

KUDAKWASHE ZHANGARE
versus
AGSON MAFUTA CHIOZA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 26 January and 20 February 2023

Trial

T W Nyamakura, for the plaintiff
I Mabulala, for the 1st defendant

MUNANGATI-MANONGWA: The plaintiff herein claims to have bought immovable property being a vacant stand from the 1st defendant in 2006. Till to date he has no title to the purchased property. The plaintiff thus seeks an order compelling the 1st defendant to effect transfer of the immovable property known as Stand 2993 of stand 322 Prospect Township measuring 4024 square metres (hereinafter called “the property”) within 7 days of the granting of the order. The plaintiff wants the Sheriff to be authorized to sign all papers and take necessary steps to facilitate transfer of the property should the 1st defendant fail to comply with the court’s order. The plaintiff further seeks costs against the 1st defendant. The matter is defended.

The 1st defendant denies selling the property to the plaintiff and states that he sold his property to a different entity being Mabata Holdings. Given this scenario, the issues that the court is called upon to determine are aptly discerned as follows:

1. Whether or not the 1st defendant sold stand 2993 of stand no 322 Prospect Township, Harare to the plaintiff?
2. Whether or not the plaintiff is entitled to the relief sought in the summons

The plaintiff gave evidence in support of his claim as follows: The plaintiff stated that he approached Property Hopes Estate Agency in 2006 who were the agents for the 1st defendant. He purchased the aforementioned property and was made to sign a sale agreement on 6 February 2006. He stated that at that juncture the 1st defendant was said to be away and was to be available on 9

February 2006 to sign the agreement on which date the plaintiff was told to return to Property Hopes offices. He stated that on 9 February 2006 he returned to the offices and a meeting was held at Property Hopes Offices on that day. In attendance was the plaintiff, his legal practitioner the now late Mr Manyurureni , Mr Matimba the registered agent for Property Hopes, the 1st defendant and the sales Manager for Property Hopes Lazarus Chiteka. It was his evidence that he paid the purchase price in full being one billion five hundred million dollars as cash and it was announced at the meeting that he was now the new owner. He was granted vacant possession by the 1st defendant. He stated that he started developing the property that very year. He built a two bedroomed cottage and a four bedroomed house and erected a security wall. He finished building in 2007. He has been in occupation till to date.

The plaintiff stated that he went to Property Hopes several times and visited the 1st defendant's home many times seeking transfer but the 1st defendant advised him that he was having a legal dispute with one Kapumha and once the issue was sorted out he was to transfer the stand to him. He advised the court that the 1st defendant would even invite him to a court hearing for him to witness the proceedings between 1st defendant and Kapumha. He also stated that in 2014 he went to the 1st defendant's house with his neighbour a Mr Kudya who had also bought a property from the 1st defendant. At one time he also went with Blessing Diza to the 1st defendant's home and on another time to court. The plaintiff stated that the 1st defendant's legal battle with Kapumha ended in 2019 and the 1st defendant did not want him to find out. When he did, he asked the 1st defendant to effect cession and he 1st defendant wanted to cancel the first sale and seek a fresh agreement to which plaintiff refused. He stated that it was at that juncture that he realized that the 1st defendant would not grant him transfer then he instituted these proceedings in 2020.

The plaintiff was cross examined at length. He stated that he had not seen the 1st defendant signing the agreement and could neither confirm whether it was him who signed or not. He however maintained that he met the 1st defendant on 9 February 2006 and he paid him and got vacant possession. The plaintiff stated that although he had gotten a receipt when he paid the purchase price the same had been in the custody of his now late legal practitioner and when he sought to retrieve it, it could not be found. Efforts to retrieve a copy from the Estate Agents were in vain as the Agency had closed down. He also indicated that he had paid the transfer fees in full at Property Hopes who had intimated that they were to remit the funds to Messrs Sakutukwa and

Partners legal practitioner. When it was suggested to him that the property could not have been sold to him as the 1st defendant had sold it to Mabata Holdings he disputed same. The plaintiff stated that at no time had the 1st defendant spoken about Mabata Holdings in their dealings. Property Hopes and the 1st defendant had sold him the property and he did not know anything about Mabata Holdings. He further denied any knowledge of the agreement of sale between 1st defendant and Mabata Holdings that was produced and stands as exhibit 2. He indicated he had waited for this long without getting title as the 1st defendant advised that there were issues to be cleared before transfer could be effected. The plaintiff indicated that no-one had ever approached him claiming ownership of the property and neither had the 1st defendant ever objected to his occupation of the property. The plaintiff gave his evidence well appears to be a credible witness and was not shaken under cross examination. In that regard the court accepts his evidence.

