CAROLINE KASULE
versus
JONATHAN KASULE
and
DAVID KASULE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 15, 18, 18 and 20 & 28 March 2019

Opposed Matter

E Jera and V.C Chidzanga, for the applicant
D Matimba, for the 1st respondent
D Ndakwenwa, for the 2nd respondent
No appearance for the 3rd respondent

CHIRAWU-MUGOMBA J: A monogamous marriage entered into in 1976, a relationship between an employer and employee resulting in three children born out of wedlock is bound not to have a happy ending as this matter will show.

BACKGROUND

The applicant and the first respondent are husband and wife having married in the UK on the 18th of September 1976. In or around 1980, the applicant, a nurse by profession and the first respondent, a medical doctor by profession, settled in Zimbabwe and have since become permanent residents. The first respondent opened a surgery where the applicant was employed as a nurse and mid-wife. According to the applicant, they started purchasing immovable properties. The chief negotiator was the first respondent who then registered the properties in his sole name. One of these properties is a stand called number 15 Kent Road, Chisipite in Harare. The applicant alleges that this property was purchased 'jointly' by the two parties but unbeknown to her, the first respondent had it registered in the name of the second respondent who happens to be his son with another woman who at one point was employed by the first respondent at his surgery. On the said stand, an immovable property was constructed and completed in 1996. The applicant alleges that in the genuine belief that the property was a matrimonial home, she contributed 'significantly' to its construction and

has since been staying at the property with the first respondent. In or around April 2015, now retired, the applicant engaged her husband with a view to executing a joint will and she was surprised to note that the Chisipite property is in the name of the second respondent. She therefore approached the court seeking the following relief:-

1. That the title deed number 04976/94 registered in the name of DAVID KASULE, the 2nd respondent herein, be and is hereby cancelled.

2. That the Registrar of Deeds be and is hereby ordered and directed to register the property into the joint names of the applicant and the 1st respondent.

3. That the sheriff for Zimbabwe be and is hereby directed to sign all the necessary papers required for purposes if *(sic)* the registration of the transfer of the property into the joint names of the applicant and the 1st respondent.

4. That Messrs Moyo and Jera Practitioners shall handle all the transactions relating to the transfer of the property into the joint names of the 1st and 2nd respondent.

5. That any costs related to the cancellation of the title deed and the registration of the property into the joint names of the applicant and the 1st respondent shall be borne by the 1st respondent.
6. Any party opposed to the application pays the costs of suit.

FIRST RESPONDENT'S POSITION

The first respondent filed a 'notice of opposition'. I have put this in 'quotation' marks because a reading of the 'opposing' affidavit reveals that it is more of a 'supporting' affidavit by the first respondent who in my view clearly took sides in this matter. This is supported also by the fact that the first respondent filed a 'supporting affidavit' to the applicant's answering affidavit. The first respondent 'confessed' that the registration of the property in the second respondent's name was improper since it is a matrimonial home. He 'admitted' that what he did was 'wrong' and he is 'embarrassed' by his actions. At the time that the property was acquired, the second respondent was about 3 years old and he could not have been in a position to contribute to the acquisition of the property let alone its development. He admitted that the applicant approached him with a view to executing a joint will and he procrastinated until applicant 'discovered' documents relating to the property. He then travelled to the UK where the second respondent currently resides with his mother and sister to 'try' and persuade him to give up ownership of the Chisipite property and take another

property built in Mt Pleasant Heights instead. This was with a view to avoid litigation that would tear his family apart. He stated that the applicant contributed both financially and indirectly to the acquisition of the Chisipite stand and to the construction of a house thereat. He stated that he did not donate the Chisipite property to the second respondent but that at the material time he was afraid that the applicant will divorce him and hence he had the property registered in the second respondent's name so that it could not form part and parcel of the matrimonial property. As to what he was really opposing, the first respondent remained mute.

