TIMOTHY TENDAI MYAMBO
versus
PATHACRES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHAREWA J
MUTARE, 11-18 July 22 November 2024

CIVIL CONTINUOUS ROLL

Declaration of validity of a sale agreement.

Mr B Majamanda, for the Plaintiff
Mr M Hogwe with Mr G Maromo, for the Defendant

CHAREWA J: The plaintiff issued summons against the defendant seeking a *declaratur* that the sale agreement for land between the parties was valid and binding with the consequential relief that defendant be interdicted from selling Lot 18, 19, 20, 21 and 38 to other persons. The further relief was that Lots 18,19,20,21,and 38 be declared plaintiff's lawful property, with the consequential relief that , and since he paid for the land, defendant be compelled to pass delivery/transfer of the lots to plaintiff. On the contrary, the defendant raised two defences: firstly, that the agreement was invalid as it was contrary to the Regional Country and Town Planning Act [Chapter 29:12] as the subject of the agreement was undivided land, and secondly, that even if the agreement of sale was valid, plaintiff did not pay the full purchase price and is therefore not entitled to transfer or delivery. As a consequence defendant counterclaimed for an order of eviction, demolition of structures and the payment of holding over damages with respect to Lots 18, 19,20,21,22 and 38. Plaintiff excepted to the counterclaim. Both parties sought costs on the higher scale.

Background

The common cause facts are that defendant is the registered owner of certain piece of land in the District of Umtali, called the Remaining Extent of the Willows of Clare Estate Ranch measuring 921, 5039 hectares, held under Deed of Transfer 9120/1987. Sometime in 2015, defendant, began the process of subdividing the land and selling off lots. It is further common cause that, defendant was properly represented by Takawira Farikai Zembe as testified to by the director Deborah Zembe. The farm being agricultural land, it is further common cause that

defendant did not have a subdivision permit or a certificate of no present interest as required by law. The subdivision permit was eventually issued in November 2017.

Plaintiff learnt about the intended subdivision and sale from the Agritex official Tobias Mabodo. Together with Tobias Mabodo, plaintiff approached defendant and some agreement, the full facts of which are in dispute, was reached. The agreement was not reduced to writing. However, it is common cause that plaintiff paid USD15 000 to the defendant for an undivided and unidentified piece of land measuring 6 hectares and that an agreement of sale for the purpose was executed by defendant's legal practitioners. It will be noted that, without amending the summons and declaration the further pleadings and the testimony in court, tacked on the issue of Lot 22. Therefore, according to Exhibit 4, the total sale value of the land claimed by plaintiff is USD77 300 with a hectarage of 78.5 hectares, comprising of Lots 18, 19, 20, 21, 22, 38. According to plaintiff there was also a seventh unidentified and undivided lot. Presumably, this 7th Lot is the one that is the subject of the written sale agreement for which USD15 000 was paid in respect of 6 hectares as none of Lots 18, 19, 20,21 and 38 (and even Lot 22 which is not subject of the plaintiff's claim) measure 6 hectares . Plaintiff claims (and defendant disputes), that he paid the full purchase price.
It is common cause that plaintiff is in occupation of some of the land as will appear further in this judgment. As a consequence of this occupation, and for the past several years, the record will show that the parties have been before the courts on numerous occasions, with defendant seeking to evict plaintiff or bar him from occupying the land or plaintiff seeking to assert his rights to the land. The current matter is but one such litigation between the parties.

The issues

At the pre-trial meeting, the parties aptly synthesized the issues as follows:

1. Whether or not the parties entered into a valid agreement of sale? Concomitantly, whether or not land without a subdivision permit can be validly sold.
2. If so, whether or not plaintiff paid the purchase price,
3. And consequently whether plaintiff is entitled to the land being Lots 18, 19, 20, 21, 22, and 38.

Preliminary issues

At the commencement of the trial several preliminary issues were resolved by consent.

1. *Plaintiff's exception to the defendants counterclaim.*

This was abandoned with no order as to costs.

