

KUMBIRAI IRENE MAFUTA
versus
JOHN KASEKE
and
TAKESURE ALBERT MAKUVAZA
and
REGISTRAR OF DEEDS
and
ZIMBABWE BANKING CORPORATION

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 23 and 30 April, 2003

Mr *C A Venturas* for applicant
Mr *E Matinenga* for 1st respondent

SMITH J The second respondent (hereinafter referred to as "Makuvaza") was the registered owner of Stand 1545 Kadoma Township (hereinafter referred to as "the Property"). The applicant (hereinafter referred to as "Mafuta") purchased the Property from Makuvaza on 30 August 2002, and was given vacant possession. She has erected a house, to roof level, on the Property. The Property has been transferred into the name of the first respondent (hereinafter referred to as "Kaseke"). Prior to the transfer of the Property into Kaseke's name, a mortgage bond had been registered against the title deeds to the Property in favour of the fourth respondent (hereinafter referred to as "Zimbank"). The transfer was registered without the bond being cancelled.

Mafuta has filed this urgent application seeking an order that Kaseke be interdicted from selling the Property pending the determination of the action she has instituted seeking an order that the Property be transferred to her - HC 2498/03. Mafuta claims that she took occupation of the Property in August 2002 and has erected a house up to roof level thereon. In 2001 Kaseke instituted an action against Makuvaza seeking transfer of the Property into his name. He alleged that Makuvaza had committed adultery with one of his wives and had agreed to pay him \$500 000 as

damages or alternatively surrender the Property to him. The Property was transferred into Kaseke's name in 2003. Zimbank obtained an interdict restraining Kaseke from disposing of the Property pending the determination of its action for the costs of the cancellation of the bond that was registered against the title deeds. However, as Kaseke has agreed to pay those costs, the interdict will now be lifted. According to Mafuta, Makuvaza denies signing the agreement filed of record in which he allegedly agreed to pay Kaseke \$500 000 or else to surrender the Property as "compensation for my affair with his wife". Makuvaza is at present living in the United Kingdom, a so-called "economic refugee". Mafuta filed, with her founding affidavit, a letter purportedly signed by Makuvaza in which he states that he has not entered into any agreement with Kaseke and that any document purporting to be proof thereof is "invalid, forged, or has been acquired through other false pretences or misrepresentation of facts".

Kaseke opposes the application. He claims that Makuvaza surrendered the Property to him in satisfaction of his claim for damages he suffered due to the affair Makuvaza had with his wife. The Property was transferred to him and is registered in his name. He also submitted that there is no urgency in the matter as there was no possibility of him transferring the Property to anyone.

Mr *Venturas* said that Mafuta had not bothered to get an interdict prohibiting Kaseke from selling the Property because the interdict obtained by Zimbank was in operation. However, once she learnt that that interdict was about to be lifted, she felt that it was necessary to obtain an interdict to protect her rights. He submitted that if the application for an interdict were to be dismissed and then Kaseke sold the Property, she would suffer severe prejudice. If, however, the application was successful there would be no prejudice caused to Kaseke because he says he does not

intend to sell the Property. Mr *Matinenga* submitted that Mafuta is non-suited.

Kaseke is in occupation and is the registered owner of the Property. Accordingly, since transfer has been passed to Kaseke, he has acquired an indefeasible right to the Property and the only remedy Mafuta has is an action for damages against Makuva. Kaseke's real right of ownership of the land prevails over Mafuta's personal right.

I consider that Mafuta has established that this is a matter of urgency.

Although Kaseke says that he does not intend to sell the Property, even if he is telling the truth, one's intention can change at any moment, especially if a willing buyer comes along and makes a very tempting offer.

In *Crundall Bros (Pvt) Ltd v Lazarus N.O. & Anor* 1991(2) ZLR 125 (SC) the Court dealt with the question of double sales. At p 131 F it stated -

"The two extreme cases are clear enough. When the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. *Per contra*, when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, his real right can and normally will be overturned subject to considerations of practicality."

In this case Mafuta bought the Property in August 2002, which was after it was allegedly surrendered to Kaseke. Kaseke obtained the order that Makuva sign all papers necessary to effect the cession on 27 June 2001 but it would appear that the transfer was not registered until much later. If Mafuta had not impugned the transfer of the Property to Kaseke, then Kaseke's rights therein would be indefeasible and she would merely have a claim for damages against Makuva. However, Mafuta's case is based on the allegation that Kaseke obtained transfer by fraudulent means. He forged Makuva's signature on the agreement in terms of which he obtained the order that the Property be ceded to him. The validity of her claim will be decided when case No HC 2498/03 is heard. All this application is concerned with is the

question of ensuring that Kaseke does not sell or dispose of the Property to a third person before the determination of case No HC 2498/03.

It seems to me that the granting of an interdict is the only way by which Mafuta can ensure that the *status quo* is maintained pending the determination of case No HC 2498/03. As far as the balance of convenience is concerned, it seems clear that Mafuta will be severely prejudiced if an interdict is not granted and Kaseke sells the Property before her rights therein are determined by the Court. On the other hand, Kaseke says that he has no intention of selling the Property. Clearly, therefore, he will suffer no prejudice if the interdict is granted. One wonder why he opposed the application. Zimbank is not opposed to the relief claimed by Mafuta.

As the matter has been fully argued, it was agreed that a final order be granted, not a provisional order. Since no order as to costs was sought, I will not make any order in relation thereto.

It is ordered that -

Pending the determination of case No HC 2498/03, the first respondent is interdicted from selling or otherwise disposing of or encumbering Stand 1545 Kadoma Township, otherwise known as 6 Cyprus Avenue, Kadoma.

Byron Venturas & Partners, legal practitioners for applicant