KENNEDY DEWERA
versus
DOUGLAS NYAUDE
and
JOHN CHARAMBA
and
BEAUTY CHARAMBA

HIGH COUT OF ZIMBABWE
MTSHIYA J
HARARE, 30 May 2014, 2 June 2014, 3 June 2014, 4 June 2014,
26 June 2014, 9 September 2014 and 24 September 2014

Trial

T Manjengwah, for the plaintiff
S Chatsama, for the 1st defendant
R Muchirewesi, for 2nd and 3rd defendants

MTSHIYA J: On 31 January 2011, the plaintiff issued summons against the defendants seeking the following relief:-

"a. That the purported sale by the 1st defendant to 2nd defendant is null and void and the rights and obligations in the agreement of sale between plaintiff and first defendant be enforced.

b. That the plaintiff is the rightful owner of the property namely Stand 475 Glen View township of Lots 1 548 of Subdivision D of Subdivision A of Glen View Extension and first defendant shall pass transfer to plaintiff in terms of the agreement.

c. that the 2nd defendant pays costs of this action on a legal practitioner and client

Or alternatively:

a) 1st defendant pays damages to plaintiff in the sum of US$ 6 500-00.
b) That the 1st defendant pays the costs of this action on a legal practitioner and client scale."

On 28 May 2014 the plaintiff's relief was, by consent of all the parties, amended to read:-

"a. That the purported sale to 2nd and 3rd defendants is null and void and the rights and obligations in the agreement of sale between plaintiff and 1st defendant be enforced.

b. That the plaintiff is the rightful owner of the property namely Stand 475 Glen View Township of Lots 1-548 of Subdivision D of Subdivision A of Glen View Extension and 1st defendant shall pass transfer to plaintiff in terms of the agreement.

c. that the 2nd and 3rd defendants and all those occupying through them, be evicted from the property within 7 days of this order.

d. that the 1st and 2nd defendants pay the costs of this action on a legal practitioner and client.

As can be seen from the above, the amended relief did away with the alternative prayer for damages. The plaintiff thus elected to pursue the relief for specific performance.

It is common cause that on 4 February 2005 the plaintiff and the first defendant entered into an agreement of sale. The plaintiff purchased, from the defendant. "Stand Number 475 Glen View Township of Lots 1-548 of Subdivision A of Subdivision D of Subdivision A of the rest measuring approximately 332 square meters being vacant residential stand" (the stand). The purchase price was agreed at ZW$27 360 000-00 (Twenty Seven Million Three Hundred and Sixty Thousand Zimbabwe Dollars).

On 5 October 2006 the plaintiff completed paying the purchase price in full.

However, on 29 May 2006, before the plaintiff had completed paying the full purchase price for the stand, the first defendant advised him that "due to escalating servicing costs for the project" the purchase price would increase to ZW$332 000 000-00 (Three Hundred and Thirty Two Million Zimbabwe Dollars less ZW$ 23 602 577-00 (Twenty Three Million Six Hundred and Two Thousand five hundred and seventy seven Zimbabwe Dollars) that he had already paid by that date. The relevant parts of the letter, addressed to the plaintiff in respect of the reviewed purchase price, reads as follows:-

> "With regards to the abovementioned, due to escalating servicing costs for the project, we have reviewed the selling price to $ 1, 000, 000.00 (one million dollars) per square meter on all stands with immediate effect.
>
> Therefore, the sale price of the stand has been reviewed to $332,000,000.00 (three hundred and thirty two million dollars) payable as follows:

> $332,000,000.00 (three hundred and thirty two million dollars) less $23,602,577.00 (twenty-three million six hundred and two thousand five hundred and seventy-seven dollars) which is the amount contributed to date. The balance of $308,397,422.00 (three hundred and eighty million three hundred and ninety-seven thousand four hundred and twenty two dollars) is payable over a period of six (6) months with effect from 1st day of April 2006 to 30th September 2006.
>
> ----------.
>
> If you are interested in continuing with your payments, kindly contact our office to sign an Addendum to your Agreement of sale. We are giving you seven (7) days notice to exercise the above option, failure of which the stand will be repossessed and resold without any further notice."

