

VIMBAI NYEMBA N.O.
versus
RICHARD GARIKAI CHAKABVA N.O.
and
MIRIAN MARAIRE
and
ROTHWELL CHAKABVA
and
ROY CHAKABVA
and
MEMORY CHAKABVA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 2, 7, March and 2 April 2018

Civil Trial

T Chivake, for plaintiff
S Mpofu, for defendant

TAGU J: The plaintiff in her capacity as the Executrix Dative in the Estate of the late Nayison Mashavave DR 419/14 who died on the 24th February 2009 at Harare issued summons against the defendants claiming for orders declaring that Stand 8519 Glen View 8, Harare, belongs to the estate of the late Nayison Mashavave, that Stand 8519 Glen View 8 Harare be removed from the Distribution Account of the Estate of the late Richard Garikayi Chakabva, that within seven (7) days of service of this order, the defendants sign all necessary documents to transfer the Stand 8519 Glen View 8 Harare into the estate of the late Nayison Mashavave and / or its beneficiaries , that in the event that the defendants' refuse to comply the Sheriff or his deputy be and are hereby authorized to sign all relevant documents to pass transfer of Stand 8519 Glen View 8, Harare from

first to fifth defendants' names to the estate of the late Nayison Mashavave and/ or its beneficiaries and that the defendants pay costs of suit.

Three issues came up for determination in this case. The first issue is whether or not Richard Garikai Chakabva sold Stand 8519 Glen View Township to the late Nayison Mashavave. The second issue is whether or not there were any improvements on the property, and if they were improvements on the property, what were the improvements and who developed the property? The last issue is whether the Estate of the late Nayison Mashavave waived its right to claim of the immovable property against the Estate of the late Richard Garikai Chakabva.

The facts as confirmed by the oral and documentary evidence produced in court are that the late Richard Garikayi Chakabva and the late Nayison Mashavave were uncle and nephew respectively. In or about the year 1980 the late Richard Garikayi Chakabva was the registered owner of Stand 8519, 108 Crescent Glen View 8, Harare. This is confirmed by an agreement of sale entered into by and between The Municipality of Salisbury and the late Richard Garikayi Chakabva signed on the 3rd and 4th of December 1979 by the buyer and seller respectively. The same fact is confirmed by various cards produced as evidence by the parties which show that the house in question was and is still registered in the names of Richard Garikai Chakabva to this day.

The undisputed facts also show that the late Naison Mashavave on or about the year 1980 was resident or was owner of house 20888 Glen Norah Harare. However, the late Naison Mashavave at that time had four wives with nine children. The eldest child was Happison Mashavave aged about 18 years who testified in this case.

As fate would have it, Richard Garikayi Chakabva passed on first on the 19th September 1994 while his family was staying at house 20888 Glen Norah Harare. On the other hand Nayison Mashavave passed on second on the 24th February 2009 while his family stayed at Stand 8519, Glen View 8 Harare. Happison Mashavave in his evidence told the court how their parents exchanged houses. He told court that his late father bought Stand 8519 Glen View 8 Harare from the late Richard Garikai Chakabva in 1980 when he was still doing his O'levels. They then moved into this stand as a family and his father then ordered Richard Garikayi Chakabva to go and stay in their Glen Norah House. However, he based his story on what he said was told by his late father because when the transactions were taking place he was not there because his father was on separation with his mother. He further told the court that his father developed the stand. He

produced a document he claimed showed that his father bought the stand. I will deal with the document shortly. Other than that document he did not produce any agreement of sale.

Mirian Maraire the wife to the late Richard Garikai Chakabva told the court of how her late husband bought the stand in question from the then Municipality of Salisbury. Her evidence was that they went and put up a temporary structure at Stand 8519 Glen View 8 where they stayed and his late husband proceeded to build a four roomed house. According to her evidence the late Nayison Mashavave later approached his husband and explained that he was having problems with his wives and asked them to go and stay at his house in Glen Norah while he was sorting out his problems. They then agreed and exchanged residences to disguise Nayison's wives. Later Nayison sold the house they were staying in Glen Norah and they asked him to vacate their house in Glen View but he resisted. Unfortunately her husband was then very ill and passed on. After he passed on she registered the Glen View House as part of her husband's Estate, and after all the necessary formalities were done the house was registered by the Master of the High Court as party of the Estate of her late husband. However, the children of the late Nayison Mashavave are refusing to vacate the house.

