

JONASI CHITSA
and
SABINA NYARAI CHITSA
versus
MATAPOS PROPERTIES (PVT) LTD
and
CLAWZY TRADING (PVT) LTD
and
REGISTRAR OF DEEDS N.O
and
THE DEPUTY SHERIFF N.O

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 18, 21, 22 October, 2, 3, 4 and 10 November 2021

R. Fitches, for the 1st plaintiff
2nd plaintiff in default
1st defendant in default
T.L Mapuranga, for the 2nd defendant
No appearance for the 3rd and 4th defendants

CIVIL TRIAL

CHIRAWU-MUGOMBA J: After many false starts, this matter that commenced in 2010 was finally heard. At the heart of the dispute lies an immovable property called certain piece of land situate in the District of Salisbury, being Stand 2465 Glen Lorne Township measuring 5290 square metres (also known as 2465 Gaydon Crescent, Borrowdale, Harare). At the time of the trial the property was registered in the name of the second defendant under deed of transfer 1741/2010.

The plaintiffs claim the following:-

- a. An order declaring the transfer of Stand 2465 Glen Lorne Township from the 1st to the 2nd plaintiffs' names to first defendant under Deed of Transfer Number 1271/2010 and the subsequent transfer of the same property under Deed of Transfer Number DR (sic) 1741/2010 from the 1st defendant into the 2nd defendant null and void and of no force or effect.
- b. An order setting aside the transfer of Stand 2465 Glen Lorne Township from the 1st to the 2nd plaintiffs' names to 1st defendant under Deed of Transfer Number 1271/2010 and the

subsequent transfer of the same property into 2nd defendant's name under Deed of transfer number 1271/2010.

- c. An order directing the third defendant to revive the registration of Stand 2465 Glen Lorne Township into the names of the 1st and 2nd plaintiff's against repayment of a sum of US\$18 100.00 to 1st defendant.
- d. An order authorising the 4th defendant to sign all the necessary documents to enable the 3rd defendant to revive the registration of Stand 2465 Glen Lorne Township into the names of the 1st and 2nd plaintiff's against repayment of the sum of US\$18100 to 1st defendant in terms of para (C) above.
- e. An order that the 1st defendant pays the costs of suit on the legal practitioners and client scale.
- f. An order declaring the agreement of sale null and void between the plaintiffs' and 1st defendant and consequently the said subsequent agreement of sale between 1st and 2nd defendant be of no force and effect.
- g. An order that the Registrar of Deeds, 3rd defendant, cancel Deed of Transfer 1741/2010 dated 29 April 2010 registered in the name of 2nd defendant, thereafter cancel Deed of Transfer 1271/2010 dated 30 March 2010 registered in the name of the 1st defendant both in respect of Stand 2465 Glen Lorne Township measuring 5290 square metres.

On the other hand, the second defendant seeks the following order in its claim in reconvention.

- a. An order ejecting the plaintiffs and all those claiming occupation through them from Stand no. 2465 Glen Lorne Township, Harare, measuring 5290 square metres within 10 days of the order being granted.
- b. Payment of the sum of US\$600.00 per month with effect from 1 May 2010 to the date of ejectment with interest at the prescribed rate from date of demand of payment in full.
- c. Costs of suit.

The joint PTC minute captures the issues for trial as follows:-

- a. Whether or not the agreement between the plaintiffs and the first defendant was a loan or sale agreement?
- b. If it was a loan agreement, what were the precise terms and conditions of the loan agreement?
- c. If it was a sale agreement, what were the precise terms and conditions of the sale agreement?
- d. Whether or not the transfer of the property from the plaintiff's to the first defendant was unlawful and invalid?
- e. Whether or not the subsequent transfer of the same property from first defendant to the second defendant was unlawful and invalid?
- f. Whether or not the plaintiffs should be ejected from the disputed property?

