "Mrs C Kawadza" who is their mother. The bills are addressed to the house. They stated that the utility bills were in the name of their mother because she owned the house and the first defendant's name came in as a nominee only to facilitate the Cabs loan and nothing else. A loan which was repaid by all of them. For that reason they had possession of all the receipts because they were kept in a box by their mother. The plaintiffs added that it is for that reason that at no point between 1984 and 2011 did the first defendant lay a claim over the house. He never asserted any right of ownership because he knew

that the house belonged to their mother. It is for that reason that although he had moved into the house with the rest of the family in 1984 he later moved out and commenced staying at a flat at Grand Hotel in town. Although he moved back into the house for some time, he was kicked out by their mother in 1997 after him and his customary law wife started giving the family problems.

He went on to rent houses in Tshabalala (where the family had left), Nkulumane and Glenkara over a lengthy period of time until well after their mother's death. She died in 1999. It was only in 2005 that she approached Shilla Rimayi, the eldest in the family and requested that he be allowed back into the house as he was then building his own house in Pumula South and needed a reprieve from rented accommodation. He was allowed back and lived in the house along with others until 2011 when problems started.

It was during squabbles with the first plaintiff who had remained living in the house with her children in 2011 that he physically manhandled the first plaintiff forcing her to vacate the house. Their uncle Eben Kawadza was called in to mediate and resolve the conflict. It is only then that the first defendant mentioned for the first time in more than 27 years that the house was his. Before then the family had lived peacefully content that the house belonged to their mother. It is that declaration by the first defendant which prompted them to litigate seeking a declaration of ownership.

The first defendant also gave evidence and did not call any witness to support his version. According to the first defendant he was doing apprenticeship at NRZ having started there in 1981 training as a platter/welder when in 1984 prior to his qualification as a journeyman in January 1985, he decided to purchase a house. He had saved enough money even though he was an apprentice to be able to raise the deposit of \$2000-00 which was required by John Pocock and Company who were selling the house for Nigel Molife.

The first defendant stated that he signed the deed of sale after speaking to Lawrence Phiri. Thereafter he started paying the balance due to Molife in instalments paid into his Cabs account. Immediately after signing the deed of sale, which unfortunately he could not produce saying he lost it less than a month after signing it, he says out of the goodness of his heart he allowed his entire family including his mother and siblings to move into it in 1984. He says he did not move in himself but elected to rent a flat at Grand Hotel in town meaning that he was then faced with the burden of paying the instalment for the house and his rent at the flat.

The first defendant says he had no problem with that. Sometime in 1986 Molife started demanding the purchase price as a lump sum and because some people had advised him that he could apply for a cabs loan, he decided to do so. He also needed to pay off Molife so that the house could be registered in his name. When his loan application was approved he obtained transfer of the house and cabs paid off Molife.

He admitted that Molife's wife had been calling the house demanding payment which calls were mentioned by Micah. His explanation was that the Molifes must have been looking for him as their debtor and not his mother because it is him who was in arrears. He stated that he repaid the Cabs loan himself and did not get assistance from anyone. Appearing to contradict himself he conceded that Sharon Kawadza paid off the balance of the loan.

The first defendant conceded that throughout the period of 27 years he had not asserted his right of ownership. He had in fact moved into the house in 1986 but was forced to move out again because his customary law wife had differences with his family members. He conceded that when he moved out in 1997 his mother had offered to give him a wardrobe because he did not own any making one wonder how someone who says he could afford a suburban house could not afford to own a wardrobe.

He stated that although he owned the house, he was forced to move out and spent several years renting township houses in Tshabalala, Glenkara and Nkulumane. His explanation for letting his family which could not co-exist with his wife live large in his own house while he was a "wandering wanderer" moving from place to place endlessly is that he was by then doing piece jobs as a welder and needed to be near his market in the townships as if there was no market in the suburbs or as if that business could not be conducted from Matsheumhlope.

The first defendant denied that he sought permission from Shilla Rimayi before moving back to the house in 2005. He says he only drove there one day, hooted at the gate and when Margaret came out he advised her that he would be moving back. That was it, although he never asserted his right of ownership at that stage.

He said he purchased the stand in Pumula South in 1998 at a time when he was struggling to pay off the Cabs loan and both Cabs and its lawyers were writing letter after letter demanding payment of arrears. The house had in fact been placed under attachment before then as Cabs sought to foreclose on the mortgage bond. He also started developing the vacant Pumula South

stand which incidentally is still being developed up to now 19 years later, so much for someone who could afford to buy a house in Matsheumhlope on his own. Significantly, the first defendant could not produce not only the deed of sale he allegedly signed with Molife at John Pocock but also a single receipt of any payment he made to either Molife in terms of the deed of sale or to Cabs in terms of the mortgage bond. Asked why this was so, he said he had kept all the receipts in a box at the house even when he did not live in that house for extended periods. When Margaret vacated the house she took the box with her. He also could not give an explanation as to why the utility bills were in the name of his mother from 1984 up to 2011 if indeed the house was his and he had signed the deed of sale. He however conceded that ordinarily City of Bulawayo and Zesa would only open a utility bill in the name of a person upon production of either a sale agreement or a lease agreement or a deed of transfer in in the name of that person.