Tangwara Matimba

Mr Matimba gave evidence as the plaintiff's witness. He stated that he was working for Property Hopes as a Real estate agent and was the registered agent for that agency. He knows both parties from the time they interacted pertaining to the sale. He stated that the plaintiff visited Property Hopes intending to buy a property the transaction of which fell through when a husband wife seller failed to agree. He requested that the agency look for another property for him. Apparently, the agency got the 1st defendant's Waterfalls property for sale. He explained that the 1st defendant had initially sought to sale the property to Mabata Holdings. He confirmed that indeed an agreement of sale had been concluded between Mabata Holdings and the 1st defendant but the same fell through. He explained that Mabata Holdings was a vehicle that he and his colleagues had mooted forming for the purpose of buying stands, developing and selling them. He stated that the company could not be registered and the agreement fell through. It was his evidence that the agreement was verbally cancelled well before the sell to the plaintiff leading to the property being open for purchase. It is then that with the defendant's knowledge the property got sold to the plaintiff. He confirmed that Property Hopes is no longer trading.

He stated that he told the 1st defendant that they had a buyer and at that time the 1st defendant was in Waterfalls. The witness told the court that the 1st defendant agreed to the sale of the vacant stand to the plaintiff. It was this witness' evidence that an agreement of sale was prepared and the 1st defendant had signed the same although he did not witness the signing but

was told by the Sales person Lazarus Chiteka. He told the court that when the plaintiff paid the purchase price in cash to the 1st defendant he was present so was Mr Chiteka the sales person and Mr Manyurureni the plaintiff's legal practitioner. He stated that Property Hopes then refunded him the amount which had been paid on behalf of Mabata Holdings. Under cross examination the witness maintained that although he had not seen the 1st defendant signing the agreement he had called the 1st defendant and the plaintiff and the seller had been paid in his presence when the parties were introduced to each other. He stated that the purchase price had moved from nine hundred million to one billion five hundred million as it was during a hyper- inflationary environment. On being quizzed about the receipt confirming payment the witness stated that receipts are destroyed after 3 to 4 years. He reiterated that Mabata Holdings was refunded in full and it has no interest in the property and cannot even accept transfer as it is not registered and the contract had been cancelled. This witness gave evidence well and was honest enough to admit that he did not see the 1st defendant signing the agreement . His demeanor and the manner in which he answered questions is such that the court is satisfied that he is a credible witness and hence accepts his evidence.

The defence opened its case by calling the 1st defendant Mr Agson Mafuta Chioza. The witness stated that he knows the plaintiff only in connection with this case. He denied ever entering into an agreement of sale with the plaintiff. The witness gave evidence that he had sold the property in issue to Mabata Holdings. This according to him was a way of raising funds to offset a high interest bearing loan he had gotten from Mr Tangwara Matimba who he stated owned a certain Financial Services company which had lent him money to do subdivisions. The witness produced an agreement of sale between him and Mabata Holdings which the court accepted as exhibit 2. He further referred to two acknowledgements of payment wherein he was paid \$31 500 000 from his agents Property Hope as part of the purchase price. He indicated that part of the purchase price in the sum of \$34 000 000 went towards offsetting his debt and could not recall what became of the balance. He denied ever receiving the full purchase price from Mabata Holdings. He stated that he pursued the balance through his lawyers Messrs Sakutukwa but Mr Matimba did not do anything.

Regarding the sale of the property to the plaintiff the witness denied ever signing exhibit 1 and stated that he became aware of the agreement of sale in 2021. He denied attending at

Property Hopes on 9 February 2006 to sign the contract or receive the money. He challenged the initials on the agreement of sale as not belonging to him. The witness further disputed the allegation that the agreement between him and Mabata Holdings had been cancelled insisting it is still in existence. The witness stated that he had given vacant possession to Mabata Holdings. He denied that the plaintiff had visited him numerous times and that plaintiff ever asked for transfer of the property. He conceded the fact that plaintiff had visited his home in 2014 in the company of one Mr Kudya and plaintiff advised him that he is the one who had bought the property he had sold to Mabata Holdings. He stated that the plaintiff did not have an agreement nor a receipt as proof of payment. He further told the court that plaintiff phoned him in 2019 when he was at court and stated that he was the one who had bought the property but in all instances the plaintiff never demanded transfer.

