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Judgment No. SC 29/07
Civil Appeal No. 204/06

STARFORD KUFAKWAZVINO v (1) CALEB MUTANDWA (2) NGONI JAUNDA (3) DIRECTOR OF HOUSING, MUNICIPALITY OF CHITUNGWIZA (4) MASTER OF HIGH COURT

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GARWE JA
HARARE, JUNE 5, 2007 & JANUARY 21, 2008

The appellant in person

The first respondent in person

No appearance for second, third and fourth respondents

ZIYAMBI JA: The judgment of the High Court which is the subject of this appeal is unedited and contains what seems to be a garbled version of the recorder's understanding of what the learned Judge said. Attempting to make sense of the judgment has been a painstaking task. It is the duty of the Registrar of the court whose judgment is being appealed against, to ensure that the judgment of the Court is edited by the Judge or Presiding Officer concerned before its inclusion in the record.

I now proceed to give reasons for the order handed down by this Court at the end of the hearing.

On 28 October 1998 the late Vashiko Sipanela died followed, in 2001, by his wife Mary Jaunda. The couple were survived by four minor children Dephine, Precious, Nyarai and Kudakwashe ("the minor children"). No executor was appointed to the estate until 1 March 2003 when letters of administration were granted to the second

respondent "for the sole purpose of effecting cession of STAND NUMBER 12928 UNIT N: SEKE: CHITUNGWIZA into the names of all the late's children namely: Kudakwashe Jaunda, Dephine Sipanela, Precious Sipanela, and Nyarai Sipanela."

On 31 December 2004, the minor children were granted certificates of occupation (in terms of s 10 of the Urban Councils (Model) (Occupation of Residential Property) By-laws, 1985) ("The Urban Councils By-laws") in respect of Stand No. 12928, Unit N Chitungwiza ("the property"). I should record here that the second respondent is the uncle of the minor children.

Meanwhile, on 1 August 2002, and some seven (7) months before his appointment as Executor Dative of the estate, the second respondent and the appellant had concluded an agreement of sale in terms of which the property was sold to the appellant by the second respondent for ZW$280 000.00. The agreement provided that the second respondent could remain on the property until 30 September 2002 after which the appellant would have vacant possession thereof. What occurred thereafter is not clear from the record but it appears that the appellant, having issued summons in the High Court, obtained, on 16 February 2005, a default judgment in Case No. HC 33/05 against the second, third and fourth respondents in effect compelling transfer of the property to the appellant.

On 12 July 2006, the first respondent, who was then representing the interests of the minor children, having been appointed *curator bonis* on 29 April 2005, obtained a rescission of the default judgment on the basis that the judgment was 'erroneously sought or erroneously granted in the absence of any party affected thereby'.

The appellant opposed the application citing inordinate delay by the first respondent in bringing the application. However, the learned Judge in the court *a quo* found that the delay in filing the application for rescission of the judgment though lengthy was not unreasonable having regard to all the circumstances. On the merits of the matter he found, firstly, that the default judgment was obtained against the second respondent in his personal capacity and not against the beneficiaries of the estate; secondly, that it was obtained when rights of occupation in the property already vested in the minor children in terms of the Urban Councils By-laws; and thirdly, that it was obtained without proof of service of the application on the Master of the High Court and without the benefit of a report submitted by the Master in terms of the Rules of the High Court.

Regarding the agreement of sale, the court found that firstly, the property was sold by the second respondent in his personal capacity and not in his capacity as executor of the deceased estate in which the rights in the property vested at the time; secondly, that the second respondent was not at the date of the agreement authorized in terms of the Administration of Estates Act [*Cap* 6:01] ("The Act") to dispose of the property; and thirdly, that the sale was not capable of being validated in the absence of proper authority vested in the second respondent to dispose of the property to the appellant. Accordingly, he found the agreement of sale to be invalid both at the time of its execution and at any subsequent time.

On appeal, the appellant took issue with the finding by the trial court that the delay in bringing the application was not unreasonable in the circumstances.

In determining whether the delay is unreasonable the Court has to make a value judgment, based on all the circumstances of the case, as to what amounts to unreasonableness in each case. There are no reasons given in the cursory judgment of the court *a quo* as to why the delay was deemed not unreasonable but the Court did indicate that consideration had been given to the circumstances of the case. Some of these circumstances are apparent on the record and they are set out hereunder.

The default judgment was not obtained against the beneficiaries of the estate or against the executor of the estate in his capacity as such but against the second respondent in his personal capacity. Further, the second respondent, being the uncle of the minor children, would have been expected to act in their interests but instead he purported to sell the house which was the only immovable asset of the estate.

The Master of the High Court is the upper guardian of all minors. For this reason r 249 of the High Court Rules 1971 provides that applications concerning estates of deceased persons and minors must be served on the Master of the High Court and a report obtained from him before a determination can be made by the Court. And lastly, the appointment of the first respondent as *curator bonis* of the estate would have involved some length of time.

Accordingly, despite the absence of detailed reasons from the court *a quo* it is evident that this is a case in which a court would have found the delay to be not unreasonable.

In any event, there is no time limit prescribed in r 449 of the High Court Rules in terms of which this application for rescission was brought, for obtaining relief in terms of this rule. The rule is worded as follows:

"**449. Correction, variation and rescission of judgments and orders**

(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind or vary any judgment or order -

(a) That was erroneously sought or erroneously granted in the absence of any party affected thereby."

It was therefore up to the trial Judge to exercise, as he did, his discretion in deciding whether or not to entertain the application.

It is clear that the judgment sought to be rescinded was granted in the absence of the minor children who are affected by it and that the judgment was erroneously granted because it was apparently not brought to the attention of the learned Judge who issued the default judgment that this was a matter concerning minor children. Had this been done, it would have become apparent to the learned Judge that notice of the application should be served on the Master and his report obtained before any judgment could be given.

The merits of the case are also against the appellant. He purported to purchase rights, title and interest in the property from one who had no authority to sell them. Those rights vested in the estate and only an executor is empowered to deal with property vested in the estate and only an executor is empowered to deal with property vested in an estate. See s 23 of the Act.

On the appellant's own admission, no executor had been appointed when he purchased the property. Accordingly, the learned Judge was correct in his finding that the sale was invalid. When the second respondent was appointed executor, it was for the sole purpose of attending to a cession of the rights in that property to the minor children. Thus the sale to the appellant could not be validated by the second respondent after his appointment as executor as the learned Judge correctly found.

It is for the above reasons that at the end of the hearing we dismissed the appeal with costs and indicated that our reasons would follow.

MALABA JA: I agree.

GARWE JA: I agree