

FANUEL JAMES CHINOUIAZVE
and
FARAI GERALD CHINOUIAZVE
versus
SONI MANDINDO
and
GODFREY NDEBELE
and
STEPHEN NDEBELE
and
BASA NCUBE NDEBELE
and
MUCHIVETE HUNGWE
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 27-28 January and 10 March 2004

Mr *Mabuye*, for the plaintiff
Mr *Ngwenya*, for the 3rd, 4th and 5th defendants

UCHENA J: The plaintiffs bought a farm from the first and second defendants. The first defendant is the late Bayela Ndebele's first wife. The second defendant is the late Bayela's son. The third defendant is the late Bayela's son born to him by his second wife the fourth defendant. The fourth defendant as already indicated is the late Bayela's second wife. The fifth defendant is the executor of the late Bayela's estate. He was appointed after the initial executor one Pinga Ndebedle had died.

The sixth defendant is the Master of the High Court being sued in his official capacity.

The late Bayela Ndebele died intestate on the 9th of May 1995. His estate was registered and his eldest son Pinga Ndebele was appointed executor of the estate. A farm Stand 1029 Wiltshire was the major asset of the estate. The master granted Pinga Ndebele authority to transfer the farm into his name. Pinga Ndebele instructed conveyancers Sobusa Gula-Ndebele to transfer the farm into his name. Pinga Ndebele died before the farm was transferred into his name. He left behind a wife and children.

According to the evidence of third and fourth defendants Pinga's estate was not registered. It remains a mystery how the farm was registered into first and second defendant's names. The first and second defendants sold it to the first and second plaintiffs. The first and second plaintiffs are now suing the third and fourth defendants so that they can be evicted from the farm. The first

and second defendants have already vacated the farm and are not defending this action. The plaintiffs also seek a declarator that they are the legal owners of the farm in dispute.

Prior to the plaintiffs issuing summons in this case the third and fourth defendants had under HC 15714/99 sued the first and second defendants challenging the transfer of the farm into their names. They in evidence said they did this on noticing people were being referred to view the farm so that they could purchase it. The first plaintiff's young brother had indicated to them that his brother would buy the farm despite their protests. The first plaintiff came to the farm while HC 15714/99 was pending before the courts. It was brought to his attention before the farm was transferred into his name. He ignored the fact that a case was pending before the court telling the third and fourth defendant that he wanted them to vacate the farm. In evidence the first plaintiff does not dispute the third and fourth defendants' protests but says he thought the third defendant was joking.

When HC 1514/99 was to be heard on 13th September 2000 the first and second defendants who were defendants in that case were in default. ZIYAMBI J, as she then was, granted a default judgment ordering that –

- “1. That deed of transfer No. 1292/97 in favour of Soni Mandindo and Godfrey Ndebele be and is hereby nullified.
2.
3. (emphasis and omissions added)

Pending the finalisation of HC 15714/99 the third and fourth defendants had also interdicted the first and second defendants from selling, donating or disposing of farm No. 102 Wiltshire. The Registrar of deeds was the third respondent in that case HC 147/2000. He was made a party to prevent transfer of the farm to the plaintiffs because first plaintiff had been to the farm and boasted that he would buy the farm in spite of third and fourth defendants' protests. Justice DEVITTIE granted the provisional order on the 29th January 2000.

The Registrar of Deeds had on 9th November 1999 been notified of the fraudulent transfer of the farm to first and second defendants and that application for the nullification of that transfer was being sought under HC 15714/99. he was specifically requested not to transfer the farm from first and second defendants to anyone pending the finalisation of HC 15714/99.

The transfer went through despite the Registrar of Deeds having been served with papers for HC 15714/99 and the letter referred to above. The third

and fourth respondents say this was because the second defendant Godfrey Ndebele worked at the Deeds Office.

The first and second defendants did not defend any of the applications or actions. This must be because they know they did not legally get title to the farm.