The defendant confirmed that the legal battle with Kapumha which the plaintiff had referred to had been resolved and there is no legal impediment preventing transfer. It was however his evidence that he can only render transfer to Mabata Holdings although he appreciated that it does not exist. Under cross examination the 1st defendant insisted that he does not want to be caught up between two agreements of sale. The witness told the court that when he was being approached by the plaintiff, he thought that the plaintiff was from Mabata Holdings. Equally he had not sought his eviction believing that plaintiff was a director of Mabata Holdings. The witness confirmed that Mr Matimba being Property Hopes's Agent appeared on both agreements of sale one for Mabata Holdings and one involving the plaintiff. He agreed under cross examination that Mr Matimba was his agent under Property Hopes. He however maintained that the property despite being sold to Mabata Holdings it remained his. From the answers on record, it is clear that the 1st defendant was prevaricating and changing goal posts. He did not strike the court as a credible and reliable witness.

ANALYSIS

Where the plaintiff's claim is based upon a contract, the onus in establishing the existence of that contract, its binding nature and the enforceability thereof falls upon the plaintiff. See *Zimbabwe Passenger Company Limited v Packhorse (Pvt) Ltd* SC 13/17 at p 18. In *casu* the plaintiff seeks specific performance and in order for him to succeed the plaintiff has to

- i) allege and prove the terms of the contract

ii) allege and prove that he complied with the obligation cast on him as per the agreement or tender performance of those obligations.

In civil matters the onus is discharged on a balance of probabilities. It is the court's duty to decipher after weighing all the evidence at hand whether that onus has been discharged.

It is common cause that the plaintiff gave his property to Property Hopes for sale. It is also common cause that the property was initially sold to Mabata Holdings as per exhibit 2. The representative of Mabata Holdings being Mr Matimba who is again the registered agent for Property Hopes represented Mabata Holdings. There is evidence of exchange of the purchase price between Mabata Holdings and the plaintiff. Mr Matimba refers to the cancellation of the agreement which although the 1st defendant denies must have occurred. Firstly, Mabata Holdings never assumed vacant possession. The 1st defendant never sued for the balance of the purchase price despite the agreement being concluded in 2004, yet he says he is willing to effect transfer of the property to Mabata Holdings. He conceded that he is aware that Mabata Holdings is not a legal persona.

The 1st defendant initially said he knew the plaintiff in 2020 and then admitted that the plaintiff had visited him at his home in 2014 and stated that he had bought the property which had initially been sold to Mabata Holdings. He admits that in 2019 he spoke to the plaintiff who again claimed to be the purchaser of the property. He did not raise issue with Mabata Holdings which he should have done if he genuinely believed that the contract with Mabata Holdings was still in existence. No attempt was ever made to evict the plaintiff. The explanation that he believed the plaintiff to be a representative of Mabata Holdings does not hold water in view of the 1st defendant's own admission that the plaintiff approached him in 2014 and 2019 claiming that he purchased the property.

The evidence of the plaintiff that the parties met on 9 February 2006 in the presence of named witnesses and there was exchange of money and introductions met with a bald denial. Yet such evidence was supported by Mr Matimba who entertained the parties in his office and relied on his sales agent's evidence that the 1st defendant signed the agreement. Although the 1st defendant seeks to distance himself from the agreement and alleges that exhibit 1 is a fraud and a product of forgery, he did not discharge the reverse onus of proving the alleged fraud and the forgery. The 1st defendant had the obligation to lead evidence discrediting the document as fraud

must not only be alleged but must be distinctly proven. In his book *“Theory and Principles of Pleading in Civil Actions”*¹ Beck states that: **“where fraud is relied on, the circumstances which reveal the fraud must be set out. It is not sufficient merely to allege that a transaction, which in the ordinary way would be a proper one, was fraudulent.”** The failure by the 1st defendant to lead any satisfactory evidence to prove that exhibit 1 was fraudulently obtained by his very agent and that he did not sign it discredits his defence as the allegation is not supported by evidence.

