

JOSEPH MARIO VAS
and
JANE TERRESA ALIPHON
and
ANTHONY AUGUST VAS
and
LEO JOSEPH ANTHONY VAS
versus
BRENDA-MAY GOMO MSIPA
and
AC DUCK ACCOUNTING AND SECRETARIAL
(PRIVATE) LIMITED
and
SIMON SHONHAYI DENHERE
and
REGISTRAR OF DEEDS N.O
and
EDNA VAS
and
ROBERT VAS
and
GODWIN MURIMI

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE: 18 November 2023 and 4 April 2025

Opposed Application: *Rei Vindicatio*

G Madzoka, for the Applicants
N Jakara, for the seventh Respondent
C T Tinarwo, for the first Respondent
E Jera, for the fifth and sixth Respondents
No appearance for the second, third and fourth Respondents

TAKUVA J: This is an opposed application for *rei vindicatio* aimed at recovering the Applicants' assets namely an undivided 16.66% share identified as Share Number 1 in a piece of land located in the District of Salisbury, known as the Remainder of Stand 926 Salisbury Township, covering 500 square metres and held under Deed of Transfer 1148/89 in the Respondents' possession.

FACTUAL BACKGROUND

The Applicants and the sixth Respondent in this case are siblings. The first Applicant alleges that the disputed property, an undivided 16.66% share identified as Share Number 1 in a piece of land located in the District of Salisbury, known as the Remainder of Stand 926 Salisbury Township, covering 500 square metres and held under Deed of Transfer 1148/89 (referred to hereafter as the Baker Avenue Property), belongs to him and his three siblings: the second, third, and fourth Applicants. He claims that they acquired the property as siblings in 1989 from a company called Abacus Property Company (Private) Limited. The first Applicant further alleges that on June 27, 2002, the Baker Avenue property was fraudulently transferred to a company named AC Duck Accounting and Secretarial (Private) Limited by the third Respondent, acting on the instructions of the fifth and sixth Respondents. In addition to the Baker Avenue property, the Applicants were beneficiaries of several other immovable properties, including the Bannister Road property, whose management they entrusted to the fifth Respondent, who is the wife of the sixth Respondent. The first Applicant alleges that this arrangement was made to allow the fifth Respondent to collect rental income from the two properties for the benefit of the second Applicant, who is reportedly suffering from schizophrenia. He claims that the siblings agreed that the rental income would be used to cover the second Applicant's medical bills at B.S. Leon, medical aid, clothing, medications, toiletries, and any other needs the second Applicant may have. The first Applicant asserts that, over the years, he never suspected or heard anything indicating that the Baker Avenue property had been sold. He claims that he only became aware of its disposal in 2019 when the sixth Respondent asked him to contribute to the medical bills and fees at B.S. Leon, stating that the fees had increased and the account was in arrears. This prompted the first Applicant to inquire with the fifth and sixth Respondents about the rental records from the two properties, but he claims he received no response. According to the first Applicant, several months passed following the sixth Respondent's request for financial assistance, and everything seemed to be in order. It was at this point that he discovered that the second Applicant's bills were now being paid by their other sibling, Erena Vas, who lives in Australia but is not a party to this claim. This realization allegedly led the family to decide to conduct a full investigation into the current status of their properties, with the actual investigation taking place late in 2022.

The first Applicant claims that on November 2, 2022, he visited the Deeds Office and obtained a copy of the Title Deed for the Baker Avenue property. He states that the deed was