SECOND RESPONDENT'S POSITION

In response, the second respondent raised three points in *limine*, (1) that the applicant has no *'locus standi'* to bring this application, (2) that the founding affidavit does not disclose a cause of action and (3) that there are material disputes of fact. On the merits the second respondent averred that the property in question was donated to him by his parents being the first respondent and one Margaret Chivero. They lived at the property as a family with the first respondent and as far as he was aware, there was no impropriety in the donation so effected and no prejudice was suffered by the applicant. He confirmed that the first respondent paid a visit to him and his mother in the UK with a view of persuading him to take up another property and give up the Chisipite one. He alleged that the first respondent resorted to threatening him that if he did not take up this offer, he would withhold support for his sister who is still under the age of 18 years and still very much a dependant. Based on sentimental value, future plans and investment that he and his siblings have in the property, he declined the proposition put to him. The second respondent's mother deposed to an affidavit in support. She averred that she has three children with the first respondent and that she is customarily 'married' to him. She averred that she started dating the first respondent from 1988 whilst working in his surgery and they customarily 'married' in 1990. At that time, the first respondent had advised her that his marriage to the applicant was on the rocks and she had allegedly filed for divorce. The first respondent had suggested to her that in case his divorce took time, they should acquire property either in her name or that of the second respondent. The applicant therefore at that time had no role in the acquisition of the property nor construction of the house thereat. Margaret Chivero and her sister actually signed the agreement of sale as witnesses on the 19th of April 1994. The construction was done by July 1995 and whilst the first respondent contributed more, Margaret Chivero averred that she also

contributed financially to the construction of the house. She moved into the property with the second respondent and another child at the end of July 1995. The first respondent went on to have another child with Margaret Chivero in 2001.

POINTS IN LIMINE

The second respondent's first point in *limine* on *locus standi* is based on his assertion that the applicant is currently married to the first respondent and that there are no divorce proceedings pending. Her claim can thus only be sustainable if she were in the middle of divorce proceedings in terms of the Matrimonial Causes Act [*Chapter 5:13]*. The second respondent is clearly misguided because one does not need to have instituted divorce proceedings to have make a claim in relation to immovable property that she alleges was acquired during the subsistence of a marriage – see *Madzara v. Stanbic Bank Zimbabwe Ltd and ors,* 2015(1) ZLR 878. The point *in limine* has no merit and is dismissed.

The second point in *limine* is that the applicant failed to disclose any basis upon which the relief sought can be granted. This is because she avers that the property was registered to the second respondent without any evidence of or allegations of the impropriety. In my view, this assertion touches on the merits of the case and is clearly misplaced. The point in *limine* is dismissed.

At the hearing, *Mr Ndakwenwa* abandoned the third point in *limine* being that the matter raises disputes of facts.

THE ARGUMENTS

On the merits, the applicant took the position that the property falls within the ambit of matrimonial property; that the sale and registration of the property was based on a fraud and should be set aside. The alleged fraud was done by the first respondent and the second respondent's mother with a view to depriving the applicant from what is rightfully hers. The applicant averred that the courts frown upon any transactions that are based on fraud and that nothing can flow from a fraudulent act. Reference was made to *Muganga v. Sakupwanya,* 1996(1) ZLR 217 and *Katirawu v. Katirawu,* HH-58-07. Further that the applicant contributed substantially to the purchase and development of the property. Reference was made to *Chigunde v Chigunde,* HH-121-15 and *Usayi v. Usayi*, 2003(1) ZLR 684 (SC). The applicant contended that the second respondent was unjustly enriched by the transfer of the property into his name. At the hearing, *Mr Jera* urged the court to take a robust view that

will aid in the development of the law in keeping with section 176 of the 2013 Constitution. He averred that the act of the first respondent amounted to a donation and that the court should seek guidance on how the courts have in some interpleader proceedings considered special circumstances that have resulted in personal rights taking precedence over real rights.

The first respondent on the merits averred that the first respondent never donated the property to the second respondent. The alleged donation took place on the background of an illicit affair and a desire to put the property beyond the reach of the applicant.

The second respondent averred that the property in question does not form part of the matrimonial assets. The property was always in the name of the second respondent from its purchase to registration. The second respondent therefore possesses real rights. In any event, the law allows a spouse to dispose of property acquired and owned by them without seeking the consent of the other spouse. Reference was made to *Sithole v. Sithole,* HH-674-14 and *Muswere v. Makanza,* 2004(2) ZLR 262 (H). The first respondent donated the property to the second respondent in his capacity as a father and thus taking full responsibility. There was no fraud perpetrated and the applicant and the first respondent simply seek an exchange of the property with that of the one in Mt Pleasant. At the hearing, *Mr Ndakwenwa* reiterated that the alleged fraud had not been proved.

THE RELEVANT LEGAL PRINCIPLES

In my view, the legal issues that this matter raises are those of a donation *inter vivos* and the consequences that flow therein and the disposal of matrimonial assets acquired during the subsistence of a marriage.

