

MUSASIWA FAMILY TRUST
versus
LAWRENCE NGWERUME
and
ROZINA ROSELYN MAGOLA
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 26 February 2015

Opposed Application

M Hungwe, for the applicant
K Maeresera, for the 1st respondent
No appearance for the 2nd and 3rd respondents.

CHITAKUNYE J. The applicant is a family trust created by Roy Musasiwa as the founder member under a deed of donation and trust.

The first respondent is the occupant of the property subject of this dispute. He is also the current executor of the estate late Edith Chikafu.

The second respondent is the previous executrix of the estate late Edith Chikafu.

The third respondent is cited in his official capacity.

The first and second respondents are both children of the late Edith Chikafu who died at Harare on 16 April 2007. The late Edith Chikafu was the owner of Stand 3850 Highfields Township, Harare. The first respondent is second respondent's half brother.

On 11 February 2009 the second respondent was appointed executrix and authorised as such to administer the estate of the late Edith Chikafu.

On 15 August 2009, the second respondent as executrix entered into an agreement of sale with applicant for the sale of Stand 3850 Highfields Township Harare. The agreement of sale, *inter alia*, provided for the purchase price as USD11000-00 (eleven thousand United

States dollars) payable in two instalments. The first instalment of USD 3000 was payable on signing of the agreement of sale and the second instalment was payable by 31 August 2009.

Clause 2 of the agreement provided that occupation was to be on the date when the current tenants vacate the property.

Clause 3.1.2 provided that the seller shall tender transfer of the property upon payment of the first instalment.

In furtherance of the agreement of sale, the second respondent obtained consent to transfer from the third respondent in August 2009. On 23 September 2009 the property was transferred to the applicant. Since that time applicant has been the holder of title in the said property.

However due to the resistance of the occupants of the property the applicant has not been able to take occupation of the property.

During her tenure as executrix the second respondent prepared the first interim liquidation and distribution account in the estate late Edith Chikafu and this was confirmed by the third respondent (the Master of the High Court) on 25 August 2009. That account confirms that the estate was distributed in terms of the late Edith Chikafu's last Will and Testament. That Will bequeathed the property in question to second respondent.

It is pertinent to point out that on 4 February 2011 the second respondent was purportedly removed from the office of executrix and was replaced by the appointment of the first respondent as executor in the estate late Edith Chikafu in November 2011. The removal of the second respondent and appointment of the first respondent as executor was not said to have had a retrospective effect.

In a bid to take occupation the applicant filed this application on 12 December 2012 seeking the eviction of the first and second respondents and all those who claim right of occupation through them from Stand 3850 Highfields Township, Harare.

The first respondent opposed the application. In his opposition the first respondent raised issue with the manner in which payments were being made, the fact that transfer was effected before full payment had been made, the sale was without third respondent's prior consent to sale and his own belief that the sale was fraudulent. He contended that the applicant was not an innocent purchaser.

It is pertinent to note that throughout his opposition the first respondent did not seem to appreciate that there was a Will and that the distribution account awarding the property in

question to the second respondent had been confirmed. Both the Will and the distribution account have not been challenged before this court and so for all intents and purposes remain valid.

The first respondent does not seem to also realise that his appointment came after the property had been sold and it apparently did not reverse what the second respondent had done as executrix. What this means is that what the second respondent had done as executrix remains valid until set aside.

In as far as the sale of the particular property is concerned there is no denying that the second respondent was the beneficiary of that property in terms of the unchallenged Will. She is the one who as executrix and beneficiary, faced with the need to settle the estate's necessary expenses, decided to sell that property. She was virtually selling her entitlement and so had the leeway to agree on terms that suited her and the buyer. Those terms include that transfer will be done upon payment of the first instalment.

I am here mindful of the authorities that have alluded to the need to obtain consent before sale. The second respondent did allude to getting such consent and also thereafter entering into a verbal agreement of sale hence the payments started being made before the written agreement was made. She nevertheless obtained the Master's consent to transfer before the transfer was made. It is my view that had the Master not been convinced by the reasons for the sale he could easily not have granted such consent. I am thus of the view that in the circumstances of this case the anomalies regarding the stage at which the Master's consent was obtained may not be fatal to the sale.

The first respondent's predicament is epitomised in the Master's report wherein he states that:-

"The estate of the late Edith Chikafu who died testate was administered to finality with the property in dispute awarded to the 2nd Respondent. I attach herewith the Will and confirmed distribution account as annexures A and B respectively. It is my submission that the property in dispute no longer forms part of the estate as it was long transferred to the applicant. This therefore means applicant should be allowed access and enjoy his rights unless compelled otherwise by an order of court. The restoration of 1st respondent as an executor dative is of academic, as it came after confirmation of the first interim account that awarded the house in question to the 2nd respondent."

At most the first respondent's appointment should deal with any assets that may not have been accounted for in the first account.

The second respondent's attitude as depicted in her affidavit is to confirm the sale and that she stood by what she did which has not been challenged. She states in paragraph 2 of her affidavit that:-

“ .. indeed the house in question was sold to him by me when I was the Executrix. According to the Will, I am the sole beneficiary. The full purchase price was paid and used to settle the estate expenses.”

Another aspect to note is that the applicant has been the registered holder of real rights in the property since September 2009.

“The registration of rights in immovable property in terms of the Deeds Registries Act [chapter..] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered.” (See *Takafuma v Takafuma* 1994 (2) ZLR103 at p 105 H).

As the registered holder of such real rights applicant is entitled to claim the property against the whole world and evict whoever is in occupation without his authority. The applicant's ownership has not been challenged. All that the first respondent has sought to do is to resist eviction without taking positive action to reverse the process that led to applicant acquiring real rights in the property. Clearly in my view the first respondent's challenge is not sustainable.

He has known about the applicant's title to the property for a long time but has taken no action to validly challenge such title. All he has done is resist eviction.

I am of the view that the applicant is entitled to the enjoyment of its property and that the first respondent has no legal basis to resist eviction. The applicant sought costs on a legal practitioner - client basis. Apart from stating that if respondents oppose the application then they should pay costs on the higher scale I did not hear applicant to allege anything else as justification for costs on the higher scale. I am of the view that the mere fact that a party has chosen to oppose an application should not on its own be the basis of seeking costs on a higher scale against them. It is every party's constitutional right to defend what they perceive to be unjust. I will thus grant costs on the ordinary scale.

Accordingly it is hereby ordered that-

1. The first and second respondents and all those claiming right of occupation through them or through estate late Edith Chikafu shall vacate Stand No. 3850, Highfields

Township, Harare, within ten days from the date of this order failing which the Sherriff, Harare shall evict them without further notice.

2. The first respondent shall pay costs on the ordinary scale.

Hungwe & Partners, applicant's legal practitioners.

Maeresera & Partners, first respondent's legal practitioners.