BENIAS NYAHUNZVI

versus

ESTATE LATE CLEVER NZANZA

and

BESTER NZANZA

and

THE MASTER OF HIGH COURT

and

THE CITY OF HARARE

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 7 & 28 September 2010 & 11 October 2010

Mr *T.M. Kanengoni*, for the plaintiff

The defence in person

CHIWESHE JP: In this action the plaintiff seeks an order compelling the second defendant, in his capacity as the executor of the first defendant, to cede and transfer the first defendant’s rights, title and interest in stand, No. 14424/6 Kuwadzana, Harare (“the property”), into the plaintiff’s name, failing which, the deputy sheriff be authorised to sign all the necessary papers to effect such cession and transfer. The second defendant opposes the grant of the order sought and has filed a counter claim seeking an order to eject the plaintiff from the property.

The plaintiff’s case is as follows. He first met the late Clever Nzanza in 2000. He had then indicated to him that he, Clever Nzanza, was selling his house in Kuwadzana. The plaintiff expressed interest in purchasing the property which Nzanza had described as a “bachelor flat” because it was a core house without water or electricity. The late Nzanza advised him that he was selling the property for $150 000-00. The plaintiff indicated that he only had $60 000-00 at the time. Nzanza said he would accept part payment as he needed to pay debts owed to Harare City Council and the Zimbabwe Building Society (ZBS). This verbal agreement was then hand written by Nzanza in his personal diary. The plaintiff, his wife and Nzanza’s wife then appended their signatures thereon. Thereafter Nzanza deposited the money into the ZBS account, got a receipt for that transaction and filed it in his diary. The plaintiff said that in terms of the agreement he would pay the balance of the purchase price through the ZBS. The plaintiff would then keep the receipts of such payments whilst the late Nzanza was to keep the diary in which the agreement had been recorded. The plaintiff was then approached by the late Nzanza sometime in 2007. He was informed that his last payment towards the purchase price would, owing to inflationary adjustments, be $15 million. This amount was to be paid by end of January 2008. The plaintiff says that the late Nzanza had advised him that if anything happened to him, he should see his son Bexter (second defendant) or his brother for the transfer of the property. He understood that late Nzanza’s brother worked at ZBS, Gokwe. The plaintiff says he paid off the $15 million as promised. The total amount paid altogether would then have been $150 million. The monies were paid through the ZBS and the plaintiff kept the receipts in terms of the agreement. He said that the amendments of figures due to inflation were also recorded in late Nzanza’s diary. He denied the assertion by the second defendant that he was a mere tenant whose payments amounted to mere rentals rather than instalments towards a purchase price.

Having paid up the purchase price the plaintiff phoned the late Nzanza in order to arrange transfer of the property. That was on 29 January 2008. The call was not responded to. At the beginning of February 2008, the second defendant came to the property saying he wanted to move into his father’s house. He advised the plaintiff that Clever Nzanza had died and that he, the second defendant, now needed to use the property. The second defendant’s aunt, who had accompanied him on that visit, asked whether the property had been transferred and the plaintiff advised her that it was still to be transferred. The second defendant then gave him notice to vacate the premises. He showed them the receipts. The second defendant’s brother was satisfied that the property had been sold, but the second defendant and other relatives kept coming back to demand that he leaves the property. The plaintiff remained adamant that he had bought the property.

The plaintiff was cross examined at length by the second defendant. The plaintiff denied that he was in occupation of the property on account of a lease agreement, insisting that there had been a subsequent agreement of sale in terms of which he had fully paid the purchase price. He denied that he had acceded to the Nzanza family’s request to terminate the lease under a three months’ notice. He disagreed with the second defendant’s assertion that initially he had been given a month’s notice but pleaded for a longer notice period because he had children attending school in the area. He said he had told the second defendant, in the presence of Nzanza’s relatives, that Nzanza had told him to seek transfer from the second defendant or his brother in the event of his death. According to the plaintiff, the second defendant has nowhere to stay hence his refusal to accept that the house was sold. In fact the second defendant had offered to buy back the house but the plaintiff refused, insisting on transfer. He said that the utility accounts were transferred into his name at the instance of Nzanza in recognition of the fact that the property now belonged to the plaintiff. Asked if the accounts had not been transferred to his name only for purposes of convenience the plaintiff categoricarilly denied that suggestion. He challenged the second defendant to produce his father’s diary wherein the agreement of sale had been recorded. He denied that he had asked the second defendant to reimburse him the value of the sink which the plaintiff had fitted at the property. It was put to him that it was only after the three months’ notice period had lapsed that he changed his mind and claimed that he had bought the property. The plaintiff refuted this assertion saying he has receipts showing that he had paid the full purchase price set by Nzanza. He said that the second defendant and his relatives had visited the property on at least four occasions. On the last occasion the second

