IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO.870/85

In the matter of

MICHAEL MAVIMBELA	Applicant AND
MUSA BOOYSEN MAVIMBELA	1st Respondent
MASTER OF THE HIGH COURT	2nd Respondent
CORAM:	HANNAH, C.J.
FOR THE APPLICANT:	MR. P. M. SHILUBANE
FOR FIRST RESPONDENT:	MR. K.M. NXUMALO

JUDGMENT

(29/8/86)

Hannah, C.J.

By Notice of Motion dated 5th December 1985 the applicant seeks an order which would enable him to have transferred into his name a plot of land situated at 227 Mhlaba Road. Piggs Peak (the land). The land belonged to the applicant's late father, Dzelelwako Reginald Mavimbela, having been purchased by him from the Government on 30th April, 1971 for the sum of E170 and the crisp question which falls to be determined is whether the land became the property of the applicant by donation prior to the father's death on 13th February 1976. If it did not, then it appears that it will pass to Musa Booysen Mavimbela, the person appointed heir to the father's estate at customary law, and who for this reason has been joined as respondent to the application.

The essentials of the applicant's case are set out in his founding affidavit sworn on an unspecified day in December 1985. I would say in passing that the fact that the affidavit is not properly dated and that it contains one glaring typographical error shows a lack of care and attention on the part of those acting for the applicant. The Court could, of

course, penalise such carelessness but while I intend to overlook it on this occasion attorneys should not think that the Court will always adopt such a forgiving attitude. Attorneys should not be too surprised if on another occasion the Court simply refuses to hear an Application where the papers are defective.

According to the applicant his father owned certain businesses in addition to the land and hand made provision during his life for various of his sons by way of gift. In the case of the applicant the provision made was a donation to him sometime before 9th May, 1972, of the land. This, he said, took place during a visit made by the father to his home. At the time there were no buildings on the land, although there is evidence that the father had lived on the land some years before he purchased it, and the father simply said that he was giving the applicant the land.

The applicant said that later he accompanied his father to the office of the father's attorney, Mrs. Muller, where certain documents were signed by both men. These documents, Exhibits A and B, were produced by the applicant and a perusal of them shows them to be powers of attorney to give transfer of the land. Exhibit A nominates certain attorneys to act for the father and then continues:

"WHEREAS I did on the 9th May, 1972 in consideration of the natural love and affection for my son, MICHAEL MAVIMBELA. donate there (sic) property hereinafter mentioned to him subject to the conditions of title, AND WHEREAS my said son has accepted the said donation, NOW THEREFORE I authorise my said Attorney and Agent to code and transfer, in full and free

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property to and on behalf of MICHAEL MAVIMBELA (born in Piggs Peak in 1939) ....."

The land is then described and there follows a renunciation of title to the land and a confirmation of the attorney's authority. Both pages bear the signature "D R Mavimbela" at the foot and a further signature "Dzelelwako Mavimbela" appears opposite the signatures of two witnesses.

The document is dated 9th May, 1972.

Exhibit B is headed "Special Power of Attorney" and reads:

"I, the undersigned, MICHAEL MAVIMBELA (Born in 1939) having read the aforegoing Power of Attorney, dated the 9th day of May, 1972, given by DZELELWAKO REGINALD MAVIMBELA (born in June, 1901) in respect of the donation by him to me of the property therein mentioned, do hereby nominate, constitute and appoint NORMAN JOHN MACROBERT and/or GERHAROUS HENDRIK WILLEM HITGE and/or JACOB EGMONT KNOLL with power of Substitution, to be my lawful Attorney and Agent in my name, place and stead, to appear before the Registrar of Deeds for Swaziland at Pretoria, and then and there as my act and deed on my behalf to accept the aforegoing donation and transfer the said property into my name."

This document bears the same date as Exhibit A and is signed "Michael Mavimbela" opposite the signatures of what appear to be the same witnesses.

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I pause here to mention the submission made by Mr. Nxumalo that even accepting these documents to be authentic they do not evidence sufficient acceptance on the part of the applicant to perfect the donation. His argument turns on the fact that in Exhibit B the applicant authorised his attorneys to appear before the Registrar of Deeds:

"and then and there as my act and deed on my behalf to accept the foregoing donation."

and is to the effect that these words evince an intention on the part of the applicant not to accept the donation until such time as transfer should take place. With great respect to Mr. Nxumalo I consider that this argument attaches far too much weight to formal legalistic words and ignores the substance of the documents and the surrounding evidence. The strongest possible evidence of acceptance by the applicant, assuming the documents to be authentic, is the father's acknowledgement in Exhibit A that the donation had been accepted. Quite apart from this there is no reason whatever to suppose that the applicant was in the least reluctant to accept the gift of the land. His evidence was that the donation had been made some time prior to the visit to the attorney and he had immediately accepted. If this be right Exhibit A must be regarded merely as a step in the completion of legal formalities and that part which refers to the donation having been made on 9th May 1972 may be construed as a confirmation or reiteration of the earlier donation. Further, the very fact that the applicant accompanied the father to the attorney's office and there signed a power of attorney in the terms of Exhibit B can itself be regarded as evidence of his acceptance. Whichever way the matter is looked at there is, in my opinion, overwhelming evidence of an acceptance by the applicant of the donation and the words relied upon by Mr. Nxumalo should not be construed as qualifying that acceptance in any way.

