

KAISA NGUWO
and
IVY NGUWO
versus
MARIA PENO
and
THE CITY OF BULAWAYO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 19 JULY 2016 AND 28 JULY 2016

Opposed matter

H. Shenje for the plaintiffs
P Mvundla for the 1st defendant

MOYO J: The plaintiffs in this matter issued summons against the defendant for specific performance. At this hearing of this matter I dismissed the special plea in bar and stated that my reasons would follow.

The facts of the matter are that sometime 25 years ago, the plaintiffs entered into an agreement of sale with first defendant's husband for the sale of stand 70301/2 New Lobengula in Bulawayo. They claim that the purchase price was paid partly to the first defendant's husband and the balance to the defendant herself.

The plaintiffs have always been in occupation of the property for the 25 year period. They claim this is as a result of the agreement of sale.

Apparently, first defendant's husband is since deceased and his estate was properly wound up in terms of the law. Subject matter of this dispute was then transferred to the first defendant as the heir of her late husband. It is alleged that first plaintiff, who is a brother to first defendant's late husband was in fact a witness to the certificate of authority that was subsequently issued to the first defendant.

The first defendant then filed a special plea in bar to the effect that the first defendant pleads that the plaintiffs should be specially barred to sue first defendant for specific performance as a result of the fact that the estate of the first defendant's husband was duly registered and finalized in accordance with the provisions of the Administration of Estates Act

[Chapter 6:01] and that the matters pertaining thereto are thus closed and the plaintiff can thus not bring the action that they have brought before this court. The first defendant further claims that in fact the first plaintiff was involved in the administration of the estate and should therefore be precluded from making any claims with regard to the house in question.

On the other hand, the plaintiffs in their replication allege that in fact, the reason why they did not lodge any claim against the estate was because they had an understanding with the first defendant, to whom they are related, that they should assist her to first transfer the property into her name, and thereafter she would be in a position to transfer it to them. I hold the view that the explanation given by the plaintiff as to why they did not lodge any claim with the Additional master, was that there has an understanding that as a family, they should first assist first defendant to get title, for owned transmission to them, cannot be easily dismissed. Lay people out there, go into various forms of agreement with no knowledge or regard for the provisions of the law whatsoever. As long as what they would have agreed on is not contrary to the law or public policy I do not hold the view that it should be merely dismissed at face value with no in depth interrogation as to what actually transpired between the parties. To do so would be to shut the door on litigants who may at the end of the day have a very good case on the merits. Unless the interests of justice will be jeopardised or unless one party will suffer prejudice, I hold the view that technical objections to lawsuits that would otherwise lead to the court discerning what the real dispute is and therefore achieving justice between man and man, should not be easily upheld. I hold the view that the very reason, that first defendant wants to use to preclude the plaintiffs being heard on the merits, is in fact an issue for trial. That is a trial should be conducted on the merits and the court would then be in a position to find on the facts of the matter, if at all plaintiffs claim is baseless, which is the reason why they did not lodge their claim with first defendant as an executrix of her late husband's estate, or if they indeed in ignorance, believed that first defendant had to get title first before, their claim could be processed.

These parties are fighting over an immovable asset of value and the real dispute between the parties will determine who should own it. This is an important subject that cannot be hastily blocked from being fully ventilated so as to achieve justice. This is especially so with regard to the fact that, the plaintiffs seem to have been in occupation of the property all these years. Their

claim cannot, on the technicalities raised by first defendant in her special plea, be easily dispensed with.

In the case of *Four Tower Investments Pty Ltd v Andre's Motors* 2005 (3) SA 39 (NPD) it was stated that decisions in reported cases tend to show that there has been a gradual move away from the overly formal approach. That, it is a development which is to be welcomed if proper ventilation of the issues in a case is to be achieved and if justice is to be done.

I hold the same view.

In the case of *Trans Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 AD at 278 SCHREIVER JA had this to say:

“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious, and if possible inexpensive decision of cases on their real merits.”

I hold the view that the special plea cannot be upheld, there is every reason in the interests of justice to have this matter tried and the real dispute between the parties decided on. I do not hold the view that failure to lodge a claim with the additional master, in the circumstances of this case, is sufficient to preclude the plaintiffs from seeking justice before this court.

I accordingly, for the reasons, stated herein, dismissed the special plea in bar and referred the matter to trial.

Shenje and Company, plaintiffs' legal practitioners
Mutuso, Taruvinga & Mhiribidi, 1st defendant's legal practitioners