

ELLEN MAJOLA

versus

BEKEZELA NYONI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 25 MARCH, 9, 17, 26 JUNE 2014 AND 3 JULY 2014

Mr *M. Ndlovu* for the plaintiff
Mr *N. Dube* for the defendant

Civil Trial

MAKONESE J: The Plaintiff in this matter initially instituted proceedings by way of a Court application filed on the 11th July 2013. The Plaintiff sought the following relief against the defendant:

“IT IS ORDERED THAT:

1. The Respondent and all those claiming occupation of house number 20339 Pumula South, Bulawayo, vacate the said house within 5 days of the granting of the order.
2. Failing which the Deputy Sheriff and his lawful assistant are authorised to evict the Respondent or anyone claiming through her from house 20339, Pumula South, Bulawayo.”

The relief sought by the Plaintiff in the Court application was opposed and after both parties had filed Heads of Argument it became apparent that the dispute between the parties could not be resolved on the papers without leading *viva voce* evidence. On the 21st June 2013 the court issued the following order by consent:

“The matter be and is hereby referred to trial. The papers filed of record shall stand as pleadings. Costs shall be costs in the cause.”

The issues for determination in this trial are summarised in the Pre-Trial Conference memorandum as follows:

1. Whether or not Stand 20339 Pumula South, Bulawayo was transferred to the Plaintiff after the death of her husband.
2. Whether or not the defendant or her husband bought the property in question.

The burden of proof on the first issue lay with the Plaintiff whilst on the second issue the defendant had the burden of proving that she or her late husband purchased the property from the Plaintiff.

The background to this matter is as follows:-

The Plaintiff was married to the late Njani Majola who died on the 16th July 1999. It is not in dispute that the Plaintiff and her late husband acquired Stand 20339 from the City of Bulawayo as an undeveloped Stand on 26th August 1997. The purchase price for the Stand was Z\$6000-00. It is further not disputed that the Plaintiff and her husband were required to erect a residential property upon the vacant stand upon submission of approved building plans to the City of Bulawayo's Housing office. The Plaintiff registered the late Njani Majola's estate under DRB Number 633/10 and Letters of Administration were duly issued in favour of the deceased's sister Getrude Lusinga who was appointed Executrix Dative. The Plaintiff then proceeded to execute a cession of the rights, title and interest in and to the property into her names on the 4th of May 2011. Once the Plaintiff had finalised the process of cession of the rights into her names she sought to take occupation of the house that she had constructed on the stand in dispute. The defendant resisted her efforts to evict her and instead averred that the property belonged to her and her late husband. The defendant contends that she was married to the late Njani Majola's brother, one Ambrose Majola in 2003. Ambrose Majola fell ill and passed away in 2004. The Defendant contends that the house on the stand in dispute was built by Ambrose Majola and herself after the Plaintiff had sold the stand to Ambrose Majola for Z\$20 000.00 because she had fallen in arrears in respect of rates for the property. The Defendant vehemently denied that when she married Ambrose Majola there was already a house on the stand and that she simply moved into a dwelling house that was ready for occupation.

The Plaintiff **Ellen Majola** led evidence in support of her claims. She denied ever selling stand 20339 Pumula South, Bulawayo to the Defendant or to her husband. She explained that the Defendant's husband, Ambrose Majola was like a son to her and her late husband. She testified that after she had finished the construction of the house she asked Ambrose to go and look after the property with her children who resided there. At that stage Ambrose was not yet married to

the Defendant. Her evidence was that the Defendant only moved into the house around 2003 when the house had already been erected. The late Ambrose Majola died a shortwhile afterwards during the year 2004. The Plaintiff stated that after the demise of her own husband she purchased building materials slowly through her proceeds from farming and the sale of livestock. She refuted the Defendant's assertions that the stand was almost re-possessed by the City Council because she had failed to pay rates for the property.

The court found the evidence of Ellen Majola to be simple and straightforward. She was candid with the court and she gave the impression of an unsophisticated woman who simply narrated events that occurred without any tinge of exaggeration. Her demeanour on the witness stand was satisfactory and I find her evidence to be worthy of belief.

The second witness called by the Plaintiff is **Getrude Lusinga**. She confirmed that she was a sister to both the late Njani Majola and Ambrose Majola. She regarded both Plaintiff and Defendant as her sisters-in-law. She testified that stand 20339 Pumula South, Bulawayo was purchased by Njani Majola during his lifetime. She was emphatic that the late Ambrose Majola never purchased the stand in question and never constructed a house upon the stand. She stated that Ambrose was looked after by the Plaintiff as "a son". The witness went further to indicate that Ambrose was only requested to move into a completed house. She asserted that Ambrose did not have the financial ability to purchase the stand. He came in and out of the country and spent most of his time in South Africa where he did odd jobs. Getrude Lusinga indicated that the Defendant joined the late Ambrose Majola when the house was already complete in 2003. Ambrose died the following year in 2004. She went further to point out that she assisted the Plaintiff to secure a builder and that the Defendant erected the house using proceeds from her farming activities and sale of her cattle. She flatly denied the suggestion that Ambrose Majola or the Defendant had purchased the property from the Plaintiff. I found the evidence of this witness to be credible and consistent with Plaintiff's evidence in material respects. She gave her evidence well and was comfortable on the witness stand. She indicated that she stood to gain nothing by giving evidence in court but wanted to ensure that the facts were presented in their proper context. She appeared to be genuinely shocked by the claims by the Defendant that she was the rightful owner of the property.

