

GROWN MOYO CHIRONGWE
versus
SIMON MAGURA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 24 May & 23 August 2022 & 18 July 2023

Civil Trial

Adv R Mabwe, for the plaintiff
Adv E Donzvambeva, for the defendant

CHINAMORA J:

Introduction

This case came before me as a civil trial. The plaintiff issued summons seeking the following relief:

- (a) Reinstating and reversing the ownership of Stand 205 Good Hope Township of Subdivision D of Goodhope, situate in the District of Salisbury measuring 2 695 square metres under Deed of Transfer Number 444/08 (hereinafter referred to as “the property”);
- (b) Cancellation of Deed of Transfer Number 3681/2011 in favour of the first defendant; and
- (c) Costs on an attorney and client scale.

The facts giving rise to this dispute would be better understood by giving the background of events as they appear from the pleadings of the parties.

The Plaintiff’s Case

According to the plaintiff, on 20 March 2013, one Perpertia Masaire (“Masaire” or “the late “Masaire”, issued summons in this court seeking the relief that I mentioned earlier in my introduction. What the current plaintiff now seeks is exactly what Masaire sought through her

summons. The plaintiff's version is that Masaire bought the property in 2002, whereafter it was transferred into her name in 2008. The process was facilitated by Grown Moyo Chirongwe who is the plaintiff in this matter, because at that particular time the late Masaire was in England where she was residing. It was Masaire's case that she never returned to Zimbabwe to sell her property. During the course of these proceedings, the plaintiff passed away in the United Kingdom on 19 February 2014. It is then that the plaintiff (Chirongwe) became the executor of Masaire's estate and, in turn, that is how he became a plaintiff in this case.

At the hearing of the case, the plaintiff opened their case by leading evidence through Chirongwe (the executor). It was his testimony that he left the country with Masaire for the United Kingdom in 2005, only to return to Zimbabwe in 2008 when his visa expired. The evidence continued that, while he was in Zimbabwe he learnt that the disputed property was being sold. He then recommended Masaire to purchase this property. The plaintiff told the court that Masaire sent the money and the plaintiff signed the agreement of sale on behalf of Masaire. This agreement is Exhibit 1 which appears on pages 2 to 7 of the record. He further explained that in 2005, Masaire returned to Zimbabwe to see where her father had been buried, and entries in her passport, copies of which appear on p 29 of the record confirm the visit. The witness further testified that Masaire obtained title in 2008 when transfer was effected, and he acted on the authority of a power of attorney given by Masaire. At all material times, the plaintiff said that he was in possession of the title deed which he kept on behalf of the applicant. The same was tendered as evidence when I heard the matter.

The plaintiff's additional evidence was that, some time prior to 2012, he discovered that someone was using the property. As a result, he made enquiries which revealed that the first defendant was using the property. Despite speaking to the first defendant, they could not agree on anything. The plaintiff communicated this to Masaire and her legal practitioners, and Masaire gave him a power of attorney so that he could take any action necessary to vindicate the property. The plaintiff added that Masaire could not return to Zimbabwe as she had started working after completing her studies. In addition, she was unable to travel since her passport had expired and had sent it to the plaintiff's wife for her to assist in getting a new passport. It was the plaintiff's testimony that the new passport came out on 5 March 2012. This is confirmed on the personal details page of the passport, which is on p 31 of the record. A look at pages of her passport from

pp 19-43 of the record shows that, during the period that the first defendant said he bought the property, Masaire had not travelled to Zimbabwe. This evidence was corroborated by a letter from the Central Registry of Zimbabwe dated 10 May 2018, confirming that it is unnecessary for Zimbabweans living in the United Kingdom to travel to Zimbabwe solely for passport applications as this can be done through the Embassy in England.

