

MAINOS MUDUKUTI  
versus  
DIRECTOR OF HOUSING OF THE  
CHITUNGWIZA TOWN COUNCIL (NO)  
and  
CHITUNGWIZA TOWN COUNCIL  
and  
NORMAN EMMANUEL KUJEKE  
and  
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
MATHONSIJ  
HARARE, 9 March 2014

### **Urgent Chamber Application**

*T K Mandiki*, for the applicant  
*T Marume*, for the 1<sup>st</sup> and 2<sup>nd</sup> respondents  
3<sup>rd</sup> respondent in default

MATHONSI J: The applicant is the executor dative of the estate of his late uncle, Davison Rangarirai Mudukuti who died on 20 October 1998, and during his lifetime was the holder of a lease agreement with an option to purchase for Stand 8451 Unit K Seke, Chitungwiza.

The applicant states in his founding affidavit that when the deceased was promoted to the position of Senior Provincial Administrator and deployed to Marondera he had invited the third respondent, his friend, to move into his house and look after it. When the deceased later tried to re-enter and take occupation of his house in 1996, the third respondent “had grown very comfortable and fond of the premises.” He resisted removal from the house claiming that he had been offered an option to purchase it. Unfortunately the deceased passed away before he could accomplish the eviction of the third respondent.

The applicant continued with efforts to evict the third respondent after his appointment as executor. He instituted eviction proceedings in the magistrates court at Chitungwiza. The matter was initially set down for the trial in November 2014 but had to be

deferred at the instance of the third respondent. When the trial was set to kick off on 11 February 2015, the third respondent only then revealed that the first respondent was now in the process of transferring all rights, title and interest in the property to him.

He was claiming ownership of the house having persuaded the first respondent to pass it on to him.

It turns out that, without communicating with the applicant, the municipality had addressed a letter to the deceased on 30 September 2014, exactly 16 years after his death, in the following:

“CANCELLATION OF TENANCY STAND NO, 8451 UNIT K

After realising that you have sublet stand number 8451 which is still a council property council hereby terminates your tenancy of the house for breaching a contract not to sublet the property to a third party without the consent of council.

Therefore council gives you thirty (30) days from 01-10-14 to 30-10-14 to vacate the premises.

Yours faithfully

K MUKAHANANA  
HOUSING OFFICER

SEKE SOUTH ADMINISTRATION.”

It is curious that after purporting to terminate the contract of a deceased person unprocedurally the Municipality then offered the same property to his old time friend turned foe who had been occupying the property by the grace of the deceased. As to how the deceased could vacate the house when he had long met his maker is the stuff for legends.

The moment the applicant became aware of those developments, he promptly made this application seeking a temporary interdict, to wit;

“TERMS OF FINAL ORDER SOUGHT

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

1. That the late Davison Mudukuti be and is hereby declared the lawful lease holder to Stand No 8451 Unit K, Seke Chitungwiza and effectively that the lease is subjected to estate late Davison Mudukuti.
2. That the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent are hereby interdicted from transferring Stand No 8451 Unit K, Seke Chitungwiza to the 3<sup>rd</sup> respondent or any third party

pending the determination in Magistrates Court Case No 755/13.

3. That 3<sup>rd</sup> respondent pay the costs of suit on a legal practitioner and client scale.

#### TERMS OF INTERIM RELIEF SOUGHT (SIC)

Pending determination of this matter, the applicant is granted the following relief:

- (a) That this order act(s) as an interdict preventing the 1<sup>st</sup> respondent, the Director of Housing of the Chitungwiza Town Council and the 2<sup>nd</sup> respondent, Chitungwiza Town Council from transferring the lease granted in favour of Davison Mudukuti to Norman Kujeke or any other third party pending the determination of the magistrates court in case No 755/13.”

The fourth respondent has also weighed in with a report in terms of r 248 of the High Court Rules, 1971 dated 6 March 2015. He states:

“I submit that it would appear the deceased Davison Mudukuti was the holder of the lease agreement which agreement was not cancelled as at date of death. Also from documents filed on record it would appear there are material disputes of fact as to the holder of the lease agreement which needs to be determined first and or established as to whether the cancellation of the lease agreement by the first and second respondents was done legally. There are also conflicting statements in that the first and second respondents purport to have cancelled the lease agreement several years after death of the lease (sic) which appears irregular with the 3<sup>rd</sup> respondent alleging that there was an oral agreement of sale between him and the deceased for the sale of the disputed property.”

In my view, the applicant, as the executor of the deceased’s estate, has made a case for the grant of a temporary interdict, which is granted where the party seeking it has shown that he has a *prima facie* right, that there is a well grounded apprehension of irreparable injury, there is no other ordinary remedy and that the balance of convenience favours the grant of the interdict.

I am satisfied that all the requirements for the grant of a temporary interdict have been met. *Prima facie* the estate has a claim to the house as the lease agreement together with all rights flowing from it was in existence at the time of the death of the deceased. To that extent certain procedures relating to how claims against a deceased estate are made kicked in. Clearly the agreement could not be cancelled 16 years after death without following the law.

Correspondence shown to me point to spirited efforts being made to transfer the lease to the third respondent, thereby grounding a reasonable apprehension of irreparable harm to the estate. Clearly there can be no other remedy available to the applicant except an interdict

and the balance of convenience clearly favours the granting of it until such time that the rights of the parties have been determined.

Mr *Marume* for the first and second respondents submitted that the deceased was subletting the property to the third respondent in breach of the lease agreement. As it is, the applicant and the first respondent are fighting over rights that they do not have. For that reason the applicant has not established any *prima facie* right.

In my view this may be so but the municipality could not proceed against the deceased estate the way it did. The arguments advanced on behalf of the municipality should be made at the appropriate time when the respective rights of the parties are being determined. Of course there is a need to join the first and second respondents in such proceedings.

For now, however, there is a case for the grant of the interdict.

Accordingly the provisional order is granted as amended.

*Mutumbwa, Mugabe & Partners*, plaintiff's legal practitioners  
*Matsikidze & Mucheche*, 1<sup>st</sup> and 2<sup>nd</sup> respondents' legal practitioners