

LEONARD BWANALI
versus
PRECIOUS KATURUZA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18, 20, 21 March & 12 June 2019

Civil trial

B Mufadza, for plaintiff
R Zimudzi, for defendant

TAGU J: The plaintiff filed a law suit against the defendant claiming an order declaring cancellation of the agreement of sale signed by the plaintiff and the defendant on 30th January 2013, an order directing the defendant to refund the plaintiff's purchase price in the sum of US\$42 000.00, an order directing the defendant to pay consequential damages in the sum of US\$18 000.00 being the additional amounts plaintiff will require in order to purchase an equivalent property at the current rates, a monthly sum of US\$400.00 from February 2013 to the date of full payment of the amounts sought above, interest at the prescribed rate on the above amounts from the date of summons to the date of full payment and costs of suit at the rate of legal practitioner–client scale.

The undisputed facts are that on the 30th January 2013 the plaintiff and the defendant who was represented by her now Late mother Susan Katuruza signed an agreement of sale in terms of which the defendant sold Stand Number 7410, Glenview Township, Harare to the plaintiff for the sum of USD 42 000.00 (Forty Two Thousand United States Dollars). The plaintiff had paid the full purchase price by 29th January 2013. The material terms were that occupation would be given to the plaintiff upon full payment of the purchase price and that cession too would be done upon full payment of the purchase price. The plaintiff was only allowed to take occupation of the property around March 2013 awaiting registration of title in his names. The defendant's agent Mrs Susan Katuruza then died almost a month or so after the signature of the agreement before she could register title in the names of the plaintiff as she had been proffering some excuses. Meanwhile, the defendant was holed up in the United Kingdom.

From the evidence led before the court the defendant in the meantime sold the same stand to the Mhetus. The Mhetus immediately changed and registered the title into their names. The Mhetus then evicted the plaintiff from the said house. Despite defending the eviction the plaintiff lost the case in HH 853/15. Having realized that for reasons that were entirely attributable to the defendant's fraudulent or negligent acts, the plaintiff was unable to enjoy unencumbered occupation of the property and could not secure title in his names, cancelled the agreement of sale and is now suing the defendant for refund of the purchase price and other ancillary reliefs.

In her plea which she repeated in her evidence -in -chief the defendant denies that the inability by the plaintiff to occupy and secure title is and was attributable to her or at all. She gave a feeble excuse that the plaintiff had ample time and opportunity to secure title to the said property in his names but because of lack of diligence on his part, he let go of the property. She said he had a clear right in terms of the Deeds Registries Act [*Chapter 20:05*] to protect his rights, title and interest prior to transfer, and then cement same on transfer. He did not. He lacked diligence and is entirely to blame for the loss of the property.

Why I said defendant gave a feeble excuse is that the defendant knowing fully well that she had sold the said stand or house to someone else through her mother, she went on to sell the same house to another person. It boggles one's mind why she did so.

In the face of the above factual outline, the defendant in my view, failed in her contractual duties as a seller. Indeed, at law every seller has the inherent duty to ensure/assure that the merchandise sold is delivered without any encumbrance. The fact that in the present case, there exists rival claims of even enough substance that plaintiff has had to be evicted, means that the Seller is already in breach of her implied duty in that regard. As could be discerned from Mashupiko's self-explanatory statement (exhibit 7) defendant's camp already knew before they consummated the agreement with the present plaintiff that at least, someone else was laying or could lay a claim on the same property. Yet they proceeded nevertheless, thereby exposing the plaintiff to the current undeserved inconveniences. An inference of fraud or negligence is inescapable given this scenario. At law, and being innocent, the plaintiff can lawfully choose to terminate the agreement without any impediment. As Abbot and Pendlebury note in *Business Law* (6th ed at p102-

“...if the innocent party elects to end the contract, he is not bound to accept further performance, and he may sue for damages at once”.

In *casu* there is no way the plaintiff can cling to the agreement and sue for specific performance given that he has already lost the claim to the property and has been evicted. His remedies lies in claiming consequential damages.

In so far as consequential damages are concerned, the defendant has to bear the brunt necessary to restore the plaintiff to the position he would have been in had the situation turned otherwise. Effectively, therefore, the relief granted cannot simply be a refund of what was paid. Instead, the refund ought to be accompanied by damages reflective of the difference that will be required to enable the plaintiff to replace the lost property under the current circumstances. In this regard, a valuation report exhibit 5 produced from a firm of valuers was never really countermanded by an opposing report by any like professionals. In the plaintiff's submission, which I found to make great sense the tepid contest by the lay defendant cannot be preferred in the face of the opinion of the professionals. Therefore, rentals lost along with plaintiff's lost rights of occupation are recoverable from the defendant. This is because such loss could fairly and reasonably be considered as arising naturally according to the usual course of things. See *Hadley v Baxendale* (1854). Put differently, the fact of the loss of rental value is a reality that the defendant knew would naturally eventuate from her failure to protect plaintiff's entitlement to undisturbed freedom as a result of her greedy or fraudulent activities.

The plaintiff has therefore, managed on a balance of probabilities to prove his claim.

IT IS ORDERED THAT

1. An order declaring cancellation of the agreement of sale signed by the Plaintiff and the Defendant on 30th January 2013 be and is hereby granted.
2. An order directing the Defendant to refund the Plaintiff's purchase price in the sum of US\$42 000.00 be and is hereby granted.
3. An order directing the Defendant to pay consequential damages as follows:
 - i) US\$18 000.00 being the additional amounts Plaintiff will require in order to purchase an equivalent property at the current rates,
 - ii) A monthly sum of US\$400.00 from February 2013 to the date of full payment of the amounts sought above be and is hereby granted.
4. Interest at the prescribed rate on the above amounts from the date of summons to the date of full payment.

5. Costs of suit at the rate of legal practitioner-client scale.

Mufadza & Associates, plaintiff's legal practitioners
Zimudzi and Associates, defendant's legal practitioners.