MILDRED SIPHIWE MANYIMO (NEE MAGORIMBO)
versus
ENERGY LINCOLN CHIVARAIDZE MANYIMO
and
DANIEL TAKUDZWA MANYIMO
and
REGISTRAR OF DEEDS HARARE

HIGH COURT OF ZIMBABWE
ZISENGWE J
HARARE, 1 October 2019 & 28 November 2019

Opposed application

TTG Musarurwa, for applicant
1st respondent in person

ZISENGWE J: The first respondent Energy Lincoln Chivaraidze Manyimo is the applicant's former husband. The second respondent Daniel Takudzwa Manyimo is the applicant and first respondent's biological son. The third respondent is the registrar of deeds Harare.

The applicant seeks an order in the following terms.

"It is ordered that:-

1. The agreement of sale entered into between the first and second respondents dated 9 February 2018 be and is hereby cancelled.
2. The 1st respondent and all those acting through him be and are hereby interdicted from transferring, mortgaging, hypothecating or dealing with stand 284 Northwood Township 2 of Sumben also known as House No. 138 Twickenham Drive, Harare, without the consent of the applicant.
3. 3rd respondent be and hereby ordered to place a caveat in Deed of Transfer Number 7050/87.
4. The 1st and 2nd respondents shall pay costs on a legal practitioner and client scale."

This current application is the latest of a series of disputes between the applicant and first respondent whose origins are found in the order granted by this court in case No. HC

12314/2012. The said order *inter alia* granted a decree of divorce and the distribution of assets acquired by the applicant and the first respondent during the subsistence of their marriage.

At the centre of this current dispute is the interpretation and implementation (albeit in part) of the court order which part deals with the distribution of one of such assets namely Stand number 284 Northwood Township 2 of Sumben, held under Deed of Transfer 7050/87 also known as 284 Northwood Township, Mt Pleasant, Harare (hereinafter referred to as "the property").

The relevant portion of the order in case Number HC12314/12 reads as follows:

"3. The immovable asset of the property namely:-

(i) Stand No. 284 Northwood Township of Sumben, held under Deed of Transfer No. 7050/87 also known as No. 284 Northwood Township, Mount Pleasant, Harare
(ii) …..
(iii) ….
All be shared equally as between the parties."

4. The defendant be and is hereby given the option to buy out the plaintiff's share in the following properties
   (i) Stand No. 284 Northwood Township Mt Pleasant, Harare.
   (ii) ....

(a) The Estate Agency Council of Zimbabwe upon request by either party's legal practitioners appoint as estate agent to value the properties and that the cost thereby be borne by the parties in equal shares.
(b) The defendant pays off the plaintiff her 50% share of the properties within sixty (60) days of the granting of the divorce order subject to any extension agreed by the parties in writing.
(c) In the event that the defendant is unable to raise the plaintiff's share of the property within the agreed 60 days or the agreed extension, the property shall be sold at best advantage on the open market and the net proceeds shared equally between the parties."

The applicant and the first respondent in the affidavits deposed to in support of their respective positions chronicled the events which culminated in the current application. The second respondent on the other hand did not file any opposing papers and was therefore barred. On the day of hearing he essentially elected to be a passive observer.

From the documents filed of record and from the submissions made on behalf of the applicant and by the first respondent, the following facts are common cause or at least undisputed; firstly, that the first respondent did not exercise the "buy out" clause of the court order and consequently the properties fell to be "...sold at best advantage on the open market and net proceeds shared equally as between the parties."

It is further common cause that in the intervening period the property could not be sold to third parties for one reason or another. The parties gave divergent versions in this regard. However, the first respondent in whose name the property is registered subsequently entered into an agreement of sale with the second respondent for the sale of that property. He sold the property for US$200 000.00. It is that agreement of sale that now forms the subject of this current application.

In brief, the applicant contends that she was not consulted by the first respondent nor did she consent to the sale of the property to the second respondent something which she was legally entitled to. She further avers that the terms of that agreement of sale including the purchase price and the terms of payment thereof cannot be construed as being "to the best advantage of the parties" as contemplated in the court order. She contends that the purchase price of US$200 000 is lower than the market price of the property despite the value of US$ 200 000 which was given by the valuator. She avers that evidence to this is higher offers which were given by other prospective buyers. The applicant further contends that the mode of payment for the purchase price proposed by the second respondent of applying for a mortgage bond after the signing of the agreement of sale was not to the best advantage of the parties.

