

TAWANDA CECIL MADZINGAIDZE  
(in his capacity as executor of ESTATE LATE WALTER MADZINGAIDZE)  
versus  
KATANGA SERVICE STATION (PRIVATE) LIMITED  
and  
THE MASTER OF THE HIGH COURT  
and  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE August 22, 2013

**Civil trial**

*C. W. Gumiro*, for the plaintiff  
*D. Muzawazi*, for the first defendant.

CHITAKUNYE J. On the date of trial the parties agreed to proceed by way of a stated case as they apparently had come to an agreement on the facts that are common cause and relevant for the resolution of the case.

**Facts**

The agreed facts were that the late Walter Madzingaidze died on 30 June 2007. The late Israel Gumunyu of the Will Writing Centre was duly appointed Executor Estate of late Walter Madzingaidze.

The inventory of the property of Late Walter Madzingaidze included an immovable property, being Lot 3 of Stand 19 Midlands Township of Midlands, measuring 5069 square metres, also known as Stand number 3/19 Lillian Road, Waterfalls, Harare. The beneficiaries of Estate late Walter Madzingaidze were as follows:-

Jane Langwani (surviving spouse);

Tawanda Cecil Madzingaidze (son) born 15 March 1977;

Walter Madzingaidze (son) born 31 January 1981;

Tafadzwa Madzingaidze (daughter) born 15 October 1983;

Melody Rutendo Madzingaidze (daughter) born 12 July 1988;

Tanaka Madzingaidze born 13 March 1997;

Itayi Brutas Madzingaidze born 02 November 2000; and

Patricia Madzingaidze born 10 November 2004.

On 11 June 2010, the then executor late Israel Gumunyu applied to the Master of the High Court for authority to sell the immovable property Stand 3/19 Lillian road waterfalls Harare in terms of section 120 of the Administration of Estates Act [*Cap 6:01*], hereinafter referred to as the Act. The application was tendered as exhibit 1. The application was accompanied by affidavits deposed to by the following beneficiaries:-

Tawanda Cecil Madzingaidze;

Tafadzwa Madzingaidze;

Melody Rutendo Madzingaidze; and

Jane Langwani.

Jane Langwani purported to be deposing to the affidavit in her own capacity and on behalf of her three minor children namely Tanaka, Itayi, and Patricia Madzingaidze in her capacity as their guardian. The respective affidavits were tendered as exhibits 2 to 5. In the affidavits the beneficiaries were directing the executor Mr. Israel Gumunyu to seek authority from the High Court to sell other than by public auction the immovable property. In paragraphs 3 to 5 of their respective affidavits each one stated thus:-

- “3. We as a family entered into a re-distribution agreement of the estate of our late father Walter Madzingaidze.
4. We have failed to raise money for administration purposes and further this estate is not liquid as it does not have cash.
5. It is against this background of lack of liquidity that I now direct the executor Mr. Israel Gumunyu to seek authority from the High court to sell other than by auction the immovable properties being house number 3/19 Lillian Road Waterfalls, Harare; Shop and Milling company at Planbridge Enterprises (Pvt) Ltd and First Electric Shop at Wedza Centre.”

They all confirmed their consent to the executor proceeding to share the residue as per their re-distribution plan. Jane Langwani confirmed with certainty that she was acting in this way on her own behalf and on behalf of the three minor children as their sole guardian.

Presented with the application and the supporting affidavits the Master of the High Court granted authority to sell by private treaty on 06 July 2010. That authority was tendered as exhibit 6 in first defendant's bundle of documents.

On 12 July 2010, Walter Madzingaidze (son) deposed to an affidavit expressing his consent to the executor to liquidate the estate as agreed by other beneficiaries. Walter was in fact purporting to ratify what the executor had done in pursuance of the agreement by other beneficiaries.

On 18 August 2010, the then executor entered into an Agreement of Sale with first defendant in respect of the property in question. The purchase price as per the agreement of sale was set at USD60 000-00 (see pages 3-6 of first defendant's bundle of documents).

The first defendant paid a total of USD59 000-00 to the executor as evident from RTGS forms attached as exhibits 9a- 9f (see pages 43, 47, 48 and 49 of the first defendant's bundle of documents).

The said amount was however not remitted to the estate, neither was it remitted to the beneficiaries. The then executor apparently converted the money to his own use.

