KENNEDY T. ZIMUNYA
and
LAURAH AGANES TAKUDZWA ZIMUNYA
versus
MARVELLOUS SHUMBA
and
SHONGWE PROPERTY DEVELOPMENT (PVT) LTD
and
MICHAEL TUCHIRI

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE,4.January 2022

Opposed Application

E.Dondo for the applicants
T.Nyamucherera for the 1st and 2nd Respondents
C.Tatira for the 3rd Respondent

MUZOFA J: After hearing parties, I dismissed the application with costs. The applicants have requested for written reasons for purposes of appeal.

The applicants are husband and wife. They purchased two plots known as Plot Number 117 and 118 of Halfway Farm Kadoma 'the property' from the first respondent. Two agreements of sale were signed. The first applicant signed the agreement in respect of Plot 117 and the second applicant signed the agreement in respect of Plot 118. The second respondent is a registered company that facilitated the sale transaction. Its role in the sale transaction was that of an agent. No relief was sought against it. It was not a party to the agreements of sale. The applicants subsequently withdrew the claim against the second respondent after the first respondent raised an objection against the joinder of the second respondent.

In due course, the first respondent cancelled both agreements of sale alleging breach of contract. He then sold the property to the third respondent.

The applicants believed they were not in breach of the contract between the parties. They approached the court for a declarator that,

1. The purported notice of cancellation dated 14 January 2021 or any other purported cancellation of an agreement of sale of Plot 117 Halfway Farm Kadoma entered into between first applicant and the respondents be and is hereby declared void and is of no effect.
2. The purported notice of cancellation dated 14 January 2021 or any other purported cancellation of an agreement of sale of Plot 118 Halfway Farm Kadoma entered into between the second applicant and the respondents be and is hereby declared void and is of no effect.
3. The first and second applicants be and are hereby declared lawful holders of rights and interest in Plots 117 and 118 Halfway Farm Kadoma respectively.
4. The first and second applicants shall continue to pay development levy to the respondents in terms of their respective agreements of sale dated 30 November 2017.
5. First and second respondents be and are hereby ordered to pay costs of suit on a client legal practitioner scale jointly and severally.

Initially the applicants sued the first and second respondents only. The third respondent was joined to the proceedings by way of a consent order under HC 4912/21.Despite such joinder the applicants did not find it necessary to seek an amendment to their draft order for the cancellation of the agreement of sale between the first respondent and the third respondent.

According to the applicants, they entered into an agreement of sale with the first respondent for the sale of the property. In terms of the agreement the purchase price was US$3 000 for each plot payable in two equal instalments. They fully paid the purchase price in terms of the agreement. The applicants were required to pay development levies, which they also paid in terms of the agreement. To their surprise they received notification of cancellation. The notice did not set out the actual breach.

In terms of the agreement, development levies were payable within 60 months. Any default attracted a 10% interest and not cancellation of the agreement. The applicants attached documents as proof of payment for both the purchase price and the development levies. They alleged that they were not given proper notice of cancellation.

The first respondent opposed the application. A point *in limine* was raised on misjoinder of the second respondent. It fell away since the claim was withdrawn against the second respondent. The first respondent did not deny that the purchase price was fully paid. According to the first respondent, the applicants breached payment of the development levies. Clause 10 of the agreement provided for cancellation in the event of a breach. The breach was

not limited to the purchase price. The applicants failed to demonstrate that they were up to date with their payments. The purported annexure G1-G 12 were not attached. The applicants were properly given notice of the breach and they did not remedy it. The cancellation was therefore properly made in terms of the agreement.

The third respondent also opposed the application. His case is that he entered into an agreement of sale of the property with the first respondent on 2 June 2021. He paid US$17 400 as the purchase price. He took possession of the property and commenced improvements. He is an innocent purchaser. He attached photographs of the purported improvements on the property. He also traversed issues on how the applicants breached the terms of the agreement with the first respondent. Obviously the third respondent would not competently place any information before the court on the alleged breach since he was not privy to the agreement, and it was entered well before he purchased the property.

In their answering affidavit to the first respondent, the applicants sought to tabulate the payments they made to demonstrate that they did not default payment of the purchase price and the development levies. I will revert to the payments later in the judgment.

Since at the time of filing this application, the third respondent was not party to the proceedings, the applicants had to file an answering affidavit addressing the third respondent's issues.

The applicants averred that the third respondent failed to demonstrate that he was a *bona fide* purchaser. He was a willing victim. There was no proof of the alleged improvements, photographs can be taken from anywhere. As the second purchaser his rights must give way to the first purchaser's rights which are the stronger. The first respondent no longer had rights in the property therefore he could not alienate any rights to the third respondents. The agreement of sale between the first and third respondents is therefore a nullity.

