ALFRED MUCHINI
versus
ELIZABETH MARY ADAMS
and
CHANTELLE ADAMS
(In her capacity as the Executor Dative in the
Estate of the late ALVIN ROY ADAMS)
and
ESTATE LATE ALVIN ROY ADAMS
and
REGISTRAR OF DEEDS
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
HLATSHWAYO & KARWI JJ
HARARE, 5 OCTOBER 2011

CIVIL APPEAL

Mr P Nyeperayi, for the appellant
Mr Mutonono, for the 2nd and 3rd respondents

HLATSHWAYO J: The appellant bought from Elizabeth Mary Adams, the surviving spouse of the late Alvin Roy Adams, an immovable property, being a certain piece of land in the District of Victoria, Lot 13 of Glynham, measuring 1,8629 ha also known as 21 Glynham Road, Masvingo (the property).

The key developments in this matter can be summarized as follows:

a) On 9 July 2004, Alvin Roy Adams, the legal owner of the property, died intestate, leaving behind a widow, Elizabeth Mary Adams and three children, all majors.
b) Almost a year later, the widow approached the legal firm, Messrs Mwonzora and Partners, to help her sell the property and on 7 July 2005 they found a buyer in the form of the appellant, who purchased the property for $350 000 000.00.
c) Appellant took occupation of the property after evicting the widow and her children and started renovating the house.

d) The widow continued to press Messrs Mwonzora and Partners for release of the purchase price, but was told to look for another law firm to assist her as Messrs Mwonzora and Partners were now representing the appellant, the purchaser.

e) The widow's new lawyers, Messrs Robinson and Makonyere wrote letters to the appellant informing him that he bought the property before the estate was registered and was thus liable for eviction.

f) On 8 February 2007, the appellant filed an *ex parte* application for an interdict to stop his threatened eviction. The interim relief was granted but one the return date the rule *nisi* was discharged. It is against this dismissal of his application that the appellant now appeals.

In his founding affidavit, the appellant submitted that the sale should be upheld because the widow or first respondent "had ostensible authority to dispose of the property by virtue of being the surviving spouse of the Late Alvin Roy Adams". Now, in law, the applicant's case falls or stands upon what is said in the founding affidavit. It cannot be propped up by what may chance in respondent's opposition. However, the issue of ostensible authority seems to have been abandoned during the proceedings in the court *a quo*. It certainly is not part of the grounds of appeal. On this basis alone, the conclusion would have been inescapable that the sale of the property fell foul of the peremptory provisions of section 21 of the Administration of Deceased Estates Act [*Cap 6:01*], which states as follows:

> "On the death of any person not being one of two spouses married in community of property, the spouse of the deceased or, in default or absence of the spouse, the child or children of the deceased ....shall secure and take charge of all goods and effects of whatever description belonging to the deceased and being in the house or upon the premises at the time of death, and shall retain the same in his or her custody and possession until delivery thereof is demanded by the executor of the deceased or by any other person lawfully appointed by the High Court or any judge thereof or the Master, to receive delivery of the same."

It is therefore clear that the first respondent had no authority to deal in the property in the manner she did. Instead, she had to keep custody of the property until the appointment of an executor or executor dative. Can it, however, be said that her actions are saved by the provisions of s 41(a) of the same statute?

Section 41 states thus:

"If-

(a) *before letters of administration are granted by the Master to any Executor for the administration of any estate, any person takes upon himself to administer, distribute or in any manner dispose of such estate or any part thereof, except in so far as may be authorised by a competent Court or by the Master or* ***may be absolutely necessary for the safe custody or preservation thereof or for providing a suitable funeral for the deceased or for the subsistence of the family or household or livestock left by the deceased****; or*

(b) *...*

every such person shall thereupon become personally liable to pay to the creditors and legatees of the deceased all debts due by the deceased at the time of his death or which have thereafter become due by his estate, and all legacies left by the deceased in so far as the proceeds and assets of such estate are insufficient for the full payment of such debts and legacies." (emphasis added)

Thus, s 41 merely elaborates on some of the penalties imposed upon those who take it upon themselves to administer deceased estates outside the provisions of the Act. They become personally liable to the creditors for all debts due by the estate should there be a shortfall in the payment of such debts. They are only excused from such personal liability if their actions were "absolutely necessary" for, among other things, the subsistence of the family or household. It was submitted on behalf of the appellant that sales conducted pursuant to the exceptions in section 41 are not void and D Meyerowitz, *The Law and Practice of Administration of Estates, 5th ed.*,pp.65-66 was cited to the following effect:

"The obligation of the person in possession to retain possession of the property does not prevent the disposal of any such property for the *bona fide* purpose of-

(a) providing a suitable funeral for the deceased,
(b) providing for the subsistence of the deceased's family or household,
(c) the safe custody or preservation of any part of such property, e.g, it may be necessary to purchase feed for cattle"

This appears to be a correct position at law. However, the facts of this case do not show that the house was sold in circumstances which satisfy the exception in section 41. For a start, it was not the appellant's submission in his founding affidavit. The appellant cannot then build its case on this chance mention of family hardship.

Secondly, the statements by second respondent in her opposing affidavit that when the deceased died "the family was left in a crippled financial position" and that "my mother was desperately in need of money" do not prove that the sale was "absolutely necessary" for the

upkeep of the family. At any rate, the family had survived for almost a year since the death of the breadwinner.

Accordingly, the court *a quo* did not misdirect itself in holding that the sale of the house violated s 21 of the Administration of Deceased Estates Act and was not saved by the exception in s 41. In the light of this finding, there is no need to examine the other requirements for the granting of an interdict.

In the premises, this appeal is dismissed with costs. The conduct by Messrs Mwonzora and Partners in representing both parties in this matter be and is hereby referred to the Law Society of Zimbabwe for its investigation.

Costa and Madzonga, Appellant's legal practitioners

Chadyiwa & Associates, 1st, 2nd and 3rd respondents' legal practitioners.

HLATSHWAYO J _____

KARWI J agrees_____