The first plaintiff gave evidence on his own behalf and purportedly on behalf of his ex-wife, the second plaintiff. He also subpoenaed one Ellen Mawire from the Deeds Office and Tawanda Chitura from the Zimbabwe Revenue Authority (ZIMRA).

The evidence they gave is pretty much straight forward. It can be summarised as follows:-

- a. The plaintiffs owned the disputed property that they acquired in 2001 through title deed number 8564/2004. The first plaintiff was desperate for money to inject into his company and he heard that one Frank Buyanga was offering loans disguised as agreements of sale. He convinced the second plaintiff and they approached Buyanga to get a loan of US\$25000 which is the money that was required for the business. Buyanga was in the company of his associates. The security required was either title deeds or a vehicle whose value was equivalent to the loan.
- b. The first plaintiff's vehicle did not have a value equivalent to the loan. The plaintiffs then handed over the title deeds to the property even though the second plaintiff was uncomfortable being an accountant by profession. The reasons for entering into such an agreement was because the plaintiffs had been assured that transfer would never be effected but that because of money lending laws, the first defendant was unable to make such loans. The best way to protect it was to therefore purport that there had been an agreement of sale.
- c. The plaintiffs signed an agreement of sale with the purchaser indicated as the first defendant. They also signed a power of attorney to pass transfer and a declaration by seller. The purchase price was indicated as US\$25 000 being the amount of the loan sought.
- d. A transfer of US\$25 000 was effected into the first plaintiff's company account Telectrical Services (Pvt) Ltd on 27 August 2009.
- e. After effecting a few payments, the plaintiffs defaulted. The first plaintiff later attempted to pay the loan through a relative but this was turned down and the loan was said to have ballooned to US\$68 000.
- f. The property was subsequently transferred into the name of the first defendant on 30 March 2010. On 29 April 2010, the same property was transferred into the name of the second defendant.
- g. Although the plaintiffs were foolish in their dealings, they never intended to sale the property to the first defendant especially considering that the value of US\$25000 was way below the value of US\$170 000 which was through an valuation of the property.

- h. The evidence of Ellen Mawire was to the effect that on the power –of-attorney that was used to transfer the property from the plaintiffs to the first defendant there was an alteration and it was not signed for.
- i. Tawanda Peter Chitura from ZIMRA testified that the capital gains tax certificate that was used to transfer the property from the plaintiffs’ into the first defendant’s name was fraudulent but that the one used for the transfer between the first and second defendant was genuine. He pointed out to the many features of the certificate to show that it was fake. The \$1250 supposedly paid as capital gains tax was never paid because the parties were not in the ZIMRA system. No number had been created in the system for purposes of effecting payment. The number indicated at the top of the certificate showed that it belonged to a different taxpayer. The signatures on the certificate were also fake. The ZIMRA stamp on the certificate was also fake. In other words, the first defendant obtained title based on a fake capital gains certificate.

On the other hand, the salient aspects of the evidence of the second defendant is as follows:

- a. Its representative *Marisa Marinda* had been looking for property to purchase on behalf of the second defendant.
- b. Before the purchase, *Marisa Marinda* took the necessary steps to ensure that the property had no encumbrances. This involved visiting the property and viewing it from outside and being satisfied that this was the one she wanted. She visited the deeds office and perused the file and documents relating to the property.
- c. An amount of US\$80 000 was paid for the property. Payment was effected through an estate agent.
- d. There was no collusion between the first and the second defendants.
- e. Had the plaintiffs acted on time in challenging the transfer of the property into the first defendant’s name, the second defendant would not be in such a position of having title since 2010 but still unable to take occupation.
- f. The plaintiffs are therefore estopped from denying the second defendant its right to take occupation.
- g. The claim for US\$600 per month as holding over damages is based on rentals for properties of comparable value.

At the close of the trial, the legal practitioners were directed to file closing submissions by 27 October 2021. Mr *Fitches* duly filed his submissions on time but none were received from Mr *Mapuranga*. No explanation was proffered on failure to file the closing submissions.