An applicant for a declaratory order must show that it is an interested person, there is a right or obligation which becomes the object of the inquiry, it is not approaching the court on an abstract or academic matter, there are interested parties upon which the declaration will be binding and that considerations of public policy favour the issuance of the order. See generally *MDC* v *The President of Zimbabwe & Ors* 2007 (1) ZLR 257 (H)

There is no doubt that the applicants have an interest in the subject matter, and this is not an academic exercise. It is the right and the public policy considerations that arise for determination. Even if the applicant seeks a declaratory order it is essentially seeking specific performance. It is trite that where a party seeks specific performance as in this case, the

applicant must demonstrate that he/she fulfilled the terms of the agreements. The right which is subject to enquiry is whether the applicants satisfied their part of the agreement.

From the factual background it is not in dispute that the alleged breach is based on non-payment of development levies. From the documents attached by the applicants as proof of payment and as explained in the answering affidavit, it would appear the applicants were not up to date with their payments of developments levies.

The court accepts that the development levies were due from March 2018.The applicants were expected to pay US$50 for each plot. So from that time to the date of cancellation in January 2021 the applicants must have paid about US $3400 for both plots. The receipts from the second respondent's office do not amount to US$3400. The total in receipts paid from March 2018 is US$2610 including US$300 paid after the agreement was cancelled. The applicants sought to rely on payments made through the bank but not accompanied by receipts from the second respondent's office. Clearly this was not proof of payment since the bank transactions did not state in whose favour the deposits were made. A concession was made on this point. On that basis the bank deposits were not considered. From the receipts attached by the applicants it was evident that the applicants were in default in the payment of the development levies.

The applicants were given notice of cancellation, and this is not disputed. Although the applicants aver that the nature of breach was not stated. The court accepts that there was substantial information to advise the applicants of the nature of the breach. The letter indicated the amount owing. It did not state how it emanated. That on its own cannot be fatal. The address used was the address chosen by the applicants for service. Similarly, the subsequent notice of cancellation was addressed as such, and the applicant received it.

It was submitted for the applicants that, even if there was a breach, which was denied consistently, the first respondent was not entitled to cancel. The remedy for a default is interest and not cancellation.

Clause 11 provides for the payment of the development levies. It is not in dispute that it is part of the terms and conditions of the agreement. A contract must be construed as a whole to give it meaning. Clause 10 of the agreement provides for cancellation of the agreement in the event the purchaser fails to perform any of his obligations. The applicants defaulted in paying the development levies.

The second consideration is whether this is an appropriate case to grant the declaratory relief.

In my view this is a case of a double sale. The following facts are common cause. The applicants purchased the property first. The third respondent was the second purchaser. Both parties have not received title to the property. The principles of a double sale must be applicable in this case.

In the leading case of *Guga* v *Moyo* 2000 (2) ZLR 458 (S) the court dealt with issues of double sales. The general principle is that where a double sale takes place, and transfer has not passed the first purchaser should succeed unless special circumstances dictate otherwise. The first in time is the stronger. The onus is on the second purchaser to establish the special circumstances. Courts will not lean in favour of a second purchaser who had knowledge of the earlier sale. Such a purchaser ceases to be a *bona fide* purchaser. See *Charuma Blasting & Earthmoving Services (Pvt) Ltd* v *Njanji & Ors* 2000(1) ZLR 85 (S).

In the *Guga* case (*supra*) the court considered what constitutes special circumstances. These include the purchase price paid by the parties, whether any of the parties had taken possession, any improvements on the property and whether the second purchaser was not aware of the earlier sale.

In this case the applicants paid US$6000 for both plots. This excludes the development levies. They did not take possession neither did they effect any improvements on the property. The third respondent paid US$17400 for the property. The court accepts that he took possession and made some considerable improvements on the property. The applicants disputed that the photographs relate to the property. However, this remained a bare disputation nothing was placed before the court to show otherwise. Having taken possession, the third respondent effected some improvements on the property by building a house although it was not fully described, erected a perimeter fence and a borehole. The third respondent aver that he was a *bona fide* purchaser who was unaware of the earlier sale. The applicants again disputed this point, but they did not favour the court with evidence to substantiate their point.

In my view the third respondent established special circumstances to tilt the balance in his favour. The justice of this matter dictate that the application must not be granted.

In the result the following order is made.

The application is dismissed with costs.

Messrs Saunyama ,Dondo Legal Practitioners , applicants' legal practitioners
Lawman Law Chambers, 1st respondent's legal practitioners
Messrs Mangeyi Law Chambers, 3rd respondent's legal practitioners