The first defendant paid for rates to the City of Harare on 04 October 2010 in the sum of USD989-00 (see page 2, the first defendant's bundle of documents).

On 08 November 2010 the first defendant obtained transfer of the property. The property since then has been in the first defendant's name as owner.

The agreement of sale and the proof of payments made were not submitted to the Master of the High Court. The Master's fees and estate duty were also not paid.

When the beneficiaries learnt that the executor Mr. I. Gumunyu had abused the purchase price they caused his arrest. Whilst the criminal matter was pending at the magistrates' court (see CRB 1888839/10), the then executor died.

It was after the demise of that executor that plaintiff was appointed executor on 07 March 2012.

In response to this claim and as is required in terms of the law the Master of the High Court submitted a Report and a supplementary report on the dispute in question.

The main issues for determination as identified at a pre-trial conference were:-

1. Whether or not at the time the second defendant authorised the executor to sell by private treaty the estate's immovable property, all the beneficiaries had given their consent to sell.

2. Whether or not the agreement of sale between the first defendant and the then executor was *perfecta*, more particularly, whether or not the estate received the purchase price.

3. Whether or not the plaintiff is entitled to the relief it seeks.

1. **Whether or not at the time the second defendant authorised the Executor to sell by private treaty the Estate's immovable property, all the beneficiaries had given their consent to sell.**

Though the first issue was crafted as such from the arguments presented it was clear to me that the issue of all the beneficiaries giving consent was intended to show that the second defendant had not complied with section 120 of the Act. The real issue should thus be whether or not second defendant complied with that section before granting the authority to sell by private treaty.

Section 120 states that:-

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

It is apparent from the above section that:-

1. The Master has to formulate his own opinion;
2. The opinion has to be formulated after a due inquiry and
3. The opinion has to be in furtherance of the advantage of the persons interested in the estate, in this case the beneficiaries.

The section does not *per se* require that all the interested parties must agree. It is the opinion of the Master after a due inquiry that is crucial. The fact of the interested parties all agreeing may only be one of the considerations to be taken into account by the Master as he carries out the due inquiry.

A due inquiry may be described as a fitting or appropriate investigation or research on the subject matter before arriving at a decision. That necessarily involves a consideration of submissions made and an assessment of what would be appropriate given the circumstances

of the matter. The Master will want to know the reason why the property has to be sold and why the sale will be to the advantage of the beneficiaries.

In *casu* the Master was seized with the application with affidavits from all beneficiaries except one in support of the application. The deponents of the affidavits indicated clearly that the reason for the sell was that the estate had no cash for administration purposes. As regards the interests of the beneficiaries, the deponents clearly stated how the interests of each beneficiary had been catered for in the re-distribution plan.

It was in these circumstances that the Master said he properly exercised his powers and granted the authority. After the granting of the authority there was no challenge to the Master's decision. The beneficiary who had not expressly given his consent at the time the application for consent to sell was made and granted later deposed to an affidavit virtually agreeing with what had been done. That beneficiary Walter Madzingaidze, in effect ratified what his fellow beneficiaries had done and this was before the property had been sold.

"The effect of ratification is to put all parties in the position in which they would have been if the act had been properly authorised before it was performed, but not so as to disturb or disturb any rights acquired by the other party to the transaction or by other third party."

(See Business Law in Zimbabwe: R. H Christie, January 1985)

In furtherance of his arguments on this issue plaintiff went on to say that Jane Langwani as the mother of the three minor children could not represent the children but should have appointed a tutor in terms of section 69(1) of the Act.

Section 69(1) states that:-

"No person, except the father of any minor or the mother of any minor whose father is dead or has abandoned the minor, by any will or other deed shall nominate and appoint any tutor to administer and manage the estate or to take care of the person of such minor."

The plaintiff's argument in this regard was incomprehensible. The estate in question was not for a minor. The immovable property in question was not even earmarked for the minors but for adults. The property that was earmarked for the minors in terms of the re-distribution plan submitted was not affected at all. Jane Langwani as the minors' natural mother was their guardian. A guardian maybe defined as -'a person having the right and duty of protecting the person, property or rights of one who is without full legal capacity or

otherwise incapable of managing his own affairs.’ (See Osborn’s Concise Law Dictionary, 6<sup>th</sup> edition 1976, by John Burke.)