The plaintiff rejected the variation of the agreement of sale and on 13 June 2006, he addressed the following letter to the first defendant:-

> "I refer to the above matter contained in your letter dated 29th April 2006 addressed to myself. In your letter, you purportedly increased the purchase price of the above mentioned stand by about 1000% i.e. from the initial agreed purchase price of $27 360 000.00 to $332 000 000.00.
>
> Kindly note that the variation is null and void as it is contrary to the existing agreement of sale. Please be advised that Clause 13 of the agreement provides that the 'Agreement constitutes the entire contract between the parties' and Clause 13.3 of the agreement states that 'no variation in this agreement shall be valid in writing and signed by or on behalf of the parties'. Needless to say, there is no written agreement of variation between myself and yourselves and I will disregard your letter in its entirety with the contempt that it deserves as it is a unilateral and arbitrary decision by one contractual party.
>
> I am hereby demanding that you withdraw your unlawful letter within 10 days of receiving this letter, failure of which I reserve my rights to protect my interests before a competent court of law.
>
> Please be guided accordingly."

The initial date on the first defendant's letter was 1 April 2006 but was later altered to read 29 May 2006.

As already mentioned, after confirmation of the balance of the purchase price at the defendant's offices on 5 October 2006, the plaintiff went ahead to clear the balance of the purchase price agreed to on 4 February 2005. However, despite payment of the full purchase price, the plaintiff did not immediately take transfer or occupation of the stand. It was never explained why the plaintiff did not demand transfer

Notwithstanding the agreement with the plaintiff, on a date not unknown to the plaintiff, but in 2007, the first defendant proceeded to sell the stand to one Oscar Karimusosa (Karimusosa). The said Karimusosa then also sold the stand to the third defendant (i.e. wife of second defendant) on 8 November 2010. The plaintiff only got to know of this new development on 7 December 2010.

Although having not taken transfer as yet, the second and third defendants are in occupation of the stand and have since constructed a 3 bed-roomed house with a kitchen, lounge, dining room, lockup garage and separate toilet.

Following the above developments, on 31 January 2011, the plaintiff issued summons against the first and second defendants seeking the unamended relief indicated at p 1 of this judgment.

The third defendant, as the purchaser in the agreement of sale entered with Karimusosa, was only joined as a party to the proceedings on 4 March 2014. She filed her plea on 22 April 2014. Her plea and the amended summons did not necessitate major changes to the Joint Pre-Trial Conference filed on 16 January 2013. The only addition to the issues was:-

> "Whether or not there are special circumstances justifying second and third defendants to remain on the property."

In the circumstances the matter was referred to trial with five issues for determination, namely:-

> "1) Whether the plaintiff and first defendant agreed to a variation of the agreement and if so, in what terms?
>
> 2) Whether there was any valid termination of the agreement between plaintiff and first defendant.
>
> 3) Whether the plaintiff is entitled to enforce the agreement it had with first defendant, if not:
>
> 4) Whether or not the plaintiff is entitled to any compensation and if so in what amount?
>
> 5) Whether or not there are special circumstances justifying the second and third defendants to remain on the property."

The amendments to the plaintiffs summons and declaration, granted by consent on 28 May 2014, only led to the addition of the fifth issue indicated above.

A lot was said during the narration of evidence in this trial.

The plaintiff and all the defendants gave evidence and in a number of instances the evidence given was common cause.

In considering the totality of the evidence placed before me, which evidence was supported by a total of 17 exhibits, I came to the conclusion that, through the concessions made by the first defendant, the first and second issues in the joint pre-trial conference minute were quickly disposed of. That is so because:-

a) The first defendant admitted that there was never any variation of the agreement of sale entered into between the plaintiff and the defendant on 4 February 2005; and
b) That there was never any valid termination of the said agreement.

Having made the above concessions, the first respondent then went on to pray for payment of compensation by himself to the plaintiff. He said the plaintiff had only lost a stand as opposed to the second and third defendants who had built a house on the stand. The first defendant's stance was not surprising because it would be expensive to compensate the second and third defendants who had since built a home on the stand at their estimated cost of US$40 000-00.

In their closing submissions, the second and third defendants summarise the case in the following manner:-

"The following became common cause and undisputed:-

I. That: - the plaintiff and the 1st defendant entered into an agreement of sale on an immovable property being Stand Number 475 Glen View Extension, Harare.

- The agreement of sale as appears from Exhibit 1 was never cancelled. The plaintiff fully paid up for the stand as appears from exhibit 4.

- The 2nd and 3rd defendants had no knowledge of the existence of Plaintiff's interest in the property at the time of concluding the agreement of sale.

II. The 1st Defendant sold the same piece of land to other purchasers. One Oscar Karimusosa who had purchased this stand later sold same to the 3rd defendant as appears from Exhibit II. It is indeed that the 1st defendant effected a double sale.

III. The 2nd and 3rd Defendants took occupation of the property in question and have constructed an eight roomed house. The amount used for the whole project is approximately US$40 000-00 (Forty Thousand United States Dollars)."