2. *The issues for trial*

A fourth issue was added as follows:

"4. If the answer to issue 1, 2 and 3 is no, whether the defendant is entitled to evict the plaintiff and if so, whether the defendant is entitled to holding over damages and in what amount?"

3. *Expungement from the record*

The final preliminary issue was a purported notice of amendment of the declaration filed of record at p.127 of the bundle of pleadings for trial which the parties agreed to have expunged from the record.

4. *Rate for holding over damages*

In the event that the court finds that there was no valid sale agreement or beach of any valid sale agreement for non-payment of the full purchase, the rate of USD150/hectare/year was agreed.

Plaintiff's case

The plaintiff testified on his own behalf, and his testimony was supported by one Tobias Mabodo who was an Agritex official at the time of the alleged sale.

Their testimony was to the effect that, plaintiff was looking for land, preferably near the highway, to settle his parents. Tobias Mabodo informed plaintiff of defendant's intention, as represented by Takawira Farikai Zembe, to subdivide its farm and to sell off plots. The two of them paid a visit to defendant's farm in September 2015, and were shown the lots for sale. Plaintiff settled for Lots 18, 19, 20, 21, 22, and 38, as well as another unnumbered plot, all measuring a total of 85,3 hectares and which total sale value he puts at USD75 300 or USD75 500. However in his further testimony he acknowledges that the total amount required for all the lots was in fact USD87 500.

Plaintiff avers that he paid the full purchase price for all the pieces of land in the amount of USD77 300. USD5 000 was paid directly into the account of Deborah Zembe, defendant's director. Another USD10 000 (for an unnumbered and unidentified plot measuring 6 hectares.t) was paid at the offices of defendant's legal practitioners, Mberi Chinwamurombe, where a memorandum of agreement of sale, entered into the record by consent as Exhibit 2, was drawn up. The balance of the payments were made in kind in that plaintiff paid, on behalf of defendant, for processing of the certificate of no present interest and other administrative requirements to

facilitate the subdivision of the land. In support he referred to a note from defendant's Mr Farikai Zembe, dated 27 December 2017 which was entered into the record by consent as Exhibit 4. He further submitted that Exhibit 4 marks the day when the agreement of sale was concluded.

Plaintiff testified that he took occupation with the construction of a cabin in 2015, and in 2016, he started constructing permanent structures in full view of defendant's representative and director who raised no objection

Under cross examination plaintiff conceded that the written agreement of sale, dated 12 August 2016, Exhibit 2, does not identify the property sold but only the hectarage (6 hectares) and that the description of the property sold is blank. He further conceded that the agreement identifies him as the seller and Takawira Zembe (and not the defendant company) as the purchaser. He acknowledged that it was his foolishness to enter into an agreement with an individual in respect of company property even though he was aware of and had researched on the defendant's status and had obtained its CR14 prior to entering any agreement. He also confirmed that there was no subdivision permit at the time of sale and that payments were made in 2015 (prior to the execution of the agreement of sale, in the amount of USD10 000 and in 2016 in the amount of USD77 300, paid in tranches of USD60 000, USD15000 and USD2700. Accordingly he paid the full purchase price for 7 lots of land, but had no receipts for the averred payments but an email. He did not produce such email.

Finally, he confirmed that defendant took issue with his occupation of its property since 2015 and construction of permanent structures in 2016 and the parties have been embroiled in litigation ever since. Plaintiff further averred that he has physically been present on Lot 22 which he has fenced and constructed residencies for himself and his workers, and Lot 38 were he has constructed workers houses and Boer goat pens because he fully paid for these two lots. Crucially, plaintiff's witness made contradictory averments: that papers were produced by Defendant's representative Takawira Zembe showing that the land belonged to him, but then confirmed that the only paper produced was a CR14 showing the three directors of defendant. He also confirmed that defendant did not enter into any agreement with defendant, but with Takawira Zembe unidentified hectares of land. He further confirmed payment of USD10000

Defendant's case

On its part, defendant denies ever entering into an agreement of sale with plaintiff as its land was undivided and lacked a certificate of no present interest at the time of the alleged

agreement. It counterclaimed for eviction and holding over damages calculated at USD150 per hectare per year.

