

JANNIPHER LEMUKANI
versus
ESTATE LATE ENARA MUGUZA
and
KASKOLA MUDHALA
and
DIRECTOR OF HOUSING CHEGUTU MUNICIPALITY
and
MASTER OF HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 19 October 2023 & 23 April 2024

Civil Trial

E Dondo, for the plaintiff
P Muzvuzvu, for the 1st and 2nd defendants
No appearance for 3rd and 4th defendants

MAXWELL J: Plaintiff approached the court seeking to have an agreement of sale dated 11 March 2011 concerning house number C44 Chegutu be declared void and of no force. She also sought to be declared the lawful holder of title and rights to the same property. In addition, she sought consequential relief of the eviction of second defendant and all those claiming occupation through him from the property.

The matter was filed as a court application. It was referred to trial when disputes of facts were evident. In a joint Pre-Trial Conference minute dated 22 June 2023, the following were the issues referred to trial.

- 1) Whether or not Evelyn Pange died on 17 April 2009.
- 2) Whether or not Evelyn Pange entered into an agreement of sale of the property in question with Enara Muguza on 7 March 2011?
- 3) Whether or not a Declaratory Order should be granted? If so, the basis thereof.

Plaintiff stated in the founding affidavit that she was born on 20 October 1994 to the late David Webu Lemukani and the late Evelyn Pange. Her parents were customarily married. She is the only surviving child. Her parents acquired an immovable property known as stand No. C44 Chegutu which was registered in her father's name through a cession in the office of the third respondent. Her father died on 9 October 2000. His estate was not immediately registered. After the death of her father, the family migrated to their rural home in Sanyati in 2008. They did not return to Chegutu. At the time of relocation to the rural home she was still a minor. She would hear discussions about a house in Chegutu.

Her mother became seriously ill and subsequently died on 17 April 2009. Her mother's estate was also not registered immediately. In 2017 she went to Chegutu with some relatives to register her father's estate. On getting to C44 Chegutu, they found second respondent in occupation of the property and he was claiming ownership of it. He indicated that the house was bought by his late wife Enara Muguza from the late Evelyn Pange in 2011. There was an agreement to that effect entered into on 7 March 2011. At third respondent's offices, the house was still registered in her late father's name. Second respondent also had a court order dated 11 November 2011 purporting to compel transfer of the property from the late Evelyn Pange to the late Enara Muguza. In her view all these documents second respondent was relying on were forged.

In 2020 she registered the Estate of her late father David Webu Lemukani under case No. DR-CH 14/20 (Chegutu). She was appointed the Executive Dative. She advertised the Estate. A final distribution plan awarding C44 Chegutu to her was approved. The house was registered in her name. Subsequently she received an application for Interdict and Reversal of Transaction filed at Chegutu Magistrates Court. The application was dismissed.

Plaintiff's evidence-in-chief reiterated the above. Under cross-examination she indicated that when they relocated to Sanyati in 2008 she was 14 years old. She confirmed that there was no lease agreement between her family and the second defendant. She stated that she obtained her mother's death certificate using the burial order. She insisted that her mother could not have signed the agreement of sale dated 3 March 2011 as she had died on 17 April 2009.

Second defendant opposed the matter. He indicated that he was a manager as Venice Mine. Through savings they bought the contested property through Mangwana and Partners Legal Practitioners. A deed of cession was signed between his late wife Enara Muguza and the late Evelyn Pange. They moved to C44 Chegutu before ownership was changed. He was at work when the transaction was done. The late Evelyn Pange wanted an additional amount and he refused to pay. As a result, Evelyn refused to sign the documents to facilitate the transfer. An application to compel transfer was filed at the Magistrate's Court. The order was granted. In 2019 he received a summons seeking his eviction. They went to court and the matter was postponed *sine die* so that plaintiff and her lawyers would verify the authenticity of the order compelling transfer. The matter was not finalized. He subsequently received City Council bills with plaintiff's name. His wife subsequently died on 14 December 2014.

Under Cross-examination he indicated that he paid for the house through Mangwana and Partners in cash. He got a receipt but he no longer had it.

(1) WHETHER OR NOT EVELYN PANGE DIED IN 2009

A certificate of death for Evelyn Pange was produced as exhibit one. It indicates the date of death as in April 2009 and the place of death as Chiyangwa village, Chief Neuso, Sanyati. The certificate was obtained on 12 October 2020. It is common cause that a certificate of death is an authoritative document that certifies the death of a person. It is issued by the Registrar General of Births and Deaths in the Ministry of Home Affairs. It is trite that there is a presumption of validity on all official documents issued by government officials in the course of their duties. See *Biti v Mafuta and others* HH 156/11 and *Zhonda and Another v T J Greaves (Pvt) Ltd and others* HH 148/11. Since the presumption is rebuttable, the official documents are considered valid until proven otherwise.

Second defendant challenged the date of death on the basis that it was supplied by the plaintiff. He however did not produce counter documents proving the existence of Evelyn Pange beyond 17 April 2009. It is trite that he who asserts bears the onus of proving such assertion. See *ZUPCO Ltd v Packhorse Services (Pvt) Ltd* SC 13/2017. Second defendant did not discharge the onus on him. That he tried to discredit the evidence of the plaintiff does not help

him in the face of an official document. I therefore find that Evelyn Pange died on 17 April 2009 as shown by the Certificate of Death produced as Exhibit One.

