SITHEMBINKOSI GODZONGERE
versus
MARGARET MUNATSI
and
DAVID MUTANDA MUNATSI
and
ASTON ALOIS MUSUNGA
and
THE MASTER OF THE HIGH COURT
and
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 5 February, 6 February & 10 April 2014

FAMILY LAW COURT
Trial Cause

T. Hove, for the plaintiff
J. Dondo, for the 1st and 2nd defendants

TSANGA J: This is a case where the claim exemplifies a crisis in expectations that often arises in African settings such as ours where people govern their lives by embracing a plurality of norms in their dealings. The formal law on a given issue is often embraced just as much as families may simultaneously craft their own expectations that may be at variance with those that flow from formal rules. Such schisms in expectations between what the formal law provides and what families themselves say they may have intended or not have intended in utilising the formal legal system are common in property dealings. This is one such case whose facts are centred on the acquisition and disposition of certain immovable property within the framework of the formal legal system. The facts which have ignited the dispute which now calls for a resolution by this court are as described hereunder.

The background

The plaintiff, Sithembinkosi Godzongere acting on behalf of a minor child, Jaden Taongaishe Mutange, whose parents are in the United Kingdom purchased certain property known as Stand 11095 Teuropa Road Zengeza. The purchase was from the estate of the late

Charles Munatsi who died on the 13th of September 2007. His widow Annatoliah Muchemwa Munatsi, listed the property as forming part of his estate. With the requisite consent of the Master, it was put up for sale in August 2008. This was done thorough the executor of the estate, Mr Musunga and an estate agent, Golden Properties. The property was duly transferred to the minor child and a certificate of occupation of the property granted by the relevant Municipal Authority, namely Chitungwiza Municipality.

What has inflamed the dispute is the refusal to vacate the property by the second defendant, David Mutanda Munatsi, despite the property having been sold and all procedures completed. His refusal is grounded in his assertion that although the property was registered in the name of the late Charles Munatsi, who was his older brother, it in fact belonged to their father, the late Andrew Royayi Munatsi who died in 1996. Flowing from this, his further argument is that the estate of the widow of the late Andrew Royayi Munatsi, that is his mother Margaret Munatsi, is the owner of the property. Margaret Munatsi having died before the trial could commence, her estate is represented by the second defendant David Munatsi. Annatoliah Munatsi, the widow of Charles, also died before this trial could commence.

This matter is in essence a consolidation of two matters. The first matter HC 4966/08 is a claim by Sithembinkosi Godzongere as the plaintiff, of the property bought on behalf of Jaden Taongaishe Mutange. Her prayer is as follows:

1. That the second defendant and all those claiming occupation through him be and are hereby ordered to vacate the premises known as Stand No. 11095 Zengeza 4 Chitungwiza within 30 days from the date of this order, failing which the Deputy Sheriff be and his hereby ordered and directed to evict the second defendant together with all other persons claiming right of occupation through him.
2. The second defendant pays the costs of suit.
3. That in the event of the defendant's appealing against the decision of this court in this case, this/these order shall, despite the appeal, be put into force immediately to the effect that the defendants can appeal but the appeal will not stop execution

The second matter HC 1922/10 is a claim by David Mutanda Munatsi on behalf of the estate of Margaret Munatsi for the following prayer.

a) The plaintiff's claim for ejectment of the defendant together with all persons claiming title through the defendant be dismissed with costs.

b) The contract of sale of the property to Jaden Mutange be and is hereby set aside
c) The transfer and or cession of the property to Jaden Mutange the minor child be and is hereby set aside
d) The plaintiff pays the costs of the suit in case number HC 1922/10

The issues which this court is asked to consider after the consolidation of the two matters HC4966/08 and HC 1922/10 are as follows:

a) Whether or not the property in dispute formed part of the estate of the late Charles Munatsi.
b) Whether or not the Master of the High Court erred in authorising the sale of the disputed property.
c) Whether or not Sithembinkosi Godzongere was aware of the dispute over the property between the Munatsi family.
d) Whether or not Sithembinkosi Godzongere as the representative of the minor child is entitled to the relief sought.

