KILLION GUMBOCHUMA

versus

STEVEN NGWENYA

(in his capacity as Executor Dative in the Estate late Abbie Ngwenya D/E740/1999)

and

GIBSON NHAMBURO

and

MASTER OF THE HIGH COURT

and

THE DIRECTOR OF HOUSING AND COMMUNITY SERVICES- CHITUNGWIZA MUNICIPALITY

HIGH COUR T OF ZIMBABWE

CHITAKUNYE J

HARARE, 18 October, 2012

**CIVIL TRIAL**

*N. Mugiya,* for plaintiff

2nd Defendant in person

No appearance for other defendants

CHITAKUNYE J: The plaintiff is a male adult residing at Stand No. 12385 Unit N, Seke, Chitungwiza. The first defendant is a son to the late Abbie Ngwenya.

The second defendant is a son to the late Ururu Nhamburo.

The third and fourth defendants were cited in their official capacities.

The plaintiff alleged that he bought stand No. 12385, Unit N Seke from the first defendant on 27 November 2003. The first defendant is alleged to have sold the property in his capacity as executor dative of estate late Abbie Ngwenya. It was alleged that Abbie Ngwenya had bought the property from Robert Latifa who had in turn bought it from Washington Nhamburo, the eldest son of the late Ururu Nhamburo. Despite the alleged sale transactions the property remained in the name of late Ururu Nhamburo till the year 2008 when the second defendant had it registered in his name as executor dative of estate late Ururu Nhamburo.

Though in occupation of the property and alleging he had bought the property plaintiff could not have the property ceded into his name due to failure by the first defendant to effect cession and the second defendant’s conduct.

The plaintiff thus approached this court seeking an order that:-

1. House No. 12385 Unit N, Seke, Chitungwiza be declared part of estate Late Abbie Ngwenya
2. The letters of administration issued in favour of the second defendant be cancelled
3. The agreement of sale entered into by the plaintiff and the first defendant be declared binding
4. The first defendant be ordered to sign all the necessary documents to effect cession of stand No. 12385 Unit N, Seke, Chitungwiza into the names of plaintiff within 4 days from the date of judgment
5. The second defendant to pay costs of suit on a higher scale.

The second defendant was the only defendant to defend the action. In his plea he denied knowledge that the plaintiff had bought the property. He instead contended that he had in fact inherited the property from his late father as he was the eldest son of the late Ururu Nhamburo. The plaintiff was his tenant, paying rentals through his bank account.

At a pre-trial conference issues identified for trial comprised-

1. Whether or not House No. 12385 Unit N, Seke, Chitungwiza is part of Estate Late Abbie Ngwenya
2. If so, whether or not the first defendant legally sold House No. 12385 Unit N, Seke, Chitungwiza to the plaintiff
3. Whether or not the second defendant fraudulently included Stand No. 12385 Unit N, Seke, Chitungwiza as part of Estate Late Ururu Nhamburo
4. If so, whether or not the letters of administration issued in favour of the second defendant by Assistant Master of the High Court sitting at Chitungwiza Magistrates Court be cancelled
5. Whether or not the cession done in favour of the second defendant at the fourth defendant’s offices should be declared null and void.

The facts of the case make sad reading in the administration of deceased estates. The circumstances of the case bring to the fore the need for expeditious registration and administration of deceased estates in terms of the law.

There are basically two versions to the saga, the plaintiff’s and the second defendant’s.

The plaintiff’s version was basically that he bought the property in question from Steven Ngwenya on 27 November 2003. Steven was a duly appointed executor of Estate late Abbie Ngwenya. Abbie Ngwenya had bought the property from Robert Latifa. Robert Latifa had bought the property from Washington Nhamburo. Washington Nhamburo had inherited the property from his father, Late Ururu Nhamburo, in his capacity as the eldest son at the time Ururu Nhamburo died in 1985.

The second defendant’s version on the other hand was to the effect that he was Late Ururu Nhamburo’s eldest son and in that capacity he inherited the property in question from estate late Ururu Nhamburo in 1985.

In about the year 2000 plaintiff began staying in this house as his tenant. Prior to that Abbie Ngwenya had been his tenant till his demise. After the demise of Abbie Ngwenya the first defendant as son to Abbie Ngwenya moved out of the premises after paying him off for improvements he alleged his father had effected on the property.

In the year 2008 the second defendant said after due process he was appointed executor dative for estate late Ururu Nhamburo. As the eldest son to late Ururu Nhamburo he inherited the property in question and had it registered in his name. The property is thus now his.

The plaintiff gave evidence and called two witnesses. He also tendered some documentary evidence. The second defendant thereafter gave evidence and called one witness.

