VIRIMAI MAKUZVA
and
KUNDAI MAKUZVA
and
YEUKAI CHEU (NEE MAKUZVA)
versus
VIOLA MACHERA (NEE MAKUZVA)
and
NENGOMASHA FAMILY TRUST
and
WILSON MANASE (IN HIS CAPACITY AS EXECUTOR
OF THE ESTATE LATE MUCHANDIBAYA MAKUZVA)
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 27 May & 2 November, 2022

Opposed Matter

M K Chigudu, for the applicant
G R J Sithole, for the 1st respondent
B Diza, for the 2nd respondent
T Zhuwarara, for 3rd respondent

MAXWELL J:

HC 7245/19

Sometime in May 2018, second respondent purchased a certain piece of land in the District of Charter, called Wiltshire 1010, commonly known as Farm 1010 Wiltshire Chivhu (the property|). The Deed of Transfer was executed at Harare on 13 May, 2019. Second applicant took occupation of the property without second respondent's consent, attempted to erect illegal structures and also placed cattle on the property which are interfering with the developments the second respondent is desirous of constructing. Despite being notified of second respondent's

ownership of the property, second applicant has failed, neglected or refused to vacate the property. Second respondent issued out an Application seeking the eviction of the first applicant and all those claiming occupation through her from the property.

HC 7775/19

On 30 November 2001, Muchandibaya Makuzva (the deceased) died. He was a widower and was survived by first, second and third applicants as well as first respondent. The deceased left a will wherein the property was to be transferred to Makuzva Trust. The Trust was not yet in existence. The will was registered and confirmed by the Master of the High Court (Master) in May 2002. An executor testamentary was appointed in terms of the will. Third respondent is the executor.

First applicant alleged that sometime in 2004, first and third respondents fraudulently transferred title and rights in the property to first respondent without the consent of the Master and the other beneficiaries, in clear contravention of the provisions of the will. Following the service of the application for eviction in HC 7254/19, the applicants became aware of the alleged sale of the property. The applicants filed an application seeking; -

1. the setting aside of transfer of the property to the first respondent and the deed thereof.
2. the setting aside of the appointment of third respondent as the executor testamentary in the Estate Late Muchandibaya Makuzva.
3. the setting aside of the sale of the property to the second respondent and an order for second respondent and all those claiming occupation through them to vacate the property within 48 hours of being served with the order.
4. that the fifth respondent be ordered not to transfer rights and title in the property from the deceased except in favour of the Makuzva Trust. In the event that such transfer had been effected, that it be set aside.
5. that fifth respondent be ordered to revive Deed of Grant number 5469/89 in favour of the deceased.
6. that first and third respondents pay costs at an attorney client scale.

An application for the consolidation of the two matters was filed under HC 1014/20. An order for the consolidation of the matters was granted.

At the hearing of the matter respondents raised preliminary points which are the subject of this judgment. Mr *Diza* associated with the submissions on the preliminary points made by Mr *Sithole* and Mr *Zhuwarara*.

1. Lack of *locus standi*

Mr *Sithole* submitted that none of the applicants has the requisite *locus standi* to institute the application. Further that at law, beneficiaries of an estate do not retain a *locus standi* to bring a *rei vindicatio* claim in so far as the property of the estate is concerned, especially where the beneficiaries are not identified. He pointed out that third respondent would be the ideal person to bring such a claim. He referred to the case of *Kadengu & Others* v *Kadengu & Others* HH 113/06 in which beneficiaries of a will were held to lack *locus standi* where an executor had been appointed. Mr *Diza* pointed out that in terms of the Will, the property was supposed to be transferred to a Trust therefore only the Trust could have competently approached the Court with a challenge to the transfer.

In response Mr *Chigudu* pointed out that HH 113/06 had been overturned on appeal in SC 27/08. The Supreme Court stated; -

> "In any event it would seem to me that the appellants, as beneficiaries under the will, would have a legal and substantial interest in the proper administration of the estate since a proper administration of the estate would ensure the protection of their inheritance. Their interest is, in my view, sufficient to give them *locus standi in judicio* in any matter relating to the proper administration of the estate."