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Returning to the history, despite the power of attorney having been given no further step was taken by either father or applicant to have the land transferred. According to the applicant's oral testimony it simply did not occur to him to do anything further. In addition to signing a power of attorney the father had also given him the title deed to the land and as far as he was concerned the land was his. He started to build a house on it and in 1975 raised a loan for the purchase of a bus on the security of the land. This loan was, of necessity, made in the father's name by a bank and the mortgage registered on 17th March 1975 but as I understand the evidence the repayments were made by the applicant and completed in 1981. The applicant surrendered the title deed to the bank and when the loan was repaid it was returned to him. Following the death of the father in 1976 he continued in possession of the land and built a more modest house on it than the one first started and it was not until 1983, when the disputed question of who was heir was finally resolved by the family's chief, that the applicant became aware that his title had not been perfected.

The events of 1983 are of some moment and I now turn to consider them. As I have already indicated the Mavimbela family was unable to agree upon an heir and recourse had to be made to their chief. In about March, 1983 the chief appointed the first respondent, the applicant's nephew and a grandson of the father, heir and later in the year the family gathered at the office of the District Commissioner for that official to confirm the appointment. Despite dissent from certain members of the family, including the applicant, the appointment was confirmed, as is evidenced by a letter dated 4th July, 1983, and it was stated that everything which had been owned by the father would thereafter be owned by the first respondent. The applicant said that he then pointed out that the land at 227 Mhlaba Road had been donated to him by the father and that it was his. Following

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this meeting the dispute as to who should be rightful heir was taken further, ultimately to the palace, and whether the matter has been finally settled I know not. Throughout this time the applicant saw no need to produce exhibit A and B or the title deed to the first respondent and it was only when attorneys acting for the first respondent placed an adver- tisement with a view to having a new title deed issued that Exhibit A and B and the title deed were produced to them.

The account of the first respondent and his mother of the meeting at the District Commissioner's Office differs from that of the applicant in one important respect. Whereas the applicant said that he stated that the land had been donated to him by the father the other two witnesses said that his claim was that he had purchased the land from the father. The first respondent said that the meeting was adjourned to enable the applicant to produce receipts as proof of purchase. No such receipts were produced and when the first respondent later learned that the applicant was claiming that the land had been donated to him rather than sold he looked upon such claim and the documents produced in support thereof with with great suspicion. It is this inconsistency in the applicant's claim which has led the respondent and his mother to challenge the genuiness of exhibits A and B and to resist this application.

The claim made in this application is, in substance, a claim made against the estate of a deceased person and in my view it should be governed by those principles which apply to such a claim. In such cases the standard of proof required remains the same as that required in any other civil action although the Court must scrutinise with caution the evidence led in support. In Re Hodgson, Beckett v Ramsdale (1885) 31 Ch D 177 at page 183 Sir James Hannen P. said:

" ..... it is said on behalf of the Defendants that this evidence is not to be accepted by the

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Court because there is no corroboration of it, and that in the case of a conflict of evidence between living and dead persons there must be corroboration to establish a claim advanced by a living person against the estate of a dead person. We are of opinion that there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that

in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule which prevents that conviction being acted upon."

In Wood v Estate Thompson and Another 1949 (1) S.A. 607 Selke J. enunciated the principle as follows:

"I am not aware of any rule of our law or of any practice of our Courts which requires that, merely because a claim is one made against a deceased's estate, it must on that account be proved with a special degree of cogency, and I do not believe that any such rule exists. If it did, it would no doubt work for the protection of the estates of deceased persons against fraudulent claims but on the other hand it might work considerable injustice on honest claimants against such estates. It seems to me that such a principle, if it existed, would obviously cut

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both ways, and on the whole, I do not think the cases are really authority for more than the principle that the Court must examine with a very cautious eye uncorroborated evidence given in such cases; but I do not appreciate that the Court should do more in that respect than it is wont to do in all cases where the interested evidence is given ex parte against someone who is not in a position to answer it."