In my view, the central issue that also has a bearing on the claim in reconvention is this. Was the agreement of sale between the plaintiffs and the first defendant valid? It matters not that the second plaintiff did not give evidence because if successful, the judgment will be in *rem* thus also covering her. It also matters not in my view that the money was transferred through a company account.

The first plaintiff was subjected to rigorous cross examination whose salient point is that it was put to him that had he approached legal practitioners at the point that he was told that the loan had ballooned to US\$68 000, the second defendant would not have purchased the property. However, the cross examination did not subtract anything from the evidence led by the first plaintiff that the loan agreement was disguised as an agreement of sale. The major constraint faced by the second defendant is that the first defendant was in default and as a result, the first plaintiff's evidence was not challenged.

The Supreme Court had occasion to deal on appeal with a similar matter that had come before this Honourable Court – see *Mzilikazi and anor vs Marume and ors*, SC-39-16. Although the company involved in that case is Gutu Properties (Pvt) Ltd, it is clear that this is one of the many proxies used by one Frank Buyanga to enter into loan agreements disguised as agreements of sale. The Supreme Court dismissed the appeal. I will therefore quote in *extenso* from the Supreme Court judgment:-

“At the hearing of the appeal, counsel for the appellants submitted that, by virtue of the abstract theory of transfer, the appellants had acquired unimpeachable title from the second respondent. However, he quite correctly conceded that the theory would not apply, if it were shown that the first respondent had no intention to transfer to the second respondent. He also accepted that, if the original agreement of sale between the respondents was void due to fraud or illegality, then any subsequent transfer of the property purportedly sold would be a nullity and the appellants would not be able to take proper title from the second respondent.

On the facts, counsel for the appellants contended as follows: that the first respondent intended to sell the property in question to the second respondent as evidenced by her signature of the requisite transfer documents and delivery of the title deeds; that she is therefore estopped from denying the intention to sell and transfer; and that, consequently, she cannot challenge the sale and transfer of the property from the second respondent to the appellants who were bona fide purchasers of the property.

The evidence led in the court a quo shows that the first respondent had no intention to sell her property to the second respondent for the unacceptably paltry sum of US\$ 30,000. The

transaction between the parties was in essence a loan agreement, as is evidenced by the fact that the first respondent made a repayment of US\$ 3,000. This effectively negates any intention of transacting a sale agreement. She was duped into the transaction by the representations of the second respondent and its agents. The second respondent was barred in the court a quo and did not appear to contradict the first respondent's position. The appellants concede that they were not privy at all to the transaction between the first and second respondents. In our view, the appellants have failed to demonstrate any misdirection by the court a quo in its factual findings as to the real intention underlying the transaction between the first and second respondents.

Insofar as the argument for estoppel is concerned, it is abundantly clear that there were no direct dealings between the first respondent and the appellants and that the former made no representations to the latter. The only party that could have relied on the doctrine of estoppel is the second respondent. Without any direct link between the first respondent and the appellants, they cannot raise any estoppel as against her.

Even on the abstract theory of transfer relied upon by the appellants, it is necessary to show that the original owner had the real intention to transfer title. Moreover, where the original sale or transfer is tainted with fraud or illegality and is therefore null and void, any subsequent sale or transfer of title is equally a nullity and cannot be sustained.

In the instant case, we have found that the first respondent had no real intention to sell or transfer the property. Additionally, and very importantly, the evidence before the court a quo, which was not challenged or rebutted, showed that there were several critical illegalities and irregularities vitiating the original purported sale and transfer between the first and second respondents. These illegalities related to the second respondent's power of attorney to transfer, the non-payment of capital gains tax, the absence of any rates clearance certificate and the unregistered moneylending status of the second respondent."

