JULIANA DUBE (nee KUNYARIMWE)
and
JONATHAN KUNYARIMWE
versus
FREDDY CHIMBARI N.O.
and
MASTER OF THE HIGH COURT N.O.
and
TENDAI PHINEAS NYAGWANDE
and
EDNA ZIVAI NYAGWANDE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 16 and 27 July 2018 & 20 December 2018

Opposed Application

G Sithole, for the applicants
J Dondo, for the 1st respondent
A Muvirimi, for the 2nd & 3rd respondents

MANZUNZU J: On 24 October 2017, my brother Judge, FOROMA J granted a provisional order in favour of the applicants in the following terms;

IT IS HEREBY ORDERED THAT:

TERMS OF THE FINAL RELIEF

That you show cause to this Honourable Court why a final order should not be made in the following terms

1. 1st respondent be and is hereby compelled to release all documents necessary to enable applicants to exercise their right of first refusal in respect of a certain piece of land situate in the District of Salisbury measuring 9465 square metres held under deed 3351/73

otherwise known as 64 Borrowdale Brooke Estate 'the property,' within seven days of this order.

2. The agreement of sale entered into between the 1st and 3rd and 4th respondents be and is hereby declared null and void.
3. Should transfer of the property cited under para (1) have occurred, it is hereby set aside.
4. 1st respondent shall pay costs of this suit.

IT IS ORDERED THAT

TERMS OF THE INTERIM RELIEF GRANTED

Pending the determination of this matter on the return date, the applicants are granted the following relief:

1. 2nd respondent be and is hereby compelled to hold an urgent enquiry in terms of s 116 of the Administration of Estate Act [*Chapter 6:01*] into the actions of the 1st respondent.
2. Stay of execution of a purported agreement entered into between the 1st respondent and 3rd and 4th respondents be and is hereby granted.

SERVICE OF THE PROVISIONAL ORDER

3. The applicant/applicant's legal practitioner and/or employees be and are hereby permitted to serve copies of this provisional order on the respondents or their legal practitioner/employees."

The matter was set before me on 16 July 2018, as the return day to deal with the issue of confirmation of the provisional order or its discharge. The application has been opposed by the first, third and fourth respondents.

Background

Both applicants are beneficiaries in the intestate estate of the late James Mutererwa Kunyarimwe (hereinafter referred to as the deceased). The deceased was a polygamist during his lifetime. The property which is part of the deceased estate and is now the centre of dispute, is a piece of land situate in the District of Salisbury measuring 9465 ^{m2} held under Deed of Transfer 3351/73 otherwise known as 64 Borrowdale Brooke Estates. An agreement of sale for the property was concluded and signed between the first respondent in his capacity as executor of the estate and third and fourth respondents on 24 June 2017. When this application was lodged on 19 October 2017 no transfer of title had yet passed to the third and fourth respondents. At the time of hearing

this application, this court was advised that title of the property was passed to the third and fourth respondents against the clear provisions of the interim order of 24 October 2017 which says; "2. Stay of execution of a purported agreement entered into between the first respondent and third and fourth respondents be and is hereby granted."

The basis upon which the applications seek the confirmation of the provisional order is that they were granted the right of first refusal to buy the property which right they still want to exercise. The first, third and fourth respondents deny that such right was ever granted to them, instead they claim, applicants were granted an option agreement to purchase the property on 15 August 2016 for $180 000 within three months calculated from 16 August 2016 to 16 November 2016.

At the commencement of the hearing of this application Advocate *Sithole* who represented the applicants made an oral application that first respondent must not be heard because he had dirty hands. This was the case, he said, because he acted contrary to the interim order interdicting execution of the agreement of sale of the property, when he allowed the transfer to proceed. Mr *Dondo* for the first respondent argued that there was no willful decision by the first respondent to disobey the court order. It was further argued that when the interim order was granted the conveyancing papers were already with the conveyancers since instructions to transfer were done before the urgent application was filed. The first respondent argued that the omission to stop the transfer was not intentional neither was it an act of dishonesty.

It was submitted on behalf of applicants that the second respondent could purge the contempt by consenting to the part of the final order sought to cancel the Deed of Transfer No. 4644/17. The first respondent expressed such consent. In the circumstances I did not find it necessary to bar the first respondent from being heard. And furthermore, the first respondent is sued in his official capacity and may not suffer any prejudice if barred.

The court heard full argument on the merits of this matter. The issues for determination by the court are:

1. Whether the applicants have the right of first refusal to purchase the property.
2. Whether the applicants have the option agreement to buy the property.
3. If applicants have right of first refusal, if there was tacit fulfilment.

4. Whether the agreement of sale of the property between first, third and fourth respondents should be declared null and void.
5. Whether the transfer of ownership of the property to third and fourth respondents should be set aside.