The foundation or bedrock of the applicant's case is, of course, the existence of the powers of attorney, exhibits A and B. In addition there is the fact that he has been able to produce the title deed to the land which tends to support his claim that this was given to him by the father which in turn tends to support his evidence that the land was donated to him. Further, there is the fact that he has been in possession of the land at very least since the father's death in 1976. On the other hand, the first respondent's claim that the applicant has acted inconsistently does receive some support from a conflict between the applicant's oral evidence and his affidavit evidence as to the reason for his failure to have the land transferred. In his oral evidence the applicant said that he took no steps to have the land transferred to him due to ignorance but in his affidavit the reason advanced is firstly a mistaken belief that he would only be entitled to take transfer after the death of the father and secondly that following the father's death transfer could not take place as no executor was appointed. I shall return to this in due course.

The allegation made by the first respondent that exhibits A and B are forgeries is a very grave one and it comes as a considerable surprise to me that neither of the persons who apparently witnessed the signatures on those documents were called to give evidence or, at very least, that

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some attempt to explain their absence was not made. When this was put to Mr. Shilubane during final submissions he appeared to recognise the force in the point because he then applied for an adjournment for the matter to be rectified but I could see no good reason for departing from the rule that litigants should prepare themselves for trial in advance and not prepare their cases piece-meal as the case develops. However, the fact that the applicant's evidence as to the authenticity of exhibits A and B is not corroborated is not necessarily fatal although it is a factor which has to be weighed in the balance. What seems to me of great significance is the nature of the two documents. Both were obviously prepared by a lawyer and I have to place in the balance the unlikelihood, though by no means impossibility, that the applicant has managed to retain the services of a lawyer to produce what would have to be regarded as a very subtle forgery. I say subtle because the most obvious forgery, in the circumstances of this case, would have been that of a deed of donation but the documents in question are merely powers of attorney. Also, it would take a clever forger to think of forging an abreviated form of signature - "D R Mavimbela" - at the foot of each page of exhibit A and a fuller signature - "Delelwako Mavimbela" in the place for signature on the second page. Further, it is permissible for me to make my own comparison between the signatures on exhibit A and those on other documents which are genuine or for which there is good reason to believe are genuine although I accept that there is considerable danger attendant upon such an exercise. In this case I have been provided with the signature "Delelwako Mavimbele" on the mortgage bond already referred to and the signature "D R Mavimbela" on what purports to be a birth affidavit of the

father mads before the District Officer, Piggs Peak on 3rd September 1970. Both these documents and the signatures thereon appear to be genuine and it cannot escape notice that there are striking similarities between these signatures and those on the questioned document.

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Lastly, there is the view I take of the applicant as a witness. He struck me as a totally unsophisticated person and I very much doubt whether he would have the guile to become involved in an elaborate subterfuge. While I do not regard him as a completely reliable witness on matters of detail I think it highly improbable that he was a party to a forgery. While I accept that no satisfactory explanation has been advanced for the inconsistency already referred to between the applicant's oral evidence and his affidavit evidence, having regard to the foregoing matters I am nonetheless sufficiently convinced that exhibits A and B are genuine and truly evidence a donation by the applicant's father.

As for the conflict as to what was said by the applicant at the meeting at the District Commissioner's office I think it most unlikely that the applicant who, having regard to my finding as to the genuiness of exhibits A and B must he taken to have had those documents in his possession, would have maintained that he had purchased the land. I do not, however, think that the first respondent and his mother manufactured this piece of evidence. I think it probably arises from a misunderstanding on their part of something that was said. There may, for example, have been some reference to the father having purchased the land and the receipts being available and having regard to heated feelings concerning the inheritance this was misconstrued..

One further point was raised by Mr. Nxumalo and that is that the mortgaging of the land in March. 1975 should be held to have the effect of revoking the donation. Whether the act of mortgaging could be construed as an act of revocation I very much doubt but the point is adequately met by the general rule that a valid donation cannot, save in the case of donations between spouses, be revoked. (See The South African Notary by Elliott and Banwell (2nd ed.) page 88 and the cases there cited).

None of the exceptions to this rule apply in the instant case.

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Accordingly, I make the following order:

The Sheriff or his deputy is authorised and directed to take all such steps as nay be necessary and to sign all necessary documents and consents for the purposes of effecting transfer into the name of the applicant in the Deeds Office of Swaziland the following property, namely:

CERTAIN : Lot no. 227 situate in Mhlaba Road in the Piggs Peak Township, District of HHOHHO, Swaziland:

MEASURING: 1852 (one thousand eight hundred and fifty two) square metres;

HELD BY: Dzelelwako Reginald Mavimbela under Crown Grant No.90/1971.

N.R. Hannah

CHIEF JUSTICE