

HH 84-03
HC 2335/03
LAZARUS JAMES
and
CHISONI JAMES
and
ESNATI JAMES
versus
WILLIAM SIKARIYOTI
and
MUNICIPALITY OF HARARE
and
TONDERAYI MALVEDA KATSIGA

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 16 and 19 May, 2003

Mr *F M Katsande* for applicants
Mr *A A Musunga* for 3rd respondent

SMITH J: The applicants filed an urgent application seeking an order restraining the first respondent (hereinafter referred to as "Sikariyoti") from ceding his rights, title and interests in Stand 6070 New Tafara, Mabvuku, Harare (hereinafter referred to as "the Stand") to any person and declaring any such sale that may have been entered into to be null and void. The third respondent (hereinafter referred to as "Katsiga") was not cited as a party but he applied to be joined and his application was granted. He opposes the application. The first respondent (hereinafter referred to as "James") is the eldest son of the late William James (hereinafter referred to as "the Deceased") who died in 1983. The Deceased became the registered tenant of the Stand in 1970. After the death of the Deceased, his estate was registered and Sikariyoti was declared to be the heir. He became the registered tenant of the Stand. In his founding affidavit James says that, being the eldest son, he was entitled to be the heir to the estate of the Deceased. However, due to differences in the family and due to the respect he gave his mother, who felt that she was best qualified to administer the affairs of the Deceased,

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he did not insist that he be appointed heir. Sikariyoti assured the applicants and their mother that on no account would he succumb to the temptation to dispose of the Stand and that any such development could be by consensus amongst the members of the family. In August 2002 his mother died. Because her restraining influence was no longer available, he kept monitoring what Sikariyoti did. He discovered that Sikariyoti had entered into an agreement with Katsiga in terms of which he sold to Katsiga his rights, title and interests in the Stand. That resulted in the applicants filing this urgent application.

Katsiga, in his opposing affidavit, deposed as follows. On 12 March 2003 he entered into the agreement with Sikariyoti to buy his rights, title and interests in the Stand for \$2,6 million. On the same day the two of them went to the offices of the second respondent (hereinafter referred to as "the Council") at Tafara to complete the formalities for the rights in the Stand to be ceded to him. The officials confirmed that the Stand belonged to Sikariyoti and approved the cession. He and Sikariyoti then went to the Council offices in Remembrance Drive and saw a Mr Tapiri. He also approved the cession and advised that within 21 days all the records of the Council would reflect that he, Katsiga, was now the registered tenant of the Stand. The on 17 March Mr Tapiri advised him that the applicants had filed this application. Katsiga says that he has paid Sikariyoti \$2,6 million for the rights in the Stand. At the time of the sale Sikariyoti advised him that he was going back to Malawi to live there, because that was his home country. He would lose his money if the cession was not approved.

James filed an answering affidavit in which he deposed as follows. Sikariyoti obtained the Certificate of Heirship fraudulently. He, himself, despite being the eldest son of the Deceased, had never received notice of the edict meeting to appoint an heir to the estate. He had not challenged the appointment of Sikariyoti as heir because he had deferred to his mother's counsel not to caused friction in the family. He had never relinquished his status as eldest son of the Deceased. That was a birth right from which he could not abdicate.

Sikariyoti was appointed heir to the Deceased on 13 May 1986.

Thereafter, he was registered as the lawful tenant of the Stand. The records of the Council reflected that he was the owner of the rights in the Stand. That meant that he could sell those rights to any person, subject to the approval of the Council. James, who is the eldest son of the Deceased, claims that he was entitled to be appointed heir and should have been so

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appointed. However, he has done nothing to rectify the position since 1986. Likewise, he and the other applicants were well aware that Sikariyoti was registered as the owner of the rights in the Stand and yet they did nothing to have the Stand registered in James' name or to have some *caveat* registered to prevent James from selling his rights in the Stand without first obtaining their approval. It could appear that Katsiga is an innocent purchaser of the rights in the Stand. He has paid \$2,6 million to acquire those rights.

In his founding affidavit James says that at no time did Katsiga ever visit the Stand to view it and confirm on what basis the applicants occupied the property. He therefore concludes that Katsiga and Sikariyoti collaborated in the plot to deprive the applicants of their rights of occupation of the Stand. Katsiga asserts that he did visit the Stand to assess whether it was worth \$2,6 million. He was satisfied that it was. He also checked with the Council officials to ensure that Sikariyoti was indeed the owner of the rights in the Stand and they confirmed that he was. It was only then that he proceeded with the sale.

Our law expects those who have rights to ensure that they protect their rights. *Lex subvenit vigilantibus non dormientibus* - the law helps those who are awake and not those who are asleep. In *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 (2) SA 464(W) at p 477-478 it was held -

"(I)t is the idle and slovenly owner, and not one who is alert but incapable of acting, who may lose his property by prescription".

Then in *Ex Parte Puppli* 1975 (3) SA 461 (D) at 463 it was said -

"The rationale of our law of acquisitive prescription is that an owner who negligently fails to protect his interests against a stranger in possession of his property should forfeit the property to the possessor".

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It seems to me that the principles set out above apply equally in a case such as this, even though prescription is not involved. Vusa should have taken action years ago to assert his rights.

Although it will cause great hardships to the applicants to require them to move from the Stand, they are to some extent the authors of their misfortune. They stood by for some 17 years allowing Sikariyoti to hold himself out as the owner of the rights in the Stand. When Katsiga wanted to buy the Stand he checked with the Council officials to ascertain who was the registered owner of the rights in the Stand and he was informed that it was Sikariyoti. Relying on that information he handed over \$2,6 million. There is nothing in the papers to show that he did not act in good faith. That being the case, I consider that there is no basis on which this court can declare the sale to be null and void.

The application is dismissed with costs.

F M Katsande & Partners, legal practitioners for applicants

Musunga & Associates, legal practitioners for 3rd respondent