The plaintiff’s evidence was to the effect that he bought the property from Steven Ngwenya who had inherited it from his father Abbie Ngwenya. Steven as the holder of letters of administration of Estate late Abbie Ngwenya had lawfully sold the property to him.

The plaintiff argued that the second defendant acted fraudulently in getting the property registered in his name in the year 2008. That registration should therefore be declared null and void.

The plaintiff’s witnesses Emelda Nhamburo and Francis Nhamburo testified next. Emelda was one of the Wives of the late Ururu Nhamburo whilst Francis was the eldest son to the late Washington Nhamburo. Both Emelda and Francis testified that Washington Nhamburo was the Late Ururu Nhamburo’s eldest son. At the time of Ururu Nhamburo’s demise in 1985, members of the Nhamburo family deliberated over his estate and agreed that Washington should move into the house in question. The two witnesses were however not agreed as to whether he was moving in to inherit or to take care of his siblings.

Emelda’s evidence was to the effect that Washington as the eldest son was asked to move into the house and take care of his siblings. She said the issue of inheritance was not settled. Up to this date Emelda professed ignorance about how the estate Late Ururu Nhamburo was finalised if at all it was. She appeared unaware the property in question was sold.

In her affidavit dated 24 April 2008, filed as part of exhibit 3 by plaintiff, Emelda confirmed the fact that the estate late Ururu Nhamburo was not finalised when at p 2 thereof she stated that-

“My husband passed away in 1985. He left the house, a store, 1 cow and a rural home. The eldest son Washington took the cow and the house No. 12385. He removed school going son Lawrence and lived with his family in the house. Washington died in 2000. Gibson took over the house up to now he is controlling the house.”

At p 3 of the affidavit she went on to say that-

“I prefer inheriting the house.”

Thus, as at 24 April 2008 Emelda was also seeking to inherit the house in question. Lawrence Nhamburo made the point clearer in his affidavit filed as part of exhibit 3 by plaintiff when he said that:-

“On my father’s deceased estate, he left behind one cow, house No. 12385 Unit N, Chitungwiza and a store in the rural area. My brothers and I sold the store and shared the money equally. Washington, Lancelot, Gibson, Paul and I Lawrence. The eldest brother Washington took the cow and the house No. 12385. I was at school staying at No. 12385 Unit N, Chitungwiza, Washington removed me from the house and occupied it with his family. Soon after Washington’s death in 2000, Gibson took over control of the house up to today. Emelda Nhamburo and the rest of the family did not benefit from the house since father’s death. I suggest that the house No. 12385 to be inherited by Emelda….”

This affidavit is dated 24 April 2008.

These affidavits tendered by plaintiff save to show that as at 24 April 2008, the time second defendant was seeking to be appointed heir and administrator of estate late Ururu Nhamburo, the two deponents were not aware that the property had been disposed of by Washington. The fight as to who should inherit this house was still on going. Such a stance confirms that the purported sale by Washington may not have been in terms of the law.

Francis’s evidence on the other hand was to the effect the family gathering resolved that Washington as the eldest son should inherit this particular property whilst the second eldest son Lancelot inherited another property. After inheriting the property his father sold the property to Robert Latifa in about 1988 or 1989. He witnessed this sale though he was a minor. He however did not know if the purchase price was paid in full. He did not know much about the subsequent sale to Abbie Ngwenya and to the plaintiff.

It was apparent from Francis’ evidence that some members of the Nhamburo family were not happy with Washington inheriting the property in question. As a consequence, Francis said, his father sold the property to avoid the continuous family feud over his inheritance of the property.

None of plaintiff’s witnesses testified to the Estate Late Ururu Nhamburo ever being registered or being administered/ wound up in terms of the law. No evidence was adduced to show that Washington as the eldest son, or any one for that matter, was ever issued with letters of administration or heir ship. The estate lay un-administered till the year 2008 when 2nd defendant registered it. What the family did was, at most, to informally share some of the property of the late Ururu Nhamburo before anyone had been appointed executor dative or heir.

If therefore the Estate late Ururu Nhamburo was never registered and administered in terms of the law can it be said the property was properly disposed of?

The second defendant contended that at the time Late Ururu Nhamburo died he was the eldest son hence he inherited the property in question. Under cross-examination the second defendant conceded that he was not the eldest son. There were in fact two sons older than him, namely Washington Nhamburo and Lancelot Nhamburo. The second defendant clearly lied on this point. Though he sought to raise doubt as to whether Washington was late Ururu’s biological child, this was clearly unwarranted and a figment of his imagination. The document he sought to rely on, in this regard, pertained to a list of beneficiaries and not biological children. That list is in fact not restricted to Ururu’s children but includes children second defendant confirmed were not late Ururu’s children. Second defendant was simply trying to avoid the truth.

