

EVERISTO NYANYIWA
versus
KESARI BENHURA
and
CLAYTON GWARINDA
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
BHUNU J,
HARARE, 10th and 25th February, 2004

Mr *Thomas* for the plaintiff
Mr *Hungwe*, for the 2nd defendant

Civil Trial

BHUNU J: This case has to do with the double sale of certain immovable property being Stand number 4338 New Mabvuku Harare otherwise known as House Number 15 Muvhimi Street New Mabvuku.

The facts giving rise to this dispute are to a large extent common cause. The undisputed facts are that the 1st defendant is the previous owner of the property in question. On the 21st December, 2001 he sold the house to the plaintiff for \$300 000,00.

The Agreement of Sale was reduced to writing by legal practitioners, Chihambakwe, Mutizwa and Partners. The plaintiff then paid \$286 000,00 by bank transfer. He testified that he paid the balance of \$14 000,00 by cash. There is no reason to disbelieve him because the seller has not complained that he was paid the balance of the purchase price.

The balance must have been paid because the two attempted to effect transfer in circumstances where Clause 2.2 of the Memorandum of Agreement of Sale provided that -

""Transfer shall be effected once the balance of the purchase price, together with interest has been fully paid".

Transfer was not effected only because the Municipal authorities insisted on the seller producing the death certificate for his late wife. The 1st defendant undertook to obtain the death certificate to facilitate the transfer at a later date but unbeknown to the plaintiff he must have obtained the death certificate and resold the property to the 2nd defendant for \$700 000, sometime in February 2002 and transfer was effected on the 5th March, 2002. When the plaintiff experienced delays and the 1st defendant was not forthcoming in expediting the transfer. The plaintiff instituted legal proceedings to compel him to effect transfer.

On the 15th May 2002 the plaintiff obtained judgment against the 1st defendant under case number HC 2733/02 in the following terms -

"It is ordered:

- (1) That the 1st respondent (Kesari Benhura) is hereby ordered to cede rights, title and interest in Stand No 4338 Mabvuku, Harare also known as No. 15 Muvhimi Street, Mabvuku, Harare to the applicant within ten (10) days from the date of service of this order, failing which the Deputy Sheriff be and is hereby ordered to sign all necessary documents to cede the rights, title and interest into the applicant's name.
- (2) That the 2nd respondent (City of Harare) be and is hereby ordered to approve the cession.
- (3) That the costs of this application be borne by the 1st respondent".

The 1st defendant did not defend the legal proceedings against him. He opted to go underground and disappeared into thin air leaving the plaintiff and the 2nd defendant to fight it out for the determination of their competing rights and interests in the property.

The plaintiff and the 2nd defendant have since been engaged in vicious legal battles which have seen occupation of the disputed property swinging from one end to the other in a vicious circle. The plaintiff is currently occupying the property.

Despite the heat which has been generated by the conflict of interests, the issue for determination is a simple one. Counsel are agreed that the sole issue for determination is

whether the 2nd defendant had knowledge of the first sale when he entered into the second sale or at the time of cession.

The plaintiff called Paradzai Mutaki a lodger occupying the house at the time the two sales were concluded. He testified that he was given notice by the owner in January 2001 to leave the house because the house had been bought. He later corrected the date of notice to December 2001. The error is understandable because he had no direct interest in the case. He cannot be expected to have accurately kept all the details of the case.

In February 2002 he was approached by the 2nd defendant's father as he wanted to inspect the house saying that it was on sale. He advised him that the house had already been bought but he insisted on inspecting the house saying that the witness being a lodger had nothing to do with the sale of the house. He then allowed the 2nd defendant's father to inspect the house. This witness was adamant that the 2nd defendant bought the house with the full knowledge that it had been bought.

The 2nd defendant did not call his father to rebut Paradzai's evidence. He proffered no reason as to why he did not call his father. Thus Paradzai's evidence stands virtually unchallenged. He opted to call his friend Stenford Nhede instead. His evidence does not take the 2nd defendant's case any further. All what he had to say was that he introduced the 2nd defendant to the seller. That evidence however contradicts the plaintiff's evidence in some material respects. In his summary of evidence the 2nd defendant claimed that he got to know about the sale of the house through an advert in The Herald placed by the executor of 1st defendant's wife's deceased estate.

He responded to the advert and was referred by the executor to three houses and he chose the house in question. The 2nd defendant's summary of evidence makes no reference to Stenford Nhede. Because of that material contradiction of facts I hold that Stenford's

evidence is no more than a fabrication calculated to bolster the 2nd defendant's defence to the effect that he was an innocent third party who had purchased the disputed property in good faith.

The 2nd defendant himself was not an honest and credible witness. His evidence was to the effect that after buying the house he was not interested in inspecting the house. He did not care whether or not the house had structural defects. Such evidence was as incredible as it is unbelievable. In my view it is highly unlikely and not in the least probable that one could buy a house and have no desire to inspect the house and to meet the lodgers occupying the house to announce that he is the new owner of the house.

I am satisfied that the 2nd defendant's evidence was tailor made to suit his defence that he never came into contact with the lodger who alleges that he told his father that the house had already been bought.

On the evidence before me I am satisfied that the 2nd defendant bought the house with the full knowledge that it had been bought. He therefore took a calculated conscious risk.

Both lawyers are agreed that on the authority of the law as articulated in the case of *Crundell Brothers (Pvt) Ltd v Lazarus N.O. & Another* 1991(2) ZLR 125 the resolution of the dispute hinged on whether or not the 2nd defendant had prior knowledge that the house had already been sold when he bought it. Having already come to the conclusion that the 2nd applicant must have known through his father that the house had already been sold at the time he purchased the property, the plaintiff's claim can only succeed.

It is accordingly ordered:

- (1) that the agreement of sale between 1st and 2nd defendant be and is hereby cancelled;

- (2) that the agreement of sale between the plaintiff and 1st defendant be and is hereby confirmed;
- (3) that the 1st and 2nd defendants be and are hereby ordered to cede their rights, title and interest in Stand No 4338 New Mabvuku, Harare also known as No 15 Muvhimi Street, Mabvuku Harare to the plaintiff within 10 (ten) days from the date of service of this order, failing which the Deputy Sheriff be and is hereby authorised to sign all necessary documents to cede rights and title into plaintiff's name;
- (4) that the 3rd defendant be and is hereby ordered to authorised the cession;
- (5) that the 2nd defendant is to bear the costs of this trial.

Mandihumba, Thomas & Partners, plaintiff's legal practitioners
Hungwe & Partners, defendant's legal practitioners