In analysing the evidence in this case, in the face of the contents of paras 2 and 3 in the above summary and the concessions by the first defendant referred to at p 5 herein; the following conclusions can be made:-

(a) The agreement of sale between the plaintiff and the first defendant is still in place and the third defendant has not taken transfer.

(b) There was never any sale of the stand to Karimusosa. There was no stand to sell i.e. nothing can stand on nothing. In *Macfoy* v *Limited Africa Co. Ltd* (1961) 3 ERH 69 (PC) it was said:-

> "If an act is void, then it is in law nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more do, although it is sometime convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

(c) Evidence shows that as at 31 January 2011, the second and third defendants became aware of the plaintiff's interest in the stand. It is on that date that the first and second defendants were served with the summons commencing this action. Both defendants entered appearance to defend on 10 February 2011 and thereafter engagements between the parties ensued; and

(d) The second and third defendants agreed that at the time summons were served they had only built the house on the stand to the slab level. They had, however, continued to build because the first defendant had assured them that he would compensate the plaintiff.

A futile and bizarre attempt was, however, made to the effect that for a period of over two years the third defendant, the person to whom the stand was sold, was left in the dark by the second defendant regarding the stand which was actually to be registered in her name. The second and third defendants confirmed that they are husband and wife and were jointly occupying and carrying on developments on the stand. It is simply not possible that the third defendant only got to know of this case when the trial commenced. That was a lie on the part of both the second and third defendants.

The other lie by the third defendant appears in her plea where in para 3 she states:-

> "3rd Defendant has since taken transfer of the property in question. Zvimba Rural District Council is aware that 3rd Defendant is the owner of **stand number 475Glen View Township of Lots 1.548 of subdivision A of subdivision D of subdivisionA of Glen View Extension, Harare.** As a result of this special circumstance, it is just that Plaintiff claims his money from the 1st Defendant. 3rd Defendant after the letter

> of 24th of January 2011 advised 1st Defendant who firmly assured that he had cancelled the agreement of sale he had entered with the Plaintiff. The 3rd Defendant continued in occupation as Plaintiff had agreed to receive compensation from the 1st Defendant. Thus the letter of 24 January 2011 was overtaken by events."

As it turned out during the trial, she never took transfer of the stand and the plaintiff did not agree to receive compensation from the first respondent.

The lies by the second and third defendants, render it near impossible to trust their evidence in this case. This leads me to the conclusion that second and third defendants were not innocent purchasers at all. When they continued to build the house to beyond the slab level, they were fully aware of the plaintiff's interest.

It is also not common cause that the second and third defendants have actually spent US$40 000-00 on the stand. That amount was not fully proved.

In view of the foregoing, it is clear that the dispute *in casu* has been clearly identified by the first defendant himself, who has in the circumstances elected to compensate a party of his own choice i.e. the plaintiff. I do not think he is entitled to that election.

In the amended summons, consented to by all parties, the plaintiff has elected the relief of specific performance. There is no prayer for damages before me and as such, even if the other parties feel that is the route that could render fairness in this case, my hands are tied. I have no damages to consider for the plaintiff. I want to believe that in electing to do so, the plaintiff has reasoned that there was never any sale to Karimusosa and therefore despite developments effected on the stand by the second and third defendants, no transfer was ever made in their favour. The stand, notwithstanding the developments by the second and third defendants, can still be transferred to him on the basis of a valid and existing agreement of sale. It is true transfer to the plaintiff is still possible.

Without specifically admitting all issues, the second and third defendants correctly identify the issue for determination in *casu* as whether or not the plaintiff is entitled to specific performance. They then make the following correct submission:-

> "The law relating to specific performance was well dealt with in INTERNATIONAL TRADING PVT LTD v NESTLE ZIMBABWE PVT LTD 1993 (1) ZLR 21 HC that historically, it was Kotze CJ in COHEN v SHIRES, MCHATTIE & KING (1882) 1 SAR 41 AT 45 who, after consulting the authorities, held that Roman- Dutch law clearly recognised the right to a specific performance of a contract; and it is interesting to note that the classic exposition of the rule on specific performance was expressed in a case which arose in the High Court of this country and which came

before the South African Appellate Division, namely, FARMERS' CO-OPERATIVE SOCIETY (REG) v BERRY 1912 AD 343. In that case Innes JA stated at 350:

> 'Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze CJ in THOMPSON v PULLINGER (1 OR p 301), 'the right of a Plaintiff to the specific performance of a contract where the Defendant is in a position to do so is beyond all doubt."

