

ROSELINE MUGODHI
and
VIMBAI MANEMO
versus
LINDIWE NDEBELE
and
NESBERT CHIKAKA
and
REGISTRAR OF DEEDS
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 23 JUNE AND 14 JULY 2016

Urgent Chamber Application

B Masamvu for the applicant
R Dzete for the 1st respondent
2nd respondent in person
No appearance for the 3rd & 4th respondents

MOYO J: At the hearing of this application I dismissed it and advised the parties that my reasons would follow:

Here are the reasons:

This is an urgent application for an order that third respondent be interdicted from effecting transfer of stand 10679 Bulawayo Township of Bulawayo Township also known as number 21 Banbury Road, Southwold in Bulawayo to first respondent and that fourth respondent be interdicted from evicting first applicant from number 21 Banbury Road Southwold in Bulawayo.

The facts of the matter are that the second applicant bought the property in question from second respondent and paid the purchase price in full, this was allegedly done through second applicant on 2 June 2015. The first applicant then took occupation of the property in August 2015 and the second respondent gave her the original title deed.

On 2 June 2015 the second respondent signed the power of attorney to make transfer.

Now on perusal of the application, one is struck by an awkward situation in that there is an agreement of sale between second respondent and second applicant dated 23 May 2015.

Clause 1 of the agreement provides that

“The seller hereby sells the property to the purchaser for a sum of \$60000-00 payable in cash.”

No dates of payment are given and yet the parties allege that the agreement of sale was drawn by a legal practitioner. The agreement further states in clause 2 that the purchaser will be given vacant possession of the property on 30 June 2015.

Surprisingly the second respondent has filed an acknowledgment of receipt of \$20000-00 from the second applicant on 23 May 2015. Applicant avers that the whole purchase price was paid but does not attach any such proof of payment.

There is another agreement of sale between second respondent again and first applicant now for \$65000-00 dated 2 June 2015.

This agreement now stipulates that:

- 1) a deposit of \$15000-00 is payable on signature on the agreement of sale.
- 2) the balance shall be paid in five months in equal instalments of \$10000-00 as from 30 of June 2015.
- 3) The balance shall be paid on or before 30 October 2015.
- 4) The purchaser shall pay each monthly instalment at the offices of Dube-Tachiona and Tsvangirai and both parties sign an acknowledge of receipt.

Applicant does not allege that she paid the purchase price in terms of the agreement neither does she attach proof of payment. I will hasten to point out that it is not clear here what first and second applicants were doing buying the same property from second respondent within a week and not showing any proof of payment for it. It boggles one's mind why second respondent had to sell his property to second applicant on vague terms before the transaction he had with first applicant was carried to fruition. Second respondent it seems then sold the property to first applicant with the involvement of both applicants. This is not explained at all in

the founding affidavit neither is the absence of proof of payment to the second respondent by both first and second applicants, explained in the founding affidavit.

Second respondent has filed opposing papers and alleges that he sold his property to first respondent, and before she had paid it off, he ran into financial problems, he then approached second applicant, borrowing \$20000-00 and advising her that he was waiting for money from first respondent who still had to pay off the purchase price. He avers that the second applicant then lent him \$20000-00 and he tendered the title deeds for the property as security. Second applicant then advised second respondent that in fact it would be better if they reduced their agreement to writing and present it like a sale agreement in case first respondent failed to pay the balance, then second applicant would then pay off the balance and take over the house. Second applicant gave him \$20000-00 and he signed for it. He also avers that second applicant later invited him to make another agreement of sale with first applicant as the \$20000-00 that second applicant had lent him in fact belonged to first applicant. That is when the agreement of sale between second applicant and first applicant dated 2 June 2015 was then prepared and signed. He says he never received any other sum of money from the applicants and infact he was made to sign the transfer papers just in case the agreement would subsequently be brought to fruition if first respondent failed to pay him his balance.

I dismissed the application for following reasons.

- 1) Firstly it is not clear what exactly transpired between first and second applicants and the second respondent since they have annexed copies of agreements of sale that seem to be divorced from the situation that was on the ground. I say so for both agreements allege that the full purchase price would be paid, meaning that both applicants paid a total of \$125000-00 to the respondent? It does not appear to be so.

The second agreement between first applicant and second respondent stipulates that \$15000-00 would be paid as a deposit, did that happen? If so what then became of the \$20000-00 that had been paid by second applicant to second respondent on 23 May 2015?

Also, the agreements do not strike as ones that were drawn by a qualified legal practitioner due to the vagueness of the terms therein. Again, it defies logic that on 2 June 2015 second applicant signed all papers including the power of attorney to make transfer yet, he was

still to wait for \$50000-00 that was yet to be paid through monthly instalments until 30 October 2015?

How could a man grant lawyers authority to divest him of his title prior to payment? It only makes sense that what could have transpired is what the second respondent alleges, that there were never any agreements of sale between himself and the applicants, that in fact he was just loaned \$20000-00 which he signed for but the parties together with the lawyers decided to draw agreements that painted a different picture with the hope that first respondent might default and that applicants would then finalise their agreements with second respondent. The lawyers that represent the applicants (the purchaser) in this matter also doubled up as the sellers conveyancers and therefore had a conflict of interest no wonder why the agreements drawn do not make any legal sense at all as well as having the seller sign a power of attorney divesting himself of property rights without receiving full payment of his dues, that is, before the purchaser had met her obligations in terms of the purchase price.

Again even if I had found that the applicants did have a valid agreement of sale with the second respondent, first respondent is the first purchaser of the property, she already has an order of this court operating in her favour, second respondent confirms that he indeed sold his house to first respondent and that she paid for it in full. As for the applicant's monies, the greater portion seems to with their lawyers as second respondent denies receiving anything at all after receipt of the \$20000-00 loan.

It is for these reasons that I found that firstly, the applicants had not made a *prima facie* case as against the second respondent neither did they successfully show that they had a right to protect as against the first respondent. They also failed to show that the balance of convenience operates in their favour. Refer to the case of *Zesa Staff Pension Fund v Mushambadzi SC 57/02*.

It is for these reasons that I dismissed the application with each party bearing its own costs as the respondents did not insist on their costs being met by the applicants.

Dube-Tachiona & Tsvangirai, applicants' legal practitioners
Maronedze, Mukuku & Partners, 1st respondent's legal practitioners