In his view, the present case is on all fours with SC 27/08. I do not agree. In *Kadengu & Others* v *Kadengu & Others (supra*), the beneficiaries are listed. *In casu,* the beneficiaries of the farm are stated in clause 4 of the will to be "as per the Trust Deed". It is common cause that the Trust was not created prior to the demise of the testator. There is therefore no list of the intended beneficiaries to the farm. Mr *Chigudu* submitted that the applicants are mentioned in the will. Their names appear in clause 5 which relates to savings. In my view, that the applicants were beneficiaries to the savings does not necessarily mean that they were also beneficiaries in terms of the Deed of Trust, more so in circumstances where there is no Deed of Trust. If that had been the case, in my view, the testator would have listed them prior to clause 5. I therefore find that the applicants have no *locus standi* to institute these proceedings.

2. The Basis for Approaching the Court

Mr *Zhuwarara* submitted that applicants claimed to be suing in terms of section 120 of the Administration of Estates Act [*Chapter 6:01*] yet that section does not give a cause of action. He pointed out that it merely deals with authority from the Master to sell immovable property. He further pointed out that it is improper for applicants to seek the removal of the executor in terms of the said section. He stated that applicants were challenged through the notice of opposition that they ought to have used section 116 of the same Act, and that there was no response in the answering affidavit therefore that should be taken as an admission. He referred to the case of *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs and Excise 7 Ors* 1993 (2) ZLR 121 where on page 127 F it is stated that:

"The simple rule of law is that what is not denied in affidavits must be taken to be admitted."

Indeed there was no response to the challenge in the notice of opposition. Applicants therefore conceded that they approached the court using the wrong section. As a result, the application is improperly before the court.

3. That the claims by the applicants have prescribed.

Mr *Sithole* referred to section 20 of the Prescription Act [*Chapter 8:11*], subsection 2 thereof allows the court to accept the raising of prescription at any stage of the proceedings. He submitted that there is no prejudice to the applicants as the facts are already pleaded in the founding affidavit, opposing affidavit of first respondent and the answering affidavit. He pointed out that first and second applicants are siblings to second respondent and they did not put in issue averments that they had knowledge of the transfer 15 years ago. He submitted that it is not in issue that when first respondent acquired rights second and third applicants were aware. First respondent had this to say in her opposing affidavit:

> "16.3 It is inconsistent with fraud for me to have the property transferred into my name 'fraudulently' and then keep the same in my name for 15 years. It is also inconsistent with fraud for the applicants to remain silent about such purported fraud for 15 years considering that since transfer into my name the applicants have been well aware of this fact. All rates and bills for the farm at which the second applicant resided, were now coming in my name. I was also very open to my half-sisters about how the lawyers had handled the transaction….."
> (underlining for emphasis)

First applicant's answer to that averment appears in para 11 of the answering affidavit on pp 134-135. There was no denial of the very specific averments above. There was only confirmation that second applicant has been residing at the farm. Mr *Chigudu* submitted that there was no admission on the part of the applicants that they knew of the transfer and that without any bills tendered as evidence, the court is left to guess if indeed there was any bill which they saw or knew about. Counsel's submissions from the bar were not in any of the affidavits from applicants on record. Following the simple rule of law that what is not denied in affidavits must be taken to be admitted, applicants admitted to have been aware of the transfer 15 years ago. Mr *Chigudu* further submitted that section 4 of the Prescription Act [*Chapter 8:11*] (the Act) was applicable therefore the claim prescribes after thirty years. In his view, the claim was not a debt. Section 4 of that Act deals with acquisition by prescription. It is clearly not applicable in this case. I am persuaded that the claim by the Applicants is a debt in terms of the Act. In *Fumia & Anor* v *Matshiya N.O. & Anor* HH 31/16 it is stated that:

> "It is trite that for the purposes of prescription, "debt" has a broad meaning and includes the majority of litigation claims, including disputes where the thing claimed is something other than money (the return of an asset, for example). Where a time for payment is not fixed, a debt becomes due when the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, or could have acquired that knowledge by exercising reasonable care."

Since the claim amounts to one of return of an asset, it is a debt in terms of the Act and therefore prescribed after 3 years of the applicants becoming aware of the transfer of the farm. This point *in limine* therefore succeeds.

Disposition

All the preliminary points relate to HC 7775/19 and they have merit. Accordingly, the claim in HC 7775/19 be and is hereby struck off the roll with costs.

The Registrar is to set the matter down for argument on HC 7245/19 on the next available date.

Mapaya & Partners, applicants' legal practitioners
Bruce Tokwe Commercial Law Chambers, first respondent's legal practitioners
Mhishi Nkomo Legal Practitioners, second respondent's legal practitioners
Manase & Manase Legal Practitioners, third respondent's legal practitioners