The first respondent's position on the other hand is essentially that he was not legally obliged to consult with the applicant before entering into the agreement of sale with anyone as long as the purchase price was not below the valuation price by an independent valuator. He further avers that there are in any event some sentimental and practical reasons why the property should remain within the family as opposed to being sold to outsiders. He avers that some of the children they had together including the second respondent still reside at this property whilst the applicant and himself reside in Canada albeit separately. He contends that the property is home to their children hence the second respondent's offer to purchase it. The first respondent further avers that the applicant is being malicious by denying the children the opportunity to save their home. He contends that at the time the children made their offer which met the market value set by the valuator, there were no other offers.

The first respondent further points out that in respect of a different property which was also subject of the same divorce order, the High Court, at the instance of the applicant compelled him to co-operate with the sale of that property, his protestation against such sale notwithstanding. His argument therefore is that by the same token, the applicant should accede to the sale of the property to the second respondent.

The crisp issue that falls for determination is whether the court order which requires the property to be sold "…. at best advantage on the open market and the net proceeds shared equally as between the parties" permitted the first respondent to enter into an agreement of sale with the second respondent (or any other 3rd party) without the concurrence of the applicant.

It is trite that the basic rules for interpreting the judgment of a court are no different to those applicable to the construction of documents. The court's intention has to be ascertained primarily from the language of the document or order as construed according to the well-known rules. Further, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. (See *Administrator, Cape, & Another* v *Ntshwaquela & Others* 1990 (1) SA 705; *Finishing Touch* 163 *(Pty) Ltd* v *BHP Billiton Energy Coal South Africa Ltd* (363/11) [2012] ZASCA 49 (30 March 2012).

The judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. See *Firestone South Africa (Pty) Ltd* v *Genticuro* AC 1977 (4) SA 298 A.

In the context of the current application the question is whether it was the intention of the parties as captured in the order of the court that either party could enter into an agreement of sale with third parties on terms shall such party deemed favourable without consulting the other party? I see no reason for arriving at such a conclusion. To the contrary, the clear intention conveyed by the order is that not only do the parties have equal share in the property, but also that they had equal say in the disposal of same. This of necessity would require each party to consult and seek the concurrence of the other in order to dispose of the property. Each party has an equal stake in the property. Any contrary interpretation would potentially lead to an untenable situation where the party disposing of the property would in its subjective view sell the property at a price or on terms which the other party may deem unfavourable. It is not for the one party to unilaterally decide what is in the best interest of the parties. Consultation with and the obtaining of concurrence of the other party would obviate unnecessary disputes. The mere fact that the purchase price agreed upon between the first and second respondent meets the value of the property does not necessarily imply best advantage. It is not uncommon for a property to fetch a price in excess of its valued price. If the intention of the parties was that the property would be sold at the valued price, the order would have stated as much.

Further in my view, the concurrence of the applicant needed to be sought where the sale between the first respondent and second respondent had to be made subject to the latter obtaining a mortgage bond which itself has its unique set of requirements and legal

implications. The fact that the first and second respondent may have sentimental or even practical reasons to keep the property with the family is hardly relevant given the wording of the order. Should that have been the intended outcome, that would have been captured in the order by (say) giving any family member the right of first refusal. "Open market" would be interpreted in its ordinary literal sense.

I did not understand the judgment by this court in *Mildred Siphiwe Manyimo (nee Magorimbo* v *Energy Lincoln Chivaraidzo Manyimo and 2 Ors* HH 67-17 as stating that either party could unilaterally enter into an agreement of sale with a third party without consulting the other party. Rather it stated that where such a consent is unreasonably withheld, the court could upon application compel the party so withholding consent to render such consent.

The applicant also sought to have the Registrar of deeds place a caveat on the deed of transfer but such caveat is in my view unnecessary as an order cancelling the agreement of sale between first and second respondent suffices.

Regarding costs, there is no justification for ordering costs on the punitive scale as sought by the applicant. Costs will be awarded on the ordinary scale.

In the final analysis therefore the following order is hereby granted. It is ordered that:-

1. The agreement of sale entered into between the first and second respondent dated 9 February 2018 be and is hereby cancelled.
2. The 1st respondent and all those acting through him be and are hereby interdicted from transferring, mortgaging, hypothecating or dealing with stand 284 Northwood Township 2 of Sumben also known as House No. 138 Twickenham Drive, Harare, without the consent of the applicant.
3. The 1st respondent shall pay the applicant's costs.

P. Takawadiyi & Associates, applicant's legal practitioners