JOHN BOURCHIER MEYBURG N.O.

(In his capacity as Executor of The Estate of the Late Anthony Joseph Levey)

versus

CHRISPEN BENJAMIN

and

BENHILDA BENJAMIN

HIGH COURT OF ZIMBABWE

GUVAVA J

HARARE, 27 January & 26 July 2012

Adv. *D. Ochieng,* for the applicant

*A. Dururu,* for the respondents

GUVAVA J: The applicant is the executor testamentary to the estate of the late Anthony Joseph Levey who died in Ireland on 21 May 2007. He seeks an order from this court in the following terms:

“1. It is declared that no agreement of sale in respect of property known as 104 Rhodesville Avenue, Highlands Harare was entered into between the applicant and the respondents.

2. It is ordered that the respondent and all persons claiming title through them vacate 104 Rhodesville Avenue, Highlands Harare within 48 hours of service of this order upon them and failing such vacation the Deputy Sherriff is authorised to evict and eject the respondents all persons claiming title through them from the said property.

3. It is ordered that the respondents pay US$1 200.00 rental from the period 1 September 2009 to 30 July 2010 plus damages of US$200.00 per month thereafter for each month or part thereof they remain in occupation.

4. The respondents pay the applicants costs of suit.”

The facts giving rise to this matter are mainly common cause and may be summarised as follows. The applicant was duly appointed the executor to the estate of the late Anthony Joseph Levey (the deceased) by the Master of the High Court on 22 January 2010. The first and second respondents are husband and wife and reside at 104 Rhodesville Avenue Highlands Harare also known as the Remainder of Lot 1 of Lot 85 of Greendale (the property). The property was owned by the deceased and is part of his estate. Following the death of the deceased the deceased’s ex wife Moira Jane Whitfield entered into negotiations with the first and second respondents for the sale of the property. On 20 August 2009 the respondents through Action Property Sales made an offer to purchase the property. The offer was accepted by Whitfield. The sale was subject to the approval of the Master in terms of s 120 of the Administration of Estates Act [*Cap 6:01*]. Whitfield gave the first and second respondents occupation of the property on or about 1 September 2009. On 2 September 2009 Whitfield attended at the applicants offices with the estate agent. The applicant advised them that he did not have the authority to enter into a formal agreement with the respondents as he had not been appointed as executor of estate. He also denies that Whitfield was acting on his behalf. The applicant thus alleges that the first and second respondents have no right to be in occupation of the property and seeks their eviction.

The respondents opposed the application. They stated in their opposing affidavit that they purchased the property for the sum of US$120 000.00. The offer of purchase was accepted by Whitfield whom they allege was acting as an agent of the applicant. The sale was subject to the approval of the Master of the High Court and payment of the purchase price. They agreed to a payment plan in terms of which they would pay US$40 000 by 30 November 2009, US$50 000 by 30 April 2010 and the final payment of US$40 000 by 31 August 2010. On 30 October 2009 Whitfield wrote to the respondents seeking to revoke the agreement. On 3 March 2010 the applicant sought and was granted authority to sell the property in terms of s 120 of the Administration of Estates Act [*Cap 6:01*]. The respondents state that at the time that they entered into the agreement they were not advised that the applicant had no authority to sell the property. They however confirmed that they had agreed with Whitfield that they would pay rent in the sum of US$200 until the full purchase price was paid. They subsequently refused to pay the rent because they realised that it did not make sense for them to pay rent for property that they had purchased. They thus submitted that they had the right to be on the property.

Three issues present themselves for determination in this matter. Firstly, whether the contract is void due to lack of capacity, secondly whether the applicant is entitled to the recovery of the property based on the *rei vindication* and finally whether the applicant is entitled to damages.

It is trite that a valid agreement of sale must satisfy certain requirements. These requirements are set out in Christie Business Law in Zimbabwe 2nd ed at p 141 as follows:

1. the thing must be capable of being sold,
2. the price must be agreed and
3. the parties must have the capacity to act.

