

SAM MOMBERUME
versus
NYASHA DZIVA
and
DIRECTOR OF HOUSING CHITUNGWIZA MUNICIPALITY N.O

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 25 January and 11 February 2022

Opposed Application

Mr S Mushonga for the Applicant
No Appearance for the 1st Respondent
Ms N Mangoi for the 2nd Respondent

MHURI J: This is a court application filed on 10 February 2017 in which applicant is seeking an order to this effect:-

- (a) that first respondent signs all relevant cession papers for stand 13371 Nyatsime Low Density Chitungwiza within 7 days of being served with this court's Order and pass cession to applicant upon payment by applicant of all the requisite cession fees.
- (b) that the Deputy Sheriff be authorized to sign all relevant papers for and on behalf of first respondent and submit them to second respondent who is ordered to accept the papers and pass cession to applicant upon payment to second respondent by applicant of the necessary cession fees.
- (c) that applicant pays to second respondent all other payments required by second respondent in order to effect the cession process.
- (d) that first respondent pays applicant's costs of suit on a legal practitioner/ client scale if he does not pass cession or opposes the application otherwise he is to pay costs on a party and party scale.

At the conclusion of the hearing, applicant proposed amendments to this draft order. In paragraph (a) to state after the word ORDER,

“and submit them to second respondent who is ordered to pass cession to applicant....”

In paragraph (b) to begin with

“In the event of failure by first respondent to sign all relevant cession papers,.....”

Paragraph (d) to be deleted and replaced with second respondent to pay applicant’s costs on a legal practitioner/ client. Costs are no longer being claimed against first respondent in view of his consent to judgment.

First respondent filed a consent to judgment on 24 November, 2020 in which he stated he was willing and ready to sign all cession papers to allow applicant to get his purchased stand and that the applicant’s prayer be granted in full.

Second respondent is averse to the granting of the application. The second respondent’s Town Clerk one George Makunde deposed to an affidavit stating the grounds for opposing applicant’s application as :-

1) that stand 13371 which was allocated to first respondent was repossessed and allocated to one Komborero Maparidze and first respondent was then allocated stand 11241 instead. Stand 11241 was also repossessed from first respondent and allocated to one Makaudze W Gakau

2) that stand 13371 was repossessed and allocated to another party because first respondent had indicated that the place was rocky as such he would not be able to blast it.

It was not clear to second respondent as to how and why the first respondent sold the stand to applicant whilst he was fully aware of the transfer.

3) that the sale of stand 13371 by first respondent to applicant was illegal as the first respondent no longer had rights over the stand.

To support its position, second respondent attached hand written copies of what it termed registers. Applicants’ case is that

1) first respondent who was second respondent’s employee was offered stand 13371 by second respondent as payment in lieu of salary arrears which second respondent owed him and had been unable to pay. The offer letter dated 25 August 2014 by B Gwenzi on page 12 of the record refers.

2) On 05 November, 2014 first respondent entered into an agreement of sale of the stand with applicant. The purchase price being US \$5 900. US \$2 700-00 was to be paid to

second respondent, US \$1000-00 to be paid to the first respondent on 05 November 2014. US \$ 2000-00 to be paid to first respondent by 10 November 2014 and another US \$2000 to be paid to first respondent by 30 November 2014.

3) In the offer letter, second respondent indicated a service charge of US \$ 2000- plus a survey fee of US \$700-00, the total being US \$2700 which was to be paid by first respondent.

4) By a letter dated 18 March 2015 second respondent advised first respondent to pay his service and survey fees within 30 days.

5) Second respondent confirmed through receipts, full payment of service charges in the amount of US \$2700 and US \$590-00 by first respondent.

6) Applicant paid in full the purchase price as per the agreement of sale

7) Having paid the full purchase price, applicant was entitled to have ownership passed on to him. But second respondent is resisting.