The third to fifth defendants were not represented in this matter.

At the commencement of the trial, counsel for the first and second defendants, Mr *Dondo*, raised a point *in limine* relating to the capacity of the plaintiff to represent the minor child, plaintiff having been cited in papers as guardian when the parents are still alive. It was not in dispute that the plaintiff had acted on behalf of the minor child. What counsel sought to argue was that guardianship can only be assumed by a natural parent or by formal appointment and that there was no document filed to show that the plaintiff had been so appointed. Mr *Hove* for the plaintiff argued that that the plaintiff had at all times acted on the strength of a power of attorney. The sale had gone through and transfer had been effected. The issue of the plaintiff's *locus standi* he said had also never been an issue up until the day of the trial. I dismissed the point *in limine* for the reason that the plaintiff was said to have acted on the basis of a power of attorney. Also not only had the sale gone through but the issue had also not been raised in the related matters that had come before the court. More significantly, the gravamen of the dispute has nothing to do with guardianship. It has to do with ownership of the property. The point *in limine* was in my view merely designed to further the delay the matter since the plaintiff would still be the core witness even if papers

were to be filed by the parents as guardians which I did not deem necessary since it was indicated that plaintiff acted on the strength of a power of attorney. In safeguarding the interests of the minor child I ruled that the matter proceed.

The plaintiff's evidence

First to give evidence in this matter was the plaintiff herself, Sithembinkosi Godzongere. Her evidence was that the parents of the minor child had responded to a classified advert on the sale of this property and had gotten in touch with her regarding a possible purchase. She had gone to the estate agents listed namely Golden Properties who had confirmed the sale of the house in Chitungwiza. She had been accompanied by two representatives from the estate agent to see the property. In addition, she said that she had undertaken a check with the Chitungwiza Municipality to ascertain who owned the property and if it could indeed be sold. She had satisfied herself that the property was indeed registered to Charles Munatsi. She had met with the executor, the agent and had also met with the widow Annatoliah Munatsi who confirmed that the house belonged to her husband. The widow's explanation was that she was selling the property because she needed to settle her husband's hospital bills. She also told her that she had children at University who needed financial support. She also said that she had seen the letters appointing Mr Musunga as executor.

According to her evidence, the second defendant Mr David Munatsi was at the property when they got there. She confirmed to the court that this was the same Mr Munatsi present in court. Her evidence was that he had shown them around and she had satisfied herself that she liked the property. She described the house as she saw it. She also stated that the estate agents had informed him that she was a prospective buyer. Satisfied with what she had seen she had then finalised the paper work and made payment which resulted in the final sale of the house and its transfer. The agreement of sale was availed as part of the evidence as was the certificate of occupation.

The plaintiff further asserted that after the finalisation of the sale they had made arrangements to put tenants in the house. However the second defendant had been given three months following a plea that alternative accommodation was proving hard to come by. During this three months period it was her evidence that the defendant had paid rentals into their Bank account. Proof of these rental payments which she had tried to obtain from the

bank could however not be provided as they were in Zimbabwean dollars and the bank had said they were no longer able to provide this data.

