MACELLINE DAPHINE MUSHAVA
and
ALOUISE MUNOCHEMEI MUSHAVA
versus
OBRAM TRUST COMPANY PRIVATE LIMITED
(In its capacity as Executor Dative of Estate Late
JOSEPH PANGANAYI MUSHAVA)
and
THE MASTER OF THE HIGH COURT N.O
and
FANNIE PERCY MUSHAVA
and
MARIA NGAZANA MUSHAVA
and
JOSIAH HATINAHAMA MUSHAVA
and
ANGELINE THOKOZILE MUSHAVA
and
ALVIN MUCHINERIPI MUSHAVA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE: 28 February and 29 March 2022

Opposed Matter

C. Tsikira, for the applicants
W. Molai, for 1st respondent
A. Mapanzure, for the 3rd, 4th and 6th respondents

MUCHAWA J: This is a court application for a declaratory order in which the following order is sought;

"IT IS DECLARED AND ORDERED THAT:

1. The first, second applicants, together with the third, fourth, fifth, sixth, seventh respondents are all owners in equal shares in the following properties mentioned in paragraph (d) and (f) of the Beneficiaries Agreement

a) Being a certain piece of land situate in the District of Salisbury called Excelsior measuring 524 0420 hectares held under Deed of Transfer No.1 808/2007 otherwise known as 8 Doronanga Farm Beatrice, and
b) Being Farm 23 Marirangwe Beatrice measuring approximately 274 hectares otherwise known as Marirangwe

2. Clause 1 (d) and 1(f) be interpreted to mean that all beneficiaries are owners in equal shares of the properties and no beneficiary has greater right to ownership than the others
3. The first respondent to pay costs of suit on a higher scale between legal practitioner and client."

The brief background to this matter is that the two applicants, third, fourth, fifth, sixth and seventh respondents are all children of the late Joseph Panganayi Mushava and are beneficiaries to his estate. It emerged at the hearing that this application had omitted to include one Josephine Mushava who is also a child to the deceased and a beneficiary. Further, the fifth respondent was said to be deceased and was therefore improperly cited instead of his estate. The first respondent is cited in the capacity of executor of the estate of the late Joseph Panganayi Mushava whilst the Master of the High Court is cited in his official capacity as the one responsible for the registration and administration of deceased estates.

Upon the registration of the estate of the late Joseph Panganayi Mushava, his children entered into a Beneficiaries Agreement in terms of which they agreed on the distribution of the various immovable properties amongst themselves and how the estate liabilities would be discharged. There appears to have been no problems with the rest of the clauses of the agreement except two which I reproduce below.

> "1 (d). Certain piece of land situate in the District of Salisbury called Excelsior measuring 524 0420 hectares held under Deed of Transfer No.1 808/2007 otherwise known as 8 Doronanga Farm Beatrice- shall be used by all the eight beneficiaries (children). For the avoidance of doubt all the children shall have the right to use the farm provided one pays the farm's rates. However, for accountability purposes, Josiah H. Mushava shall ultimately be responsible for Doronanga Farm's general upkeep and administration.
> 1 (f). Farm 23 Marirangwe Beatrice measuring approximately 274 hectares otherwise known as Marirangwe- shall be used by all the eight beneficiaries (children). For the avoidance of doubt all the children shall have the right to use the farm provided one pays the farm's rates. However, for accountability purposes, Angeline T Mushava shall ultimately be responsible for Marirangwe Farm's general upkeep and administration."

At the hearing, I dismissed a point *in limine* taken by the first respondent. Ms *Moloi* submitted that the executor should have been cited in his personal name as Oliver Masomera and not Obram Trust Company (Pvt) Limited. This was because the Letters of Administration on page 33 of record show that Oliver Masomera was appointed in his capacity as the Managing Director

for the time being of Obram Trust Company (Pvt) Ltd. It is clear that the entity appointed as executor is the first respondent which would be represented by Oliver Masomera. Had he been appointed in his personal capacity, there would have been no need to indicate he would so act in his capacity as Managing Director of the first respondent.

What prompted this application was the position taken by the first respondent that it was proceeding to transfer ownership of Doronanga Farm and Marirangwe Farm to Josiah H Mushava and Angeline T Mushava, respectively. In the notice of opposition this position is put thus, "The fifth and sixth respondents were given authority over the properties mentioned in paragraph (d) and (f) of the Beneficiaries Agreement. It is their responsibility to look after the properties and to maintain them. It is only fair that they be given ownership in order for them to be able to execute their duties properly and to administer the properties." Ms *Moloi* stood firmly by this position.
The applicants through Ms *Tsikira* contended that no ownership rights are bestowed on these two by the agreement and that all beneficiaries have usufruct rights only. Their interpretation is that the ownership of these two properties was not settled by the agreement and the executor's interpretation will rob them of their rights in respect of these properties.