Additionally, the plaintiff testified that when Masaire executed the power of attorney, her signature was in cursive. Another witness called by the Plaintiff was a handwriting expert (Leonard Tendai Nhari) to explain the disparity in the signatures of the late Masaire. His report was tendered into evidence as part of Exhibit 1, which appears on pp 45-47 of the record. It was the expert's testimony that although there were some minor variations, the late Masaire's signature was in cursive and similar throughout. He stated that some of the variations can be attributed to natural variations with time. The conclusion by Nhari was that a comparison of the cursive signatures of Masaire showed that they were closely similar. I make the observation at this juncture that Nhari was approached by both the plaintiff and the first defendant. The plaintiff further explained that Masaire did not return to Zimbabwe at the time of the sale, which is the reason why plaintiff still possessed the original title deed. Regarding Masaire's signature, the plaintiff asserted that, any document which had a signature that was not in cursive was not hers. He said that the property was sold for a very low price, and asserted that Masaire could not have sold it for that given what she paid for it. The plaintiff persisted that he was entitled to the relief he was seeking. He gave his evidence well and was not shaken under cross examination.

The Defendant's Case

The first defendant opened his case by giving evidence himself. He said that he was an engineer with ZESA, and he saw an advertisement for the property in the Herald newspaper. There was Crispen Mudzuri's number in the advertisement. He told the court that he only knew Mudzuri, but did not verify his particulars beyond knowing that he stayed in Zimre Park. In addition, he said that Mudzuri introduced him to Masaire and that Mudzuri also linked him with Keenan Properties, who drafted the agreement of sale, with Chibaya & Partners named as conveyancers in that agreement. In his evidence he said that he was introduced to these lawyers by Masaire. However, the papers before the court show that the conveyancing was done by Mr James Chikobvu Muzangaza of Muzangaza, Mandaza & Tomana. In his evidence, the first defendant admitted that

he did not verify Masaire's documents or confirm her telephone number with the relevant mobile operator. To support his version, the first defendant relied on an agreement of sale between him and Masaire. Further, he produced an acknowledgement of receipt of the payment of US\$4500 (towards the purchase price) dated 21 April 2011, and an acknowledgement of debt for the sum of US\$1460 dated 3 June 2011. In addition, the first defendant tendered a deed of transfer registration number 3681/2011 which conferred title to him. He said the delay in transfer was because Masaire was ill at Chivhu Hospital. Asked in cross examination, why he had stated in his plea that Masaire had no agent, the first defendant had no answer.

The first defendant then led evidence through his second witness, Muzangaza (the lawyer who did the transfer of the property). A bank statement from Muzangaza's trust account showed a transfer of US\$12 040 to Masaire's bank account on 9 September 2011. Muzangaza testified that he had met Masaire in the company of the first defendant. Additionally, he testified that the parties had agreed to give him the mandate to transfer the property. Muzangaza denied that Masaire introduced him to the first defendant. His evidence was that he knew the first defendant in December 2011 when he wanted to register the bond. In addition, Muzangaza said that he did not know the witness who signed the acknowledgement of debt and receipt of payment. In answer to a question from the court, Muzangaza agreed that Mudzuri's signatures on the documents were not consistent. Additionally, Muzangaza denied that he authorized the first defendant to attend the Capital Gains Tax interview at the Zimbabwe Revenue Authority (ZIMRA). Further, Muzangaza denied that he knew that Masaire was ill, and that this caused the delay in transfer. In my view, Muzanga's evidence and contradictions in their testimony damaged the credibility of the first defendant. The lawyer said that in terms of the agreement of sale he was not the lawyer who should have done the transfer of the property. Muzangaza admitted that conveyancing of the property was done through a copy instead of the original title deed. He said verification of Masaire's details was done by a clerk in his firm. Neither Muzangaza nor the first defendant could explain why Masaire had not given them the original title deed. To add to this, Muzangaza could not remember whether the file that he received from Chibaya & Partners had an application for a lost title deed.

