

LUNGISANI MOYO  
**versus**  
MUSIYIWA NYAMUKONDA  
and  
SIBANGANI MZIZI

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 20 FEBRUARY 2018 AND 1 MARCH 2018

### **Opposed Application**

*T Gamure* for the applicant  
*B Dube* for the 2<sup>nd</sup> respondent

**MATHONSI J:** The applicant and the first defendant are husband and wife having been married in terms of the Marriage Act [Chapter 5:11] at Bulawayo on 29 April 2003. They jointly own stand 6860 Nkulumane Township of Subdivision A of Valley Field Bulawayo (the house) which they hold by Deed of Transfer No. 1239/2006. The applicant has brought this application against her husband and the second respondent seeking an order declaring null and void a sale agreement concluded between the two of them on 23 May 2012 in terms of which the second respondent purchased the house from the first respondent for a purchase price of \$15000-00.

In her founding affidavit the applicant stated that she moved to England in 2002 to earn a living for her family. While she worked in that country her husband remained in Zimbabwe and in due course she was able to put together enough money to purchase the house. In doing so she did not get any financial assistance from the first respondent but still had the house registered in both their names in terms of the Deed of Transfer I have already referred to. She was still resident in England when she was informed by her helper that the first respondent was busy trying to sell the house to a purchaser. Investigations revealed that it was actually the second respondent who was buying the house.

The applicant attached a copy of the agreement of sale in which the parties are listed as the first respondent and the applicant as the two sellers of the house with the second respondent shown as the purchaser of the house. In clause 7 of the said written agreement the parties to it agreed;

“The parties agree that this document is the entire agreement between them and any other terms and conditions to be inserted or deleted shall be endorsed by both parties.”

Although the sale agreement was ostensibly concluded between the three parties, only the first and second respondents signed it as seller and purchaser respectively. The applicant, though listed as one of the sellers, was not even provided with space to append her signature and did sign the agreement.

In her founding affidavit, the applicant stated that the first respondent did not notify her of any intention to sell the house, he did not secure her consent to such sale as a joint owner and the house was purportedly sold without her knowledge. Upon discovering the sale agreement, she promptly registered caveat number 80/2012 on the Deed of Transfer which exercise has managed to secure the ownership of the house and prevent any attempt to transfer it to the second respondent. According to the applicant the purported sale agreement is invalid at law and therefore ownership could not pass to the second respondent.

While the offending husband, the first respondent, stayed far away from these proceedings despite being served with the application, the second respondent filed opposition insisting that at the time the sale was concluded the applicant had been notified by her husband of the sale and agreed to it giving her husband authority to sell the house even though she was outside Zimbabwe. Asserting that the sale agreement was concluded with the knowledge and consent of the applicant the second respondent made the strange point that the fact that the applicant did not sign the agreement does not in law render it invalid as the law allows a person to sell a jointly owned property “provided there is consent of the owner.”

It is settled in our jurisdiction that ownership in immovable property is held by way of a Deed of Transfer in the name of the person who owns the immovable property as provided for in the Deeds Registries Act [Chapter 20:05]. Registration of rights in immovable property is a matter of substance as it conveys real rights upon those in whose names the property is registered which rights have been described as “the sum total of all the possible rights in a thing.” See

*Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 105G. It means that those real rights cannot be alienated by anyone else except their holder.

I have stated that it is common cause that the applicant did not sign the agreement of sale which was purportedly entered into between herself and her husband, the first respondent, on the one hand and the second respondent on the other hand. Yet the agreement of sale purports to dispose of not just the first respondent's half share of the house but the whole house including the other half of it held by the applicant by virtue of the joint Deed of Transfer I have adverted to. In addition to arguing that the applicant gave her consent to the first respondent to dispose of the whole house, a consent which has not been proved, the second respondent has sought to argue that the fact that the joint owner did not sign the sale agreement does not invalidate the agreement. I do not agree.

I have no doubt in my mind, from a reading of the papers placed before me, that the applicant did not sell, neither did she give consent for the sale, of her half share in the house. The purported sale was done without her knowledge or consent. The implications of such misadventure are aptly dealt with by the learned author R. H Christie in his book: *Business Law in Zimbabwe*, 2<sup>nd</sup> edition, Juta & Co Ltd, at pp 149-150 where he says:

“An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring a vindicatory action to recover his property from anyone, including a *bona fide* buyer, in whose hands he finds it. The general rule that the seller can give no better title than he has operates in favour of the true owner, unless the purchaser proves that the true owner is estopped from denying the seller's authority to sell.”