After the expiration of the three months she and her husband had gone to the house and found the second defendant's wife. It was the plaintiff's evidence that all goods had been packed. There was again a plea for more time which the plaintiff said they could not entertain due to the fact that they had already done so and had a tenant who was waiting to take occupation. It was also the plaintiff's evidence that she and her husband were in fact given keys by the defendant's wife which they gave to the tenant. They were satisfied that they had introduced their tenant and went back home. On arrival they got a telephone message from the tenant saying that the defendant and his family were refusing to vacate. The plaintiff stated that her husband had then gone back to Chitungwiza where he had found a sizeable gathering of people from the neighbourhood at the residence. He learnt that the second defendant was refusing to vacate on the grounds that the house belonged to his parents. The crowd had also threatened to turn violent in support of the second defendant whom they said they knew as the occupant of the house over many years. Following this development the plaintiff and her husband had then gone back to seek the assistance of the estate agent and the seller, the now late Annatoliah Munatsi. The plaintiff averred that the widow had reiterated her position that the house belonged to her husband. The plaintiff's evidence was also that the widow had indicated that the property would have been sold a long time ago since the money needed at the hospital was a lot. She had also said that she had a letter from her husband saying she should sell the house. The house had at one time been advertised but unfortunately her husband had died on the day the advert came out. She also stated that had the widow survived this letter and advert were to have been produced as evidence. The plaintiff was adamant that she would not have bought the property had she known of any dispute. Her position was that none had been brought to her attention until the day the tenant tried to take occupancy. It was also her evidence that the first time that they heard of the second defendant's claim was when the second defendant refused to allow the tenant to take over.

In cross examination counsel for the second defendant argued that the plaintiff was lying that she saw the second defendant when she went to view the property since he would have been at work. The plaintiff was however resolute that she had been shown the house by the second defendant. She was also challenged on the issue of rentals and keys and she again remained unwavering in what she had told the court. Much was also made of the fact that she

could not possibly have known of the private arrangements within the Munatsi family regarding the house. Her response was that she had bought the house on the strength of the papers that she had examined which showed that the house was owned by Charles Munatsi. I found the witness to be a steady and credible witness. There were no indications of crafting or manipulation of her evidence to suit her case. Where she could not remember she stated so.

The second witness to give evidence was Mr Honerwa from Golden Estate Agents. His evidence was essentially that when selling property belonging to a deceased estate steps are taken to ensure that the person selling has the authority to sell. The sale was done because they were letters of administration and consent to the sale from the Master. He confirmed going to view the property when the second defendant was there having made a prior appointment with him by phone. He also said that the second defendant had indicated to him that the fence was his as he had put it up and that whoever was buying the house should pay him for the fence. It was after the meeting with the second defendant that the property was advertised officially. The visit where representatives of the Estate Agent accompanied the plaintiff to view the house was later after she had responded successfully to the advert. He confirmed the second defendant's presence again on this occasion.

He too under cross examination maintained his stance that he had interacted with the second defendant and that the sale of the property was kosher. Asked if he agreed that it is possible for a family to agree to register a property under the name of a particular person without the intention of it belonging to him, he agreed that it can happen but opined that it would be stupidity because nothing could stop that person legally from saying that the property belongs to him. It was put to him that the family had lodged their complaint with the Master regarding the inclusion of the property under the late Charles Munatsi's estate. His response was that if that was indeed the case, then the fact that the master consented to the sale was evidence that he did not put any store to these objections as he would not have consented otherwise. It was also his view that if all these objections to ownership had been raised during the late Charles's life time, it would have helped to shed light on the matter. In his assessment the difficulties had arisen because in laws usually do not want the property to be acquired by a daughter in law. The issue only arose after Charles's death to prevent a stranger taking over the property. He also stated that it would not have been possible for him to go into the house without the parent's permission since the children had clearly refused the

first time that he had gone to look at the property. This is why he had made an appointment with the second defendant.

The second defendant's evidence

The second defendant, David Munatsi gave evidence in his capacity as executor in Margaret Munatsi's estate and in his own interest. However, he did not produce any evidence confirming his appearance as executor. His evidence regarding how stand 11095 was acquired was that their rural home was burnt down during the height of the liberation struggle in the mid-1970s. His brother Charles, already then a teacher, had taken in the whole family at his place in Glen Norah. However, as he was sharing this accommodation with another teacher, the arrangement was not practical as the place was over crowded. Their father Andrew Munatsi who was working in South Africa tasked Charles, to look for a property where the family could stay. This was done. A two roomed core house was found which according to the second defendant was paid for by his father who sent money to his mother, who in turn gave the money to Charles. This was in 1978-9. The house was later developed into a five roomed house and it was his evidence that his father, Andrew Munatsi and not Charles who paid for the extensions. He also told the court that the house was put in Charles name because his father had acquired South African citizenship and believed that he was not allowed to own a house in Zimbabwe as a foreign citizen. He averred that the house was acquired as a family home and was never meant to benefit Charles alone.