Second respondent's submissions in support of its opposition was that, first respondent was transferred to stand 11241 in 2016 after he had complained that stand 13371 was rocky and could not afford to build. This complaint was not in writing, neither was there a written offer letter of stand 11241. The records (hand written) go to prove that first respondent was allocated stand 11241.

Stand 13371 was later transferred to Komborero Maparidze. This also was not put in writing. Council's approval was not sought prior to applicant and first respondent entering into an agreement of sale. First respondent knew that he had ceased to have rights over stand 13371 but fraudulently sold and received the purchase price. The sale therefore is not enforceable because the stand had been transferred to someone else.

A reading of the papers filed of record and considering the oral submissions made by the parties' counsel, clearly shows that this is one matter second respondent ought not to have opposed at all. This matter ought to have been settled as far back as 2017 without the need of approaching this court.

It is not in dispute that second respondent offered first respondent stand 13371 in lieu of payment of salary arrears. Second respondent concedes to this fact in its opposing affidavit. An offer letter dated 25 August 2014 on second respondent's letter head filed of record bears testimony

to this. Another duly stamped document on second respondent's letter head dated 18 March 2015 called upon first respondent to make payment of the service charges and survey fees. Confirmation of full payment of these charges was generated as receipts on second respondent's official documents. What then was left is cession of ownership from second respondent to first respondent and then to applicant.

What boggles the mind and raises suspicion is that all other second respondent's dealings as deposed to and submitted by its counsel are not documented at all. It relied on hand written copies of what it terms council registers on which are cancellations which are not explained at all. There is no official written cancellation on a letter head to first respondent. There is no offer letter in respect of stand 11241 to first respondent as averred. There is no offer letter on a letter head to Komborero to show that he was offered stand 13371. There is no cancellation letter in respect of stand 11241 which second respondent avers was again repossessed from first respondent. There is no official document at all to support second respondent's averments vis a vis its transactions after confirmation of receipt of full payment of charges.

Further, applicant's submission that he has been in occupation of stand 13371 since then to date and has done some developments on it but no one has ever come to complain, went undisputed, indeed if the stand was given to Komborero it was expected that Komborero would complain to second respondent about applicant's occupation of the stand. Second respondent's counsel submitted that she was not aware of any complaint being raised with second respondent.

A further issue that boggles the mind and exposes second respondent is the submission that first respondent was aware of the transfer of stand 13371 from him to Komborero and yet he went ahead and fraudulently sold the stand to applicant. The agreement of sale was entered into in 2014 after the issuance of the offer letter. The transfer according to second respondent was in 2016. So where is the fraudulent transaction here? To also say the sale is unenforceable because the stand was already transferred to another party is yet another lie by second respondents. As alluded to, there is no proof that this stand was transferred to anyone else except being allocated and offered to first respondent.

In view of the fore going, I will grant applicant's application and the relief sought with the amendments earlier stated.

As mentioned, this matter ought not to have come this far. Even having come this far ought not to have been opposed so vigorously in view of some of the concessions made. I will grant applicant's prayer that second respondent pays costs on a legal practitioners and client scale.

In the result, it is ordered that:-

1. The application be and hereby granted.
2. First respondent signs all relevant cession papers for stand 13371 Nyatsime Low Density Chitungwiza within seven days of service of this court order on him and submit the papers to second respondent for processing
3. In the event of failure by first respondent to comply with paragraph 2 above, the Deputy Sheriff is hereby authorized to sign all relevant papers for and on behalf of first respondent and submit them to second respondent.
4. Upon receipt of the papers referred to in paragraphs (2) and (3), second respondent shall pass cession to applicant within 30 days upon payment by applicant to second respondent of the necessary cession fees and all other payments required by second respondent in order to effect the cession process.
5. Second respondent pays costs of suit on a legal practitioner and client scale.

There is no order as to costs against first respondent

Mushonga Mutsvairo and Associates, applicant's legal practitioners.

Matsikidze Attorneys at Law, respondent's legal practitioners.