(2) WHETHER OR NOT EVELYN PANGE ENTERED INTO AN AGREEMENT OF SALE WITH ENARA MUGUZA IN 2011

Having found that Evelyn Pange died on 17 April 2009 it follows that she did not enter into an agreement of sale in 2011. In any event even if she had been alive and had signed the agreement produced as exhibit 4, in my view the agreement would have been null and void. Exhibit 4 is a Deed of Cession. A cession is a transfer or giving up of rights and interests by one party which the other party accepts or receives. The cession is anchored on an agreement that is legitimate. No formalities are required for a valid cession. See R H Christine: Business Law in Zimbabwe Juta and Co. Ltd, 1998 @ p 110.

The question to be answered would be whether or not Evelyn Pange was capable of ceding rights and interests in C44 Chegutu. Second defendant is basing his argument on a court order produced as exhibit 7. The order is stamped 10 May 2022 in a matter between Enara Muguza and Everline Pange. Everline Pange was ordered to effect change of ownership of House number C44 Chegutu failing which the Director of Housing was authorized to do so in favour of the applicant. It is common cause that Evelyn Pange was not the registered owner of the property in question. Her husband, David Webu Lemukani, was the registered owner. By the time the order was granted the registered owner had died. The property therefore was under a deceased estate and had to be dealt with in terms of the Administration of Estates Act [*Chapter 6:01*]. It could therefore not be sold or transferred without the involvement of the Master. Evelyn Pange did not have the rights and interests to cede to Enara Muguza as her deceased. Husband's estate had not been registered, no letters of Administration had been issued and the deceased's estate had not been disbursed. In any event, as stated above, she had died in 2009.

Moreover, the authenticity of the court order relied upon by second defendant is questionable. The copy on page 9 of his bundle of documents indicates that it was a default order by W Tiyatara on 10 November 2011. It is however signed on his behalf, that is "pp" and stamped 10 May 2022. The case number is given as CIV 568B/11. The draft order on page 8 of Plaintiff's bundle of documents has the reference 568/11. It does not show the presiding judicial officer. It does not show whether or not any party appeared. It seems to be an order granted

after perusing the documents only as it does not reflect that any party was heard. The draft order is signed and stamped. The date of the stamp is not clear. There is a signature of the presiding Magistrate. The two documents do not have the same information. Their authenticity is therefore questionable. It is not clear if W Tiyatara is the one who signed on the draft order in plaintiff's bundle of documents. The proceedings are alleged to have taken place in 2011, two years after Evelyn Pange had died. I find that the Deed of Cession is null and void.

(3) WHETHER OR NOT A DECLARATORY ORDER SHOULD BE GRANTED? IF SO, THE BASIS THEREOF.

Second defendant makes reference to the Estate of the late Evelyn Pange. It is common cause that such estate was not registered. The basis for its registration is not evident as there was no property registered in Evelyn Pange's name. she died before the estate of her late husband was registered. It follows that as at the time of her death, she had not legally inherited the property in her husband's name. there was therefore no basis of her assuming rights and interests in it. By the time of her demise, the rights and interests in the property vested in an unregistered deceased estate. When the estate of the late David Webu Lemukani was finally registered the only beneficiary was the surviving child.

The power of this court to grant a declarator is stated in s 14 of the High Court Act [*Chapter 7:01*] as follows:

"The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation such person cannot claim any relief consequential upon such determination."

By virtue of this section this court is empowered to determine existing, future or contingent rights or obligations. The requirements for a declarator are listed in the case of *Johnson v AFC* 1994(1) ZLR 95 @ 98 as that.

- i. the person instituting the proceedings must be an interested party;
- ii. the court must inquire and determine an existing future or contingent right or obligation; and
- iii. the case must be a proper one for the court to exercise the discretion conferred on it.

See also Herbstein and Van Winsen The civil Practice of the High Courts and Supreme Court of Appeal of South Africa 5ed@1428

In *casu*, plaintiff is seeking the declaration of an existing right. As the only surviving child of the late David Webu Lemakani and Evelyn Pange she is an interested person in the matter. I am persuaded that this is a proper case to exercise discretion and it therefore follows that plaintiff satisfied all the requirements for a declaratur.

The following order is therefore appropriate

1. The application for a Declaratory order be and is hereby granted in favour of the applicant in the following terms:-
 - (a) The purported agreement of sale of property known as stand No C44 Chegutu dated 7 March 2011 or any other purported agreement of sale between the late Evelyn Pange and the late Enara Muguza be and is hereby declared void and of no force.
 - (b) Applicant be and is hereby declared the sole holder of rights and interests in the property known as stand No C44 Chegutu as per the final distribution plan done by the fourth respondent in case No. DR -CH 14/20.
 - (c) First and second respondents and all those claiming right of occupation through them at the property known as stand No. C44 Chegutu be and are hereby ordered to vacate the premises within 10 days from the date of this order, failure of which the Sheriff of the High Court or his lawful deputy shall be authorized to evict them.
 - (d) First and second respondents be and are hereby ordered to pay costs of suit on an attorney and client scale jointly and severally, the one paying, the other to be absolved.

Messrs Saunyama, Dondo, applicant's legal practitioners
Hamunakwadi & Nyandoro Law Chambers, first and second defendant's legal practitioners