Section 10 of the General Law Amendment Act [*Chapter 8:07]* states as follows:-

10 Amendment of law in respect of formalities relating to donations

No contract of donation shall be invalid solely by reason of the fact that it is not registered or notarially executed.

This means that a donation needs not be reduced to writing in order for it to be valid. In *Mogudi vs. Fezi,* (2007) ZAWCHC, 45, Van Zyl J had occasion to deal with the contract of donation. After making a distinction between a donation *inter vivos* and *mortis causa,* he stated as follows:-

> "A donation may be defined as an agreement in terms of which one party (the donor) undertakes, gratuitously and without obligation, by virtue of liberality, generosity or benevolence, to give something to another (the donee) with the intention of enriching or otherwise benefiting the donee. See *Digesta* 39.5.1, where the Roman jurist Julian observes that a gift made with the intention that it should forthwith become the property of the

recipient and will not be returned under any circumstances, is properly called a donation, provided it is made out of liberality (*liberalitas*) and generosity (*munificentia*)."

The learned judge further went on to state as follows:-

"He [Von Savigny] says … that a donation is a transaction *inter vivos* between donor and donee whereby the donee is enriched and the donor correspondingly impoverished, such transaction being accompanied by an intention on the part of the donor at his expense to enrich the donee. He points out that an essential element is a disinterested *voluntas* on the part of the donor who must have in mind only the *utilitas* or *commodum* of the donee and not his own advantage".

Further still he stated as follows:-

"Inasmuch as donation constitutes an agreement between the donor and donee, it must, of course, ***comply with all legal requirements for a valid contract.*** Apart from the essential of *consensus* regarding the nature and ambit of the donation and the contractual capacity of the parties, it is clear that the donation must be accepted, expressly or tacitly, by the donee. Furthermore, in line with the authorities cited above, the donor must, without the expectation of any counter-performance or benefit accruing to him in return, intend to enrich the donee by making him a gift out of his assets. Such assets will then be diminished in the amount, or to the value, of the gift, leaving the donor correspondingly impoverished. See in general the useful discussion in *LAWSA* volume 8 part 1 (2nd edition 2005) par 305-309 (p372-379).

Our law also recognizes that there are instances where a donation can be revoked. Revocation of donation between spouses was dealt with by the Supreme Court in *Taylor vs. Taylor*, SC -70-07. See also *Malaba v Malaba*, HB- 14-05. In *Mukudu v. Mukudu and ors*, TSANGA J stated as follows in relation to donation and revocation,

"Whilst generally a donation is irrevocable, there are exceptions to this general rule particularly where a donee has shown ingratitude. Under Roman Law the *Institutes of Justinian* refers to ingratitude as a ground for revocation in *Inst* 2 **7** 2:

"It is to be observed, however, that even where gifts have been completely executed we have by our constitution under certain circumstances enabled donors to revoke them, but only on proof of ingratitude on the part of the recipient of the bounty; the aim of this reservation being to protect persons, who have given their property to others, from suffering at the hands of these, latter injury or loss in any of the modes detailed in our constitution" - trans1 Moyle *The Institutes of Justinian* **(1906).**

Examples of ingratitude include personal violence against the donor; treacherous deeds causing the donor great pecuniary losses which extensively diminished his estate; exposure to danger threatening the donor's life; and a breach of written or oral undertakings of the donee. Examining the traditional sources of revocation of a donation under Roman and roman Dutch law Susan Scott for example summarises the modern position as follows

"In modern terms the position can be stated as follows: ingratitude is a ground for revocation of donations. The examples given in the Code and expanded on **by** the Roman-Dutch authors indicate that the grounds of ingratitude are serious infringements of a person's personal rights,

personality rights and property rights. It is also clear that in all these situations the donee must have acted with intent".[1]

Regarding disposal of assets acquired during the subsistence of a marriage, perhaps there is value in repeating the often cited passage in the *Muswere* case. MAKARAU J (as she then was) eloquently captured the issue as follows:-

> "The position in our law is therefore that a wife cannot even stop her husband from selling the matrimonial home or any other immovable property registered in his sole name but forming the joint matrimonial estate: see *Muzanenhamo's* case *supra.* There must be some evidence that, in disposing of the property, the husband is disposing it at undervalue and to a scoundrel: see *Muganga's* case *supra.* Mere knowledge that the seller of the property is a married man who does not have the consent of his wife to dispose of the property is not enough: see *Pretorius v. Pretorius* 1948(1) SA 250(A)".