defendant had brought a letter from the Rent Board, inviting the parties to a hearing. The parties were subsequently referred to the Magistrates Court but his lawyers chose to approach this court. He denied that at one stage Nzanza and one Chimombe had visited him for purposes of collecting rent. He also denied that on one occasion he had pleaded with Nzanza not to increase rentals and had produced his pay slip to show that he would be unable to meet any increase.

The second defendant challenged the assertion by the plaintiff that the second defendant’s aunt had agreed to change of ownership. Was it not the correct position that the Nzanza family had been given a month’s notice to vacate the company house they had been occupying in Greendale. For that reason it became necessary that the plaintiff makes way for them by leaving the property he was renting in Kuwadzana. The plaintiff’s response was that late Nzanza never told him that the Greendale house was company property. He only said he was selling the “bachelor flat” because it was too small for his family. The second defendant further put it to the plaintiff that the arrangement for him to pay rentals through ZBS was made for purposes of convenience as they, the late Nzanza’s family, were then staying in Chinhoyi making it impracticable for the family to physically receive the rentals from him. The plaintiff denied this saying that the late Nzanza had told him that the rentals were for school fees. He said the late Nzanza had told him that he was the Chief Accountant of Amalgamated Gold Mines, Arcturus and that he had a company car. Late Nzanza would come to collect rentals monthly at the plaintiff’s work place. The second defendant then put it to the plaintiff that the school fees were paid for by the company to which the plaintiff surprisingly agreed, given his earlier stance. The second defendant put it to the plaintiff that the late had never told his family that he was collecting fees from the plaintiff. The plaintiff was adamant that this was so and said that the diary with the written agreement should have been produced by the second defendant. The second defendant reiterated his earlier position, namely, that the plaintiff agreed to leave and asked for three months’ notice which request was granted. After 3 months and well after the expiry of the notice given the Nzanza family to leave the Medallion Gold Company house in Greendale, the second defendant approached the plaintiff for vacant possession. It was then, according to the second defendant, that the plaintiff said the late Nzanza had sold the house to him. When asked to produce the agreement of sale, the plaintiff said it was a verbal agreement and that he had receipts confirming payment of the purchase price. The receipts were with the plaintiff’s lawyer. The second defendant said the plaintiff had not then told him that the agreement had been entered into late Nzanza’s diary. The plaintiff denied these assertions, insisting that he had told the defendant about the diary and the receipts. He said the second defendant had gone to the Rent Board demanding rent and he the plaintiff had told the Rent Board that he had fully paid for the property and, as owner, he could not be asked to pay rentals. The second defendant put it to the plaintiff that he had only gone to the Rent Board because the plaintiff was refusing to vacate the premises as agreed. Asked whether he had any documentary proof of the agreement of sale, the plaintiff reiterated that it was recorded in late Nzanza’s diary. The plaintiff was also quizzed over his evidence to the effect that late Nzanza had told him that in the event of his demise, the plaintiff should approach the second defendant or his brother for purposes of effecting transfer of the property. The plaintiff on his part insisted that that is what happened the last time he met late Nzanza.

The plaintiff called one witness, namely, his wife Grace Chiparamombe. She in the main corroborated the plaintiff’s evidence in chief. She said that she was present when the agreement was made. She had signed as a witness to the written agreement entered into late Nzanza’s diary. She said the purchase price was to be paid through ZBS and that the price would have been fully paid by end of January 2008. She however said she did not know what the purchase price was. She also said that late Nzanza would collect rentals for school fees but the money to purchase the house would be paid directly to the ZBS. Asked by counsel why the property had not been transferred, she said late Nzanza came to advise them as to who to approach in the event of his death. He was already ill then. She too was thoroughly cross examined by the second defendant. Asked about the rentals collected for school fees, she said she did not know for which child the fees were, but late Nzanza had said the child was out of the country, probably in Israel. When challenged that none of Nzanza’s children had been outside the country, she said she would not know.