In support of her case, the Defendant gave evidence. She said that sometime in the year 2000, she together with her late husband purchased stand 20339 Pumula South from the Plaintiff

after the death of Plaintiff's husband. They proceeded to develop the stand. Plaintiff undertook to transfer the property into Defendant's names after winding up her husband's estate. Plaintiff failed to do so and instead instituted proceedings to evict the Defendant from her lawfully acquired property. The Defendant swore that she witnessed the Plaintiff being handed the sum of Z\$20 000-00 by the late Ambrose Majola. She stated that she was the only witness to the transaction. The Defendant conceded that she moved in to cohabit with the late Ambrose Majola sometime in 2003. Her husband died the following year in 2004. Defendant averred that the Plaintiff never come to the property and resided in the rural areas. She however confirmed that when the Plaintiff attempted to evict her from the premises, she resisted those attempts. Defendant alleged that the late Ambrose Majola had at the time of his death approached the City of Bulawayo to change the account name on the water and rates bills. The Defendant's contention was that because the rates and water bills were in the name of Ambrose Majola proved that he had acquired ownership in the property. The Defendant further alleges that the Plaintiff is taking advantage of the fact that the agreement of sale was verbal and that the Defendant's husband is now late. I found the evidence of the Defendant difficult to believe for the following reasons:

- (a) Defendant said she married and moved in to cohabit with the late Ambrose Majola in 2003.
- (b) The evidence of the Plaintiff and Getrude Lusinga clearly shows that the house was constructed between the year 2000 and 2003.
- (c) The late Ambrose Majola was being looked after by the Plaintiff as "a son" and could not have had the financial means to purchase the property.
- (d) The alleged verbal agreement had no witness except Defendant herself.
- (e) If the Defendant commenced co-habiting with the late Ambrose Majola in 2003 she would not have been party to the construction of the property. The house was erected when she moved in.
- (f) The Defendant failed to establish the basis of her entitlement to the property.

I concluded that the evidence of the Defendant was discredited under cross-examination. Her narration of events was not convincing and she did not impress as an honest witness. The version of the Plaintiff is more credible than that of the Defendant. I make the specific finding that on the evidence placed before the court, the Defendant could not have constructed the house

with her late husband because they only started co-habiting in 2003 when the dwelling house was already complete. The Defendant moved into the property in 2003, her husband fell ill and died in 2004. It is inconceivable that the house would have been erected before the Defendant moved in in 2003 in that her late husband was actually being looked after by the Plaintiff and her husband. There was no evidence placed before the court to show that Defendant had the financial means to pay for the property.

Analysis of the Law

The law is clear on the sale of immovable assets belonging to a Deceased Estate. The Assistant Master should give his consent in terms of section 120 of the Administration of Estates Act [Chapter 6:01]. The section provides as follows:

“If, after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested the estate to sell any property belonging to such estate otherwise than public auction he may, if the will of the deceased contains no provision to the contrary, grant the necessary authority to the executor so to act.”

In the case of *Kizito Mutsure v Ichabod Muringisi* HB 20/09, the learned NDOU J stated the position as follows:

“In terms of section 120 of the Administration of Estates Act [Chapter 6:01], the approval of the Master of the High Court is required for such agreement of sale of an immovable asset of the estate. This is a condition precedent which suspended the operation of all obligations flowing from the agreement until the approval of the Master.”

In *casu*, the absence of the Master’s authority is fatal to any purported sale of the property which renders any agreement *void ab initio*.

The Defendant admitted under cross-examination that when the late Njani Majola’s estate was advertised calling upon debtors and creditors to submit their claims she did nothing about it. The Defendant was subsequently aware that the property was transferred into the names of the Plaintiff and yet she chose to sit back and do nothing. It is self evident that the Defendant only took action when she faced eviction from the property.

In the circumstances I am satisfied that the Plaintiff has succeeded in proving that the rights, title and interest to and stand 20339 Pumula South, Bulawayo were transferred to the Plaintiff in accordance with the law after the death of her husband. On the other hand, however, I find that the defendant hopelessly failed to convince the court that her late husband or herself

purchased the property in question at any time.

In the result, I make the following order:-

1. The Defendant and all those claiming occupation of house 20339 Pumula South, Bulawayo be and hereby ordered to vacate the aid house within 5 days of the granting of this order.
2. In the event that the Defendant to comply with this order the Deputy Sheriff, Bulawayo or his lawful deputy be and are hereby authorised to evict the Defendant or anyone claiming ownership through her from house number 20339, Pumula South, Bulawayo.
3. The Defendant is ordered to pay the costs of suit.

Mtweli Ndlovu and Associates, applicant's legal practitioners

Messrs Maronedze, Mukuku & partners, defendant's legal practitioners