

DENNIS CHIGUMBU
versus
MARVELLOUS SHUMBA
and
MUNETSI PRIMO MACHIKICHO
and
SUSAN MACHIKICHO

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 12 November 2021 and 23 January 2022

Court Application - declaratur

Mr *T C Masara*, for the applicant
Mr *T Nyamucherera*, for the 1st respondent
Adv *G Madzoka*, for the 2nd and 3rd respondents

CHINAMORA J:

Introduction:

This is an opposed court application seeking a declaratory order and other ancillary relief in the following terms:

“IT IS ORDERED THAT:

1. The agreements of sale entered into by and between first respondent, second and third respondents on 8 September 2020 in respect of Plot No. 49, Halfway Farm, Kadoma and Plot No. 50, Halfway Farm, Kadoma be and are hereby declared null and void.
2. The second and third respondents and all those claiming occupation through them be and are hereby ordered to vacate Plot No. 49, Halfway Farm, Kadoma and Ploy No. 50, Halfway Farm, Kadoma within forty-eight (48) hours of the date of this order.
3. The second and third respondents be and are hereby ordered to cease any form of development or possession or occupation of, or any portion, of Plot No. 49, Halfway Farm Kadoma and Plot No. 50, Halfway Farm, Kadoma and to remove or cause to be removed from same all assets of any kind or description which they may have placed or caused to be placed at, or within, Plot No. 49, Halfway Farm, Kadoma and Plot No. 50, Halfway Farm, Kadoma.
4. Applicant be and is hereby authorized to demolish or cause to be demolished and remove or cause to be removed, any form of development of any structure or super structure on Plot No. 49, Halfway Farm, Kadoma and Plot No. 50, Halfway Farm, Kadoma.

5. The Sheriff of Zimbabwe or his lawful deputy be and is hereby directed to enforce clauses 2, 3 and 4 of this order and where necessary seek the assistance of the Zimbabwe Republic Police.
6. The first respondent shall pay the costs of this application on the legal practitioner and client scale.

ALTERNATIVELY

1. The first respondent be and is hereby ordered to allocate, to the applicant, plots of same size and value with Plot No. 49, Halfway Farm, Kadoma and Plot No. 50, Halfway Farm, Kadoma, within seven (7) (*sic*) of the granting of this order.
2. Failure by the first respondent to abide by clause 1 above of this order, the first respondent be and is hereby ordered to pay the applicant an equivalent of US\$30 000.00, at interbank rate, being reimbursement of the purchase price of Plot No. 49, Halfway Farm, Kadoma and Plot No. 50, Halfway Farm, Kadoma together with prescribed interest thereon calculated from the date of this order to the date of payment in full.
3. The first respondent shall pay the costs of this application on the legal practitioner and client scale.

Factual background

The applicant asserted that on 29 May 2015, he entered into two agreements of sale in respect of Plot No. 49, Halfway Farm, Kadoma and Plot No. 50 Halfway Farm, Kadoma (hereinafter referred to as the properties) with the first respondent. According to applicant, the first respondent sold the properties as part payment for the land surveying services the he had rendered to first respondent in respect of the whole property. The applicant also alleges that the first respondent through his company Shongwe Property Development (Pvt) Ltd would pay the transfer costs on behalf of the applicant.

It is not in dispute that the first respondent is the registered owner of the property under which the properties fall to which first respondent holds subdivision permit to subdivide several plots. It is applicant's averment that he donated Plot No. 49 to one Charles Shepherd Shonhiwa. However the donation was revoked given the circumstances of the matter. Applicant contends that sometime in 2020, discovered that second and third respondents were in occupation of the properties. Though disputed, applicant alleges that after an inquiry with the first respondent as to why second and third respondents were in occupation, first respondent assured applicant that he was sorting out the issue. However, despite repeated demands, first respondent failed, refused and neglected to resolve the issue.

As a result, one Shonhiwa instituted proceedings against the second respondent in case number HC 7354/2020 seeking the eviction of the second respondent from Plot No. 49 which applicant had donated to him. However, the matter was withdrawn. It was only then that the

applicant alleges became aware that second and third respondents had bought the properties from the first respondent on or about 8 September 2020. It on this basis that the applicant filed an application for declaratory relief seeking the above mentioned relief.

The first respondent opposes the matter and argues that the said agreements were cancelled as the applicant failed to pay the purchase price which was on cash basis. He further alleges that the law protects the second and third respondents from unscrupulous purchasers such as the applicant especially when the second and third respondents had already made developments. On the other hand, the second and third respondents raised an objection *in limine* to the effect that the applicant's claim in respect of the properties had prescribed. The second and third respondents argue that the applicant and the first respondent entered into agreements of sale of the properties on 29 May 2015. Consequently, applicant should have claimed transfer of the properties into his name by 29 May 2018 at the very latest. On the merits, the second and third respondent submits that they were not aware of the agreements between applicant and first respondent and as a result they are innocent purchasers. The second and third respondents argue that the applicant did not provide the agreements to show that the properties were part payments for the survey services he provided to the applicant. Additionally, the second and third respondents suggest that, in the absence of such evidence the applicant's claim ought to fail.

After hearing the submissions of Counsel for the parties, I upheld the second and third respondents preliminary point based on prescription and dismissed the application with costs on the ordinary scale. Before I could hand down the judgment, the applicant had noted an appeal to the Supreme Court and had requested for my reasons. These are given below:

I dismissed the application on the basis that the applicant had done nothing over a period of time to protect their rights. In this regard, I place reliance on the case of *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 (2) SA 464 (W) at p 477 – 478 where it was held that:

“It is the idle and slovenly owner, and not one who is alert but incapable of acting, who may lose his property by prescription.” See also *Ex parte Puppli* 1975 (3) SA 41 (D) at 463.

The applicant purportedly bought the properties on 29 May 2015 and did nothing to secure his interests in the properties and had filled this application on 10 June 2021. Section 2 of the Prescription Act defines debt as any obligation arising from statute, contract, and delict or otherwise. Likewise, the applicant is seeking to vindicate a right or obligation arising from a

contract of sale of the properties he entered into with the first respondent. Section 15(d) of the Prescription Act further provides in the present circumstances that:

“15. The period of prescription of a debt shall be:
(d) except where any enactment provides otherwise, three years, in the case of any other debt.”

The applicant has essentially done nothing for the past six years to protect his rights in terms of the contract that he entered into with the first respondent. In my view the present application ought to fail on this point and accordingly it is ordered as follows:

1. The point *in limine* on prescription is upheld.
2. The application is hereby dismissed.
3. The applicant shall pay the first, second and third respondents' costs on the ordinary scale.

V S Nyangulu & Associates, applicants' legal practitioners
Lawman Law Chambers, first respondent's legal practitioners
Coghlan, Welsh & Guest, second and third respondents' legal practitioners