marked with the endorsement "Transferred to AC Duck Accounting and Secretarial (Private) Limited," and the subsequent deed became Deed of Transfer No. 7022/2002. According to the first Applicant, this Deed of Transfer No. 7022/2002 was further endorsed to show that the property had been transferred to the third Respondent, the current owner, on November 25, 2005, under Deed of Transfer No. 9835/2005. The first Applicant emphasizes that he had possession of the original title deed to the Baker Avenue property at the time of its initial transfer in June 2002. He also alleges that the signatures on the Power of Attorney to Pass Transfer do not belong to him, nor to the second, third, and fourth Applicants, as claimed. The first Applicant further asserts that the second Applicant could not have signed any documents related to the transfer of the Baker Avenue property as she was fully incapacitated at the time. He also claims that the signature of the third Applicant on the document does not belong to him. Additionally, he states that the fourth Applicant, who was residing in Canada at the time of the 2002 transfer, could not have signed the document, as the signature is not his, and he was out of the country. The Applicants, therefore, allege that the Respondents fraudulently obtained a replacement copy of the original title deed and used it, along with a Power of Attorney bearing forged signatures of the Applicants, to effect the transfer of ownership of the Baker Avenue property. The Applicants seek that the ownership of the Baker Avenue property be reverted to their names, as they contend that the transfer was made without their consent.

The third Applicant agrees with all of the first Applicant's submissions. The third Applicant further alleges that he went to the Baker Avenue property sometime in November 2022 and confirmed that the property is currently occupied by one Mr Misheck, a police officer. He alleges that Mr Misheck has been occupying the property for over 20 years, paying rentals ranging between \$300 and \$600.

The fourth Applicant agrees with all of the first Applicant's submissions. The fourth Applicant further alleges that from the time he left Zimbabwe in 1984, he only came back in 2017 for a one-month holiday with his son.

The First Respondent asserts that the Applicants are not the rightful owners of the Baker Avenue property. She claims that in June 2002, the Applicants sold the property to Stephen Chirewa in his personal capacity, who later transferred his ownership rights to the Second Respondent. The First Respondent alleges that when she facilitated the transfer of the Baker Avenue property, the Applicants approached her to prepare a sale agreement and effect the transfer. According to the First Respondent, the Applicants told her that they had lost the

original title deed, which led to her application for a replacement copy. The First Respondent further states that if it is true that the Fifth Respondent was tasked with managing the property, she should be able to explain to the court how she was overseeing the property without realizing that ownership had changed hands multiple times. The First Respondent contends that the Applicants' failure to consult with her or inquire about the matter through their legal representatives is clear evidence that they are concealing something. She also claims that if the first Applicant truly possesses the original title deed to the Baker Avenue property, then he misrepresented to her that he had lost it when the transfer took place. The first Respondent further asserts that the Applicants did not raise any objections regarding the issuance of a replacement copy of the deed in their application. She claims that the fact the Applicants waited over 20 years to file the current application indicates that they are not being truthful in their claim. The first Respondent denies that the power of attorney to pass transfer was forged, stating that all the signatures on it belong to the Applicants. She also contends that the letter provided by the first Applicant from B.S. Leon confirms that the second Applicant has been residing there since October 2006, which is after the June 2002 transfer. The first Respondent further claims there is no evidence to show that the second Applicant was suffering from schizophrenia in 2002. Additionally, she alleges that the fourth Applicant did not provide any evidence, such as copies of his passport, to verify that he was out of the country during the relevant period.

For emphasis, the first Respondent alleges that the Applicants signed both the agreement of sale and the power of attorney. She further alleges that the Applicants have no legal basis for cancelling Deed of Transfer 7022/2002 and Deed of Transfer 9835/2005.

The fifth Respondent claims that the matter before the court stems from a misunderstanding among the siblings. She denies that the transfer of ownership of the Baker Avenue property was fraudulent, asserting that the Applicants and the sixth Respondent properly and lawfully sold the property to the second Respondent and ensured its transfer. The fifth Respondent states that she married the sixth Respondent while his mother, Mrs. Christine Vas, who is also the mother of the Applicants, was still alive. She further claims that the five siblings purchased the Baker Avenue property with the surplus proceeds from the sale of their Kwekwe property. According to the fifth Respondent, the property was then rented out, and the fourth Applicant collected the rental income at that time for the benefit of Mrs. Christine Vas. She asserts that after the fourth Applicant left Zimbabwe, she was appointed to manage