It is common cause in this case that the agreement was purportedly entered into by the respondents and Mrs Whitfield on 21 August 2009. The property belonged to a deceased estate and the person who had the right to enter into such an agreement was the executor of the estate. Mrs Whitefield was not the executor of the estate. It was submitted by the respondents that Mrs Whitfield was acting on behalf of the applicant who was waiting for the relevant letters of appointment. The issue in my view is not whether or not Whitfield had the applicant’s authority to enter into the contract but whether the applicant had the requisite capacity to allow Whitfield to enter into the contract. Christie in his book “The Law of Contract” 3rd ed at p 292 states that an agent cannot contract on behalf of a non-existent principle. In terms of s 25 of the Administration of Estates Act [*Cap 6:01*] an executor must have been appointed and issued with letters of administration before he can act on behalf of the estate. In the case of *Nyandoro* v *Nyandoro* 2008 (2) ZLR 219 (H) at 222 KUDYA J cited the case of *Clarke* v *Barnacle N.O & Ors R & NJ* 358 (SR) at 349B – 350A where MORTEN J stated the legal position as it still obtains today as follows:

“whether testate or intestate, an executor, either testamentary or dative, must be appointed....so that the executor and he alone is looked upon as the person to represent the estate of the deceased person.”

Clearly in my view it is only the executor who would have the *locus standi* to enter into a contract of sale of the deceased’s property. The applicant had not been appointed executor and thus lacked the requisite capacity to enter into any contract on behalf of the Estate as at 21 August 2009. I did not accept the respondent’s argument that the applicant had been appointed in terms of a will and therefore the Masters letters of administration were a mere formality. Clarke Case *supra* makes it very clear that even when it’s a testamentary appointment a person cannot act as executor until the letters of administration have been issued. It follows that as the applicant did not have the capacity to act for the estate he would not have had any mandate to authorise Whitfield to enter into a contract on his behalf. In my view therefore the contract is *voidab initio* on the basis that it was entered into by parties who had no capacity to negotiate or conclude such an agreement.

It was argued by Mr *Dururu* for the respondent that the parties had entered into a conditional contract which would come into operation on the appointment of the applicant as the executor. However an examination of the agreement shows that this was not the intention of the parties. The only condition to the coming into operation of the agreement was the grant of authority by the Master of the High Court. The condition was imposed in the erroneous belief that the parties who had entered into the agreement had the capacity to do so which they clearly did not have. At the time they entered into the contract it was not legally permissible for anyone to represent the estate.

I now turn to the second issue before me. The *actio vindicatio* is an extraordinary remedy that is granted to the owner of a property to enable him to quickly repossess his property. Mr *Ochieng* submitted, correctly in my view that the only defence that a possessor may have against such a claim is by proving some right which is enforceable against the owner. (See *Chetty v Naidoo* 1974 (3) SA 13). The respondents in this case have shown that they entered into an agreement with Whitfield and not the Estate or the applicant. The respondents thus have no claim against the estate.

The third issue relates to whether or not the applicant is entitled to damages and if so in what amount. The applicant claims that the respondents have been in occupation of the property since 1 September 2009. The estate has not received any benefit from the property from that time. The respondents in their papers do not dispute the quantum claimed but the liability to pay. Indeed it would have been difficult for them to dispute the sum of US$200 per month as the respondents concede that they had agreed to pay that amount as rent in their opposing affidavits. The basis of their defence is that they had entered into an agreement of sale with the applicant. Since I have already made the finding that their contract was void their defence therefore cannot stand.

In the result I make the following order:

1. It is hereby declared that no valid agreement of sale in respect to the property known as the Remainder of Lot 1 of Lot 85 of Greendale also known as stand number 104 Rhodesville Avenue Highlands was entered into between the applicant and the respondents.
2. The respondents and all persons claiming title through them are hereby ordered to vacate the Remainder of Lot 1 of Lot 85 of Greendale also known as stand number 104 Rhodesville Avenue Highlands Harare within 30 days of service of this order upon them failing which the Deputy Sheriff is hereby authorised to evict and eject the respondents and all persons claiming through them from the said property.
3. The respondents are hereby ordered to pay rent in the sum of $1 200 for the period 1 September 2009 to 30 July 2010 plus holding over damages in the sum of US$200 per month from 1 August 2010 to date of vacation of the property.
4. The respondents shall pay the costs of suit.

*Coghlan, Welsh and Guest*, applicant’s legal practitioners

*Dururu & Associates*, 1st & 2nd respondents’ legal practitioners