As the eldest son, and going by the law then obtaining, Washington would have been entitled to inherit the Estate late Ururu Nhamburo. However as testified to by plaintiff’s witnesses and the second defendant the estate Late Ururu Nhamburo does not appear to have been wound up. The two eldest sons of late Ururu Nhamburo, namely, Washington and Lancelot, have since passed on. It is that situation the second defendant has chosen to take advantage of. Second defendant has now registered the estate late Ururu Nhamburo. Second defendant has now registered the property into his name and none of the family members who would ordinarily be interested parties has objected to that. Instead it is plaintiff who has challenged that registration.

The second defendant contended that the plaintiff was his tenant from the year 2000. In that regard he referred to some rental payments the plaintiff made to him. He went on to say at some point he gave the plaintiff three months’ notice to vacate the premises. When that period lapsed plaintiff pleaded with him for an extension of the notice period. All this he contended confirmed he was the owner and the plaintiff was his tenant.

On his part, the plaintiff conceded that at some point he paid rentals to second defendant but this was under duress as the second defendant was harassing him and his family. Second defendant was claiming ownership of the house and making his family’s stay unbearable.

On the question of whether the property is part of estate Late Abbie Ngwenya, the second defendant contended that Abbie Ngwenya was a mere tenant. When Abbie Ngwenya died his son Steven Ngwenya demanded compensation for the improvements he alleged his father had effected on the property. The second defendant said he duly paid Steven the compensation and Steven vacated the premises. It was therefore improper for Steven to have included the property on the Inventory of Estate Late Abbie Ngwenya.

Steven did not contest this case nor was he called as a witness and so we are unable to know on what basis he included a property registered in the name of late Ururu Nhamburo as part of his father’s estate. The Estate late Abbie Ngwenya was said not to have been wound up as yet. There was no evidence that Steven had the authority to sale by private treaty the property in question.

It is trite that estate property is regulated by the Administration of Estates Act [*Cap* *6:01*]*.*

An executor appointed to administer an estate must act in terms of the Act. Where any property is to be disposed of it must be done in terms of the Act. It is not any one who can validly dispose of estate property.

In this regard s 23 of the Administration of Estates Act [*Cap 6:01*] provides that-

“The estates of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the form B in the Second Schedule by the Master to the testamentary executors duly appointed by such deceased persons, or such persons as shall, in default of testamentary executors, be appointed executors dative to such deceased persons in manner hereinafter mentioned.”

Section 25 of the Act provides for the appointment of the executors. It is this executor who will be required to administer the deceased estate in terms of the Law. (See also s 68B for persons subject to customary law-appointment of executor)

If in the process of administration the executor desires to sell any assets by private treaty section 120 of the Act enjoins him or her to first seek the Master’s consent. That section states that:-

“ If, after due inquiry, the Master is of opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.”

Where no such consent has been obtained the validity of the sale is brought into question (see *Nemuseso* v  *Mashita & Others* 2009(2) ZLR 298)

The events as testified to above show that the estate late Ururu Nhamburo may not have been dealt with in terms of the law and so the property may not have been disposed in terms of the law. Plaintiff could not confirm or even assert that late Ururu Nhamburo’s estate had been registered and administered in terms of the law before the property was sold to Robert Latifa. Francis ‘evidence was not adequate on this point. At the time of the alleged sale to Robert Latifa, which sale he said he witnessed, he was only about 14 years old and thus a minor. He could not confirm that any of the legal requirements were met. If therefore at the time of the purported sale to Robert Latifa no executor dative had been appointed and no letters of administration had been issued to Washington Nhamburo or to anyone, was such a sale valid? It may also be paused that if, as appears to be the situation, there was no Master’s consent to sale, is this not further evidence that the sale to Robert Latifa may have been fatally defective?

If Washington Nhamburo had not been appointed executor dative or had no Master’s consent to sell by private treaty, it follows the purported sale to Robert Latifa was a nullity. Subsequent dispositions are inevitably affected by this finding.

The fact that second defendant was highly unreliable and controversial in his dealings with the estate late Ururu Nhamburo to an extent that he blatantly lied that he was the eldest son of Ururu Nhamburo at the time of Ururu Nhamburo’s demise, would not in my view make up for the lack of evidence on the legality of the disposal of the property in question. The onus was upon plaintiff to show that though the property was still in late Ururu Nhamburo’s name he had acquired it legally and such title was not tainted with any illegality.

I am of the view that plaintiff has not proved that he is entitled to the relief he seeks.

Accordingly it is hereby ordered that an absolution from the instance be and is hereby granted.

Each part shall bear their own costs of suit.

*Mupindu & Mugiya Law Chambers*, plaintiff’s legal practitioners

Second defendant, self actor