the Baker Avenue property, continuing to collect the rentals and direct them to Mrs. Christine Vas. The fifth Respondent claims that in 1989, the fourth Applicant granted her Power of Attorney to transfer the Baker Avenue property into the names of the Applicants and the sixth Respondent, as this had not been done in 1986 when the property was purchased. She asserts that at this time, she took possession of the original title deed for the Baker Avenue property. The fifth Respondent further states that around 2000 or 2001, Mrs. Christine Vas left Zimbabwe for India and never returned. She claims that in 2002, the Applicants and the sixth Respondent decided to sell the Baker Avenue property. The fifth Respondent alleges that by the time the decision was made, she had misplaced the title deed, which led to an application for a lost copy of the deed, and the transfer was then carried out based on that copy. She later found the original title deed, which she claims to have kept until 2020, when it was taken from her by the first Applicant. The fifth Respondent contends that the sixth Respondent, along with the first, second, and third Applicants, signed the sale documents on their own, while she signed on behalf of the fourth Applicant, having been given Power of Attorney to do so.

The fifth Respondent claims that in 2020, the Vas siblings had a dispute regarding the welfare of the second Applicant, which led the first Applicant to demand all files related to the properties and the second Applicant's welfare. This resulted in the sixth Respondent handing over the files, including the original title deed of the Baker Avenue property, to the first Applicant. From that point, neither the fifth nor the sixth Respondent regained possession of these documents. As a result, the fifth Respondent argues that the Applicants are now making false allegations against the Respondents, taking advantage of the fact that the first Applicant is now in possession of the documents, which are being used as evidence in this case. She contends that the annexures submitted by the first Applicant as evidence of his signature actually belong to the sixth Respondent and were part of the file that the first Applicant gained possession of in 2020.

The fifth Respondent also asserts that there is no founding affidavit from the second Applicant, who is allegedly unable to depose to an affidavit. She argues that the second Applicant should not be included as a party in the case unless a curator has been appointed to represent her interests. Furthermore, the fifth Respondent claims that the order being sought by the Applicants is flawed, as it only seeks the reinstatement of the Baker Avenue property in the names of the first, second, third, and fourth Applicants, excluding the sixth Respondent, who is also a sibling and had a share in the property. The fifth Respondent emphasizes that no fraud

occurred, as the sixth Respondent, along with the first, second, and third Applicants, all participated in the transfer of the Baker Avenue property, and the fourth Applicant had given the fifth Respondent power of attorney to act on his behalf, which she did. Finally, the fifth Respondent asserts that the Power of Attorney attached by the Applicants is not the one used for the transfer in 2002, and the signatures on it are forged.

The fifth Respondent claims that the Applicants were aware that the Baker Avenue property had been sold and that only the rental income from the Bannister Road property was being used for the benefit of the second Applicant. She alleges that the issue of the sale of the Baker Avenue property only came to light when the first Applicant obtained the original deed after allegedly collecting files from the sixth Respondent. The fifth Respondent denies the claim that Erena Vas was funding the second Applicant's bills at the request of the fifth and sixth Respondents. She clarifies that Erena Vas only sent \$5,000 Australian dollars in 2018 to help with the second Applicant's bills. The fifth Respondent further asserts that she and the sixth Respondent continued to support the second Applicant even after the tenant began defaulting on rental payments.

The sixth Respondent concurs with everything submitted by his wife, the fifth Respondent. In addition to these submissions, the sixth Respondent claims that a major fallout occurred within his family after he approached the first Applicant, requesting him to start contributing towards the welfare of the second Applicant. He alleges that a week after this disagreement, he went to fetch water at the third Applicant's house, where the first Applicant was also present. According to the sixth Respondent, both the first and third Applicants then harassed him, accusing the fifth Respondent of misusing funds intended for the second Applicant. It was at this point that the sixth Respondent told the first and third Applicants that he no longer wished to be involved in collecting rental payments from the Bannister Road property due to the tenant, Mr. Misheck, consistently falling short or delaying rent payments.