Right of First Refusal/Right of Pre-emption or Option Agreement

The position taken by the first, third and fourth respondents is that the applicants were at a meeting of 15 August 2016 before the Master, when they were given a buyout option to buyout the other beneficiaries. The applicants were initially given 3 months within which to exercise the option rights, that is from 15 August 2016 to 15 November 2016. The applicant failed to exercise their right within that period. They were allowed an extension of 45 days up to 30 December 2016 but none the less failed to do the buyout.

The applicants do not dispute that such time was laid out to them. First and foremost they deny there was an option agreement but instead a right of pre-emption. The reason why they failed to exercise that right of first refusal was that the first respondent refused to give them the necessary documentation to exercise their right. The necessary documentation was to assist them to access finance from financiers. They did not specify as to the identity of such documents but the fact is they did request for some documents which they did not receive from the first respondent.

The first respondent said what he did was above board because even an inquiry by the Master under s 116 of the Administration of Estates Act, shows that his conduct was proper. In fact the conclusion of the Master in that inquiry concludes thus;

> "Having considered the submissions our observation filed of record we have come to the conclusion that the executor had followed proper procedures up to the time of the sale. However, the issue of the contractual dispute are outside our jurisdiction." [my underlining]

This conclusion is clear in that the Master could not determine whether there was a right of first refusal or option. The distinction between a right of first refusal or pre-emption and that of an option is clear.

A right of first refusal or pre-emption is created when in an agreement one party (the grantor) undertakes that when he decides to sell his/her property he/she will first give the other party (the grantee) the opportunity of first refusal of buying the property at a price equal to that offered by another person. The grantor is then said to be under an obligation to do what he voluntarily bound himself/herself to do, that is, offer the property to the grantee first at a price

equal to that offered by a third party or which he is prepared to accept from any other would be buyer.

The grantee is said to have acquired the correlative right to the property offered to him/her first so that he/she can match the price offered by the third party or refuse the offer. See *Manchester Ship Canal Company* v *Manchester Racecourse Company*, [1901] 2 Ch 37 at 46-47; *Sher* v *Allan*, 1929 OPD 137 at 140-142; *Cohem* v *Behr*, 1946 CPD 942 at 946 – 947; *Bellairs* v *Hodnett & Anor*, 1978 (1) SA 1109 at 1138F – 1139H. *Hirschowitz* v *Moolman & Others*, 1983 (4) SA 1 at 6; *Sotoriou* v *Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 at 932 B – G; *Madan* v *Macebo Heirs & Anor* 1991 (1) ZLR 295 (S) at 302 A – 303D.

A right of pre-emption is therefore created by an agreement between the granter and the grantee. A breach of such contract like in any other contractual relationship can create a cause of action. The onus is on a party who alleges a breach to show that there was such an agreement. See *Eastview Gardens Residents Association* v *Zimbabwe Reinsurance Corporation Ltd and others*, 2002 (2) ZLR 534 at 549 B – C.

While this has been said about the right of first refusal, there are a number of authorities which distinguish an option from the right of first refusal.

In the case of *Onai Makamure* v *Devon Engineering (Pvt) Ltd*, HH 106-2008 at p 3 – 4 where GOWORA J, as she then was had this to say;

> "The difference between an option to purchase and a right of first refusal was discussed at length in *Cohen* v *Behr* 1946 CPD 942 which is a judgment by DE VILLIERS J as he then was. At p 947 the learned judge quoted the following passage from the judgment of *Williams L.J from Manchester Ship Canal Company* v *Manchester Race Course Company.*
>
> "There appears to be two possible meanings of the words 'first refusal'; one is that they mean the opportunity of refusing a 'fair and reasonable' offer by the Race Course Company to sell the land en bloc to the Canal Company; the other is that they mean the opportunity of refusing the land at a price acceptable to the Race Course Company offered by some person other than the Canal Company, which is what l understand by the term 'right of pre-emption'…..The agreement does not provide that the first refusal shall be given at any particular price or on any particular terms; nor that the price and other terms shall be ascertained by arbitration or in any other way. Looking at these circumstances, I think there is at least fair ground for the contention that the clause only imports that the Race Course Company shall, in either of the prescribed events, make a fair and reasonable offer to sell the land to the Canal Company, and I wish to consider the case from this point of view, which is the view most favourable to the defendants…… I think that the very words 'first refusal' in clause 3 import that the price at which the Race Course Company give the Canal Company the 'first refusal' is a price at which the Canal Company will offer the land to other would be buyers in the event of the refusal of the Canal Company to buy at that price…..The

