CHIPO GOTO
versus
SHADRECK TSURO N.O
(*In his capacity as executor dative of the Estate of the Late Edith Shope Goto*)
and
PHILDAH CHIKEREMA
and
MONICA CHIVIYA
and
TABITHA CHAGONDA
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 13 June & 30 August 2023

Opposed application

D Sanhanga for applicant
C Kuhuni for 1st, 3rd and 4th respondents
No appearance for 5th Respondents
2nd respondent barred

TSANGA J:

The issue arising from this application for a declarator is whether property can be transferred to a donee after the death of a donor. Applicant, Chipo Goto, seeks to have declared null and void, the first and final distribution account in the estate of the late Edith Shope Goto, her mother, and who died on 28 May 2021. She also seeks that the first respondent, Shadreck Tsuro being the executor, sign all documents to distribute and transfer to her, property known as Stand 1207 Mabelreign, Township, held under Deed of Transfer Number 3032/91.

The declarator is sought on the basis that the late Edith Shope Goto in fact donated the property during her lifetime to the applicant. The donation is said to have been made on the 22nd July 2016 in gratitude by her now deceased mother for the way in which the applicant had

looked after a deceased cousin's children. The applicant also did not have a house of her own in Zimbabwe.

A memorandum of agreement signed on 22 July 2016 is attached in which the late Edith Shope Goto is said to have agreed to donate the property. The agreement, however, talks of donating to her son although the applicant is mentioned as the donee. One can assume that the reference to son is an error as applicant avers she is the daughter of the late Chipo and not son. Also signed on that day, and, as proof of the donation is a declaration by the donor confirming the donation that she was not going to be paid anything. The late Edith Shope Goto had further signed a power of attorney nominating and appointing *Jonathan Samkange* of *Venturas & Samkange* legal practitioners to be her lawful attorney and agent to appear at the Deeds Office and effect transfer. The applicant had also signed a declaration confirming that the property was donated to her. She had nominated the same lawyer to effect the donation transfer on her behalf with the Registrar of Deeds.

In addition, three affidavits of relatives who were also present on the day at the lawyer's offices are attached. They basically confirm that the late Edith Shope Goto indeed intended to pass transfer of the property to the applicant. Further, attached to the application is the Capital Gains Tax Exemption Certificate obtained from the Zimbabwe Revenue Authority (ZIMRA) which was approved on 18 August 2018.

The challenge, however, is that the property was never transferred to the applicant. According to her, this was due to financial incapacitation to complete the conveyancing process as she was not working at the time. She avers that her limited finances had gone towards paying fees for her children. Therefore at the time that her mother died on the 28th of May 2021, some nearly five years later, the property was still in her name.

It is against the backdrop of this factual reality the executor had gone on to include the property on the inventory as belonging to the deceased and refused to accept the assertions in writing from the applicant's lawyers that the property was the subject matter of transfer by *Jonathan Samkange* of *Venturas & Samkange*. This is the context under which the nullification of the distribution account is sought as well as a declarator that the executor should instead transfer the described property in terms of the donation done on 22 July 2016. That donation is said to be still extant. Applicant also seeks that the costs of this application be borne by the first respondent, the executor.

At the hearing, Ms *Sanhanga* for the applicant therefore emphasised as central and as being supported by the evidence in this case, the intention to donate, characterised by an offer

and an acceptance. She argued that a donation is perfected once there has been an offer which is accepted and cited *D E & Anor* v *C E & Ors* 2020 (1) All SA at p 123 as being in support of this position. The transfer itself, she argued, is but a juristic act while the donation, materially, is evinced by the intention of the donor, exemplified in this instance by entering into a declaration for the purposes of transference; causing a power of attorney to be drawn; and attending the ZIMRA interview, ultimately resulting in the issuance of a capital gains tax being issued. Her emphasis accordingly was that by doing all this, the donor had done all she could do to effect transfer. The fact that title was not issued she argued, does not invalidate the actions of the donor since obtaining title is the very last item in transfer. She postulated that it is an administrative step, the intention of the donor being always paramount. On the donor's intentions being paramount, she cited *Master* v *Thomson's Estate* 1961 (2) SA 20 in this regard.

Ms *Sanhanga* also drew the court's attention to *Paul Kathuni Gichunge* v *Victor Polycarp Ntwiga & 2 Ors* [2016] eKLR a Kenyan case. Therein it was emphasised (in paragraph 26) that a person can deal with their property as they choose during their lifetime and that any person wishing to query the fairness or otherwise of the person's actions should do so during that person's life time. On the requirements of a donation *inter-vivos*, as encompassing intention to make the gift, acceptance of the gift and delivery of the subject matter to the donee, the court's attention was also drawn to another Kenyan case *Reginah Nyambura Waitathu* v *Tarcisio Kagunda Waithatu & 3 Ors* [2016] eKLR for a discussion and an example of the application of these principles.

