SYDNEY MUTARA

and

CHRISTINE MUTARA

versus

SOLOMON MUTARA

and

KONRIAS MUTARA

and

ISHMAEL MATYENYIKA

and

MASTER OF THE HIGH COURT

and

REGISTRAR OF DEEDS (NO)

and

CHITUNGWIZA MUNICIPALITY

IN THE HIGH COURT OF ZIMBABWE

GUVAVA J

HARARE, 16 SEPTEMBER 2011 & 3 MAY 2012

Family Law Court

**Opposed Application**

Mrs *F. Chagadama*, for the applicants

Ms *T. Mberi*, for the 1st and 3rd respondents

 GUVAVA J: The applicants in this matter seek an order in the following terms:

1. That first respondent be and is hereby barred from disposing of and effecting transfer of house No 16036, 6th Street, Sunningdale 2, Harare.
2. That fourth respondent be and is hereby ordered not to effect any transfer of House No 16036, 6th Street, Sunningdale 2, Harare.
3. That House No 16036, 6th Street Sunningdale 2 Harare be and is hereby registered in the names of Sydney Mutara, Christine Mutara and Solomon Mutara in equal shares or;
4. Alternatively: That house no 6118 St Marys’ Chitungwiza and Stand 33221 Seke “M”Chitungwiza be and are hereby registered in the names of Sydney Mutara, Christine Mutara and Solomon Mutara in equal shares.
5. The fifth and sixth respondent be and are hereby ordered to comply with the order sought.

The facts giving rise to this application are common cause and may be summarised as follows. The first and second applicants are brother and sister respectively. The first respondent is the applicants step brother and heir to their mother’s estate. The late Filda Mutara was the mother of the first and second applicants’ and the first respondent and she died on 9 October 1990. The second respondent is their uncle who was appointed executor to the estate of the late Filda Mutare. In 1993 following the attainment of the age of majority by the first respondent the second respondent transferred ownership of stand 16036, 6th Street, Sunningdale 2, Harare (the property) that was left by their mother to him. After taking transfer the first respondent proceeded to sell this property to the third respondent. As payment for this property he received house number 6118 St Marys Chitungwiza and the sum of US$10 000 with which he used to purchase an undeveloped stand which is Number 33221 Seke “M”Chitungwiza. The applicants state that the first respondent should be interdicted from transferring the property to the third respondent because they will suffer irreparable harm as they will be homeless. They further state that the first respondent, as heir to their mother’s estate at customary law, has a duty to provide them with an alternative accommodation since he has sold the only home they had.

 The application was opposed by the first and third respondents. The first respondent argued firstly that the applicants had a pending case before this court which was on the same facts. On the merits he stated that he had sold the property as there was conflict between the applicants and his wife. He therefore decided to purchase two properties in order to avoid further conflict. The first respondent argued further that as the applicants were no longer minors he did not have a duty to provide them with accommodation. He stated in his opposing affidavit that in the unlikely event that the court finds that he does have a duty to provide the applicants with alternative accommodation he owns two other properties to which they can have joint ownership without interfering with the rights of the third respondent with whom he had entered into an agreement of sale.

 The second respondent did not file any opposing papers and in my view should not have been cited in these proceedings. He was appointed executor of the Late Filda Mutara‘s Estate and discharged his function when he transferred ownership of the property to the first respondent. In any event there is no claim being made against him.

 The third respondent opposed the application on the basis that he was a bona fide purchaser who had entered into a valid agreement with the first respondent. He further submitted that the first respondent was the owner of the property and he had fully discharged his obligation in terms of their agreement.

 At the commencement of the proceedings it was conceded by counsel for respondents that he was not pursuing the point *in limine* as it was now apparent that the application had been withdrawn by the applicants.

The main issue that falls for determination in this application is whether or not an heir at customary law has a duty to support adult dependants. In this case it is not in dispute that the first respondent was appointed heir to the estate of the Late Filda Mutara who died intestate on 9 October 1990 in terms of customary law. It is also common cause that he inherited the only property which was in the estate namely house number 16036, 6th Street, Sunningdale 2, Harare. It is also clear that the law to be applied in this case is the law that was applicable before the amendment to the Administration of Estates Act, 6 of 1997.

 It is now settled in our law that an heir at customary law administers the estate for the benefit of deceased’s dependants. In the case of *Magaya v Magaya* 1999(1) ZLR 100 (S) the court dwelt at length on the legal status of an heir at customary law. At p 104 of the judgment MUCHECHETERE JA quoted Bennet in his book “Human Rights and African Customary Law under the South African Constitution” and stated as follows:

“In customary law, succession is intestate, universal and onerous. Upon the death of a family head his oldest son (if deceased had more than one wife, it would normally be the oldest son of his first wife) succeeds to the status of the deceased. Emphasis on the term “status” implies that an heir inherits not only the deceased property but also his responsibilities, in particular his duty to support surviving family dependants”.

It is thus clear from the principles set out in the above cited case that the first respondent being the eldest son of the deceased has an obligation to look after his mother’s dependants as he steps into the shoes of the deceased. The applicants are majors as they have attained the age of eighteen. The question to consider is whether a person who has attained the age of majority can be considered a dependant at customary law. Ms *Mberi* for the first respondent submitted that the first respondent has no duty to support the applicants. She based her argument on s 2 of the Deceased Persons Family Maintenance Act [*Cap 6:03*] where a dependant is defined as follows:

1. a surviving spouse, a divorced spouse who was entitled to maintenance at the time of deceased’s death,
2. a minor child,
3. a major child who suffers a mental or physical disability,
4. a parent who was being maintained by the deceased or
5. any other person who was being maintained by the deceased.