For reasons not quite clear, the first respondent defendant's legal practitioner, despite the first defendant having made clear concessions, goes on to submit that there was a contract variation and proper cancellation. That submission is not borne out of the defendant's own evidence in this case. Accordingly, I can only consider the first defendant's submissions to the extent they address the issue of specific performance in the circumstances of this case.

I am happy that the first defendant also relies on the same authorities cited by all the other parties on the issue of specific performance.

Given the above I believe that what remains is for this court to judiciously use its discretion to determine if there are any special circumstances justifying the second and third defendants to remain on the stand because of the developments they have made thereon. (i.e. issues on the Joint Pre-Trial Conference Minute)

I am inclined to agree with the plaintiff that no special circumstances exist. It is evident that the second and third defendants were not innocent purchasers. Under cross-examination, they both agreed that they took a risk in the belief that the first defendant would compensate the plaintiff. As early as 31 January 2011, before making any substantial developments on the stand, they were fully aware of the plaintiff's interest in the stand. To their own peril, they ignored that and continued to pour money on a stand they knew had been bought by the plaintiff and to which they had no title. The second and third defendants deliberately created a situation they believed would influence any fair minded person in their favour. They, cannot, in my view, be allowed to benefit from circumstances that they deliberately created with sinister motives. They, in collusion with the first defendant, embarked upon a calculated risk. They could have ceased developments until the dispute was resolved. They, instead, went ahead to create a situation which they believed could only be explained in their favour. I am therefore unable to agree that there are special circumstances entitling the second and third defendants to remain on the stand.

In support of his position in the matter, the plaintiff correctly submitted as follows:-

"5.1 The legal position in our jurisdiction is that if in a double sale situation the second buyer has knowledge of the first sale of the property either at the time of the sale or at the time it took transfer of the property, unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the 2nd buyer. In deciding whether there are special circumstances affecting the balance of equity the court must bear in mind that the primary remedy of the wronged buyer is the remedy of specific performance which will be granted unless there is some equitable reasons disqualifying him from obtaining such relief. See ***Chimphonda vs. Rodrigues and Others 1997 (2) ZLR 63, TendaiMuza vs. Christina Muwirimi and 2 others HH -14-2009.***

5.2 The facts surrounding the 2nd and 3rd Defendants' acquisition of the property are telling. They saw an advert in the press and checked on the authenticity of the estate agent and not the status of the property. in fact, they did not even see Oscar Karimusosa's agreement of sale with 1st Defendant although in terms of their agreement they were buying his rights in that agreement. They concluded the two agreements on the same date, making payment on Monday 8th November 2010 and Monday 15th November 2010 as shown on the 2nd page 4 of Exhibit 11 (there are two page 4's). On the 10th of November 2010 and Thursday 11th November 2010, they, as per the receipts on page 3 of exhibit No. 11, paid for someone to prepare a plan which they submitted on 22nd November 2010 for approval. Four days later, a further plan approval fees, development fee was paid. On the 8th of December 2010, exactly a month after acquisition, the 1st stage of the building was approved.

5.3 The 2nd and 3rd Defendants started their project in haste, litigation did nothing to dampen the zest, according to them, all they needed to continue was the 1st respondent's words 'the stand is yours' and the absence of an order to continue with the creation of special circumstances to tilt the balance of equities in their favour. It is submitted that the 2nd and 3rd Defendants knew of Plaintiff's interest since their acquisition, that is why they set out to get into a better position from the 10th of November 2010 until even the matter was setdown for trial. They cannot be allowed to benefit from their fraudulent scheme."

In view of the above submissions and my own findings herein, I am unable to deny the plaintiff the remedy of specific performance.

On the issue of costs, I believe it is only fair that they be borne by all defendants. It is clear they worked together from the time the stand was purportedly sold to the third defendant by Karimusosa.

It is therefore ordered as follows:-

a. The purported sale to the 3rd Defendant be and is hereby declared null and void and the rights and obligations in the agreement of Sale between the plaintiff and the 1st Defendant be and are hereby enforced.

b. The Plaintiff be and is hereby declared the rightful owner of the property namely Stand 475 Glen View Township of Lots 1-548 of Subdivision D of Subdivision D of Subdivision A of Glen View Extension and the 1st Defendant shall pass transfer to the Plaintiff in terms of the agreement dated 4 February 2005.

c. The 2nd and 3rd Defendants and all those occupying through them, be and are hereby evicted from the property and that such eviction shall take place within 30 days from the date of this order; and

d. The 1st, 2nd and 3rd Defendants shall pay the costs of this action on a legal practitioner and client.

Messrs Hogwe, Dzimiri & Partners, 1st Defendant's Legal Practitioners
Messrs Mushangwe& Company, 2nd and 3rd Defendants' Legal Practitioners