On costs she submitted that the applicant initially sought costs against the estate, but had since shifted to seeking these against the executor himself in his personal capacity due to his refusal to cooperate regarding the transference of the donation.

The first, third and fourth respondents oppose the application. The first respondent, the executor, avers that no claim was made within the period allowed when he advertised for debtors. Furthermore, it was only on 17 June 2022 that the applicant's current practitioners, had written to the Master (fifth respondent) objecting to the distribution plan. The executor's position therefore is that since Edith Shope Goto died before the property was transferred, she therefore died intestate with the property registered in her name. He therefore maintains that the property should be distributed amongst the deceased's intestate beneficiaries as per his inventory filed with the Master.

The third respondent, Monica Chiviya, a sibling to the applicant, swore to an affidavit explaining how the house had been bought for their mother using their brother's name to get a

mortgage. Following his death, the house had been transferred to their mother. She also avers that she was surprised to learn that her mother had donated the house to the applicant as the intention was to keep the house in the family, and, in any event, the applicant was not one of the siblings who had contributed to the house in the initial instance. She avers that she had accosted her mother who said she did not know and denied that she intended to donate the house to any one of the siblings. She raises the issue of material dispute of facts and that the applicant ought to have used the action procedure. She also says on the merits that the donation could not have been gratuitous if it was made as compensation for her immense contribution in looking after a relative children. She avers that the applicant preyed on her mother's advanced age. She also maintains that as the donation was not perfected, the property remained that of the deceased.

The supporting affidavit by the fourth respondent, Tabita Chagonda, also a sibling of the applicant is not very helpful in its additional statement. She alleges that at the time of the purported donation, she and other relatives were simply made to get into a car by the applicant and were only told when at the lawyers that their mother intended to donate the property to "Judy". She does not say who Judy is or on what basis they were not allowed to ask questions.

The second respondent, Philda Chikerema, also filed a notice of opposition through the representation of the Legal Aid Department and an opposing affidavit. She too denies that their mother's intention was ever to benefit the applicant only. She emphasises that her mother instead wanted to benefit all her grandchildren through a Trust which would be inclusive of the applicant as a beneficiary because she did not have a house. No heads of argument were filed on her behalf by the Legal Aid Department so she was effectively barred and did not appear at the hearing.

Mr *Kuhuni*, on behalf of the first, third, and fourth respondents argued as follows at the hearing. In light of the donation having been made to compensate the applicant for looking after a relative's children and her not owning property in Zimbabwe, remunerative and reciprocal donations are not true donations. The donation was a discharge of a moral obligation which the deceased felt she had towards the applicant. The document said to embody the donation was not done out of liberality but merely to discharge an obligation. Further, he emphasised that a donation *inter vivos* cannot be transferred after the death of the donor and it cannot transmute itself into a testamentary disposition. The requirements for a donation being

an intention to donate; acceptance by the done, and, delivery in the sense of the donor divesting themselves of the property, he stressed that whatever happens in a donation *inter vivos* should happen between living people. In this instance, he argued that only the intention to donate was expressed but there was no indication of acceptance. Further, he stressed that the deed of donation was entered into in July 2016 and yet nothing was done by applicant until the executor filed a liquidation and distribution account in 2022. As a result, the title remained in the name of the deceased and therefore the property belonged to her estate and was distributable in term of intestate succession, so Mr *Kuhuni* argued. He was steadfast that like an agreement of sale without transfer, it only accorded personal rights. Vesting of ownership was required by an act of transfer. He cited the *Sherriff of Zimbabwe* v *Gumbe and Anor 378/20* for this principle.

Materially, Mr *Kuhuni* did not pursue the factual thrust of the third and fourth respondents who attempted to veer somewhat from acts of a donation. Instead his focus, conceding that some event took place, was on its nature and the issue of its incompleteness or otherwise of the donation. These were indeed the real issues.

Legal and Factual Analysis

On the issue of the motive of the donor, as discussed *Master* v *Thomson's Estate,* pointing to Roman authorities, when it comes to a donation:

> "The main feature is the intent to enrich the donee. Provided this is present, the fact that there may be other motives underlying the gift cannot alter the nature of the legal transaction."