> contract here to give Canal Company the 'first refusal' involves a negative contract not to part with the land to any other company or person without giving that first refusal."
> A more concise description of the term was given by GWAUNZA J (as she then was) in *Sawyer* v *Chioza* 1999 (1) ZLR 203at 207C – G whereat she said the following:
>
> > "Cooper Landlord and Tenant at p 143 aptly summaries the grantor's obligations in relation to the exercise by the grantee of his right of pre-emption:
>
> "An agreement of pre-emption contains both a negative and a positive element. The negative element is that the grantor is restrained from selling to a third party, the positive element is once he is prepared to sell he is under obligation to sell to the grantee."
> In my view, the above captions describe the essential elements of the right of pre-emption (or first refusal) in terms that are both clear and unambiguous. My reading of these requirements is that the following steps must, in that sequence, be followed in the exercise of the right of pre-emption:
>
> a) A specific third part offers to buy the property at a given price;
> b) The grantor is prepared to sell at that price; but
> c) Before accepting the buyer's offer, the grantor reverts to the right of pre-emption, informs him of his decision to sell at the price offered by the particular buyer and asks him (grantee) to exercise his right of first refusal.
>
> Thereafter, the outcome, in terms of who ends up buying the property, depends on the grantee's decision on whether to exercise his right…"

In the *Eastern Motors (Pvt) Ltd* v *City of Mutare*, HH 212 – 2001 at page 4 MAKARAU J as she then was had this to say;

> "It appears implicit from the above decisions and numerous other decided cases on the subject that an option comprises of two distinct parts, an offer to sell and an agreement to keep that offer open for a stipulated period. The acceptance of the offer within the stipulated period brings into being a valid sale agreement."

It was also held in *Venture* v *Birchholts,* 1972 (1) SA 276 A that an option is regarded as a contract sui generis which consists of an offer to sell coupled with an agreement to keep the offer open for a period.

In casu the applicants persisted that there was a right of first refusal and alleged the first respondent breached the agreement when he went ahead and sold the property to the third and fourth respondents without offering the same to the applicants. The applicants state in para 16 of the founding affidavit;

> "Stealthily and without communicating to the applicants, the first respondent proceeded to conclude an agreement of sale with the third and fourth respondents."

This averment was not disputed by the first respondent in the opposing affidavit. Instead the first respondent said he had given the applicants enough time to buy out the other beneficiaries but they failed. The first respondent does not say when he received the offer to purchase from the

third and fourth respondents and being prepared to sell the property at that price, if he informed the applicants, and before accepting the offer if he asked applicants to exercise their right of first refusal. This is why the first respondent maintains it was an option.

Despite the submissions by the first respondent that it was an option, the first respondent in his opposing affidavit in para 8 had this to say, "The agreement of sale is above board and applicants were given ample time to exercise their right of first refusal in respect of the property in dispute and failed to purchase the same." (my underlining)

The first respondent who has at all times been represented by a lawyer cannot now turn around and claim it was an option. There was no good explanation as to why the first respondent would refer to a right of first refusal when he knew it was an option. In fact the papers remain with no amendment. The applicants said it was a right of first refusal in their papers and the first respondent in response also says they had a right of first refusal. He cannot be heard now in submissions that it was an option. The applicants had a right of first refusal.

Agreement of sale between the first respondent and the third and fourth respondents

First respondent does not dispute that he failed to offer the applicants the property when he got the third and fourth respondents as prospective buyers. That failure amounts to a breach of the right of first refusal agreement between the first respondent and the applicants. The breach makes the agreement between the first respondent and the third and fourth respondents void *ab initio*. The agreement was a complete nullity and nothing flows from it. The third and fourth respondents hold title over the property which is dependent upon the agreement with the first respondent. That title is also a nullity. See *Mac Foy* v *United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) e 1172 where Lord DENNING had this to say;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Likewise the title deed in favour of the third and fourth respondents must collapse having been put on nothing, there being no agreement.

A good case has been made for the confirmation of the provisional order granted by this court on 24 October 2017.

Accordingly:

IT IS ORDERED THAT:

1. The provisional order granted by this court on 24 October 2017 be and hereby confirmed in the following terms:
   (a) The agreement of sale entered into between the 1st respondent and 3rd and 4th respondents be and is hereby declared null and void.
   (b) The transfer of the property to the 3rd and 4th respondents is hereby set aside.
   (c) The 1st respondent be and is hereby ordered to release all documents necessary to enable applicants to exercise their right of first refusal in respect of a certain piece of land situate in the District of Salisbury measuring 9465 square metres held under deed 3351/13 otherwise known as 64 Borrowdale Brook Estate "the property", within seven days of receipt of this order.
   (d) In order to enable the 1st respondent to comply with para (c) of this Order the applicants shall furnish the first respondent with a written list of the documents considered necessary for them to exercise their right of first refusal.
   (e) 1st respondent shall pay costs of suit.

Messrs Mawere Sibanda, applicants' legal practitioners
Dondo & Partners, 1st respondent's legal practitioners
Messrs Muvirimi & Associates, 3rd & 4th respondents' legal practitioners