WHETHER THERE WAS A SALE

No evidence was presented to suggest the existence of a sale agreement. The sole evidence of Happyson Mashavave was wholly hearsay as he was not staying with his father at the time. The document relied by Happyson Mashavave reads as follows-

"15/2/88

Dear Uncle

I am Richard. Uncle the issue that is troubling me concerns the house. Word has reached me and I have made certain observations on this issue. We need to meet. I do not know if you had changed the card. Please uncle lets meet.

R.G.Chakabva"

With the greatest of respect this piece of document presents problems. Firstly it cannot be said to be an agreement of sale. Secondly, it does not say to whom it is addressed but only to uncle. Thirdly, it is not signed with the same signature which signed exhibit 3. It is *prima facie* difficult to find that the document was done by the late R G Chakabva. Even if it may be assumed it was written by the late Richard Garikai Chakabva, the tone of the note is to the effect that the writer

was being concerned about the rumours he/she had heard about the house and was worried if the receiver had changed the card to the house. He/ she wanted a meeting over the issue. The card was being used for the sole purpose of paying rates to the Municipality. The plaintiff who is an Executrix dative failed to prove that there was an agreement of sale other than to rely on what she heard from the beneficiaries.

WHETHER THERE WERE IMPROVEMENTS ON THE STAND

From the evidence of Marian Maraire her late husband had constructed a four roomed house at the time they moved out. Currently according to Happison Mashavave the house is now seven roomed. There is therefore proof that some improvements were done over the years. These improvements may have been done by Nayison or her children. Be that as it may, this did not pass ownership of the house to the beneficiaries of Nayison Mashavave. It is trite that personal rights die with the holder, ie Richard Garikayi Chakabva. See *Matsinde v Nyamukapa* HH-102-06.

WAS THERE WAIVER OF RIGHTS?

At the end of the trial no evidence had been presented to support a request for the alteration of registration of rights, title and interests in the names of the defendants. The plaintiff's case did not demonstrate any objections to the public declaration by the Executor in the Estate of the late Richard Garikai Chakabva. As properly submitted by the counsel for the defendants the failure to act as against registration of title into the defendants amounted to waiver of rights in the immovable property. The law on waiver is stated in *Chidziva and Ors v Zimbabwe & Steel Co. Ltd* 1997 (2) ZLR 368 (SC), when quoting *Mutual Life Ins Co. of New York v Ingle* 1910 TPD 1910 TPD 540 the court held that :

“when a person entitled to a right knows that it is being infringed, and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it”

DUMBUTSHENA CJ in *Barclays Bank of Zimbabwe LTD v Binga Products (PVT) LTD* 1985 (3) SA 1041 (ZS) at 1049 B-E says-

“I seek, however, to highlight the principle of waiver set out by Lord DENNING MR at 140a-c where he said:

“The principle of waiver is simply this, if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it. Then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for

him to do so; see *Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd* [1952] I Lloyds Rep 527. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be allowed to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them; see *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 ALL ER 6587. But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.”

In casu the two deceased persons are related and had been visiting each other quite often. It baffles one’s mind why for such a long time transfer was not done if at all there was an agreement of sale and rights over the Stand had exchanged hands. The beneficiaries even waived their rights in failing to claim against the Estate of the late R.G Chakabva before transfer. As for the plaintiff she said she was not aware of the transfer because by then she had not been appointed Executrix dative. In my view, given the fact that the registration of the title into the defendants name was properly and procedurally done, it ought not to be interfered with.

The case brought by the plaintiff is speculative and of no substance. It fails on the legal principles and is devoid of merit it is my view that the reliefs sought ought to be dismissed with costs on a higher scale.

IT IS ORDERED THAT

1. The reliefs sought by the plaintiff are dismissed.
2. The plaintiff to pay costs on a higher scale.

V Nyemba & Associates, plaintiff’s legal practitioners
Munangati & Associates, 1st – 5th defendants’ legal practitioners