

WILLIAM MUKUDU
versus
ESTERE STELLA MUKUDU
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE 17 March & 3 April 2017

Opposed application

T Mupangwa, for the applicant
B Ngwenya, for the 1st respondent
2nd and 3rd respondents cited in official capacities

TSANGA J: This is an application for rescission of a judgment granted in default in a matter concerning revocation of a donation made by a parent to child. The applicant denies being in default on account of the fact that the summons were never served upon him at his last known address in accordance with the rules. Whilst summons were served, they were in fact served at the family residence. He says that his mother, the first respondent, was fully aware that he was no longer residing at 4129 Twiza Way at the time that the summons was issued and that he was in fact now residing at 2 Camel Ave Cnr 8th Ave and Herbert Chitepo. His mother together with the rest of the siblings reside at 4129 Twiza Way which is where they have resided inclusive of applicant although applicant says that he had moved.

The applicant says he only got to know of the default judgment after he issued his own summons in the magistrate's court against his mother, the respondent for her eviction from the premises on the grounds that he is the owner of the property that she has been living in at his pleasure and he now wished to terminate the arrangement. It was in reply to those summons that he learnt that a default judgment had been issued against him. He argues that

there are strong prospects of success if the default judgment is rescinded on account that there is no deed of donation and that the property was transferred to him directly by his father as supported by the title deed which was in his name.

The respondent's narrative is that she indeed issued the summons in question under HC 708/15 and used the family home address as that is the address she knew for the applicant. Whilst the respondent had moved out of his own accord he continued to come home as and when he wanted. She denies that default judgment took him by surprise as he deliberately ignored court processes from his brothers to come and collect the relevant documents. She draws on the fact that she had in fact previously issued so summons in 2013 under HC 6791/13 which had later been withdrawn seeking to cancel the applicant's title and to put the property into all the children's name and that the process in that matter had indeed also been served at the family residence. He had in that case been advised of the court process and had indeed come to collect. Her other son had in fact sworn an affidavit of his efforts to get the applicant to come and collect the relevant court papers in question.

As regards the property in question she argues that there are no prospects of success as a donor is entitled to rescind a donation on the basis of ingratitude. Her narrative as regards the property known as 4129 Tynwald Township Lot 5 Tynwald is that it was bought by herself using her own personal funds when the applicant was seven years old after selling her own property in Chtungwiza unit N Seke. It was transferred directly into the applicant's name from her direct instructions and to avoid further expenses with the expectation in mind that should anything ever happen to the parents in the future, the donee would at least be able to look after the rest of the siblings. Her late husband had in fact bought stand 4130 Twiza Way Tynwald of Lot of Tynwald which had been transferred into one of the other children's name. It was however later sold. She averred that following her husband's death the applicant as donee had shown extreme disrespect threatening to sell the house and to evict everyone else on account of the house being his and that he could do what he pleased. She argues that the applicant's own summons in which he indeed seeks to evict her and render her homeless speak for themselves as regards the ingratitude she has complained of.

The grounds for rescission of a judgment made in default are well set out. There must be must be a satisfactory explanation of why the applicant was in default. The *bona fides* of the applicant to rescind the default judgment is also considered whilst there must also be a reasonable defence on the merits which carries some prospect of success. (See *Stockhill v*

Griffiths 1992 (1) ZLR 172(S) and *Mdokwani v Shoniwa* 1992(1) ZLR 269 (S). The applicant's explanation that he had moved on to a new address which his mother should have used. It is true that when the summons were issued by his mother in 2013 they were sent to the family address and that when he responded to those summons he used his address as ??? and had thereafter engaged a firm of lawyers to represent him. It is also however true that the summons in that had been brought to his attention by his brother. This court has a reasonable basis for concluding that having been advised to come and collect his court papers it is the applicant who deliberately refrained from doing so in this instance because of his own suspicions as to what the papers may have been about. The choice to cut himself off completely from the rest of the family was his own. In any event even if the applicant is said to have a reasonable explanation for his default this ground is not looked at in isolation. The reusable prospects of success must also be looked at.

This is also a case where the donee has in fact shown ingratitude by seeking to throw the entire family out and to sell the subject matter of the donation even during the parent's lifetime.