She admitted though that when the second defendant came to the property, she and plaintiff had requested three months’ notice to vacate the premises in order to expedite the transfer of their school going children. She said they had so requested because they wanted first to see what the position was regarding the property. They also wanted to have papers drafted to reflect their legal position. Asked why they had not from the outset said that they had bought the house, she replied that they had not known the second defendant besides, they felt they could not discuss the issue without a neutral person to mediate. It was for this reason that they indicated their agreement to leave after three months. She also said they had told the second defendant that he could occupy the property if he reimbursed the plaintiff the purchase price. She said that they hardly dealt with the late Nzanza and often paid rentals through his girlfriend, one Florence Makaranyi. Asked why she had not told the second defendant about Florence, she replied that this was a secret which was none of the second defendant’s business. The plaintiff’s case was closed after this witness.

The second defendant’s evidence in chief was to the following effect. His father died on 27 January 2008. After his death he, with two of his aunts and an uncle, went to his father’s house in Kuwadzana. The purpose of the visit was to tell plaintiff to vacate the property as the family had been given a month’s notice in Greendale. They now needed to reside at the Kuwadzana property. They similarly gave the plaintiff a month’s notice to vacate that property. The plaintiff, however, requested a longer notice of three months as he needed time to transfer school children. The plaintiff also asked to be reimbursed for the sink he had fitted at the property, but because of inflation, he was unable to assess its current value. He needed time to check its market price. The second defendant told him to revert to him once he had ascertained the true value of the sink. After three weeks, the plaintiff called the second defendant asking him to come and discuss the value of the sink. Soon after this call, the plaintiff phoned again to advise the second defendant not to come as his brother had passed away.

During the Easter holidays the second defendant and his brother visited the plaintiff enquiring about the sink. The plaintiff told them that he was still to calculate its value but that someone from the RBZ had agreed to assist him with an assessment of its value. It was then that the plaintiff told him that he had paid the mortgage bond and that he would look for receipts to prove this fact.

The second defendant returned to the plaintiff on another day seeking to see the receipts. He was shown two loan statements. When he returned home the second defendant found a similar statement with the same date. He and two others returned to the plaintiff and confronted him with this other loan statement. They asked him to produce the statement in his possession for purposes of comparison. The plaintiff said he had taken it to his legal practitioner. He then said that he had bought the house under a verbal agreement. It was then that the second defendant went to report to the police. The police referred him to the Rent Board where he was given a letter calling upon the parties to attend a hearing. He gave this letter to the plaintiff. He said that at the hearing the Rent Board asked why the plaintiff was no longer paying rent as before and whether he had an agreement of sale. The plaintiff told the Rent Board that the agreement had been verbal. The rent board then referred the matter to the Magistrates Court but the plaintiff reported the matter to this court.