On defendant's behalf, Deborah Zembe testified that indeed Takawira Zembe, though not a board member (as is apparent from CR14 dated 19 May 2016, was tasked with managing the issue of the subdivision of the defendant's farm and consequential sale of lots. He was *in situ* at the farm and dealt with plaintiff. She confirmed that plaintiff indicated his intention to purchase of 6 hectares which purchase went through as she received the money in her account. However, she denied authorising any sale of lots 18, 19, 20, 21, 22 and 38 to plaintiff, but acknowledged that some transactions were done by her husband and she would not know about them. She averred that plaintiff unlawfully and without authority, took occupation of defendant's property in November 2018 and should be evicted and pay damages.

Takawira Farikai Zembe testified that indeed plaintiff, accompanied by Mr Mabodo, approached him looking for land, 5-6 hectares, to buy. But the witness claimed he told plaintiff that the land had not yet been subdivided and he had no confirmation whether it was even possible to subdivide a commercial farm. After a week, plaintiff came back asserting that subdivision would not be a problem as Mr Mabodo would facilitate and plaintiff himself knew high profile officials to assist the process. By then, the witness had in hand a list of the subdivision requirements. No sale agreement had been reached at this time.

The following weekend plaintiff returned with Mr Mabodo and a surveyor who took GPS measurements of the land. On the Monday, plaintiff went to defendant's legal practitioners offices and demanded for an agreement of sale which is Exhibit 2 in the record for 6 hectares, which he had measured at the weekend, and for which he paid a total of USD15 000 at USD2 500/hectare as he refused to pay he asking price of USD4000 per hectare.

The witness denied selling lots 18, 19, 20, 21, 22 and 38 to plaintiff. He explains Exhibit 4 as confidential communication to his legal practitioner rather than an acknowledgement of having sold several lots to plaintiff in cash and kind and tabulating the purchase price. In fact, the witness asserted that the only sum received from plaintiff was USD2500 as a loan to buy a plough and USD15 000 paid for 6 hectares aforesaid. He does not acknowledge the descriptions and attendant sums allegedly paid by plaintiff detailed in Exhibit 4 as part payment for the land. According to his calculations therefore, if the agreement of sale was valid, plaintiff would still owe USD77 300 for 73, 5 hectares.

The law

I am of the view that the point of law raised, with regard to s39 of the Regional Town and Country Planning Act Chapter 29:12 has the potential to resolve the plaintiff's claims in their entirety. This is because a valid sale of land, apart from satisfying the general requirements of a valid agreement of sale, must also be in conformity with s39 (1) the Regional Town and Country Planning Act, Chapter 29:12. Specifically, where the sale is of a subdivision, there must already be an existing and approved subdivision permit, otherwise the sale is *void ab initio*. It is not enough to state that the sale was predicated on the suspensive condition that it was subject to the issuance of such permit or that it was an instalment sale which became complete after the issuance of the subdivision permit. Nor is it helpful that a permit was subsequently approved. The test is whether, at the time the sale agreement was entered into (my emphasis), there was in existence a subdivision permit. If there was not, then whatever agreement the parties reached is irredeemable: no rights to delivery or any other proprietary right can flow from a non-event.[1]

This is the trite position buttressed by numerous judgements in our jurisdiction which have interpreted and applied 39(1) which provides as follows:

> "**39 No subdivision or consolidation without permit**
> (1) Subject to subsection (2), no person shall—
> (a) subdivide any property; or
> (b) enter into any agreement—
> (i) for the change of ownership of any portion of a property; or ……; except in accordance with a permit granted…"

It is instructive to note that, for purposes of the present matter, s39 (2), to which subsection (1) is subject, only excludes municipal, local government and state land from the strictures of s39 (1) (a) and (b). The interpretation of s39, has, in my view, already been settled by the Supreme Court when it held that:[2]

> "… s 39 forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for the change of ownership of the subdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited."*(my emphasis)*

Thus any subdivision or agreement of sale of unsubdivided land other than in terms of s39 (2) is proscribed by law and is thus illegal and invalid.