 She thus argued that as the applicants did not fall into any of the above categories the first respondent had no obligation to look after the applicants. However this very point was again dealt with in the *Magaya* case supra at 108 E and F as follows:

“I agree with what Bennet op cit says at p 5 about the nature of African society. The learned author states that at the heart of African socio –political order lay the family, a unit that was extended both vertically and horizontally too encompass a wide range of people who could be called “kin”. The family was therefore the focus of social concern. In the circumstances individual interests were submerged in the common weal and the system stressed individual duties instead of his/her rights. And the legal relationships of most consequences in customary law were those of a family’s dealings with other families, not those from one person’s relations with another. At the head of a family there was a patriarch, or senior man, who exercised control over property and lives of women and juniors. It is from this that the status of women is derived. The woman’s status is therefore basically the same as that of any other junior male in the family. Mr Ncube conceded that males in a family are as subordinate to the patriarch as females until they are “liberated”. The liberation generally comes with the death of the patriarch and the male taking over or with a male moving away from the family and founding his own family”.

Thus law relating to dependants at customary law is clearly set out in the above quotation. The heir assumes the responsibility of looking after all members of the family who were left by the deceased. Parliament recognised that the responsibility placed upon an heir was indeed onerous and thus decided to change customary law to what it is today. However the late Filda Mutara died in 1990 prior to the amendment to customary law through legislation. The first respondent therefore inherited in terms of the old law and it is those principles that apply to this case in determining this matter. It is apparent from the facts of this case that the two applicants have not been“liberated” as they were still living with the first respondent in their mother’s house when he sold the property. They had not moved out to start their own families. They are therefore the first respondents’ dependants at customary law.

The applicants seek an interdict to stop the first respondent from transferring house number 16036, 6th Street, Sunningdale 2 into the name of the third respondent. They argue that if he sells the property they will be deprived of shelter which the first respondent is obliged to provide. The principles to be applied in an application for an interdict have been set out in numerous judgments of this court and the Supreme Court. In order to succeed the applicants must establish the following. Firstly that they have a clear right, secondly that they have no other remedy and finally that actual injury must have been committed or reasonably apprehended. (See *Minister of Local Government* v *Mudzuri & Aor* 2004 (1) ZLR 223)

 In my view the applicant’s case falters at the very first hurdle. They must establish a clear right to the immoveable property which would warrant the court exercising its discretion in their favour and granting the interdict. The applicants in this case are not the owners of the property. The property is registered in the name of the first respondent. An heir at customary law inherits immoveable property in his personal capacity and thus ownership is vested in him. In the case of *Muswera* v *Makanza* HH 16/05 MAKARAU J (as she then was) stated as follows: to the property.

“Under our law of property the right of ownership over property of whatever nature confers the most complete and comprehensive control one can have over property. The right of an owner of land for instance to sell the land is almost untrammelled, it being subject only to the conditions in the deed conferring title and any other real rights over the property that the owner may have caused to be registered against his or her title to the land,……”

The applicants thus cannot stop the first respondent from selling the property if he so wishes as all they have is personal rights against him and not real rights against the world at large. The personal rights of the applicant cannot interfere with the rights of the third respondent who has lawfully purchased the property from the first respondent and paid value for it.

The applicants also have an alternative remedy as the first respondent has stated in his submissions that should the court find that he does have an obligation to support the applicants then he would be agreeable to having the new properties registered in the applicant’s names as well as his own.

Thus, whilst the applicants have not satisfied the requirements for the grant of an interdict they have been able to show that the first respondent has an obligation to provide alternative accommodation. It was argued on behalf of the first respondent that the case of *Vareta* v *Vareta & Ors* 1992 (2) ZLR 1 is in support of the view that he is not obliged to provide alternative accommodation to the applicants. However reading the case it is my view that it can be clearly distinguished on the facts. In the *Vareta* case there was a home in the communal lands where the defendants could stay. The court thus held that the customary law heir had no obligation to provide them with rented accommodation in the urban area as well. In the case before me there is no evidence that there is any other home. The first respondent has sold the only home that the applicants have. The duty on a customary law heir to provide alternative accommodation was stated by BECK JA in the case of *Masango* v *Masango* SC 66/86 where he stated at p 3 of the cyclostyled judgment as follows:

“In the absence of making it possible for the appellant to find such alternative accommodation for herself and the children as would be reasonable in all the circumstances, I do consider that the respondent is not entitled to insist upon their eviction from what is admittedly now his house. To order their eviction without suitable alternative provision having been made for their shelter would be tantamount to sanctioning avoidance by the respondent of his customary law obligation to care for his father’s wife and children.”

The first respondent has stated in his opposing affidavit that he would have no objections to being co owners with the applicants of the two properties that he purchased from the proceeds of their mothers house. It was however clear from the evidence that stand 6118 St Mary’s Chitungwiza is registered in the name of the first respondent’s wife. She was not a party to these proceedings and no evidence was produced to show that the first respondent had the authority to deprive her of her rights of full ownership to the property. I will therefore only make an award in respect to stand 33221 Seke “M” Chitungwiza as this property is in the name of the first respondent. It is however pertinent to point out that the property in question is an undeveloped stand and thus the first respondent’s obligation to provide the applicants with accommodation remains until this property becomes habitable.

The applicants in this case did not claim costs in the application. I will therefore not make an order for costs.

 I therefore make the following order:

1. That Stand 33221 Seke “M” Chitungwiza shall be registered in the names of Sydney Mutara, Christine Mutara and Solomon Mutara in equal shares.
2. That the first respondent shall provide accommodation to the applicants until stand 33221 Seke “M” Chitungwiza becomes habitable.
3. That each party will bear their own costs.

*Harare Legal Projects Centre*, applicants’ legal practitioners

*Hogwe, Dzimiri & Partners*, 1st & 3rd respondents’ legal practitioners