On why his father had not registered the house in his name when he returned to Zimbabwe in the 1990's, he stated that this was because there was no need to rock the boat since all were staying peacefully. He emphasised that the acquisition of the house predated Charles's marriage to Annatoliah. He said that he only got to know about the registration of the estate when he was phoned by the now late Annatoliah that he was wanted at the High court. This was also when he got to know that Mr Musunga had been appointed as executor. Following family consultations his sister Longina and he were tasked to unearth further particulars regarding the winding up of the late Charles Munatsi's estate. Upon discovery that stand 11095 had been listed as part of Charles's property, he said that he had written a letter to the Master which he left at the Master's office. The purpose of the letter was to highlight that the property in question should not have been listed under the late Charles Munatsi's estate.

The letter as well as supporting affidavits by the now late Margaret Munatsi detailing the history of the property were produced as evidence during the trial. However none of the documents produced bear a stamp from the Master's office confirming that they were received. It was the second defendant's insistence that despite this anomaly in the non-stamping of these documents, they were in fact filed. He says that he was under the impression that the objections had been accepted. Though probably unintended, the second defendant's letter in fact lends support to the late Charles Munatsi as an enterprising developer. He acquired the house in Glen Norah under the home ownership scheme. In addition, the second defendant's letter points out that when their father eventually returned to Zimbabwe, he gave each of them money. The second defendant bought himself a stand in Glen Norah which he admits he failed to develop. He states that it was the late Charles Munatsi who then constructed five rooms on this property. Regarding stand no 11095 in Zengeza 4, he insists in this letter that was developed for the family using money sent by his father. He also states that he has resided in this house with his wife and four children from the time it was completed. While he paints his brother in somewhat of an unpleasant light regarding the use of the second defendant's car which he said that he had been given by his father, the letter clearly paints a picture of Charles as the one who was prone to take the bull by the horns.

Regarding the sale of the house he denied ever showing the plaintiff the house maintaining that she must have been shown by ghost as it was not him. He further vehemently denied ever seeing the estate agent. He said he had met Mr Godzongere only whom he told that the person selling the house was not the owner and said that the Godzongeres had proceeded to buy the house at their own peril. He denied ever paying rent to the Godzongeres in any account. He also denied that his wife had at any time surrendered keys. He acknowledged the altercation with Mr Godzongere on the day the tenant was supposed to take occupation and said he had told him that the only person who could remove him was the one who had put him there in the first place. He said it was not true that the house needed to be sold to pay hospital bills as a relative who had been looked after by his mother had paid the bill as an act of gratitude. He emphasised the point that Annatoliah wanted to take property which does not belong to her. In his estimation that house was supposed to remain as is since they were staying well. Although his father built himself a house in the rural areas when he returned, the second defendant said that he still regarded the

Zengeza hose as his and would occasionally visit. He said that he had heard that it was Annatoliah who advertised the house for sale on the day her husband died. He said he had been cheated into signing the documents appointing Musunga as executor and that he did not understand these documents. He maintained that his prayer was for the sale to be set aside and also for the cession to Jaden Matange to be set aside.