To the extent that both the City of Bulawayo water/rates and the Zesa electricity bills wherein the name of “Mrs C Kawadza” the probability is that she had a sale agreement in her name which she produced to open accounts. This is particularly so when regard is had to the fact that the sale agreement signed at John Pocock was not produced by either side. The first defendant could only produce a letter purportedly written by John Pocock on 9 August 1984 barely a month after the sale which reads:

“TO WHOM IT MAY CONCERN

This is to certify that Mr Titus Kawadza, purchased through our Company, 13 Colleen Rd, Matsheumhlope, on the 1st July 1984 on Deed of Sale.

L Phiri
SALES”

As to why it became necessary for that letter to be written the first defendant says he had lost his copy of the sale agreement. As to why he did not ask for a copy from the estate agent, he says he could not afford one. He initially stated that the letter was written because it was the procedure of John Pocock to write such a letter. He was forced to revise that explanation under cross examination. He also stated that he kept the letter at his work place. Perhaps the last part contains the real reason why the letter was requested from John Pocock, to satisfy his employers

that he had purchased a house when he probably had not. All the other stories simply do not make sense.

The first defendant was not a good witness. He was loud and his demeanor was hopeless. He kept evading pertinent questions. Most of what he said does not make sense and appears wholly improbable in the circumstances. Most of the times he ignored questions choosing to rumble on and on about things that were not asked.

Here is a person who admits that he was, for all intents and purposes, a student at the time the house was purchased in 1984, who was said to have been staying at a crowded four roomed house belonging to his parents. Of course, he claims to have been staying alone at a flat he could scarcely afford as a student, a story which is demonstrably false. He claims he could afford to save money to buy a house in the eastern suburbs while still a student. Clearly false.

He says the sale agreement was in his name yet he has failed to produce it. On the other hand, the evidence of utility bills in the name of his mother tends to suggest that in fact the sale agreement may have been in his mother's name which she produced to open accounts at BCC and Zesa. As proof of purchase he can only produce a short letter written by the estate agent a month after he ought to have signed a sale agreement which he does not have. No reasonable explanation is given as to why that letter was written and not the production of a copy of the agreement unless if the agreement was not in his name.

This is a man who is described by all his siblings as having been a man of the world who enjoyed his life, a spent thrift who frittered his earnings on alcohol and other pleasures of this world with reckless abandon and as such could not have afforded to save to buy a house. In fact more than 12 years after he had qualified as a journeyman, that is in 1997, he still did not even own a wardrobe and his mother had to offer him one. This is by his own testimony.

He claims not only to have afforded a house in Matsheumhlope while still training but to have also afforded the luxury of moving all his relatives into it while he chose to remain living at a modest flat at Grand Hotel. Not only that, he spent several years renting township houses in Tshabalala, Nkulumane and Glenkara, places which are far from being comfortable at all compared to the upmarket house in Matsheumhlope. He then gives a not so wise explanation that he was moving into those rented houses because they each had a geyser. So what? What is apparent is that all the houses he was able to rent, including the one that he is still building since

1998, are in the modest locations of the western areas of Bulawayo. This suggests that the house in question is certainly out of his league.

As if that was not enough to suggest that he did not purchase the house, when his mother was still alive and even when he was also a married and had children to take care of, when he had differences with his sister who lived with the mother at the house, he did not assert any right over the house. He quickly moved out and remained banished from the house from 1997 to 2005, a period of 8 years.

This is a person who has been unable to produce proof as a single payment made by him towards the purchase of the house. A person who admits that Sharon Kawadza the daughter of the first plaintiff is the one who paid off what must have been a problematic loan due to Cabs in order to bring relief to the family. He was unable to say why Sharon would expend money settling a loan for the purchase of a house in which her mother had no interest. This happened long after Christine Kawadza had died. In any event, if indeed he purchased the house as he claims, surely he would have had a stop order on his salary to pay the Cabs loan instead of leaving it in arrears all the time.

I therefore have no hesitation in rejecting the version of the first defendant as being untrue and the fruit of a selfish opportunist intent on taking advantage of the trust bestowed on him by his mother and other members of his family. In the process he has betrayed his late mother whose dream was to provide comfort for her offspring who had to derive benefit from the pension of their departed father.

Mr Mafirekureva for the first defendant has submitted that because the plaintiffs sought an order that they be declared the true owners of the house and not the estate of their late mother in the draft order, they must suffer grief because they have not proved that they are the true owners. He submitted that it is incompetent for a court to grant a litigant relief that he or she did not pray for as the litigant is bound by his or her pleadings. He relied on the authority of *Indium Investments (Pvt) Ltd v Kingshavan (Pvt) Ltd & Others* 2015 (2) ZLR 40(S) and *Proton Bakery v Takaendesa* 2005 (1) ZLR 60 (S).

