

KASIYAN JENA
and
DERECK MUTIMBA
and
MIRIAM MUTIMBA
versus
ESTATE LATE JOSIAH MUSINDO JENA
and
ESTATE LATE CORNELIA JOHANNA JENA
and
NHAMO MICHAEL JENA
and
MUNICIPALITY OF CHEGUTU
and
THE MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 31 October 2016 & 19 January 2017

Opposed Matter

A. Masango, for the plaintiffs
D. Kanokanga & A Taruvinga, for defendants

MUNANGATI-MANONGWA J: The first, second and third applicants are siblings, and, together with two others who are not party to these proceedings hold title to stand number 1027 Chegutu, Pfupajena Township measuring 205 square meters. In reality they have occupied land which is on stand 1028 Chegutu, Pfupajena Township, for more than 20 years and have always considered this land to be theirs. Meanwhile in October 2014 the third respondent acquired title to stand number 1028 Chegutu Pfupajena Township (hereinafter referred to as “the property”). This respondent then made a demand against the applicants to vacate the property. In response

the applicants applied *inter alia* for a declaratur that they are the rightful owners of the property. On the 31st October 2016 I heard the matter and granted the following order: That

1. The purported transfer of Stand 1028 Pfupajena Township into the 2nd and 3rd respondents be and is hereby set aside.
2. The inclusion of the property called Stand Number 1028 Pfupajena Township Chegutu as being party of the estate late Cornellia Johanna Jena is declared null and void and hereby set aside.
3. The 1st, 2nd and third applicants are hereby declared the lawful owners of stand number 1028 Pfupajena Township Chegutu.
4. The 4th to 6th respondents be and are hereby ordered to prepare all documents necessary to enable the applicant to receive transfer or stand 1028 Pfupajena Township Chegutu within 14 days of handing down of this order.
5. The 2nd and third respondents shall co-operate by way of signing any documents necessary for the transfer and registration of title to the applicants.
6. The supplementary first and final distribution account in the Estate of the late Josiah Musindo Jena dated the 6th of December 2013 be and is hereby declared null and void and of no force and effect.
7. The costs of this application shall be borne by the 2nd and third respondents jointly and severally, the one paying the other to be absolved.

I hereby furnish the reasons for arriving at that decision.

The history of the case shows that one Josiah Musindo Jena the maternal grandfather of the applicants died testate on the 13th October 1989. He owned a number of immovable properties including the property in issue which is occupied by applicants described in the title deed they hold as stand number 1027 Chegutu Pfupajena Township. In his Will, the late Josiah Musindo Jena bequeathed stand 1027 to one Cynthia Jena. It is the applicants' case that the stand had been erroneously registered at the deeds office as stand 1027 Chegutu Pfupajena Township. The applicants allege that, the said Cynthia Jena and her children the applicants, took occupation of the property bequeathed to her which on the ground is the stand in issue. Upon the winding up of her father's estate, Cynthia Jena took transfer of stand 1027 under deed number

4979/95. Cynthia Jena died in 2002 and left behind a will. In her will which is filed on record, she bequeathed property situate on stand number 1028 Chegutu to all her five children comprising a butchery, bottle store and a supermarket. The will specifically mentions stand 1028, the property now in issue, although the title deed she held referred to stand 1027.

The applicants and their siblings inherited from their mother as per her will and obtained title in June 2006 with the property described in the title deed as stand 1027. The applicants state that, upon realizing the mistake regarding the stand number, they sought to rectify same with their legal practitioners Musunga and Associates initiating the process to have the title deeds rectified to read “stand 1028” as early as July 2006 up until 2010. It seems the process was never finalised. It is applicant’s case that it was only in 2014 when they received a letter to evict them from a butchery they inherited from their mother that they became aware that third respondent had obtained title to Stand 1028. The third respondent purported 23 years later to be a beneficiary to the estate of the late Josiah Musindo Jena their maternal grandfather as per a supplementary first and final liquidation account filed on the 13th October 2013. It is applicants’ contention that the third respondent fraudulently obtained title to stand 1028 when he realised that applicant’s title wrongly referred to stand 1027, although he was aware that applicants occupied land on stand 1028 which is what they inherited.