It was also the defendant's case that the plaintiff travelled to Zimbabwe and personally sold the property. He said that there are no stamps or endorsements of entry into Zimbabwe, because she could have come in unconventionally. The first defendant, however, did not provide proof of

this. He also did not tell the court the other documents, other than her passport, that Masaire would have used. Thus, the plaintiff's evidence that Masaire was at work at ASDA in the United Kingdom remained uncontroverted. On the purchase price of the property, the first defendant said that it was fair, but had no valuation report to support this. The first defendant contended that the agreement of sale and the subsequent deed is regular, and there was no need to impugn the deed. It seems to me that the issue that I must determine in this trial is: Whether or not a valid agreement of sale was concluded between the late Masaire and first defendant. I will now examine the relevant law.

The Applicable Law

The law with regards to passing of ownership is that the party passing ownership must have authority to do so. This was expressed in *Lord Investments (Pty) Ltd v Mocasta Investments (Pty) Ltd* 1986 (2) PH A 64 (AD), by VILJOEN JA as follows:

“For ownership to pass the parties to a contract of sale must at least have the *animus transferendi* and the *animus accipiendi dominii* (Van der Merwe, op.cit. 202) but another essential requirement for the passing of ownership is that the transferor must be competent in law to transfer ownership. With certain exceptions (none of which is present in this case) nobody can transfer more rights than he himself has: *Nemo plus juris ad alium transferre potest quam ipse habet*”. [My own emphasis]

Put differently, no rights can accrue to a party who has not lawfully acquired title. In this jurisdiction, the position of the law was put more succinctly by BHUNU JA in *TIBIC (Pvt) Ltd & Anor v Mangenje & Ors* SC 13-18, when he stated that a party who had no real rights in a property cannot competently transfer it. The learned judge of appeal relied on *Agro Chem Dealers (Pvt) Ltd v Gomo & Ors* 2009 ZLR 255, where GOWORA J (as she then was) asserted that:

“No person who is not the owner can transfer ownership in anything whether or not such transferor was acting in good faith or *mala fide*”.

See also R H Christie, *Business Law in Zimbabwe*, 2nd Ed, Juta & Co Ltd at 149-150.

In *casu*, it is imperative for me to consider whether a valid contract was consummated between the first respondent and the late Masaira. I will examine the evidence adduced before the court in its entirety for me to find the answer. If I find that a valid sale did not take place, the deed of transfer in the first defendant's name would have to be cancelled.

Analysis of the Case

The evidence of the plaintiff was clear and convincing, more so, that he had known Masaire since 2005 was not challenged in cross examination. He was adamant that the signature on the agreement of sale relied on by the first defendant was not Masaire's. He had known Masaire long enough to be familiar with her signature and, in fact, had been authorized by two powers of attorney from the late Masaire. I therefore have no reason to doubt the plaintiff's testimony in this regard. His evidence was corroborated by the handwriting expert. I observe that Nhari (the handwriting expert) showed that the signature of the late Masaire is not in cursive, which was the style of signing that was on her documents, which were used for comparison. No plausible explanation was given by the first defendant why Masaira would suddenly change and start using capital letters when signing documents. The witness stated that, outside the normal variations in handwritings ascribed to passage of time and other factors, the signature on the agreement of sale was not that of the plaintiff. I notice that Nhari, who had been approached by both parties, had no reason (or motive) to lie. He gave his evidence well and nothing in his evidence was materially dented in cross examination. Nhari was dispassionate and made concessions where this was necessary. The court, therefore, accepts his testimony and report. In this connection, in the South African case of *Menday v Protea Assurance Co. Ltd* 1976 (1) SA 565 at 569B-C, I agree with the court's conclusion that:

"It is not the mere opinion of the expert witness which is decisive but his (or her) ability to satisfy the court that, because of his (or her) special skill, training and experience, the reasons for the opinion which he (or she) expresses are acceptable."