Whilst generally a donation is irrevocable, there are exceptions to this general rule particularly where a donee has shown ingratitude. Under Roman Law the *Institutes of Justinian* refers to ingratitude as a ground for revocation in *Inst 2 7 2*:

"It is to be observed, however, that even where gifts have been completely executed we have by our constitution under certain circumstances enabled donors to revoke them, but only on proof of ingratitude on the part of the recipient of the bounty; the aim of this reservation being to protect persons, who have given their property to others, from suffering at the hands of these, latter injury or loss in any of the modes detailed in our constitution" - trans1 Moyle *The Institutes of Justinian* (1906).

Examples of ingratitude include personal violence against the donor; treacherous deeds causing the donor great pecuniary losses which extensively diminished his estate; exposure to danger threatening the donor's life; and a breach of written or oral undertakings of the donee. Examining the traditional sources of revocation of a donation under Roman and roman Dutch law Susan Scott for example summarises the modern position as follows

"In modern terms the position can be stated as follows: ingratitude is a ground for revocation of donations. The examples given in the Code and expanded on by the Roman-Dutch authors indicate that the grounds of ingratitude are serious infringements of a person's personal rights, personality rights and property rights. It is also clear that in all these situations the donee must have acted with intent".¹

¹ See Susan Scott **Revocation of gifts on the ground of ingratitude - from**

See also the cases of *Malaba v Malaba HB 14/05* and *Taylor v Taylor SC 70/07* in which a donation was declared revocable on the ground of ingratitude.

The deed of ingratitude in this case is said to be the fact that the donee has sought to throw out the entire family and is said to have attempted to sell the family home. It is clearly supported by the applicant's own summons seeking to evict the respondent from the premises so the fact that there is this intention to evict is not in dispute. The applicant's own papers and his particulars of claim speak for themselves in this regard. The act of ingratitude is therefore of a sufficiently serious nature as it would render the respondent homeless.

A donee has a moral duty to refrain from acting maliciously towards the donor. Selling the residence at this point when the parent is alive and still living in the house with other children would obviously constitute an act of cruelty and cause hardship to the personal life of the donor and the family as a whole. It would amount to personal infringement of personality rights on the part of the donee. Revocation in such circumstances is permissible to avoid the undesired effects on the interests of the donor and other close persons such as family members residing with the donor in this instance. Eviction of a parent by a child to whom property was donated, is unlikely to be countenanced by any court simply because a child has a strong sense of entitlement. The fact that the donor has opposed this application for rescission in my view also points to the fact that the donor is not willing to forgive the act of ingratitude. This is clearly an indication that she has exercised her mind on the issue and that in the face of not wishing to forgive the donee for the act of ingratitude. It would be a fruitless exercise granting rescission in this matter. The argument that there is no deed showing that there was a donation takes the matter no further since the requisites of a donation do not centre on a deed of donation but on the intention to donate and the transference of the property. See *Kudzanga v Kudzanga & Ors* HH 485/13. In any event s 10 of this General Law Amendment Act [*Chapter 8:07*] is very clear that a donation is not invalid just because it was not registered or notarially executed. It provides as follows;

“10 Amendment of law in respect of formalities relating to donations

No contract of donation shall be invalid solely by reason of the fact that it is not registered or notarially executed.”

It has in fact become fairly common for parents to buy property which they transfer directly to their children. There is nothing unusual in the manner in which it was done that takes away from the fact that it was a donation. The respondent has clearly explained in her papers how the donation was made. At seven years old when the donation was made the donee cannot possibly challenge the circumstances of the donation which he says was from his father and not his mother. I see no prospects of success by the donee in arguing against the donation. Furthermore, the kind of ingratitude exhibited herein is common among young people who have had to toil for nothing and have a strong sense of rights and so little of their responsibilities. From all across Africa come proverbs that caution on ingratitude. According to the Swahili proverb “the gratitude of a donkey is a kick”, to the Egyptians “ingratitude is the worst of sins” whilst to the Ivoirians “ingratitude is sooner or later fatal to its author”. Having failed to be mindful and grateful for all that he had been given and the responsibility thrust upon him, at 28 the applicant is young enough to work for his own property whilst going through life lessons on gratitude. Here too he can draw from the Chinese proverb that “once you raise your own children you will know the hardship of your parents”.

Significantly in terms of the common law, the reason advanced by the respondent for revoking the donation fits the categories upon which a donation can be revoked in that the personal rights of the donor would clearly be affected from the sale of the said house which is presently a family home. The respondent has a very strong case which supports the default judgment which is unlikely to be reversed. There is no need in my view to put this family through further turmoil.

The application for rescission of judgment is dismissed with costs.

Masawi & Partners: applicant’s legal practitioners

Chinawa Law Chambers: 1st respondents’ legal practitioners