

KUDZANAI MAKOMBE
versus
RHODEN MUNYORO
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 15 June & 31 October 2023

Special Plea

Ms *P Mueya*, for the plaintiff
Mr *T K Mutambo*, for the 1st defendant
No appearance for 2nd defendant

MHURI J: On 5 December 2022 plaintiff issued summons against first defendant claiming:

- (a) an order for the cancellation of the transfer of a certain piece of land situated in the district of Salisbury called stand number 357 Mandara Township of Lot 5 Mandara of the Grange, measuring 1, 0549 acres registered in favour of the first defendant under Deed of Transfer number 6751/2022.
- (b) an order for registration of the property into Christy Wilkinson's name under Deed of Transfer number 5277/1968.
- (c) an order for the second defendant to cancel Deed of Transfer number 6751/2022 registered in the name of the first defendant on the basis of fraud, and delivery of the registration therefore in the plaintiff's name
- (d) costs of suit;

According to plaintiff's declaration, first defendant is her biological brother. She has resided at the property in question which she was leasing from Christy Wilkinson and had purchased it from her in 1989. On 25 June 2021 plaintiff applied for and was granted an order for transfer of the property into her name. The order was granted on 19 January 2022 under case number HC 3426/21.

Unbeknown to her, first defendant had also applied for transfer of the same property into his name and was granted an order under HC 2021/21. First defendant's transfer was effected by second defendant before plaintiff's transfer.

In her view, she was prejudiced of the property due to malicious, fraudulent and wrongful misrepresentation of the first defendant to Court, the result of which she is entitled to transfer of the property in her favour.

Consequent to being furnished with some of the further particulars he had requested, first defendant entered a special plea to plaintiff's claim praying that the special plea be upheld and the summons be dismissed with costs. The special plea was to this effect;

1. that first defendant was granted an Order by this Court in terms of s 9 of the Titles Registration and Derelict Act [*Chapter 20:20*] under case number HC 2029/21. The Order directed second defendant to transfer the immovable property stand number 357 Mandara Township of Lot 5 Mandara of the Grange measuring 1, 0549 acres to first defendant. Second defendant complied with the Court Order and effected the transfer.
2. a provisional order under HC 2029/21 was published in the Herald newspaper and Government gazette calling upon any person having right or title to the property to appear before the Court and establish their claim on the 20 October 2022 or be forever barred from doing so.
3. plaintiff did not appear in Court to establish her claim on the return date and is forever barred from doing so.
4. that this Court cannot grant an order reversing the transfer of the property to first defendant as prayed for by plaintiff without first having set aside the Order granted under HC 2029/21.
5. the Order under HC 2029/21 remains extant and the gains of first defendant under that Order cannot be reversed without first having set aside the Court Order.
6. The order sought by plaintiff is therefore a brutum fulmen.

First defendant persisted with his plea making the submissions that the transfer of the property into his name was as a result of an extant Court Order and the reversal of this transfer can

only be done upon the order being varied or set aside. He cited the case of *CFU v Munro & Ors* 2000 (1) ZLR 405 (S) to support his submission.

It was his submission that an order as sought by plaintiff will be a *brutum fulmen* if granted without first setting aside the order granted under HC 2029/21.

In response to the special plea, it was plaintiff's submissions that she was in occupation of the property through her children and mother until she came back from the UK. She raised in her summons, allegations of fraud against first defendant in relation to the passing on the property to him. The Court Order relied upon by first defendant was procured by fraud hence anything flowing from the fraud is tainted by an illegality and nothing legal can flow from the illegality as such the transfer is *void abinitio*.

Plaintiff cited the case of *Tafama Chirisa v Makufa Mugadzaweta* HH 323/2014 to support her submission.

It was plaintiff's further submission that she saw it prudent to proceed by way of summons instead of an application because there are disputes of facts that will require leading of evidence and that because she alleged fraud it will not be in the interest of justice that the matter be thrown away on a technicality without being ventilated on the merits.

Plaintiff prayed that the special plea be dismissed and the matter be dealt with on the merits.

Most of the facts in this matter are common cause, the main one among them being the fact that on 6 May 2021 first defendant filed a chamber application in terms of s 3 of the Titles Registration and Derelict Lands Act [*Chapter 20:20*].

On 21 September 2021, this Court granted a provisional order with a return date on 20 October 2021 calling upon the respondents and anyone with rights and interests in the property to show cause why the property stand number 357 Mandara Township should not be ceded, transferred to and registered in the name of first defendant, failure of which they would forever be barred from making any claims.

On 23 November 2021, this Court issued an order directing second defendant to transfer, register and cede the property to first defendant.

Meanwhile, plaintiff had also filed a similar application under HC 3426/21 on 21 June 2021 which was granted by this Court on 19 January 2022 to the effect that upon compliance with

all statutory requirements by plaintiff, second defendant registers title of the said property in the name of plaintiff.

It is not in dispute that first defendant had the property transferred into his name in September 2022. This was by force of this Court's Order of 23 November 2021. This Order is extant as it has not been rescinded. It is this Order which first defendant avers should be set aside first before plaintiff can seek reversal of the transfer. I agree with first defendant on that submission. Second defendant effected the transfer into first defendant's name on the strength of the Court Order.

Trite is the legal position that an extant Order of the Court is to be obeyed or given effect to until it has been set aside by a Court of competent jurisdiction.

See; *Commercial Farmers Union v Mhuriro & Others* 2000(2) ZLR 405 (S).

The result therefore in my view is that the order being extant whatever was done on its force is lawful. Whether the Order was sought fraudulently is a matter for argument in the application for rescission of the said Order. To seek reversal of the transfer without first seeking rescission of the Court Order that gave birth to the transfer would be procedurally irregular.

In the circumstances, I uphold the special plea and order that the plaintiff's claim as per her summons be and is hereby dismissed with costs.

Matsika, Legal Practitioners, plaintiff's legal practitioners
Lunga Mazikana Attorneys, first defendant's legal practitioners