I found this witness to lean towards a tendency to deny virtually every aspect that he thought would go against him. His insistence that he never met the agent nor the buyer to show them the house seems most unlikely more so in light of the evidence articulated by the earlier witnesses. While the history surrounding the acquisition of the original core house has truth to it, there was no evidence placed before the court to categorically support the assertion that the house was from start to finish inclusive of the extensions entirely funded by their late father Andrew Munatsi who was based in South Africa. Despite the fact that the late Andrew Munatsi did return to Zimbabwe in 1990 particular at a time when the legal consequences of letting the eldest son remain with title were well appreciated, he did nothing to change the status quo. The law of inheritance at the time when he died was that the eldest son inherited in his individual capacity. This property was already in the eldest son's name. Absolutely nothing was done to change this reality or that is not what the family intended. The argument that nothing was done because things were going smoothly and that 'a good thing is a good thing' as the second defendant put cannot absolve the inaction in light of the very well-known legal consequences of the single heir at that time. Indeed there may have been no need for the transfer into Andrew's name because he saw Charles as his legitimate heir and the property was already in his name. In 1996 the property would not have gone to Margaret Munatsi if he died intestate but to Charles Munatsi. The Administration of Estates Amendment Act which changed the position of inheritance under customary law only came into effect on the first of November 1997. There was no challenge to ownership when the purported real owner of the property Andrew Munatsi returned to Zimbabwe. There was again no challenge regarding the property being in Charles's name when Andrew, his father died. During Charles' life time there was no effort to challenge his sole ownership either. In fact it is only after the sale was effected and the transfer had gone through that the matter was legally challenged.

Longina Munatsi the sister to the second defendant also gave evidence. She confirmed the story relating to the history of the acquisition of the house. She said that she was staying with her brother Charles at the time the house was acquired and going to school in Glen

Norah. She recalled that they did things as family and that they all agreed that the registration be done in Charles's name. She said that during the time her father was in South Africa, it was Charles who looked after the family. Her evidence was that her father returned in 1990 and died in 1996. The reason why he did not change the status quo was because he found everyone staying well. Also she said he wanted to rebuild his rural home. Unlike David whose stance was that the house forms part of his mother's estate her evidence was that the house belongs to all of them. In her view it was not put in a Trust because under customary law it is the eldest son who acts in trust for the whole family and that is exactly what Charles did. She said that Charles's salary would not have been enough to do the extensions hence her insistence that it was her father who sent the money. She acknowledged that neither of them had any proof to show to the court that their father sent the money but that she knew that the money would come in letters. The letters were also no longer available. She was of the view that Charles would have had the receipts for the materials because the money was sent to him and he would go and buy the materials. Her opinion was that the house was claimed by Annatolia as part of her husband's estate because she was being greedy and selfish yet she and her husband already had properties of their own. When asked whether her father's estate was not wound because there was nothing to wind up her response was that Charles had been the one who saw to the winding up of their father's estate.

Regarding the edict meeting she said that she had only heard from David when he came to report that he had been called by Annatoliah. She confirmed that the family had met and had decided to challenge Annatoliah's registration of the property as belonging to her husband. She had also heard about the sale from her brother who had told her that the Godzongere's had come and that he had been held by the collar by Mr Godzongere. She also said that she had told her brother not to leave the house as Sithembinkosi had no right to buy that house. She described Annatoliah as someone who did things crookedly behind their backs. She conceded in cross examination that it was only after the house had been sold that they had decided to engage lawyers to assist with the case although she maintained that they had lodged an objection earlier with the master regarding the listing of the property.

Factual and Legal Analysis

The basic presumption is that the person in whose name property is registered is the one who has a real right. Such right is enforceable against the world at large. See *Ncube* v *Ncube* 1993 (1) ZLR at p 39. It must also be borne in mind that rules on ownership as

provided by the formal law play important roles. They have a protective function and provide predictability and transparency particularly ascertaining ownership. When disputes arise, consequences of real rights, stemming from formal rules can help to steer a case towards speedy resolution.

However, the presumption of real rights for the registered owner is one that can be set aside if it is successfully rebutted. Drawing on similar circumstances an example where such presumption was successfully rebutted is the case of *Kamanga* v *Estate late Chikondo as represented by Oswold Bute Chikondo in his capacity as executor and others* 93/2011. Property had allegedly been registered in the name of another to evade local authority's regulation prohibiting multi ownership. The evidence of the witnesses in that case was unassailable as to how the property had been paid for and as to who had effected the improvements to the properties. In the present case all those who could have properly shed light on the matter are deceased. The evidence stated by the second defendant and by his sister Longina as to what was intended as regards ownership was not always consistent. The issue of ownership vacillated between various scenarios. In second defendant's evidence the property in fact belonged to his father and on his death his mother should have been the rightful owner. By contrast, according to Longina, the family met and chose Charles as a trustee. Her claim was that the property has always been collectively owned and in fact belongs to all of them. Even accepting that a trust can be established informally the certainty of an intention to create a trust was in my view far from established. The fact that a home was to be used to the benefit of the family did not in itself create a trust.