The second defendant was subjected to lengthy and gruelling cross examination by Mr *Kanengoni,* for the plaintiff. He insisted that he was not aware of any agreement of sale pertaining to the property. He said that he was very close to his father and would have been told if the house had been disposed of. He admitted that he was not always with his father – he would see him about four times per year as at some stage he was away from home working for Kukura Kurerwa Bus Company. His father was an accountant at a mining company. He was adamant that his father would have told him of important family matters such as the sale of the property. He said it was unlikely that his father would have dealt with the family’s house behind their backs. He said when the house was bought his father took him there to show him. He would have told him if he were to sell. He said he never saw the diary that the plaintiff referred to. He had looked for it at home and at his father’s workplace to no avail. He said that his father had never told them anything about this diary. His father used to show him all the letters concerning the house but he never mentioned any diary. He said he did not know anyone called Florence alleged to have been his father’s girlfriend. Asked as to how his father paid for rates during the period 2000 to 2005, he said his father told them that he had arranged with the lodgers that they deposit their rentals into his account as the family was then resident at Chinhoyi. He also said the lodgers would pay electricity and water bills as they were the consumers of those services. He said that at the Rent Board he had produced a statement from the ZBS showing how his father had paid for the property. The plaintiff had two payment sheets identical to the one that showed his father’s payments. He produced as exh (2) a letter dated 28 January 2000 from ZBS offering the late Clever Nzanza mortgage facility on the security of the property. Exh 3 is a letter dated 8 September 1999 from the Harare City Council advising the late Nzanza that he was eligible for a stand in Kuwadzana and inviting him to attend to their offices for further process, and, exh “4”, a Medallion Gold Company will form depicting C. Nzanza as the testator. Because this form was only a copy, the court requested the company to furnish it with the original will form. Also filed of record is a letter from ZBS dated 17 January 2003 addressed to Messrs Honey and Blankenburg advising them that the mortgage account had been paid off and may they issue title deeds directly to the client C. Nzanza once they are at hand. From these documents it is clear that the property was fully paid up by 27 January 2003. This supports the second defendant’s contention that the house was paid off in November 2002. As for payments that the plaintiff made between May 2001 and December 2007, the second defendant says he does not know why the plaintiff was paying for a house that had been fully paid for. It was put to him that although the house was in his father’s name, it was the plaintiff who was making the payments. His response was that the house belonged to his father, as stated by his father in his will written in 2007. He said his father was a straight forward person. He did not tell them he had sold the house and when he died nobody came to claim anything. He produced the original will as exh “4”. He suggested that the plaintiff could have forged receipts that he tendered to the court as exh “1”. He reiterated that his father never sold the house. He had died in his arms – he at no stage told him the house was sold. All he said was that the title deeds are not yet out. Asked why it was that some of the amounts paid by the plaintiff on exh “1” were higher than the expected rentals, he said that some of the payments included arrears as his father often complained that the plaintiff was not always up to date with his rentals. Besides, the plaintiff had told him that his father would sometimes lend him money. He said that his father would not distribute the property to his children knowing that he had sold the same. This was after counsel had suggested that the second defendant’s father was a dishonest man. He said that his father’s integrity can be vouched for by his employers and fellow employees. He said that it was because of his father’s good name that the company had, as recently as the previous week, offered him employment. He denied that he wanted to grab the property because he had no other source of income.

The second defendant then called Eretina Taramba, his aunt. She told the court that she was a sister to the late Nzanza. She had accompanied the second defendant to the property to give notice to the plaintiff. He had requested three months’ notice in order to accommodate school transfers. She said the plaintiff did not say the house had been sold. He only demanded to be reimbursed the amount he had used to install the sink. She said she had never met the plaintiff before but she had been aware that her brother owned the property and that there was a tenant at the house. Under cross examination, she said that she had lived with her late brother since her days as a primary school child as from grade 3. The deceased had never told her that he had sold the house. She said she was like a first born to him and that she was privy to the goings on in her brother’s life. She denied any knowledge of a diary. She said her brother had bought the house using the proceeds of a car he had sold as well as proceeds from his salary. During his illness her brother had told her that they could move to Kuwadzana if the worst came to the worst. They were then staying in the company house. She said the receipts held by the plaintiff could be receipts for rentals.

The second defendant’s last witness was Benjamin Marira Chimombe. He said he knew the late Nzanza as they were workmates. He first met the plaintiff on the day that he was instructed by his employers to ferry the late Nzanza to hospital. After the late had been attended to he had asked the witness to drive to his house to collect some rentals. He said he drove to the house and then to the plaintiff’s work place, namely Paramount Garments. There they called the plaintiff who came to see Nzanza. The witness left the late Nzanza and the plaintiff to discuss their business. The witness says he left the vehicle and went inside the garment factory where he was talking to some employees. On their return journey he said the late Nzanza told him that the plaintiff had said that he did not have any money. He said he had known the late Nzanza for a period of 5 to 6 years. He knew him as a person who was committed to his work as an accountant with Arcturus Mine. Under cross examination, he said he had worked as a junior employee to Nzanza. He said he had been to the property once before this occasion. They had then gone to fetch rentals as on this second occasion. He said he used to drive Nzanza to doctors and other various places. He said Nzanza had been ill for sometime. He said he never told him that he was selling the house. He said Nzanza had a company diary which he moved around with. With that witness the second defendant closed his case.

