IGNATIOUS MATANDA (under power of attorney)

Versus

KWANELE KHANYE

And

ANZAC INVESTMENTS (PVT) LTD

And

GRANT THONYE LAND SURVEYORS

And

REGISTRAR OF DEEDS (N.O.)

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWYO 11 MAY 2021 & 10 MARCH 2022

Opposed Application

M Chimwanda for the applicant
E. Mlalazi for the 1st respondent
No appearance for 2nd, 3rd and 4th respondents

TAKUVA J: Applicant filed what he termed a "chamber application for cancellation of Deed of Transfer number 771/2011".

Background facts

The applicant and the 2nd respondent signed an agreement of sale wherein the applicant purchased a certain piece of land in extent 4 000 square metres identified on the plan by number 73 situated along Circular Drive, Matsheumhlophe, Bulawayo. According to the agreement the 2nd respondent represented by one Hendrik Stephanus Rootman is the seller while the purchaser is indicated as Michael Fiyado Mathanda. This agreement was signed on the 10th of April 2000. Mr Rootman is now deceased. The property was subject to a final survey. There were disputes regarding the survey between the property owners and the land surveyors.

Sometime in April 2005, 2nd respondent instructed 3rd respondent to show the various buyers the land which had been further surveyed and pegged. The applicant was one of such buyers invited. Applicant constructed a semi-permanent structure on the property. Further, applicant adhered to the terms of the agreement of sale by paying through Sterling Properties (Pvt) Ltd.

The 2nd respondent resold the property to the 1st respondent in January 2011 who proceeded to take transfer and ownership of the stand until May 2020 when he sold it to a 3rd party. A dispute arose between applicant and 2nd respondent over the reason for the cancellation of the agreement of sale. On 1st day of March 2018 the applicant obtained an order under HC 3337/17 confirming him as the owner of stand 73 Matsheumhlophe Bulawayo. The applicant is seeking to cancel the title deed in favour of the 1st respondent namely Deed of Transfer number 771/2011.

The 1st and 2nd respondents opposed the application by filing their notices of opposition. The 1st respondent filed heads of argument and appeared in court on the date of the hearing while the 2nd respondent did neither.

First respondent's case

The thrust of the 1st respondent's case is to resist the cancellation of his title deed by arguing that there is no recognizable cause of action pleaded by the applicant for the cancellation of the 1st respondent's title to the property in dispute. It was contended that the applicant has failed to demonstrate the basis upon which he seeks the courts to cancel the 1st respondent's title deed.

Further, it was argued that the 1st respondent was an innocent purchaser of the property in dispute and has taken transfer, title and ownership of the property in dispute and as such he

has real rights over the property, he thus deserves more protection from the courts than the applicant.

The applicant in as far as his interests to the property are founded on an alleged valid agreement of sale is only clothed with personal rights which are only enforceable against 2nd respondent and as such his remedy should be limited to the 2nd respondent on the form of restitution and damages or otherwise.

The 1st respondent raised three points *in limine*. The 1st is that the notice of application is fatally defective. The argument is anchored on the fact that in terms of r60 (1) of this court's rules a chamber application must, if served on an interested party, be in form 23. In other circumstances, it must be in form 25. Form 23 is for use in ordinary court applications or those chamber applications that require to be served like the current one. One of its most important features is that it sets out a plethora of procedural rights. For example in notifying the respondent of his rights to oppose the application and warns him of the consequences of failure to file opposing papers timeously. It alerts the respondent to those rights.

On the other hand form 25, is for a simple procedural chamber application and requires that the substantive grounds for the application be stated, in summary fashion on the face of that form. This is the form which the applicant has used herein and is the wrong form.

In my view this point *in limine* is not dispositive of the case in that while it is clear that the applicant used a wrong form, it did not use a non-existent form. Therefore, the use of the wrong form is hereby condoned in terms of rule 7 (1) (a) of this court's rules. SI 202 of 2021.

The second point *in limine* relates to the use of a wrong procedure. The argument is that since this matter is riddled with material disputes of facts the correct procedure to adopt is by action or trial procedure through the issuance of a summons and not by application and/or

motion proceedings. It was further contended that this is one matter that cannot be resolved by motion proceedings and the multiplicity of litigation on this matter is in itself an indication that the matter is loaded with disputes of facts and the applicant ought to have foreseen this and proceeded by way of action procedure.

The applicant's response was that there are no material; disputes of fact because the applicant's case is founded on a court order under HC 3337/17.

The proper approach to adopt in such cases was laid down in *Shereini* v *Moyo* 1989 (2) ZLR 148 (SC) at 150A-B where the court stated that:

> "the court has a discretion as to the future course of application proceedings where there are material disputes of fact which cannot be resolved on the papers. The court can choose to dismiss the application as a mark of its disapproval of the procedure chosen, or refer the matter to trial or call for oral evidence in terms of the rules of court. The first course is adopted where the applicant should have realized at the time of launching the application that disputes of fact were bound to arise. (my emphasis)

See *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC); *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 at 222B-C; *Van Niekerk* v *Van Niekerk & Ors* 1999 (1) ZLR 421 (S) at 428.

I take the view that in persisting with the argument that there is no challenge to the order under HC 3337/17 and that there are no disputes of facts *in casu*, the applicant is misrepresenting facts. On page 42 of the record of proceedings the 1st respondent filed an application for 'rescission of judgment" under HC 2312/19. This is an application for rescission of judgment granted in favour of the applicant under HC 3337/19. This application is pending.

Also, there are two more cases that are pending in this court involving the same dispute over the same property. They are (i) HC 1456/20 an urgent chamber application filed on 4 September 2020 and (ii) HC 1666/20 a chamber application filed on 30 September 2020.

I am of the view that in this case it was clear at the time of mounting this application that there were material disputes of facts. Firstly because there has already been multiple litigation in respect of the property in dispute between the applicant and 2nd respondent. Secondly, at the time of mounting this application, applicant already knew that 2nd respondent is alleging that the agreement of sale between applicant and 2nd respondent was cancelled at the instance of the 2nd respondent due to breach on applicant's part.

Thirdly, the applicant has continuously alleged that the 1st respondent obtained title to the property unlawfully and unprocedurally but has failed to place before the court the facts that constitutes the so-called unprocedural events and furthermore it should have occurred to the applicant that 1st respondent will point out that he was an innocent purchaser. Accordingly, there was sufficient indication that this matter will be riddled with disputes of facts and applicant ought to have proceeded by way of summons.

In the circumstances, the application being fatally defective is hereby dismissed with costs.

Mudenda Attorneys, applicant's legal practitioners
Mathonsi Law Chambers, 1st respondent's legal practitioners