The claim that objections to the property having been listed as belonging to Charles was not supported by evidence. What appears to have stimulated the challenge to the sale was that it was spearheaded by Charles's widow whom the family deemed as an outsider rather than that it did not belong to the late Charles. It is therefore my view that the property in dispute rightly formed part of the estate of the late Charles Munatsi in the absence of tangible evidence to support the notion that the property was wholly and entirely developed by Andrew Munatsi only.

While the second defendant claimed in his evidence that both him and his mother had written to the Master, there is no evidence that these letters were ever received by the Master as they were unstamped. As such the Master of the High Court did not err in authorising the

sale of the disputed property as there is no acceptable evidence to confirm that there were objections that were ever placed before him.

Whether a purchaser had knowledge of a dispute relating to the ownership of the property under sale is pertinent in determining whether such sale should be set aside. See *Nkomo* v *Ncube* HB 27/2004. In the present case the evidence is that the proceedings challenging the sale were only initiated after the property had been sold and after the plaintiff had taken transfer on behalf of the minor child Jaden Taongaishe Mutange. I do not think that the second defendant was being candid with the court when he claimed that the property had been purchased with the full knowledge that it was under dispute. It is my finding on the evidence placed at the trial that Sithembinkosi Godzongere was not aware of the dispute over the property between the Munatsi family. There is no basis in my view for overturning the real rights that were acquired by Jaden Taongaishe Mutange through the purchase of the property by Sithembinkosi Godzongere. She is entitled to the relief sought on behalf of the minor child.

Counsel for the plaintiff, Mr *T. Hove* sought leave to include an additional prayer that in the event of the defendants appealing, the appeal should not stop execution. This was on the basis that such right has been upheld by the Supreme Court, albeit sparingly invoked. His submission was that this was a proper case, especially as the plaintiff is a minor child who continues to be prejudiced by not being in occupation of the property. In *Whata* v *Whata* 1994 (2) ZLR 277 (SC) it was stated that special leave would have to be granted after special application is made by the successful party, not to suspend the order as a result of an appeal. As stated by GUBBAY C J at p 281 of that case:

> "The principle to be applied by the court considering the grant of an application for leave to execute a judgement under appeal, is what is just and equitable in all the circumstances. The enquiry normally involves assessing such factors as the potentiality of irreparable harm or prejudice being sustained by either the successful or losing party, and if by both, the balance of hardship or convenience; and the prospects of success on appeal, including whether the appeal is frivolous or vexatious or has been noted for some indirect purpose, such as to gain time to harass the other party……. The need to take account of such factors serves to underscore that it is contrary to the basic tenets of natural justice for a court to order that is judgment be operative and not be suspended, before giving the unsuccessful party the right to be heard as to why execution should be stayed."

Therefore should the need still arise, an application will have to be made by the plaintiff for leave to execute pending any appeal. An order will at that time be made which

takes into account crucial factors outlined above which critically include among them, whether the appeal is being noted merely for purposes of delay and its real prospects of success.

Accordingly I hereby make the following order

1. That the 2nd defendant and all those claiming occupation through him be and are hereby ordered to vacate the premises known as Stand No. 11095 Zengeza 4 Chitungwiza within **30 days** from the date of this order, failing which the Deputy Sheriff be and his hereby ordered and directed to evict the 2nd Defendant together with all other persons claiming right of occupation through him.
2. The 2nd Defendant is ordered to pay costs of suit.

Musunga & Associates, plaintiff's Legal practitioners
Dondo and Partners, defendants' legal practitioners