In his address Mr *Kanengoni* urged me to find in favour of the plaintiff. However, a candid assessment of the evidence at hand would lead me to a different conclusion. The plaintiff avers that he entered into an agreement of sale of immovable property with the late Nzanza. The onus is upon him to show on a balance of probabilities that indeed such agreement was concluded. There are two main issues militating against him. Firstly, the agreement appears to have been verbal. He however says this agreement was reduced to writing and recorded by the late Nzanza into his personal diary. The parties and their witnesses signed into this diary which was kept by the deceased. The plaintiff never sought nor obtained a copy of the agreement, either at the time or subsequently during the seven years he claims to have been servicing by instalments the purchase price. And even as the late Nzanza had fallen ill and was allegedly advising the plaintiff that in the event of his death he should approach his son or his brother for transfer of the property, the plaintiff did not seek a written arrangement confirming the sale or at least a written undertaking or instruction addressed to late Nzanza’s successors, directing them to transfer the property to the plaintiff in the event of his demise. Instead, the plaintiff would have us believe that for years he laboured with instalments, but failed to secure the written agreement relating to such an important transaction. Are these the actions of a reasonable man in the plaintiff’s position?

Secondly, the plaintiff gave conflicting testimony with regards an issue that goes to the root of this matter. The plaintiff told the court that they never asked for a three months’ notice to enable them to transfer school children. The plaintiff’s wife confirmed what the second defendant told this court, namely, that a request was made to extend the one month notice to three months in view of the school term and that such request was acceded to.

In any event, it has been conclusively shown that by January 2003, Nzanza had fully paid his mortgage with ZBS. How then can the plaintiff claim that he made payments towards a mortgage bond that had been discharged?

On the whole the plaintiff and his wife were not convincing in their account of what transpired before and after late Nzanza’s death. They admit that initially they did not tell the second defendant that they had bought the property. Why would they not? No plausible reason has been given for not asserting their rights in this regard from the outset. The excuse that they declined to do so because they did not know the second respondent is lame. Did it matter whether they knew him or not? This was a property they believed they had bought. In any event they could have asked for the second defendant’s identity card if they had not believed his self- introduction. It was only later, and apparently as an after thought, that they decided to inform the second defendant of the agreement of sale.

On the contrary, the second defendant’s account was simple and straight forward. He struck me as an honest and reliable witness. His account was credible and consistent with the totality of the evidence that was adduced in the course of the trial. Where his testimony conflicts with that given by the plaintiff, I would without hesitation prefer his version of events over that of the plaintiff. I do not believe that the plaintiff entered into any agreement of sale, verbal or otherwise. If he did then he has dismally failed to prove its existence. The probabilities point to the fact that any payments he made into the deceased’s account must have been rentals or payments in respect of other debts. There is nothing tangible to suggest that these payments were being made towards the purchase of the property.

On the contrary, the second defendant has shown beyond doubt (and this is common cause) that the property was offered to his late father by the City Council. Thereafter a mortgage bond was secured in favour of his father for purposes of purchasing the stand. Before the process of registration of the bond was complete, the deceased had paid off the property. At the time of his death the deceased was waiting for the title deeds to be processed. The deceased left a will in which he bequeathed the house to his children, a fact which is inconsistent with the assertion by the plaintiff that the house had been sold to them. The deceased was a respected professional person. He held a responsible job in the mining industry. It is evident that his job took him to various mining stations including Chinhoyi, Mtorashanga and Arcturus. He was an accountant. This movement meant he was stationed out of the Harare area for long periods. Does it not make sense that he would have arranged that rentals for the Harare property be paid into his account as he could not with reasonable convenience receive it himself on account of the distances involved? I am satisfied that the plaintiff is not entitled to the relief he seeks. I therefore find in favour of the second defendant and, by the same token, in favour of the first defendant.

It is accordingly ordered as follows:-

1. The plaintiff’s claim be and is hereby dismissed in its entirety with costs.
2. The second defendant’s counter claim be and is hereby upheld
3. The plaintiff and all those claiming through him be and are hereby ordered to vacate the property known as stand No. 144 24/6 Kuwadzana Township, Harare by 30 May 2012, failing which the deputy sheriff be and is hereby authorised to evict the plaintiff and all those claiming through him from the said property.

*Munangati & Associates*, plaintiff’s legal practitioners