

TINASHE MUNOTENGWA
versus
LAWRENCE MUKARONDA

HIGH COURT OF ZIMBABWE
WAMAMBO & KATIYO JJ
HARARE, 12 September 2023 and 13 September 2024

Civil Appeal

E Jera, for the appellant
T S Mjungwa, for the respondent

WAMAMBO J: This matter came as an appeal against the whole judgment of the Magistrate sitting at Harare Magistrate Court.

Before the Magistrate appellant herein was the plaintiff while respondent herein was the defendant.

Plaintiff issued summons for defendant's eviction from stand 7593 Warren Park Harare (hereafter called the property).

Plaintiff contended that he purchased the property in 2006. Defendant contended that he purchased the property in 2002.

The property in question, an undeveloped vacant stand was owned by Saltana Enterprises (Pvt) Ltd (Saltana). Saltana underwent judicial management. Defendant bought the property from Ernest Pahwaringira a senior director of Saltana in his personal capacity.

Plaintiff bought the property from the judicial manager under Tudor House Consultants.

Plaintiff was supported by Deny Pfukwa Mutingwende one of Saltana's directors. His evidence was to the effect that plaintiff was vetted by the City of Harare and his agreement of sale was subsequently regularized by Saltana. He was of the view that defendant had no right or title to the property as there was no regularization and that the property was not one of the 32 director's stands.

Charles Mukaronda testified in defendant's favour. His testimony spoke to him purchasing the property on behalf of his brother the defendant. Further that he had paid the full purchase

price. He was of the view that Saltana engaged him in relation to the property because he was a *bona fide* purchaser.

Another witness who testified for the defendant is Ernest Pahwaringira. His evidence was to the effect that the property was among 32 directors stand. He legitimately sold the property to the defendant in 2002 and had signed documents regularizing the sale of the property to plaintiff, in error.

The trial Magistrate was convinced that plaintiff's case had no merit and dismissed plaintiff's claim with costs. Plaintiff was dissatisfied with the outcome and appealed to this Court. As appellant he raised four grounds of appeal as follows:-

- “1. The Court *a quo* erred in finding that the agreement of sale between the respondent and one Ernest Antony Parwaringira was valid at law.
2. The court *a quo* erred in failing to appreciate the role of the Judicial manager and the validity of the actions of the Judicial manager against all the previous actions of the directors of a company.
3. The Court *a quo* erred in disregarding all the processes that the appellant underwent in the acquisition of the stand none of which the respondent had gone through.
4. The Court *a quo* erred in finding as authentic the receipt of the payments allegedly made by the respondent to the Judicial Manager.”

Respondent raised points *in limine* in his heads of argument. He attacks all four grounds of appeal. The second and third grounds of appeal are said to be invalid on account of their failure to raise and impugn any findings of fact by the Court *a quo*.

The first and fourth grounds of appeal are attacked for different reasons. They are attacked for being untruthful in the sense that what they allege as having been found by the trial court is untrue and not borne by the record.

I will proceed to consider the points *in limine* presently.

Respondent cited the case of *Van de Walt v Abrey* 1994(4) SA 85 (W) wherein STEGMANN Jsaid:

“Firstly, the notice must specify details of what is appealed against (i.e the particular findings of fact and ruling of law that are to be criticized on appeal as being wrong) and secondly the grounds of appeal (i.e must indicate why each finding of fact of ruling of law that is to be criticized as wrong is said to be wrong. For example, because the finding of fact appealed against is inconsistent with some documentary evidence which shows to the contrary or because it is inconsistent with the oral evidence of one or more witnesses, or because it is against the probabilities.”

I appreciate the need for clarity and specificity in the couching of the grounds of appeal. The second ground of appeal apart from not indicating why the findings by the trial Magistrate are wrong is also unclear. It is unclear, what particular role, of the judicial manager is being referred

to. The link between the acts of the judicial manager and the previous actions of the directors is not established in the ground of appeal. It is indeed a vague ground of appeal and will not be considered as it is not a valid ground of appeal.

The third ground of appeal fails on not pointing out why the finding by the Magistrate was wrong. All it does is to place processes appellant went through and then proceed to announce that respondent did not go through the same processes. What processes appellant went through is not specified. The difference of the processes the parties underwent and its implication to the case is also not specified. The purported third ground of appeal, like the purported second ground of appeal is not a valid ground of appeal.

I move to the first and fourth grounds of appeal. As mentioned earlier these grounds are alleged not to reflect what transpired on record.

The first ground of appeal reflects that the trial Court found the agreement between respondent and Parwaringira as valid at law. To resolve this challenge, I will revert to the Court *a quo*'s judgment.

My reading of the judgment does not yield a portion thereof where a definitive finding was made that respondent's agreement with Parwaringira was valid. What the Magistrate found was that appellant did not prove that he had greater rights than that of the respondent who was the first purchaser.

Viewed from a different angle one can say the findings that the agreement was not proven to be fraudulent implies that it was valid at law.

My finding on this ground is that even if it were considered to be a valid ground, the Magistrate's findings are solid. The attack on the agreement as being forged were not proven. If anything, they were raised as a red herring. I say this because it is common cause that respondent signed an agreement of sale with Parwaringira. The issue raised was whether Parwaringira had authority to sell the property in question. The trial court also found that 32 stands were allocated to Directors and Parwaringira as one of the directors benefitted and sold the property in question to respondent.

The trial court also adverted to Exhibit "C" which reflects that the judicial manager accepted payment for the property in 2016, thus creating confusion. In the circumstances I find the first ground unmeritorious.

The fourth ground of appeal faults the finding by the Court *a quo* that receipt of payment to the judicial manager was authentic.

The respondent attacks the same ground on the basis that it is not borne by the record. The respondent avers, that the Court *a quo* held that the onus rested on the appellant who raised fraud to establish the same, but failed to discharge this onus.

The Court *a quo* is finding on this issue is captured at p 9 of the record where the Court *a quo* said:

“Exhibit C shows that the judicial manager accepted money from defendant as final payment for the stand in question on 12 October 2016 yet they also accepted money from the plaintiff creating the confusion we now have Saltana cannot therefore escape liability.”

The trial Court was faced with documentation indicating that both appellant and respondent’s payments for the same property were accepted by the Judicial manager. The Court attributes confusion to the judicial manager and lays the blame on Saltana’s door.

I find that the findings by the Magistrate without authenticating the payment by the respondent to the judicial manager are to the effect that the confusion was caused by the Judicial manager. In any case Exhibit C and D were both produced by the respondent with no objection from the appellant.

The fourth ground of appeal is thus dismissed for the reasons given above. I have found “grounds” 2 and 3 to be invalid and grounds 1 and 4 to be unmeritorious. I have also found the trial Magistrates’ judgment sound on the salient issues.

To that end the appeal stands to be dismissed.

It is ordered as follows:-

The appeal be and is hereby dismissed with costs.

WAMAMBO J:.....

KATIYO J agrees:.....

Moyo and Jera, appellant’s legal practitioners
Tavenhave and Machingauta, defendant’s legal practitioners