Ms *Mapanzure* submitted for the third, fourth and sixth respondents that indeed the wording of clauses 1 (d) and 1(f) shows that all eight beneficiaries have a usufruct to the two properties provided they contribute towards rates used for the maintenance of the two properties. None of the beneficiaries was awarded the farms as their personal properties. It was argued that the court should not exercise its discretion and grant a declaratory order as prayed for in terms of the draft order as this would be tantamount to making a new agreement for the parties and would stand contrary to the principle of sanctity of contracts.

The beneficiaries though agreed that the rights in the two farms are merely in the form of a usufruct, have divergent views on what this court should do. As evident from the draft order, the applicants want the court to declare that each of the eight beneficiaries are owners in equal shares over the two properties. On the other hand the third, fourth and sixth respondents have come up with an intricate proposal for a redistribution plan of the two farms. They want the court to leave it to the beneficiaries to renegotiate a redistribution plan. Their proposal for renegotiation is the following;

- That there be a proper subdivision carried out by a professional surveyor of each of the two farms and that parties be allocated portions of such subdivisions to ensure they run separate and independent lives from each other where they can each be fully accountable and responsible for the upkeep and maintenance of the farms
- That a fair redistribution plan should divide each farm into two parts with separate title deeds for each of the two families. Each family to then share the portion allocated to it
- That there be a subdivision permit and endorsement by representatives of the two families before the subdivision takes place
- That each family retains the homestead which belonged to their mother
- That each family be responsible for thereafter running its own portion of the farm and may decide on the names to appear on the title deed of their portion
- That the estate should cater for the subdivision and related costs
- That as the fifth respondent already sold and benefited personally from the sale of a portion of Dorononga farm, his estate should not get an equal portion to the others as this would be unfair.
- That Josephine Mushava who was omitted in this application, should benefit alongside all the beneficiaries.

Furthermore, Ms *Mapanzure* submitted that section 5 (1) (a) of Deceased Estates Succession Act, [*Chapter 6: 02*] empowers heirs to come up with a redistribution plan which would be binding upon the executor. It was prayed that the instant application should be dismissed with costs on a higher scale for lack of merit.

It is clear and no longer in contention that the Beneficiaries Agreement left the question of ownership of the two farms unresolved. It appears it is only the executor that wants to quickly and conveniently wind up its work and has chosen to read ownership into clauses where this is evidently absent, particularly if regard is had to clauses 1 (a), (b), (c), (e) and (g) which made specific awards of property to the beneficiaries. It is a settled principle of law that the *usufructuary* is only entitled to the use and enjoyment of the property and does not acquire ownership of the property. See *Voet 7* 1 32. Equally the duty to be ultimately responsible for the general maintenance and upkeep of the two farms by Josiah H Mushava and Angeline T Mushava, does not, by any stretch of the imagination, translate to ownership rights.

The only remaining question for my determination is whether the granting of the order as sought is in-keeping with the agreement of the beneficiaries. The applicants submitted that the agreement should be interpreted through its ordinary grammatical meaning and that there is no ownership bestowed on any of the parties to this matter. This position, as I have already found, is correct. This grammatical interpretation also supports a finding that clauses 1(d) and 1 (f), do not bestow equal shares of ownership on the beneficiaries. There is a lacuna on the subject of ownership. The applicants are asking the Court to step into the shoes of the beneficiaries and redraft the contract for them. Such a stance has been consistently castigated by the courts. In *Magodora & Ors v Care International Zimbabwe* SC 24/14, PATEL JA (as he then was) put it clearly as follows;

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H."

In casu, the applicants are asking the court to read in, an ownership clause which is not in the agreement at all. I decline to usurp the role of the executor or that of the beneficiaries particularly as there is recourse provided in s 5 (1) (a) of Deceased Estates Succession Act, [*Chapter 6: 02*] which empowers heirs to come up with a redistribution plan which would be binding upon the executor. See below:

> **"Agreement on alternative division or direction to sell property devolving in undivided shares**
> (1) Where as a result of a distribution in intestacy any property devolves upon any heirs in undivided
> shares—
> (*a*) the heirs may agree upon an alternative division of the property, and such agreement shall be binding on the executor"

I hasten to point out that the route which the first respondent wanted to take is clearly outside the contract, as I have already stated. What the first respondent should do is to facilitate a meeting of the beneficiaries to seek a meeting of the minds on ownership of the two farms. That would then become the way forward towards the winding off of the estate of the late Joseph Panganayi Mushava. There is no valid basis for the court to intervene and amend or supplement a contract on behalf of the parties.

The prayer for costs on a higher scale was not justified. The applicants, third, fourth and sixth respondents ended up in agreement that the route which the first respondent wanted to embark on was a wrong one. There will be no order as to costs therefore.

There being no merit in the application, it be and is hereby dismissed with no order as to costs.

Muvirimi Law Chambers, applicant's legal practitioners
Chatsanga & Partners, first respondent's legal practitioners
Chinawa Law Chambers, third, fourth and sixth respondent's legal practitioners