In a similar matter with yet another company called Cookham Inn (Pvt) Ltd- see *Mhende and anor v Cookham Inn (Pvt) Ltd and anor*, HH-45-21, the same *modus operandi* was used. The salient part of the judgment by MAFUSIRE J reads as follows:-

"Mapungwana further claims Buyanga, or one or other of his employees or associates, forged the actual transfer documents that saw him lose his house to Cookham Inn. He scoffs at the Mhendes for posturing as innocent buyers in the subsequent transfer from Cookham Inn to themselves. Among other things, they never inspected the house, their representatives being content just to inspect the property from outside. Furthermore, the paltry \$12 000-00 declared on the transfer documents as the purchase price, or the \$20 500-00 that they claim to have actually paid, were both so trifling that it shows they were complicit in the whole scam. According to him, the property was at that time worth not less than \$45 000."

Further that,

"Buyanga's loan dealings were illegal. He was not a registered money lender. But that is a small part of the problem. The larger parts are manifold. Mapungwana did not sell his house to Buyanga's company. Mapungwana may have gone into it with his eyes wide open. He made himself desperate for money. He ignored all the flashing red lights. Evidently the prospects of making supper profits from his business concept dulled his common sense. Undoubtedly, that was part of the 'foolish wisdom'. But the fact remains that he did not sell his house. Buyanga assured him that he would not lose his house. However, no sooner was that assurance given than the house was transferred. The documents in respect of the transfer from Mapungwana to Cookham Inn were forged. The transfer giving rise to deed of transfer

no 4602/2009 was illegal. Further, no stamp duty or capital gains tax were paid as required by law. With this finding I need not concern myself with the subsequent transfer from Cookham Inn to the Mhendes or their *bona fides* in the entire transaction. They took precarious title. The transfer to them hung on nothing. If the first transfer was a nullity, assuredly it is, so also is the second one to themselves which hinged on the first.”

The matter in *casu*, bears all the hallmarks of the *Mzilikazi* and *Mhende* judgments. The first and the second plaintiffs never intended to sell their property to the first defendant. The loan agreement was fraudulently disguised as an agreement of sale. The transfer from the plaintiffs to the first defendant’s name was fraught with irregularities chief among which is a fraudulent capital gains certificate. Even though the court is convinced that the second defendant took all steps to ascertain whether the first defendant had title, an agreement founded on an illegality cannot at law give rights and obligations enforceable by parties *inter se*. – See *Gift Investments (Pvt) Ltd vs Zimbabwe United Passenger Company and anor*, SC 99/20. The transfer of the property from the first to the second defendant is therefore tainted and cannot stand. The doctrine of estoppel cannot protect the second defendant – *Mzilikazi (supra)*. For those reasons, the claim in-reconvention by the second defendant against the plaintiffs for eviction and holding over damages cannot be sustained. I note that the plaintiffs had offered to pay US\$18100 to the first defendant. The latter was however in default at the trial to confirm, accept or reject the offer.

On costs, I will adopt the approach outlined in the *Mhende* matter. The plaintiffs were foolish in their dealings despite the red flags. The second defendant was diligent and the court perceived no collusion with the first defendant. An appropriate order will be that each party bears its own costs.

Disposition

1. Deed of transfer No. 1271/2010 dated 30 March 2010 in favour of Matapos Properties Limited over a certain piece of land situate in the district of Salisbury, called stand 2465 Glen Lorne Township, measuring 5290 square metres is hereby set aside.
2. Deed of transfer No. 1741/2010 dated the 29th of April 2010 in favour of Clawzy Trading (Pvt) Limited over a certain piece of land situate in the district of Salisbury, called stand 2465 Glen Lorne Township, measuring 5290 square metres is hereby set aside.

3. The Registrar of Deeds be and is hereby ordered to revive deed of transfer no. 8564/2004 dated the 14th of October 2004 in favour of Jonasi Chitsa and Sabinah Nyarai Chitsa within seven days from the date of service of this order.
4. The second defendant's claim in reconvention be and is hereby dismissed.
5. Each party shall bear their own costs.

Ferrao Law Chambers, plaintiffs' legal practitioners
Mushoriwa Pasi, 2nd defendant's legal practitioners