Cilliers v *Liebenberg*, 26 A.C. 611 at p. 615, was also cited in the same case in expounding on the nature of a donation, where DE VILLIERS, C.J, drawing on the language of Grotius *Introduction* 3.2.1, characterised it as:

> "a promise whereby a person, without being under a legal obligation so to do, binds himself to give to another something belonging to himself without receiving anything in return or stipulating for anything for his own benefit."

See also similar case law discussed in *Kasule v Kasule* (1) ZLR 668 on the nature and definition of a donation.

There is no doubt from the factual spectrum in the case before me that the intention by the late Edith Shope Goto was to enrich the applicant and the fact that donor may have wanted to thank her for looking after a cousin's children is neither here nor there as applicant's lawyer rightly argued.

However, at common law delivery is also required to perfect an *inter vivos* gift, which simply means a gift between living persons, or, from one living person to another.

> "The delivery required in gifts *inter vivos* is usually stated to be an actual, constructive, or symbolical delivery according to the circumstances. It is commonly stated that the delivery must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit. The usual test applied to any *inter vivos* delivery is that it must be such a delivery as will most effectually divest the donor of dominion and control over the subject of the gift. In addition, the delivery must be absolute and unqualified, and it must vest the donee with, and divest the donor of, control and dominion over the property." [1]

The requirement of delivery in an *inter vivos* donation was also succinctly captured in the American case of *Begovich* v *Kruljac 3***8** Wyo. 365, **267** Pac. 426 (1928).

> "In gifts *inter vivos* the primary intent and purpose is to give immediate control of and dominion over the property to the donee. The intent to give is not sufficient. It must be fully and completely carried out. No gift is made, unless it was perfected by actual delivery, fully and completely giving dominion over, and control of, the subject of the gift during the donor's lifetime to the donee. In other words, delivery is just as much a constituent element of such gift as the intention to give".[2]

In other words, where control of the property remains with the donor then there can be no valid gift *inter vivos*. What is essential is that the gift given should immediately pass and be irrevocable by the donor. Besides preventing fraud, the purpose of delivery is to also make the donation certain and definite, especially on part of the donor. Materially, title, in its complete form must vest in the donee during the lifetime of the donor if the gift is not to be invalid.

The requirements of a gift inter vivos therefore boil down to:

a) An immediate intention to make a gift

b) Acceptance of the gift

c) Actual delivery of the gift divesting the owner of control and dominion

Indeed the case of *D E & Anor* v *C E & Ors* cited by both lawyers, is clear that transfer is required and not just the intention to make a donation. Thus, in *Kasule v Kasule* for example,

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[1] See Marcum, James V. (1950) "The Theory of Delivery in Gifts Causa Mortis," Kentucky Law Journal: Vol. 39: Iss. 2, Article 6.
Available at: https://uknowledge.uky.edu/klj/vol39/iss2/6

[2] As discussed by M James above

the court refused to revoke the registration of an immovable property which had been registered in the name of a donee. The donation was found to have met all the requirements of a donation.

The nature of the property in this instance is immovable property. In order to take transfer of immovable property and exercise full dominion over it, a change of ownership and title is required through the Deeds Registry. Suffice it to point out that the property was in the urban areas and title could only pass by following, to the logical conclusion, all the requisite procedures for transfer. It is the completed act of transfer of ownership of immovable property that divests the owner of control over his property and that gives another control over that same property. Title is indeed not taken lightly. See *Takafuma* v *Takafuma* 1994 (2) 103 (S) on the implications of holding title. The intent of the donor in this instance cannot count for the act of transfer because the law is clear from the nature of the property, on how transfer is to be effected.

The actions of the donee must also be examined in terms of acceptance. Whilst the donor may have done all on her part towards facilitating the process of effecting transfer, the donee certainly did not perfect the donation by having it actually put into her name. There is absolutely no doubt that without legal transfer of title of the property, its dominion and control one hundred percent remained with the now deceased during her life time and up until her death. The donee only has herself to blame for failing to take title timeously. There is an African proverb which admonishes: "Do something at its right time, and peace will accompany it." The absence of peace in winding their mother's estate is precisely because the applicant failed to act timeously in accepting the donation. None of this would be before the courts. The right time to take transfer would have been during the now deceased's life time for the avoidance of these type of squabbles.

The application fails. I do not agree that the estate should be saddled with costs from the applicant's own lackadaisical approach to having the property registered in her name.

Accordingly the application is dismissed with costs.

Rungwadi & M Rujuwa, applicant's legal practitioners
Messrs *C Kuhuni*, first, third and fourth respondent's legal practitioners