DISTRIBUTABLE (26)

Judgment No SC 29/05

Civil Appeal No 150/03

(1) LAZARUS JAMES (2) CHISONI JAMES (3) ESNATI JAMES v
(1) WILLIAM SIKARIYOTI (2) MUNICIPALITY OF HARARE (3)
TONDERAYI MALVERN KATSIGA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE MAY 23 & SEPTEMBER 6, 2005

F. Katsande, for the appellants

No appearance for the first and second respondents

M. Kamdefwere, for the third respondent

CHIDYAUSIKU CJ: The appellants in this case filed an urgent application in the High Court seeking an order restraining the first respondent (hereinafter referred to as "Sikariyoti") from ceding his rights, title and interests in Stand No 4076 New Tafara, Harare (hereinafter referred to as "the stand") to any person and declaring any such sale that may have been entered into null and void.

The third respondent, (hereinafter referred to as "Katsiga") was not

originally cited in the proceedings. He applied to be joined in the proceedings and his application was granted. He opposed the application.

The first appellant (hereinafter referred to as "James") is the eldest son of the late William James (hereinafter referred to as "the deceased") who died in 1983. The deceased became the registered tenant of the stand in 1970. After the death of the deceased, his estate was registered and Sikariyoti was declared to be the heir. He became the registered tenant of the stand. James contends that, he is the eldest son of the deceased, and as such, should have been appointed heir of the deceased. He contended that Sikariyoti had assured the appellants and their mother that on no account would he dispose of the stand as that was the family home.

In August 2002 the mother died. Because the mother's restraining influence was no longer there he continued to monitor what Sikariyoti did. He discovered that Sikariyoti had entered into an agreement with Katsiga in terms of which he sold to Katsiga his rights, title and interests in the stand. That resulted in the appellants filing the urgent application in the High Court.

Katsiga opposed the application and contended that on 12 March 2003 he entered into an agreement with Sikariyoti to buy his rights, title and interests in the stand for $2.6 million. On the same day the two of them went to the offices of the second respondent (hereinafter referred to as "the Council") at Tafara to complete the formalities for the rights in the stand to be ceded to him. The officials confirmed that the stand belonged to Sikariyoti and approved the cession. He and Sikariyoti then went to the Council offices in Remembrance Drive where the cession was also approved. He subsequently became aware that the appellants had filed an application to stop the sale. Katsiga had paid Sikariyoti $2.6 million for the rights in the stand and at the time of the sale Sikariyoti advised him that he was going back to Malawi to live there because that was his home country.

James, in an answering affidavit, claimed that Sikariyoti had obtained the

certificate of heirship fraudulently and that he, himself, despite being the eldest son of the deceased, had never received notice of the edict meeting to appoint an heir to the estate. He had not challenged the appointment of Sikariyoti as heir because he had deferred to his mother's counsel not to cause friction within the family. He had never relinquished his status as the eldest son of the deceased. That was a birth right from which he could not abdicate.

Sikariyoti was appointed heir to the deceased on 13 May 1986. Thereafter, he was registered as the lawful tenant of the stand. The records of the Council reflect that he was the owner of the rights in the stand. That meant that he could sell those rights to any person, subject to the approval of the Council. James, who is the eldest son of the deceased, claims that he was entitled to be appointed heir and should have been so appointed. However, he has done nothing to rectify the position since 1986. Likewise, he and the other appellants were well aware that Sikariyoti was registered as the owner of the rights in the stand and yet they did nothing to have the stand registered in James' name or to have some *caveat* registered to prevent Sikariyoti from selling his rights in the stand without first obtaining their approval.

According to Katsiga he had visited the stand to satisfy himself that the stand was worth $2.6 million. He was satisfied that it was and he checked with the Council officials to ensure that Sikariyoti was, indeed, the owner of the rights in the stand and they confirmed that he was. It was only then that he proceeded with the sale.

On these facts the learned judge in the court *a quo* dismissed the application on the basis that James and the rest of the appellants had done nothing over a period of time to protect their rights. In this regard he placed reliance on the case of *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 (2) SA 464(W) at p 477-478 where it was held that:-

> "It is the idle and slovenly owner, and not one who is alert but incapable of acting, who may lose his property by prescription."

The learned judge also relied on *Ex parte Puppli* 1975(3) SA 461(D) at 463 where it was stated that:-

> "The rationale of our law of acquisitive prescription is that an owner who negligently fails to protect his interests against a stranger in possession of his property should forfeit the property to the possessor."

The learned judge concluded that the principles set out in the above cases

applied to the case before him and, accordingly, dismissed the application.

The appellants were dissatisfied with the outcome and appealed to this Court. In this Court Mr *Katsande*, for the appellants, argued that at customary law, it was James who was entitled to inherit the stand and his rights should not have been treated as if they had been prescribed. He further argued that the Malawi customary law which, in his submissions, applies to the succession in this matter was the same as the Shona and Ndebele customary law. He asked us to take judicial notice that Malawi customary law was the same as Shona and Ndebele customary law.

In my view it is not possible for this Court to take judicial notice of customary laws of a foreign country without any authority or evidence being placed before it. But even assuming that counsel was correct in this regard I am unable to find fault with the reasoning of the learned judge in the court *a quo*.

The appellants in this matter were fully aware that the stand was registered in the name of Sikariyoti since 1986. They did nothing about it and it was only when Sikariyoti had sold his rights in the stand that they sought to assert their rights.

In my view the learned judge was correct in dismissing the application.

It is for these reasons that the appeal is dismissed with costs.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

F M Katsande & Partners, appellants' legal practitioners

Musunga & Associates, third respondent's legal practitioners