The sixth Respondent claims that he later had a meeting with the first Applicant and Mr. Misheck at the first Applicant's house. He states that the purpose of the meeting was simply to hand over the management of the Bannister Road property and the collection of rentals to the first Applicant. The sixth Respondent insists that there was no fraud in the sale of the Baker Avenue property and that all registered owners of the property were involved in the sale. The sixth Respondent requests that the application before the court be dismissed with costs on an attorney and client scale.

The seventh Respondent has been included in this application to represent his principals, Douglas Tsetsetse and Fungai Zinyama, who are the current owners of the Baker Avenue property. He asserts that his principals lawfully purchased the property from the wife of the third Respondent, who had been awarded the property by the High Court following their divorce in case number HC2951/13. The seventh Respondent claims that the sale was completed on 17 August 2022. He also argues that the second Applicant should not be considered a party in the proceedings, as she is allegedly incapacitated and requires a curator to act on her behalf. Furthermore, the seventh Respondent contends that the fourth Applicant's supporting affidavit is invalid, as it was not signed before a Notary Public. The seventh Respondent requests that the application be dismissed with costs.

ISSUE FOR DETERMINATION

Whether or not the Applicants' application for *rei vindicatio* is justified.

APPLICATION OF THE LAW TO THE FACTS

The requirements for an *actio rei vindicatio* were set out in *Chenga v Chikadaya & Ors* SC

7-13 at pg. 7 as follows: -

“The *rei vindicatio* is a common law remedy that is available to the owner of property for its recovery from the possession of any other person. In such an action there are two essential elements of the remedy that require to be proved. These are firstly, proof of ownership and secondly, possession of the property by another person. Once the two requirements are met, the onus shifts to the respondent to justify his occupation.”

The position was also set in the case of *Nyahora v CFI Holdings* SC 81-14 by Ziyambi JA who stated that:

“The action *rei vindicatio* is available to an owner of property who seeks to recover it from a person in possession of it without his consent. It is based on the principle that an owner cannot be deprived of his property against his will. He is entitled to recover it from any one in possession of it without his consent. He has merely to allege that he is the owner of the property and that it was in the possession of the defendant/respondent at the time of commencement of the action or application. If he alleges any lawful possession at some earlier date by the defendant then he must also allege that the contract has come to an end.”

Similarly, in the case of *Chetty v Naidoo* 1974 3 SA 13 (A), which is the *locus classicus*, it was stated as follows:

“The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner.”

From the case law, it is trite that for one to succeed in an *actio rei vindicatio*, they must prove ownership of the property which they seek to vindicate and establish that the person in possession holds it without their consent or any lawful cause. Conversely, to successfully defend the claim, the possessor must show a right to retain the property or a contractual basis to hold onto the property.

In *casu*, from the facts brought forward by all the parties, it is evident that the Applicants indeed initiated the transfer of the Baker Avenue property in 2002; therefore, there is no unlawful possession. If indeed, this transfer was done fraudulently, the Applicants should have filed the application within a reasonable time. 20 years is too long for the Applicants to claim that they were not aware of the said transfer. The Baker Avenue property has now changed ownership four times from the time of sale in 2002. To then award the Applicants the relief they seek of *rei vindicatio* is not in the interests of justice as it will prejudice the other three innocent parties who lawfully acquired the property.

The law is clear on the fact that for one to succeed in an application for *rei vindicatio*, one has to prove ownership of the *res* and unlawful dispossession. The Respondents have proved ownership of the Baker Avenue property by producing title deeds registered with the Deeds Registration Office to that effect. Based on the above, it is clear that the Respondents are aggrieved by the Applicants’ actions, which have caused both financial and time-related losses for them.

In this regard, the Respondents have successfully demonstrated rightful ownership of the property in dispute. It is for this reason that the application for *rei vindicatio* is not justified, given the circumstances.

Disposition

In the result, the application is hereby dismissed with costs on the ordinary scale.

TAKUVA J:

Wintertons, applicants' legal practitioners

Zimudzi and Associates, first respondent's legal practitioners

Moyo and Jera, fifth and sixth respondents' legal practitioners