

ESTATE LATE FIDELIS JOSIAH CHIWEDZA  
and  
OSBURGA NDHLOVU  
(In her capacity as the Executrix Dative of Estate Fidelis Josiah Chiwedza)  
versus  
LUISA GOMBARUME  
and  
POLKA EXECUTOR SERVICES (PVT) LTD  
and  
AFRICA REAL ESTATE  
and  
MESSERS MAKUNIKE AND PARTNERS  
and  
CHIEF REGISTRAR OF DEEDS N.O.  
and  
MASTER OF THE HIGH COURT N.O.  
and  
SHERIFF OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE  
UCHENA J  
HARARE 11, 12, 17 September 10 October 2014 and 22 January 2015.

**Civil Trial**

*S. Deme*, for the plaintiff.  
*J. Dondo*, for the defendant

UCHENA J: Fidelis Josiah Chiwedza issued summons against the defendants, claiming the following:-

1. A declaratory order that the Agreement of Sale (Annexure B) which was entered into between him and the first defendant's deceased husband be and is hereby held to be valid and
2. An order that the Plaintiff be declared to be the lawful purchaser of the deceased's rights, interest and title in Stand 23 84, Highfield Township, Harare and;
3. An order compelling the fifth defendant to accept and approve documents signed by the second defendant and/or fourth defendant, upon the upliftment of the

caveats registered against the property, transferring the property from the deceased to the plaintiff failing which the fifth defendant be ordered to accept and approve the documents, signed by the seventh defendant or his lawful deputy transferring the property from the deceased to the plaintiff and;

4. An order that the sixth defendant confirms that he approved and or approves the sale of the property from the deceased to the plaintiff and;
5. An order directing and authorising the seventh defendant to uplift caveats No 309/88 and 744/95 registered over the property under Deed of Transfer No 6771/85.
6. An order that the costs of suit be paid by the first, second and fourth defendants, jointly and severally, the one paying the others to be absolved.

Fidelis Josiah Chiwedza thereafter died and has been substituted by his wife Osburga Ndolvu, who was appointed executrix dative of his estate.

The first defendant Lusia Gombarume is the surviving spouse of the late Paradzayi George Gombarume who entered into the sale agreement with the plaintiff.

The second defendant Polka Executors Services is the executor dative of the late Paradzayi George Gombarume's estate.

The third defendant Africa Real Estate is an Estate Agent which has been mandated to sale the house in dispute by the second defendant.

The fourth defendant P. W Makunike and Partners was a firm of Legal Practitioners. Mr Makunike who filed a consent to judgment on 22 August 2014 indicated in that document that Makunike & Partners (is now obsolete). Mr Makunike was formerly practising with Hove Mutasa and Associates. He apparently took the late Gombarume's file with him when he left Hove Mutasa and Associates. (See Exhb 12)

The fifth defendant is the Chief Registrar of Deeds cited in his official capacity as the official responsible for the registration and transfer of properties.

The sixth defendant the Master of the High Court was cited in his official capacity as the official responsible for the administration of deceased estates.

The seventh defendant the Sheriff was cited in his official capacity as the official who executes the orders of this court.

Osburga Ndolvu who testified for the estate late Fidelis Josiah Chiwedza told a simple and strait forward story of how her husband bought Stand 2384, Highfield Township from the first defendant's late husband. They were looking for a house to buy. Her husband had

recently become a pensioner and had funds from which they could buy a house. They among several other houses viewed the late Gombarume's house. They found the first defendant at home, who confirmed that the house was on sale, as had been advertised in a newspaper. She asked them to come back and talk to her husband who was responsible for the sale of the house. They went back in the evening and found the first defendant's husband not yet at home. He however arrived and agreed with her husband on the sale of the house. The parties eventually agreed to involve the seller's legal Practitioners leading to the sale agreement being drawn by Hove Mutasa and Associates. They agreed on occupation taking place three months later. They moved into the house and lived there peacefully though the late Gombarume died before transferring the property to her husband. Her husband also died before the property was transferred to him. This led to several court cases being filed by her husband and against him till she took over as the executor of her late husband's estate. She produced several supporting documents with the defendant's legal practitioner's consent. She told the court that she was on most occasions, present when her husband transacted with the late Paradzayi G. Gombarume. She said she was present when the late Gombarume took them to his lawyers where the agreement was reduced to writing.