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[1] MacFoy v United Africa Co LTD (1961) 3 All ER 1169 (PC) at p11721 "If an act is void, then it is in law a nullity."
[2] *X-Trend-A-Home (Pvt) Ltd* v *Hoselaw (Pvt) Ltd* 2000 (2) ZLR 348 (S)

> "As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute."[3]

The courts do not deal with or endorse illegalities. Therefore, once a court finds that an agreement or a contract it is being enjoined to endorse as valid was entered into by the parties contrary to statutory provisions, that finding disposes of the matter. The requirement for courts to uphold statutes is such that even where the parties have not brought the issue up, the court is entitled, *mero motu*, to raise the issue of illegality.[4]

Analysis

It being common cause that, in this case, there was no subdivision permit at the time of the purported sale agreement. It is not necessary to go further: there is therefore no valid sale agreement between the parties, it being proscribed by law. This is a hurdle plaintiff cannot surmount.

No doubt, in order to try and escape the vicissitudes of having entered into an agreement for an unsubdivided piece of land contrary to s39 (1) aforesaid, plaintiff avers that the sale agreement was only concluded on 27 December 2017 with the drafting by defendant of Exhibit 4. I cannot agree: Exhibit 4 was not an addendum to any sale agreement. It is clear on the face of it that it is merely a status report of the situation between the parties. The sale agreement was concluded orally in 2015, following upon which plaintiff took occupation. The written agreement was then generated in 2016 in respect of an unidentified piece of land measuring 6 hectares. By every account therefore, the agreement to sell unsubdivided land was prior to the issuance of a subdivision permit and was accordingly proscribed by law.

Plaintiff is accordingly, not entitled to the *declaratur* he seeks. It is thus not necessary to deal with whether or not he paid the full purchase price. However, in passing, it can be observed that Exhibit 4, which plaintiff relies on to prove payment of the purchase price, falls short of the total amount required for all the pieces of land he lays claim to. Therefore, even had the sale been valid, plaintiff faced a challenge to obtain the *declaratur* he sought.

Defendant's counterclaim

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[3] *York Estates Ltd v Wareham* 1949 SR 197, per Lewis ACJ

[4] Hativagone & Anor v CAG Farms (Pvt) Ltd & Ors [SC 152/14] (2015) ZWSC 42

Having found that the purported agreement between the parties was not valid but rather is void for illegality and consequently that plaintiff is not entitled to the relief he seeks, the final question is therefore whether defendant is entitled to evict the plaintiff and obtain holding over damages.

It goes without saying that if you occupy someone's property without valid reason, you lay yourself open to claims for eviction and payment of holding over damages. I take judicial notice, from court records at Mutare that plaintiff's occupation of defendant's property has been a contentious issue which has been before the criminal and civil courts on numerous occasions. Therefrom is gleaned that the parties have not been in peaceful co-existence since plaintiff took occupation. This position was apparent from the testimony of plaintiff and defendant's two witnesses.

It is clear from the pleadings that the defendant's counter-claim is not founded on the alleged oral and written agreements relied upon by plaintiff, but is based on the *rei vindicatio*: that the defendant is the lawful owner of the land; that the plaintiff is in occupation of the land; that defendant had not consented to such occupation; which occupation was in any event predicated on an illegal, invalid and contested agreement. To cap it all the evidence of Deborah Zembe regarding the plaintiff's illegal occupation of the land was never challenged in cross-examination. Nor did plaintiff provide any evidence of how he "lawfully" took occupation.

Defendant having successfully challenged the validity of the agreement upon which plaintiff derives his *causa* and *locus standi* before the court, it follows that the claim for eviction ought to succeed, and so too, the claim for holding over damages at the agreed rate of USD150/hectare/per annum.

However, damages must be proved. Defendant led no evidence at all with respect to the extent and manner of plaintiff's occupation of its land. What is clear from the totality of the record, and this is more from plaintiff himself rather than defendant, is the admission on page 21 of the transcribed record, that plaintiff is in occupation of Lots 22 and 38 where he has constructed structures which include his residence, workers houses and Boer goat pens. However, no evidence of occupation on Lots 18, 19, 20, and 21 is led. Accordingly, I can only order holding over damages for Lot 22 measuring 36.5 hectares and Lot 38 measuring 8.8 hectares to make a total of 45.3 hectares.

