

JOHN TRANOS MATUKUTIRE
versus
FILLET MADENGA
and
RATIDZAI MATUKUTIRE
T/A GLOBAL VILLAGE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 18 & 26 October 2022

Opposed Application

Ms F *Mahere*, for the applicant
Mr TL *Mapuranga*, for the 1st respondent
No appearance for the 2nd respondent

TAGU J: This is an application in terms of r 59 of the Rules of this Honourable Court, 2021 for the confirmation of cancellation of an agreement of sale entered into by applicant and the first respondent over Stand Number 1258 GoodHope Township of Lot 16 of Goodhope Harare measuring 2000 square metres on 12 April 2018.

The material terms of the Agreement of Sale were that the full purchase price in terms of clause 1 of the said agreement was US\$45 000 which was to be paid in instalments with the initial deposit of US\$30 000 being paid within five days of the parties signing the agreement of sale. The balance of US\$15 000 was to be paid directly to applicant and as cash within 30 days of signing the agreement of sale. The first respondent failed to make any payments. First respondent was given notice in terms of clause 15 of the Agreement of Sale which fell on deaf ears. However, when confronted first respondent claimed that he paid the purchase price to the second respondent and through the second respondent's project known as Global Village which project applicant said is not part of it. Resultantly, the applicant cancelled the agreement and now seeks its confirmation.

The first respondent opposes the application and filed a counter claim in terms of r 58 (b) of the High Court Rules, 2021.

At the hearing of the matter, Ms F *Mahere* move for the striking out of the counter-claim. The application to strike out the counter-claim was not opposed by the counsel for the first respondent and same was granted.

Before dealing with the merits of the application the counsel for the first respondent took a point *in limine* to the effect that there are material disputes of fact which cannot be resolved on the papers. These dispute of facts relate to the entire factual basis upon which the present application is based. He said applicant ought to have proceeded by way of action procedure and not motion procedure. He said applicant is aware that he took oath and mentioned that he paid the full purchase price to him in the presence of the second respondent. Furthermore, he argued that the agreement of sale is extant despite several attempts to have it cancelled. According to first respondent these disputes of facts cannot be resolved on papers even if the court adopts a robust approach, hence prayed that the application be dismissed with costs on a legal practitioner and client scale.

The preliminary point was strongly opposed by the counsel of the applicant who submitted that there are no material disputes of fact as the agreement of sale is clear as to what was to be done, when it was to be done and how it was to be done.

In motivating his argument counsel for the first respondent said we have two contradictory scenarios where the first respondent says he paid the purchase price when second respondent was present and her role in those matters was to act as the record keeper for the applicant and she would produce receipts given to the applicant. He referred the court to applicant's wife's affidavit p 86, particularly to the last two sentences, p 87 para 4.4, p 88 para 6.2 where the applicant's wife RATIDZAI MATUKUTIRE (the second respondent) said:

- “3. No issues arise, save to confirm that I am aware of the agreement between 1st Respondent and my husband, Applicant. I aver that I was a witness to this transaction, and the signature that appears at page 19 of the agreement, being the signing page of the referenced agreement which Applicant relates to in paragraph 8 of his founding affidavit, is mine (See where it is written “sold by Mrs. Matukutire”. I was involved in the sale of the property to the 1st Respondent. Applicant sold more stands to different buyers and I was applicant's record keeper for all these transactions.
- 4.4 In particular, I remember applicant being paid the sum of US\$5 000, US\$20 000 and US\$10 000(twice), and I receipted same, for and on behalf of applicant.
- 6.2 In fact, applicant makes reference to payments made to me, when payments were made to him and I only authored receipts to confirm the payments of the purchase price in terms of the agreement of sale.”

The counsel concluded by saying in the present case we have two people saying money was paid in full to the applicant, one them being applicant's own wife. Only the applicant says money was not paid to him, but paid to his wife and money did not come to him eventually. He referred the court to p 19 of the Agreement of Sale which says "sold by the wife". Dispute of this nature cannot be resolved on papers. I was referred to *Jirira v ZIMCOR Trustees Ltd & Anor* 2010 (1 ZLR 375 (H) at 378 where it was said:

"There is no way of ranking affidavits in terms of veracity. One simply cannot find one affidavit more credible than the other."

The applicant maintained that there are no material disputes of fact and all that the first respondent has are bald averments. It was submitted that a look at the agreement of sale does not show that the second respondent was indicated as the applicant's book keeper. Reference was made to several receipts which shows that payments were made to second respondent and that second respondent did not receive the payments on behalf of the applicant.

The applicant referred me to two authorities on dispute of facts. In *Peterson v Cuthbert & Company Limited* 1945 AD 420 at 428, it was held that in every case the court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence because if this were not done the respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant.

In *Supa Plant Investments (Pvt) Limited v Edgar Chidavaenzi* HH 92/09 at p 4 MAKARAU J (as she then was) stated:

"A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

In the present case it is not in dispute that applicant and first respondent entered into an Agreement of Sale of an immovable property. The terms of the Agreement of Sale are clear. However, there is a dispute as to whether or not the full purchase price was paid. According to the applicant some money was paid to his wife RATIDZAI MATUKUTIRE (2nd respondent) t/a Global Village though he had not authorized her to receive any money on his behalf. The first respondent said he paid in full to the applicant in the presence of applicant's wife. The applicant's wife swore to an affidavit in which she confirmed that indeed she was recorded on the Agreement

of Sale as the seller, that she witnessed the transaction between applicant and first respondent, and that she witnessed money being paid by the first respondent and she issued out receipts. According to her all the purchase price was paid. All these statements were made by the three parties in this case on oath. Proof of payment was produced by way of receipts attached to the record. That second respondent is applicant's wife is not in dispute. The applicant even admitted that second respondent got a buyer for the property for him.

The facts put by the applicant in this case have been disputed and traversed by the first respondent in such a manner as to leave this court with no ready answer to the dispute between the parties in the absence of further evidence. As was said in the case of *Jirira v ZIMCOR Trustees Ltd & Anor*, (*supra*), this court found it difficult to determine the veracity of the affidavits of the parties. There are indeed serious and material disputes of facts which cannot be resolved on papers. Further and oral evidence is required so that the second respondent can explain why her testimony differs from that of the applicant. Equally, applicant has to explain why his testimony differs from that of the second respondent. The first respondent has to proffer further evidence as to why he paid to second respondent contrary to the provisions of the Agreement of Sale.

For these reasons I uphold the second point *in limine*.

IT IS ORDERED THAT:

1. Application is dismissed.
2. Applicant to pay costs.

Mugiya & Muvhami, applicant's legal practitioners
Rubaya & Chatambudza, first respondent's legal practitioners