I am therefore faced with a situation where in two decided cases the first and second defendants' title to the farm was held to have been improperly obtained. The documents from the Master and from Gula-Ndebele the conveyancers provide no link between the transfer of the farm to Pinga Ndebele and the first and second defendants. The evidence adduced proves Pinga Ndebele had a wife and children who could have inherited the farm on his death.

In the present case it is not necessary to determine whether the estate of Pinga was registered and what should have happened to the farm after his death. It is common cause that Pinga's estate was not registered. It is also common cause that the first and second defendants did not inherit from Pinga's estate. Mr *Mabuye* on page 2 of his written address said –

“The Executor, Pinga Ndebele proceeded to instruct conveyancers Sobusa Gula-Ndebele to attend to the transfer and he duly executed a Power of Attorney to effect transfer. Unhappily Pinga Ndebele died before the farm was transferred into his name, whether this was by design or accident on the part of the conveyancers, the transfer went through but to Soni Mandindo and Godfrey Ndebele, the mother and young brother of the late Pinga Ndebele.” (emphasis added)

It is common cause that this court has set aside the resultant title to Soni Mandindo and Godfrey Ndebele. This is because there is no legal basis on which the two could have taken title to the farm. The Master did not authorize them to take title. The family did not authorize them to take title. It is also not alleged that the late Pinga or the executor of his estate authorized them to take title. The title of Soni Mandindo and Godfrey Ndebele to the farm was therefore not valid. The only reasonable inference that can be drawn from the facts of this case is that they fraudulently obtained title to the farm.

The plaintiffs could not therefore have inherited good title from Soni and Godfrey. The plaintiffs were not *bona fide* purchasers. The evidence of the third and fourth defendants established that the first plaintiff's young brother Hamandishe came to the farm to view it for the first plaintiff. They told him that the farm was not for sale. He said they would buy the farm in spite of the third and fourth defendants' protests. This is what caused the third and fourth

respondents to institute proceedings which were pending when the first plaintiff visited the farm before it was transferred into their names. The first plaintiff admits being told of the pending litigation. He said he thought the third defendant was joking, when he said they would not leave the farm and that there was pending litigation. The first plaintiffs' attitude seems to me to confirm his brother's attitude. He like his brother believed they could buy the farm as long as Soni and Godfrey were on their side. They were alerted of a dispute over the farm. They ignored the warning to their own detriment. They are not innocent purchasers.

The registrar of Deeds has also indicated that following the decision in HC 15714/99 nullifying Soni and Godfrey's deeds he has cancelled the deeds to the plaintiffs. The plaintiffs do not therefore have a basis for evicting the third and fourth defendants. In the case of *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H) MALABA J, (as he then was) at page 265F-G said:

"The respondent does not deny that the lease agreement contained a term reserving ownership of the motor vehicle for Stanbic Finance. Gum Electrical did not in reality have title to the motor vehicle. On the principle that no-one can give to another a better title than he himself possesses, the respondent without the intervention of law through the recognised exceptions, could not acquire better rights in the motor vehicle than Gum Electrical had. Gum Electrical did not in fact become the owner of the motor vehicle and therefore could not transfer ownership to the respondent." (emphasis added)

I respectfully agree with the judge's comments. In the present case the plaintiffs could not have received better title from the first and second defendants. Their illegal claim to the farm was nullified by this court. The plaintiffs cannot be saved through the intervention of recognised exceptions of law as I have found them to be *mala fide* purchasers. They knew of the legal dispute before transfer and ignored it. They took transfer knowing the title of the seller was being challenged.

The plaintiff's recourse is in seeking damages against first and second defendants. They have not prayed for damages in this case. They merely sought for a declaration that they are the legal owners of the farm and eviction of the defendants.

In the circumstances the plaintiffs' claims are dismissed with costs.

Mabuye & Company, plaintiff's legal practitioners.
Ngwenya & Associates, 3rd, 4th and defendants' legal practitioners.