As to the period of occupation, defendant's 1st witness testified that occupation was from November 2018. This was unrebutted. In fact, the averment is a more generous recollection than that of plaintiff who, at page 21 of the transcript, testified that he took occupation

sometime in 2015 when he constructed a cabin. However, the cabin was occupied by defendant's relative. It was only in 2016 that plaintiff started staying "close to defendant" when he commenced construction of his residence and staff houses on the two lots. Accordingly, I find that defendant is only entitled to holding over damages for 45.3 hectares on Lots 22 and 38 at USD150 hectares per annum with effect 10 November 2018.

I must comment that it is unfortunate that plaintiff rooted his claim entirely on the validity of the agreement of sale and his right to delivery/transfer and sought no alternative relief, particularly since it is clear from the testimony of both parties that he made some payments towards the purchase price, the processing of documents towards obtaining the subdivision permit and improvements on the land. However, the court cannot raise claims on plaintiff's behalf or grant him that which he did not seek.

Conclusion

In the premises, the court finds that the agreement of sale between the parties was prohibited by law and the court cannot twin itself to a claim *contra bonos legis.* As a consequence, no rights accrue to plaintiff to support a claim for delivery of the *merx* of such contract. On the contrary the plaintiff, being unable to show that defendant acquiesced to his occupation, must be evicted and pay holding over damages.

Costs

Plaintiff made no submissions to support his claim for higher costs, either in his testimony or in his closing submissions. On the other hand defendant persisted with its claim for higher costs on the grounds that plaintiff's litigation was an abuse of process designed to sanitize his unlawful occupation of defendant's land, which must be punished by the court. This is because he did not dispute that his occupation of defendant's land was without its consent, in circumstance where he justified his position by approaching the court to enforce the terms of a concluded agreement, and which in any event would have been in direct violation of statute.

I would have been persuaded by this argument if defendant's own conduct was not morally reprehensible. Knowing that it was not entitled to sell any land prior to the issuance of a permit, it nonetheless did so, and took plaintiff's USD15 000 for property it was illegally selling. Further, it accepted, as evidenced by Exhibit 4, plaintiff's help to facilitate the administrative processes necessary to enable it to subdivide and sell its land. And as to contradictory evidence, defendant does not fare much better: it's Mr Zembe claimed that he was not authorised to sell

and property by defendant and that he in fact never sold any property to plaintiff, which position he could not maintain and in any case was directly contradicted by his wife. Defendant has only succeeded because the agreement between the parties is directly prohibited by statute. Further, it has failed to prove plaintiff's occupation of Lots 18, 19, 20 and 21 and has therefore only partially succeeded in its own claim for eviction and holding over damages. In the circumstances, I see no reason to depart from the usual position of costs following the results on the ordinary scale.

Disposition

In the premises the following order is made:

1. The plaintiff's claim for a declaration of validity of the sale agreement between the parties and consequent claim to an interdict to bar defendant from selling Lots 18, 19, 20, 21 and 38 to other persons is dismissed.
2. The plaintiff's claim for a declaration ownership of Lots 18, 19, 20, 21 and 38 consequent claim to compel delivery/transfer of the same is dismissed.
3. The defendant's counter claim for eviction and holding over damages succeeds.
    a. The plaintiff is ordered to vacate, and remove all his property, including improvements on the land, from the defendant's property within 30 days of service of this judgment.
    b. The plaintiff is ordered to pay holding over damages in respect of 36.5 hectares on Lot 22 and 8.8 hectares on Lot 38, at the rate of USD150 per hectare per annum or its equivalent in ZIG on the date of payment, with effect from 10 November 2018 to date of vacation.
4. The plaintiff is ordered to pay the defendant's costs of suit on the ordinary scale.

Khupe & Chijara Law Chambers, plaintiff's legal practitioners
Hogwe Nyengedza, defendant's legal practitioners