I am aware that, when dealing with the evidence of an expert witness, there is need to tread with caution. Consequently, I have not only considered the evidence of the expert witness but looked at it in conjunction with the plaintiff's. Turning to the evidence of the first defendant, my observation is that he did not provide anything to demonstrate that he knew Masaire and had interacted with her regarding the sale of the property. In this respect, he did not have her phone number. Yet he spent money on a property whose original title deeds he was not given. Besides, no explanation was given for changing the conveyancers. Where there is a change to a term of a contract, I would have expected the first defendant to demonstrate that the parties had agreed to

the variation of the clause nominating the conveyancing lawyers. The first defendant's evidence also contradicted that of Muzangaza regarding the Capital Gains Tax interview at ZIMRA.

The plaintiff's evidence that Masaire never travelled to Zimbabwe during the period covering 2011 to about 5 March 2012 is consistent with probabilities. First and foremost, the passport of the late Masaire does not have stamps showing entry into and out of Zimbabwe during the period in question. Secondly, there is a letter from the Central Registry, whose contents were not challenged by the first defendant. Let me observe as a matter of law, that Masaire's passport is an official government document whose contents are presumed to be regular until lawfully invalidated. (See *Mhandu v Mushore* HH 80-11). While the first defendant suggested that the plaintiff may have travelled through other means, such means were neither explained nor proven. At any rate, that notion is not only whimsical, but speculative and far-fetched. In fact, it beggars belief why the late Masaire would enter the country through unorthodox means.

In so far as the signature on the agreement of sale is not that of Masaire, I have no hesitation in finding that it was forged and is therefore fraudulent. Accordingly, no valid sale could have come about if the late Masaire did not sign the agreement, but it was signed by a fraudster purporting to be Masaire. The inevitable conclusion that I reach is that the sale was (or is) a nullity, and bestowed no ownership rights on the first defendant. The law is clear that everything that follows a nullity is *ipso facto* null and void, and I turn attention in particular on the title deed. In this context, the effect of an invalid act was spelt out by the Supreme Court in *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) at 157B-C, where KORSAH JA accepted the following:

“If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I:

‘If an act is void, then it is in law a nullity. It is not only bad, but incurably bad ... 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.’”

As I have preferred the plaintiff's evidence to that of the first defendant, on the basis of the law referred to above, the plaintiff is entitled to regain the disputed property, despite its registration in the name of the defendant. That title was defective, and ought to be cancelled in terms of s 8(2) of the Deeds Registries Act. It means that, once Deed of Transfer No. 3681/11 is cancelled, the

original title deed number 444/08 is, by operation of law, automatically revived. I am inclined to afford the plaintiff the relief that he seeks.

Turning to the issue of costs, ordinarily, they follow the result. In this case, the applicant has asked for costs on an attorney and client scale. It is trite that costs are in the discretion of the court which should be judiciously exercised. The level of costs, which is punitive, is granted in exceptional circumstances where the applicant has justified such costs. I am not satisfied that the award of punitive costs has been justified by the plaintiff, as I believe that costs on the ordinary scale would be appropriate in the circumstances.

Disposition

In the result, I grant the following order:

1. Deed of Transfer Number 3681/2011 in favour of the first defendant, relating to Stand 205 Good Hope Township of Subdivision D of Goodhope, situate in the District of Salisbury measuring 2 695 square metres, be and is hereby cancelled;
2. Deed of Transfer Number 444/08, in respect of Stand 205 Good Hope Township of Subdivision D of Goodhope, situate in the District of Salisbury measuring 2 695 square metres, be and is hereby reinstated.
3. The Registrar of Deeds be and is hereby directed and authorized to amend and endorse the records kept by his office in accordance with paragraphs 1 and 2 of this order.
4. The first defendant shall pay the plaintiff's costs on the ordinary scale.

V Nyemba & Associates, plaintiff's legal practitioners
Magwaliba & Kwirira, first defendant's legal practitioners