Although no receipts were produced, the agreement itself states that this was a cash sale with the amount to be paid upon signing. The plaintiff gave evidence that he tried to retrieve receipts from his now late legal practitioner’s offices but the file could not be located. The agency Property Hopes has since closed but Mr Matimba the former registered agent gave evidence that receipts are destroyed after three to four years which is normal in the business world given that this is a 2006 transaction. That the plaintiff did extensive developments on the stand and has been in occupation for 14 years with the 1st defendant’s knowledge can only point to someone who believed that they own the property. No eviction was ever sought and no counter claim has been launched which is not consistent with an owner who has not sold his property. Nothing was presented before the court that the 1st defendant had reported the plaintiff or the agents for fraud pertaining to the sale of the house despite the 1st defendant knowing as early as 2014 that the plaintiff was claiming to have purchased the property.

The plaintiff’s evidence that he would attend court involving the 1st defendant and Kapumha involving land which incorporated this property at the invitation of the 1st defendant has not been rebutted. If anything the 1st defendant did not deny that there was protracted litigation surrounding the land involving Kapumha. Further that the matter was resolved in 2019. Incidentally the evidence of the plaintiff was to the effect that the legal battle is the reason why transfer could not be timeously effected and the defendant had assured him that transfer would be effected after resolution of the legal dispute with Kapumha. It is the 1st defendant who then backtracked and did not want the plaintiff to know that the dispute was over and transfer could be effected. It thus makes sense that the plaintiff’s occupation was never challenged for over 14 years despite him taking vacant possession and openly developing the property. In fact it is the

¹ 6th Edition p125

plaintiff who has taken the initiative to bring the case to court and no counter claim has been made by the defendant. Equally the plaintiff's evidence that the 1st defendant now wanted the plaintiff to enter into a new contract was not disputed.

A court is at liberty to consider both factual and circumstantial evidence in the determination of a matter drawing inferences where necessary as long as there is evidence from which a reasonable and most likely inference can be drawn. In civil matters the degree and extent of the drawing of inferences in terms of what I would term the "exclusionary tool" in drawing an inference is different. In a criminal matter the rule is that "the proved facts should be that they exclude every reasonable inference from them save for the one sought to be drawn."² However a different rule applies to civil matters and justifiably so given that the proof required in civil matters is less rigorous as compared to criminal matters where proof is beyond reasonable doubt. In *Ebrahim v Pitman NO BARTLETT J* referring to the matter of *AA Onderlinge Assuransie-Associasie Bpk v de Beer*³ stated that "...it is not necessary for the plaintiff seeking to rely on circumstantial evidence in a civil case to prove the inference which he asked the court to make as the only reasonable inference. He will discharge the onus which rests on him when he has convinced the court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences."

Given the evidence elucidated in the foregoing paragraphs and adopting the approach on how to deal with circumstantial evidence in civil cases it seems clear to me that the more plausible conclusion to be drawn from the facts presented and proven in this court, is that the contract between the defendant and Mabata Holdings was cancelled, 1st defendant through his agents sold the property to the plaintiff, and plaintiff indeed bought the property in question and paid the full purchase price. Thus the contract is still binding and the 1st defendant unceremoniously seeks to distance himself from the contract which he is aware of its existence. It is this court's finding that the plaintiff has proven on a balance of probabilities that he bought the property in question paid for it, was granted vacant possession and ought to receive title.

In the result the following order is made:

² See *R v Bloom* 1939 AD 158 at 203

³ 1982 (2)SA 603(A) 603

1. The 1st defendant be and is hereby ordered to take all necessary steps to ensure and facilitate the transfer of the property known as Stand 2993 of stand 322 Prospect Township measuring 4024 square metres to the plaintiff within 14 days of the granting of the order.
2. In the event of 1st defendant failing to comply with paragraph (1) the Sheriff of the High Court shall sign all necessary documents and take all necessary steps to facilitate transfer of the property known as Stand 2993 of stand 322 Prospect Township measuring 4024 square metres to the plaintiff.
3. 1st defendant to pay costs

DizaMunetsi Attorneys, applicant's legal practitioners

Mabulala & Dengure Legal Practitioners, respondent's legal practitioners