

NOT REPORTABLE/DISTRIBUTABLE

MONICA GONDO
v
(1) **NTOMBIZODWA NHOWE** (2) **RAYMOND TAFADZWA**
NHOWE (3) **HARARE MUNICIPLITY** (4) **REGISTRAR**
OF DEEDS N.O (5) **SHINGIRAI FABION NHOWE**

SUPREME COURT OF ZIMBABWE
MAKONI JA, KUDYA JA & CHATUKUTA JA
HARARE: 21 JUNE 2021

K. Gama, for the appellant

S.T. Mutema, for the first respondent

CHATUKUTA JA: This is the unanimous decision of this Court.

This is an appeal against the whole judgment of the High Court which set aside the agreement of sale between the appellant and the fifth respondent, the compliance certificate issued by the third respondent to the fifth respondent and the transfer of subdivision 40715 Harare Township to the appellant under Deed of Transfer 7167/18.

The first respondent and the fifth respondent are wife and husband. The fifth respondent is the registered owner of stand 13687 Salisbury Township held under Deed of Transfer 6830/88 (the main property).

The fifth respondent was issued, on 9 June 2017, with a permit to subdivide the main property to create Stand 40715 Harare Township (the subdivision). The permit had

certain conditions attached to it. The fifth respondent proceeded with the subdivision. Thereafter and on 30 October 2017 he entered into an agreement of sale of the subdivision with the appellant. The subdivision was subsequently transferred to the appellant on 28 November 2018.

On 7 May 2019, the first respondent approached the High Court in terms of s 14 of the High Court Act seeking the relief as granted by the court *a quo*. The basis of her application was that she had an interest in the subdivision by virtue of her marriage. She averred that “having issued divorce proceedings under HC 9350/12 in which the ownership of the property said to have been transferred irregularly to the first respondent was part to issue, my interests and rights in the property would be peremptorily defected (*sic*) if the declaratory order is not granted (*sic*).”

The court *a quo* made a finding that the first respondent had a direct and substantial interest in the subdivision derived from her marriage to the fifth respondent and the pending divorce proceedings.

It also found that the certificate of compliance was obtained fraudulently since it had been issued after the agreement of sale between the appellant and the fifth respondent had been concluded. It also found that the certificate was not signed by the Director of Works of the third respondent. It further found that the fifth respondent did not comply with the terms and conditions of the subdivision permit before concluding the sale agreement with the appellant.

Aggrieved by that decision the appellant filed the present appeal in which she raises four grounds of appeal. At the hearing, the appellant abandoned ground no 3.

It is our view that this appeal can be resolved by the determination of the fourth ground of appeal. The ground raises the question whether the first respondent had a direct and substantial interest to impeach the agreement of sale between the appellant and the fifth respondent.

We agree with Mr. *Gama* that the first respondent did not have a direct and substantial interest in the subdivision. The main property and the subdivision were subsequently registered in the name of the fifth respondent. As the owner of the properties he could dispose of the properties. Instead the first respondent has an indirect interest in that she has a personal right against the fifth respondent. That personal right disentitles her from vindicating the subdivision.

The court *a quo* therefore misdirected itself in making a finding that the first respondent had a direct and substantial interest in the main property and the subdivision.

It was therefore not necessary for the court *a quo* to inquire into the validity of the certificate of compliance.

In any event the first respondent was not privy to the contract between the appellant and the fifth respondent. She therefore could not sue on it.

There is no reason why we should depart from the general principle that costs follow the course.

Accordingly, we make the following order:

- 1 . The appeal be and is hereby allowed with costs.
- 2 . The order of the court *a quo* be and is hereby set aside and substituted with the following:

“The application for a declaratory order filed under Case No. HC 3715/19 be and is hereby dismissed with costs”

MAKONI JA : **I agree**

KUDYA JA : **I agree**

Gama & Partners, appellant’s legal practitioners

Stansilious & Associates, 1st and 2nd respondent’s legal practitioners

Kanonga & Associates, 3rd respondent’s Legal Practitioners