The first defendant who was the only witness for the defence disputed that the property was ever sold to the plaintiff. She told the court that the late Fidelis Josiah Chiwedza and his family were their tenants who refused to continue paying rent after her husband died.

The issue to be determined is whether or not the plaintiff bought the house in dispute from the late Gombarume. The determination of the case hinges on the credibility of the witnesses and the corroboration of their testimonies by documental evidence.

The plaintiff's witness gave her evidence convincingly. Most of her evidence is supported by documental evidence. She stood firm under cross examination. She gave information which could only have been given to her and her late husband by the seller.

The first defendant was not a truthful witness. She lied about not knowing her husband's legal practitioners. She at some stages acknowledged them, but deliberately denied knowing them when it became clear that their involvement confirmed the sale.

The fact that the seller's legal practitioners drew the agreement of sale is proof that the seller sold his house to the plaintiff. It is inconceivable that the plaintiff would on his own discover the seller's lawyers and purport with their cooperation to have bought their client's house. It is further inconceivable that the buyer would know without the seller's cooperation details of the seller's mortgage bond. It is also inconceivable that if the plaintiff and his

family were tenants the first defendant would not have enforced her right to be paid rentals. The paper trail from the agreement of sale to the fake transfer proves the existence of a sale which the plaintiff wanted finalised.

Mr *Dondo* raised the issue of the forged title deeds as an indication that the agreement of sale and other documents could also have been forged. I agree that the forging of the Title Deeds suggests that the lawyer concerned cannot be trusted. This however does not affect the agreement of sale which was prepared by Hove Mutasa and Associates whose credibility cannot be affected by Makunike who forged the Title Deeds long after he left their law firm. The forging of the Title Deeds does not suggest collusion between Makunike and the late Fidelis Josiah Chiwedza, as if that was the case, he would not have reported him to the Law Society as he did through Exh 12 in which he gave details of how he had been following up the transfer with Makunike who eventually told him in 2000 that the title deeds were now available. Receipts for the payment of the purchase price issued by Hove and Mutasa (Exh(s) 2 and 4) are also not affected by Makunike's forgery. The forgery of the Title Deeds years after the sale suggests an attempt by the legal practitioner to silence, a purchaser, whose demands for transfer, he was failing to meet. The agreement of sale was signed at Hove and Mutasa on 5 February 1995. Payments were receipted at Hove and Mutasa on 6 and 16 February 1995. This fits well into the sequence of events explained by Osburga Ndlovu.

I am therefore satisfied that the first defendant's late husband sold Stand 2384, Highfield to the plaintiff. The declaratory order and ancillary orders sought will therefore be granted except that seeking the upliftment of the caveats. The plaintiff did not cite the Cold Storage Commission and the other person in whose favour those caveats were registered. A court cannot grant orders against a party who has not been cited and given an opportunity to defend himself.

The confirmation of the sale by the Master is not necessary as the sale took place during the seller and purchaser's life time.

It is therefore ordered as follows:-

1. It is declared that the Agreement of Sale (Annexure B) which was entered into between the late Fidelis Josiah Chiwedza and the late Paradzayi George Gombarume be and is hereby held to be valid and;
2. The Estate late Fidelis Josiah Chiwedza be and is hereby declared to be the lawful purchaser of the late Paradzayi George Gombarume's rights, interest and title in Stand 2384, Highfield Township, Harare and;

3. The fifth defendant shall accept and approve documents signed by the second defendant upon the upliftment of the caveats registered against the property, transferring the property from the estate late Paradzayi George Gombarume to the estate late Fidelis Josiah Chiwedza, failing which the fifth defendant shall accept and approve the documents signed by the seventh defendant or his lawful deputy transferring the property from the estate late Paradzayi George Gombarume to the estate late Fidelis Josiah Chiwedza, and;
4. The costs of suit shall be paid by the first and second defendants, jointly and severally, the one paying the other to be absolved.

*Legal Aid Directorate*, plaintiff's legal practitioners  
*Messrs Dondo & Partners*, first defendant's legal practitioners.