The learned judge continued as follows:-

> "On the basis of the above, it clearly presents itself to me as the position at law that a wife in the position of Mrs Makanza has no real right in immovable property that is registered in her husband's sole name, even if she contributed directly and indirectly towards the acquisition of that property. Her rights in relation to that property are limited to what she can compel her husband to do under family law to provide her with alternative accommodation or the means to acquire alternative accommodation. Her rights, classified at law as personal against her husband only, are clearly subservient to the real rights of her husband as the owner of the property"

In the *Madzara* case, TSANGA J aptly discussed the law relating to this issue. While making certain observations on the prejudice to spouses especially wives, she nonetheless concluded that the answer to dealing with the issue lay in legislative intervention.

CONSIDERATION OF THE FACTS IN THE PRESENT MATTER

In my view, the facts of this matter reveal that the first respondent donated the property to the second respondent in 1994 through paying for the stand, having the stand transferred to the second respondent and construction of a house on the stand. Not having a formal notarial deed of donation does not invalidate the act contrary to the applicant's assertion in her answering affidavit. Due to the fact that the second respondent was a minor at that time, the first respondent acted on his behalf not only in signing the agreement of sale but also in the transfer of the property to him. The second respondent effectively acquired real rights upon the transfer of the property into his name. The transfer falls into the realm of executory donation in terms of which the agreement of sale was followed by transfer of the property. I

[1] See Susan Scott **Revocation of gifts on the ground of ingratitude - from Justinian to Lawsa** 2011 J. S. Afr. L. 361 2011

need not belabour the point on acquisition of real rights since it has been canvassed in a plethora of cases before this honourable court. Given the fact that the applicant's legal practitioner ended up conceding that the first respondent donated the property to the second respondent, the legal principles regarding donation come into play. The applicant denied from the start that the act of her husband was one of donation and only belatedly conceded at the hearing. Whilst donation is a legal issue that can be raised at any time, in my view applicant lost an opportunity to put facts before the court that would aid her in showing that that donation was tainted in some way. As I will discuss later, applicant located her claim in the realm of a spouse disposing of an asset without the other's consent. Whilst the applicant and the first respondent were initially on all fours in denying the donation, the applicant later threw the first respondent under the bus by accepting that it was indeed a donation. Apart from the fact that it is only a donor in my view who can seek revocation of a donation, no facts have been placed before the court to warrant revocation of the donation. The first respondent's act of donation is supported by his actions of having a house constructed on the premises, the fact that the second respondent, his mother and his sibling moved into and stayed at the property and only left in 2002 when they moved to the United Kingdom all point to the actions of a father who had the interests of his children at heart. His actions of travelling to the UK to persuade the second respondent to give up title to the Chisipite home and get title to the Mt Pleasant home appear to be those of a father who is caught between two 'families' but that cannot be a ground for revoking the donation. I find the explanation by the first respondent that he feared that he would be divorced by the applicant a fallacy. Even after the 'first' indiscretion which resulted in the birth of the second respondent, he still went on to have two more children with the second respondent's mother. Clearly those are not the actions of a man who fears divorce. The applicant in my view was very economical with the truth in her founding affidavit. She sought to paint a picture of a very vulnerable woman whose husband was dishonest with her by having a child out of wedlock and it turned out that there are three children out of wedlock by the first respondent with the same woman. She did not take the court into her confidence by failing to explain why she waited for many years to occupy the Chisipite property. As it always the case, an application stands or falls on its founding affidavit and litigants who withhold facts hoping to create a false narrative do so at their own peril. Applicant made sweeping and generalised statements on the nature of her contribution and the inescapable conclusion is that she did not play any part in the purchase

and construction of the Chisipite home. Even if she did, as I will discuss later, direct and indirect contributions are relevant to sharing of matrimonial assets at divorce.

As aptly observed by VAN ZYL J in the *Mogudi* matter, a donation must comply with all the requirements of a valid contract. The applicant has sought to allege that the second respondent acquired the property through improper means and that there was fraud and misrepresentation. The immediate question that arises is this – misrepresentation to who? Dr I Maja in *The law of contract in Zimbabwe,* (2015) deals extensively with the issue of misrepresentation at pages 96-97 as follows: - He defines misrepresentation as a situation in which, *'.....one of the parties is induced to enter into a contract by words or conduct that creates a false impression. These false impressions are created before the parties enter into a contract and they actually induce the innocent party to enter into the contract which (s) he would not have entered into the contract had the actual facts been known. These words are not part of the terms of the contract.'* This situation envisages an 'innocent' and a guilty party. The applicant was never at any stage a party to the agreement of sale. All that she alleges is that the first respondent should not have had the property registered in the name of the second respondent because it is a matrimonial asset. The person that the applicant needs to take issue with therefore is the first respondent and that places the matter in the realm of rights between spouses during the subsistence of a marriage.