The third respondent’s case is that “the late Cynthia Jena took occupation of stand 1028 Pfupajena Township thinking that it was Stand 1027 Pfupajena Township.” He further alleges in his opposing affidavit that the applicants are not entitled to the relief that they seek because Stand 1027 and Stand 1028 Pfupajena Township are two different stands with different measurements, and are held under two different title deeds. He maintains that he lawfully took transfer in terms of provisions of paragraph 5 (d) of Musindo Jena’s will as stated in the supplementary distribution account.

I find the following to be common cause: that the late Josiah Musindo Jena owned the property which the applicants currently occupy, that the applicants initially occupied the property through their mother who took occupation after her father’s death. The applicants are on Stand 1028 which they have occupied for over two decades. Josiah Musindo Jena, and later his daughter and subsequently applicants hold title to stand 1027 whilst in reality they occupied

stand 1028. The third respondent obtained title to stand 1028 in 2014, 24 years after the late Josiah Musindo Jena passed on and same was facilitated by a supplementary account.

Mr *Masango* for the applicants argued that the third respondent had gotten title through fraud and could therefore not legally acquire title to stand 1028, the property in issue. He submitted that the process was a nullity as third respondent had taken advantage of a technicality of the mix up of stand numbers yet he knew that the land allocated to the initial holder Josiah Musindo Jena by Chegutu Town Council remained stand 1028, the property in issue. He submitted that the original owner never owned two adjacent stands that is, 1027 and 1028; hence he could only bequeath that which he had. He sought the setting aside of the supplementary distribution account as it was fraudulent and the reversal of the subsequent transfer to third respondent.

Mr *Kanokanga* for the third respondent argued that the applicants should have resorted to the provisions of the Deceased Estate Act and challenged the Master's decision on review. Therefore, applicants had adopted a wrong procedure as the supplementary distribution account was confirmed. He further argued that the applicants should have sought rectification of records through the deeds office. The court is convinced that applicants came to the correct forum and there is nothing wrong with the procedure adopted. They are seeking a declaratur and the setting aside of a transfer of title of stand 1028. Such relief can only be granted by this court it being beyond the Master's purview. In any case they only realized that third respondent had taken title when they were to be evicted and this was well beyond the exercise of the Master's powers.

It is clear from papers filed of record that the Municipality of Chegutu confirmed to applicants' legal practitioners upon an enquiry in 2006 that the late Josiah Musina Jena had been allocated stand 1028 and never 1027. When the applicants sought transfer from the late Cynthia Jena to themselves and suggested that the Municipality had mixed up the stand numbers the later denied that. The Municipality maintained that the stand given to the late Josiah Jena Musindo was 1028. It even referred to the consent that was signed on the 17th of May 2004 by their then official Dr N.C Zinyowera on behalf of Chegutu Municipality. For the avoidance of doubt the letter which is part of the record partly reads:

"In response to your minute dated 11/07/2006, please be informed that the Chegutu Municipality records have never at one time mixed up stand numbers. The records reflect Jena's stand as 1028 refer to the consent signed by the late Dr M.C Zinyohwera on behalf of Chegutu Municipality. However it is apparently clear it could have been typographical errors

as cited on your current document that is erroneously reading *certain piece of land situate in District Salisbury instead of reading certain piece of land situated in the district of Chegutu*”

The letter ends by advising Musunga and Associates, applicant’s lawyers to make amendments and forward them to the deeds office for correction of the information.

This information coupled by the fact that the third respondent has not placed before the court any evidence that the late Josiah Msindo Jena ever owned stand 1027 on the ground, supports applicants’ contention that they inherited stand 1028 despite reference to stand 1027 in the title deeds. That Cynthia occupied stand 1028 and stayed with her children thereat and thereafter left the businesses on the stand to her children who continued to occupy same, makes it abundantly clear that it is this land that her father left to her. It is clear that there was wrong capture of information from the time title was initially transferred from Chegutu Municipality to the late Josiah Msindo Jena. It is also irrefutable that as early as 2006 process to rectify the anomaly had started long before the third respondent obtained title. On the 24th February 2010 Chegutu Municipality had issued a rates clearance certificate pertaining to stand 1028 to applicants to facilitate rectification of the title deed made in favour of applicants in 2006 when they got title from their late mother.