In that capacity therefore Jane Langwani had the authority to represent the minors.

The plaintiff further argued that the consent to sale was improperly obtained because second defendant did not abide by section 122 of the Act.

Section 122 states that:-

“In cases where minor heirs are interested in property inherited from the estate of any deceased person the Master may apply through the chamber book to a judge for authority for the lease, mortgage, sale or other disposition of such property, and the judge may make such order as in the circumstances he considers advisable.”

The use of the word ‘may’ in the provision makes it clear that the Master is called upon to exercise his discretion whether to refer the matter to a judge in chambers or not. In *Nemuseso v Mashita & Others* 2009 (2) ZLR 298 court held that:-

“In terms of s 122 of the Administration of Estates Act [*Cap 6:01*], it is incumbent upon the parties to approach the Master for his consent to sale or so that he could apply to a judge for authority to sell the property. The provision indicates that the Master is called upon to exercise his discretion as to the referral of the case to a judge in chambers. It is clear that the property of a minor is protected and may not be disposed of without the consent of either the Master or the court. Clearly, the intention of the legislature was to protect the inheritance of minors from unscrupulous executors. The Master will usually require a sworn appraisal of the property to be sold. He will want to know why the property is being sold and why the sale will be to the benefit of the minor(s). The same information will be required by a court and the court will not grant such leave unless fully satisfied beyond all reasonable doubt that it will be to the advantage of the minor(s).”

In *casu* the Master was approached and he made a decision after being furnished with the reason for sale and that the sale will be to the advantage of the beneficiaries. In any case, unlike in the *Nemuseso* case where the property had by Will been bequeathed to the minors, in this case the property was not bequeathed to the minors. In terms of the re-distribution plan the property was intended for adult beneficiaries. The minors and their mother were to inherit another immovable that was not the subject of the sale.

Accordingly I am of the view that there was no mandatory requirement for the Master to refer the matter to a judge in chambers. The Master properly exercised his discretion and granted the consent to sale.

2. **Whether or not the agreement of sale between the first defendant and the then executor was *perfecta*, more particularly whether or not the estate received the purchase price.**

This issue is no longer of importance in that in the agreed facts the parties confirmed that the first defendant paid the purchase price to the then executor as evidenced by RTGS forms tendered into evidence as exhibits 9a-9f. The total paid to the executor was USD59 000-00. USD 989-00 was paid by first defendant as rates to the City of Harare. That is evident from page 2 of the first defendant's bundle of documents.

It is common cause that the then executor did not remit the money to the estate he instead converted the money to his own use. The beneficiaries who include the current executor caused the then executor's arrest. Unfortunately the then executor met his demise before he had been made to make good the money he had converted to his own use. The question is should the late executor's misdeeds prejudice an innocent purchaser?

It is common cause that the late executor was acting for and on behalf of the estate when he entered into the agreement of sale with first defendant. He was in fact performing his duties in terms of the law. That same law required him to furnish security for due administration of the estate. In that regard s 31(1) of the Act states that:-

“Every executor dative, assumed executor or curator *bonis* shall , before he is permitted to enter on the administration of the estate, find security to the satisfaction of the Master for the due and faithful administration of the estate to which he has been appointed, for such amount as in the circumstances of each particular case is reasonable.”

The executor's failure to execute his duties faithfully cannot in the circumstances be visited on the purchaser. Where an executor fails to perform to the expected level he stands to lose the security proffered and aggrieved parties may take appropriate legal action against the executor.

3: **whether or not the plaintiff is entitled to the relief he seeks.**

From the above analysis of the case I am of the view that the plaintiff's claim for the declaration of the agreement of sale between the late Executor Israel Gumunyu and first defendant as null and void cannot be granted. That agreement is valid and binding.

With this conclusion the other reliefs sought cannot be granted as they were premised on the agreement of sale being declared null and void. The plaintiff's relief could probably have been in pursuing a claim against the estate late Israel Gumunyu.

Accordingly the plaintiff's claim is hereby dismissed with costs.

*Ngarava, Moyo & Chikono* plaintiff's legal practitioners  
*Mtombeni, Mukwasha, Muzawazi & Associates*, first defendant's legal practitioners.