The applicant has 'confessed' that, "*From the income generated from the first respondent's being a lecturer and the operation of the surgery, we started buying properties. The purchases of the properties were negotiated by the first respondent and invariably, got registered in his name'.* The applicant would therefore have been content by having the Chisipite property registered in the name of the first respondent alone. What she cannot countenance is the fact that it was registered in the name of the second respondent. Though cognisant of the fact that the property was never registered in the name of the first respondent in my view, the issue at stake is one in which a spouse during the subsistence of a marriage deals with property that they own. The applicant clearly located her claim in the domain of her husband the first respondent having acted unilaterally in having the property registered in the name of the second respondent. She averred that she genuinely believed that her interests were fully protected. She averred that she significantly contributed to the construction of the house. This was supported by the first respondent. Both applicant and the first respondent were however not forthcoming about the nature of the 'contribution'. If money, how much

was it? If building supplies, what were these? If supervision, what was the nature of such? They were content to make generalised and sweeping statements. Although as I have already observed, the property was never registered in the name of the first respondent, he could still have had it registered in his name and then donate it to the second respondent. In my view, applicant's claim is therefore located in the realm of personal rights against the first respondent. As admitted by applicant, there was no fault on the part of the second respondent. *Mr Jera* and *Mr Matimba* both placed emphasis on the alleged admission by the second respondent's mother in her supporting affidavit that the first respondent had discussed the issue of his divorce from the applicant and that they agreed to acquire property either in her name (2nd respondent's mother) or the second respondent. In their view, this supported that fraud had been perpetrated. This argument is fallacious. The second respondent's mother is not before this court. It would have been a different matter or issue if the property had been registered in her name. The acts of the first respondent were clearly those of a father who was intend to look after his son as he was legally bound to do.

Although Mr *Jera* urged the court to take a cue from interpleader proceedings and find that special circumstances arise in this matter. In my view there are none. The applicant sought to create a false impression that she moved into the Chisipite property upon the end of the construction of a house. As a matter of fact, the persons who moved in are the second respondent, his mother and his sibling and another sibling was born in 2001. The applicant only moved into the property in 2002 when the second respondent and his family moved to the United Kingdom. The second respondent is not a stranger but a step-son to the applicant and a son to the first respondent. Both the applicant and the first respondent seek to create a false narrative that they have the second respondent's interests at heart. There is no explanation as to why the applicant and the first respondent cannot also occupy the Mt Pleasant Heights property. If it is as good as the Chisipite property, there is no explanation as to why they want to entice the second respondent to take that particular property. The only inference is that the properties have different values. The gesture by the first respondent of travelling to the UK in my view is nothing but a guilty trip and that cannot equate to special circumstances. Even if the applicant avers that she made direct and indirect contributions that is only relevant in proceedings for divorce and sharing of matrimonial assets. Let me hasten to add that the court will only consider this and other aspects on the basis that the property

constitutes matrimonial assets. As long as the marriage is in subsistence, the relationship between the applicant and the first respondent remains one of personal rights.

Accordingly the application cannot succeed.

The applicant's prayer for costs is one that is strange but one that I am noticing in many cases that are coming before the court. She stated that, *'Any party opposed to the application pays the costs of suit'.* This 'carrot and stick' approach is not acceptable. It remains the constitutional right of any litigant to institute or defend proceedings in any court of law. I do not see how opposing any application should be the basis for an order of costs. Ironically *Mr Jera* submitted that in the event that the application is not successful, each party should bear its own costs. As has been stated in a plethora of cases, costs are at the discretion of the court. Such discretion shall be exercised judiciously.

DISPOSITION

It is ordered that:-

1. The application be and is hereby dismissed with costs.

Moyo and Jera, applicant's legal practitioners
Matipano and Matimba legal practitioners, 1st respondent's legal practitioners
Pfigu Tanyanyiwa and Gapare, 2nd respondent's legal practitioners.