That the third respondent is bereft of a feasible defence is apparent from the opposing affidavit itself. Despite far reaching allegations made in the applicant’s founding affidavit third respondent’s opposing affidavit hardly contains ample information apart from bare denials serve for two paragraphs that restate that the stands are different with different title deeds and measurements. He claims lawful title, acknowledges the occupation by applicants and nothing more. No explanation is rendered as to how the applicant’s mother and ultimately the applicants got to occupy that property, and why third respondent was silent for more than two decades after Josiah Msindo died and for 12 years after Cynthia’s death.

Further, the third respondent purports to inherit directly from the late Josiah Musina Jena in terms of paragraph 5(d) of that deceased’s will and denies that the property was ever into Cornelia Johana Jena’s estate. Apart from his say so, the title deed he holds confirms this in the causa clause as it refers to clause 5(d). Of note are the following points:

- a) Nowhere does Josiah Musindo Jena's will refer to stand 1028 at all which the third respondent claims to inherit. That will refers to stand 1027 which is awarded to Cynthia Jena.
- b) The third respondent is not stated as a beneficiary to the residue of the estate.
- c) Clause 5(d) provides for conditional inheritance stating that in the event of one or more of the beneficiaries not taking up their inheritance within 5 years of the deceased's demise such inheritance shall devolve upon the remaining beneficiaries in equal shares, share and share alike.

All the above noted points do not support the third respondent's purported inheritance. Mr. *Kanokanga* for the third applicant admitted that stand 1028 is not mentioned in the will. On being quizzed by the court as to which beneficiary in the will had failed to take up their inheritance within the stipulated period for the third respondent to be able to take up same in terms of clause 5(d), Mr *Kanokanga* could not provide a substantive answer save to say he did not have the information. Due to the above observations which are factually supported, the third respondent has no basis to own Stand 1028 the property in issue.

The totality of the evidence brings about the conclusion that at stake are rights to only one stand it being stand 1028 which the Chegutu Municipality allocated to Josiah Msindo Jena. It is this land that the late Josiah Musina Jena bequeathed to his daughter and indeed the daughter bequeathed to her children. Accepting that the land that Josiah Musindo Jena was allocated by Chegutu Municipality is 1028, the proper in issue, means in essence there was nothing to award and transfer to third respondent in 2014 because the potential rights to the stand already belonged to applicants. Ownership of stand 1027 passed to applicants due to an error most probably arising out of a typographical error and regrettably was carried over hence their attempt to rectify. Errors are bound to happen in registration of title hence provision by the legislature for rectification. Section 6 of the Deeds Registries Act [*Chapter 20:05*] provides for rectification of errors pertaining to among other things property description and gives room for rectification in several deeds if the error so appears in them, This seems to be the route that applicants were pursuing as shown by correspondence and an affidavit by Mr. Musunga which is on record.

It was held in *Dondo N.O. v Muganhiri & Others*¹ that transfer effected as a result of misrepresentation of facts is a nullity and does not receive recognition at law. Equally, ownership of land or title thereto cannot be sustained in light of a fraudulent act (see *Agro Chem Dealers (Pvt) Ltd v Gomo & Ors*).² The third respondent capitalized on a technicality and unethically if not fraudulently obtained title to stand 1028 when he realized that stand 1028 was still held by Chegutu Municipality and was not in applicants' names. The award and the transfer of the property was therefore a nullity from the onset. The very fact that the fifth respondent confirmed a supplementary distribution account is neither here nor there as there was nothing to pass to the third respondent, and the acts being a nullity, the outcome remains a nullity. Title is the sum total of real rights in land but same has to be legally obtained. The third respondent holds a title deed from which no real rights flow as he never had any potential real rights in the land to assume when he obtained title but did so fraudulently. It is due to the foregoing reasons that I granted an order in favour of the applicants.

Musunga & Associates, applicant's legal practitioners
Kanokanga & Partners, third respondent's legal practitioners

¹ HH77/15

² HC 3342/08