The case of *Proton Bakery (Pvt) Ltd v Takaendesa, supra* was a labour matter in which the Labour Tribunal had ordered the reinstatement of a former employee on the basis of the chairman's "reading of the record (of appeal)" and not on the evidence led and the submissions

made by the parties. It was an outcome which none of the parties had sought or placed before the Tribunal. That case is clearly distinguishable from the present matter.

In *Indium Inv. (Pvt) Ltd v Kingshaven (Pvt) Ltd & Others, supra* the main thrust of the judgment is that the court *a quo* which had been asked to decide principally on the cancellation of a lease agreement between the parties and consequential relief on the basis of *rei vindicatio* had gone on to decide an issue that was not placed before it for determination namely the status of an agreement between people who were not even party to the action. It held that such contract was in *fraudum legis*. The Supreme Court found that as a misdirection and *inter alia* remitted the matter for determination of the real issue.

In my view that matter is also distinguishable from the present matter where, as I have already said, the parties require me to decide the question of who owns the house in dispute. Although the plaintiffs had, in their affidavits in support of the application before it had been converted to trial action, had moved for an order that they be declared the true owners of the house, they urge of me the finding that the house belongs to the estate of their mother.

Ms Dube for the plaintiffs submitted that the court is empowered to grant any relief that it deems meet so long as a case has been made for the alternative relief. As a case has been made for declaring that the house belongs to the estate of the late Christine Kawadza, I should make that order. In my view, the argument advanced by the first defendants counsel is academic indeed in light of the issue for trial placed by the parties themselves before me for determination. The issue is broadly who is the rightful owner of the house. It is couched in the form of a declaratur and does not require me to grant any other relief to the plaintiffs. The parties must therefore be taken to have long departed from the draft order that was filed. After all it was only a draft order.

In any event, it is trite that pleadings may be amended by evidence. What we have in this case is evidence pointing to the fact that Christine Kawadza used her husband's pension to deposit a house for her big family. She then mobilized every member of the family who could afford to contribute towards the settlement of the balance. Although the first defendant was used to secure a loan from Cabs he was just a nominee. It is not him who repaid it and the house was registered in his name out of administrative necessity to facilitate the loan. All the parties were at *ad idem* that the house belonged to Christine Kawadza.

Mr Mafirekureva also took issue with the evidence of some of the plaintiffs like Shilla Rimayi who were not present when the house was purchased saying that the evidence was inadmissible hearsay. This is because what they testified about is what they were told by Christine Kawadza. I agree with *Ms Dube* for the plaintiffs that the statements made to the witnesses were first hand hearsay which is admissible in terms of s27 (1) of the Civil Evidence Act [Chapter 8:01]. She relied on the authority of *Hiltunen v Hiltunen* 2008 (2) ZLR 296 (H) 301 G and 302 A which I have had occasion to refer to and to associate myself with in *Mabuza v Ncube & Others* HB 41/16. In that judgment I made the following remarks when holding that the instructions given to a legal practitioner by his deceased client were admissible in evidence as first hand hearsay;

“In my view s27 (1) of the Civil Evidence Act [Chapter 8:01] provides for the admissibility of the evidence of *Masiye-Moyo*. It provides:

‘Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings.’

Masiye-Moyo testified that the deceased had given him instructions as his legal practitioner to institute proceedings against Busisiwe for the recovery of the house. Whatever form those instructions took, be it a written statement or a recorded one or even an oral one from which the legal practitioner took notes, it remains a fact that it was first hand hearsay given to him by the deceased. If the deceased had been present, and giving evidence himself it would have been admissible. Clearly therefore first hand hearsay is admissible in terms of the Civil Evidence Act [Chapter 8:01] where the identity of the person who made the statement is known and if he had given it himself it would have been admissible.”

I have no reason to depart from that pronouncement which I still stand by. All the statements made by the late Christine Kawadza to her children who testified about and concerning them in court are admissible first hand hearsay.

I also do not agree with *Mr Mafirekureva's* submissions that the plaintiffs do not have *locus standi in judicio* to sue because the property belongs to their mother. In this action the executor dative of their mother's estate is cited as the sixth plaintiff thereby completing the cycle. In any event all the children of the deceased are beneficiaries of her estate who are entitled to inherit from it. For that reason they have a direct interest in the estate. In order to

justify participation in a suit or to bring proceedings for relief, a party must show that it has a direct and substantial interest in the right which is the subject matter of the litigation and the outcome of the litigation. See *SA Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O) 1031; *Zimbabwe Teachers Association & Others v Minister of Education and Culture* 1990 (2) ZLR 48 (H).

I am satisfied that the plaintiffs have a direct and substantial interest in the litigation. They are therefore entitled to bring this action. In my view the matter is now resolved.

In the result it is ordered that:

1. It is declared that stand 302 Matsheumhlope Township 7 of stand 186A Matsheumhlope also known as 13 Colleen Road Matsheumhlope Bulawayo belongs to the estate of the late Christine Kawadza.
2. The said property must be transferred to the estate of the late Christine Kawadza and dealt with in terms of the law relating to the administration of deceased estates.
3. The costs of this action shall be borne by the first defendant.

Messrs Danziger & Partners, plaintiffs' legal practitioners
Messrs Moyo & Nyoni 1st defendant's legal practitioners