Indeed our law protects the right of an owner to vindicate his or her property as a matter of policy against even an innocent purchaser, whose only defence against a vindicatory action is estoppel. See *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) at 438 C; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C. That position of our law stems from the well-established principle expressed in the maxims: *nemo dat quod non habet* which is allied to: *ne mo plus juris ad alium transferre potest quam ipse habet*, that is, no one can give what he or she does not have and no one can transfer any right greater than he himself possesses. It means that where a person who is not the owner and possesses no mandate to do so purports to sell or

transfer property, such sale or transfer is a nullity. See H Silberberg and J Schoeman, *Silberberg and Schoeman's The Law of Property*, 2<sup>nd</sup> edition, Butterworths, Durban, 1983 at p72.

An innocent purchaser can only succeed to defeat a vindicatory action on the basis of estoppel, that is he or she must show conduct on the part of the applicant amounting to a representation to such purchaser on which he or she acted to his or her prejudice. Other than alleging without more, that the applicant gave authority to her husband to sell the house, the second respondent has not even begun to allege and establish estoppel.

The first respondent owns only a half share of the house and as such without the consent of the applicant all that he could disposed of was his share in the house give that an owner of real rights cannot transfer greater rights that he or she has in the *res vendita*. See *Shana v Shana and Others* 1990 (2) ZLR 129 (HC) at 134B. The first respondent however purported to sign off the entire house. This was done through an agreement ostensibly involving the two joint owners. Could such a written sale agreement give rise to a valid contract. I think not. A sale agreement, which is generally referred to as a contract of purchase and sale, is first and foremost a contract. Therefore all the features of a contract must exist before a valid sale can come into being. The principal feature of a contract is that there must be consensus between the parties. It is often said that the parties must be at *consensus ad idem*.

Writing about that the learned authors SWJ Van Der Merwe, L F Van Huysseeten, MFB Reinecke and GF Lubbe in *Contract General Principles*, 4<sup>th</sup> edition, Juta, Cape Town 2012 stated:

“In general, consensus consists in the agreement between two or more persons about the consequences or results they wish to create. There has been some controversy as to whether the intentions which create the agreement must always emanate from at least two distinct persons or whether consensus can also occur where the intentions emanate from one person in more than one capacity. Notionally it seems untenable for one person in one and the same capacity to express two intentions sufficient to constitute consensus. However, where there is a difference in capacity, recognition of consensus based on intentions expressed by one and the same person has been accepted (see *Van der Merwe v Nedcor Bank Bpk* 2003 (1) SA 169 (SCA) 174 where the sole director of two companies or the representative of a close corporation who concludes a contract with himself in his personal capacity) ----. Being actual or subjective agreement, consensus will only be present if the persons expressing the intentions are aware that their minds have met. In so far as consensus is a legal concept the intention must also be that the results of the agreement should be legally relevant, in other words that there should be

legal consequences. The elements of consensus can therefore be expressed as follows: (a) the contractants must agree on the consequences they wish to create; and (b) they must intend to bind themselves legally; and (c) they must be aware of their agreement.” (The underlining is mine).

Indeed if a party does not intend to be legally bound by the agreement it cannot possibly give rise to a contract as there would be no consensus. It is a fact that for the purposes of the law consensus exists only if the parties are aware of their agreement.

Looking at the circumstances of the present case, it is apparent there was no consensus, if for no other reason than that the second alleged seller not only did not sign the agreement, she was not even present when the agreement was concluded. She would have contracted through an agent or an attorney if she had given a mandate for someone to sell her half share on her behalf. No such mandate has been established and for the second respondent to say the applicant agreed to the sale and gave the first respondent authority to sell the house without producing such agreement or mandate is simply not enough. It betrays desperation of gigantic proportions. If the authority existed surely it would have been produced.

The way I look at it, the position of the law regarding the alienation of jointly owned property is that this can only be done by the joint action of all the co-owners. While a single co-owner can lawfully alienate his or her undivided share in the property, in respect of land this can only be done if such co-owner occupies a defined share of the property in which case he or she can alienate his undivided share. See *Masubey v Masubey* 1993 (20 ZLR 36 (H)). In respect of a house the alienation of the whole of it can only be effected by a co-owner with the consent of the other co-owner.

In any event all that may well be academic in that in this case the applicant seeks an order declaring an agreement of sale purportedly concluded by three people including herself as null and void. To the extent that the agreement was purportedly concluded by her when she did not, is indicative of the nullity of it. Where an agreement lists three people as the parties to it when in actual fact one of them was not involved either directly or through an agent, such agreement cannot possibly be valid. It lacks one of the essentials of a valid agreement, the consensus or indeed the presence of all the parties involved.

In the result, it is ordered that;

1. The agreement of sale entered into between the first and second respondents on 23 May 2012 for the sale of stand No 6860 Nkulumane Township Bulawayo be and is hereby set aside as null and void and of no legal effect.
2. The second respondent shall bear the costs of this application on an ordinary scale.

*Kossam Ncube and Partners*, applicant's legal practitioners  
*Lunga Gonese and Partners*, 2<sup>nd</sup> respondent's legal practitioners