

PAMBANA KUDAKWASHE
versus
MUZIRA MATHIAS
and
CHITUNGWIZA MUNICIPAL COUNCIL
and
BLANDINA DZIVA

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 27 October 2005 and 11 May 2006

Opposed Application

Mr. Muchanyerei, for the applicant
Mr. Drury, for the 3rd respondent, in forma pauperis

PATEL J: This is an application for an order evicting the 1st respondent from Stand No. 15724, Unit "P" Seke, Chitungwiza, and all others claiming rights of occupation in the stand. The applicant also seeks cession of the 1st respondent's rights, interests and title in the stand to herself.

In her counter-application, the 3rd respondent seeks an order setting aside the sale of the stand to the applicant and interdicting the cession or transfer of any right, interest or title in the stand unless and until certain events have occurred.

Both the applicant and the 3rd respondent claim costs against the 1st respondent.

The Facts

The 1st and 3rd respondents are married under customary law. The 1st respondent is also married to the applicant as his second customary law wife.

The disputed property is owned by the 2nd respondent (the Council). It was allocated to the 1st respondent under a certificate of occupation issued in 1980. Thereafter, in June 1982, the Council and the 1st respondent entered into a purchase/sale agreement (the Council Agreement) in terms of which the stand was to be purchased by instalments payable over a fixed period.

In January 2000, the applicant and the 1st respondent entered into an agreement of sale (the Sale Agreement) whereby the former purchased the property for the sum of \$120,000. The applicant paid the full purchase price in terms of the Sale Agreement and sought cession of title to the property.

On the 14th of February 2000, the 3rd respondent sought and obtained an interdict from the Magistrates Court restraining the 1st respondent from selling the property. This order still stands and has not been set aside.

Subsequently, on the 15th of March 2000, the applicant obtained an order from this Court evicting the 1st respondent and compelling cession of title. The 1st respondent was in default and the 3rd respondent was not a party to the proceedings at that stage. On the 1st of June 2000, pursuant to an urgent application by the 3rd respondent, this default judgement and order were set aside and the 3rd respondent was joined as a party to these proceedings.

The 3rd respondent is currently residing in the property. She avers that she does not know the applicant and was not aware of the sale of the property to the applicant. She claims that the applicant and the 1st respondent are acting in collusion to dislodge her from the property.

The 1st respondent does not oppose the applicant's claim to the property. He vacated the property on the 1st of May 2000. He accepts that he is still married to the 3rd respondent and states that he is prepared to accommodate her at his rural home.

The Arguments

For the applicant, Mr. *Muchanyerei* submits that the validity of the Sale Agreement itself has not been challenged and that the 3rd respondent's grounds for opposing this application do not vitiate the Sale Agreement. In this respect, he argues, in keeping with the decision in *Muganga v Sakupwanyanya* 1996 (1) ZLR 217 (S) at 219, that a wife cannot prevent the disposal of the matrimonial home where there is a genuine sale and transfer untainted by any fraud or attempt to defeat her rights. He also submits that the interdict in the Magistrates Court was granted after the Sale Agreement was concluded and cannot, therefore, affect the enforceability of that agreement.

Mr. *Drury*, for the 3rd respondent, submits that the Sale Agreement is not binding for several reasons. Firstly, the 1st respondent did not obtain the Council's consent before concluding the Sale Agreement, as he was required to do in terms of clause 21 of the Council Agreement. The applicant has neither denied the absence of Council consent nor adduced any proof that the Council did in fact consent. Moreover, the 3rd respondent's views as the spouse in occupation of the property were not sought in respect of the proposed cession, in accordance with the prevailing administrative policy of the Council. The Sale Agreement is accordingly null and void and unenforceable.

In response, Mr. *Muchanyereyi* argues that the Council was given notice of the present application and, not having opposed it, must be regarded as having waived its rights and agreed to the sale of the property. He further states that when the default order granted on the 15th of March 2000 was served on the Council it purported to approve the cession of the property in accordance with the order of this Court. However, this aspect was not canvassed in the applicant's founding and answering affidavits

and, therefore, there is no evidence properly before the Court in that regard.

As regards the equities of this matter, Mr. *Drury* submits that the 3rd respondent has been in lawful and continuous occupation of the property with the Council's consent since 1980. She has also paid all the rates, charges and levies due in respect of the property and has been largely responsible for the material improvements thereon. In these respects, it is argued that the balance of convenience is clearly in her favour and that her rights are eminently superior to those of the applicant.

Decision

Clause 1 of the Sale Agreement declares the agreement of sale between the applicant and the 1st respondent. Clauses 5 and 9 respectively provide for the giving of vacant possession and the transfer or cession of the property upon payment of the full purchase price.

Clause 21 of the Council Agreement stipulates as follows:

"The purchaser shall not part with possession of the property or any part thereof nor cede nor assign nor hypothecate this Agreement or any rights hereunder to any person without the previous consent in writing of the Council".

Having regard to the facts of this matter, I am of the view that the Sale Agreement is invalid for two distinct but related reasons. Firstly, it is not disputed that the proposed cession or transfer of the property constituted an essential component of the Sale Agreement. The 1st respondent agreed to cede the property without having obtained the Council's previous consent in writing. Without the Council's consent, it would not have been possible to effect cession or to compel compliance with the 1st respondent's undertaking to do so. Thus, the agreement to effect cession was clearly unenforceable at the time that the Sale Agreement was entered into. In this respect, the fact that the Council might have

subsequently approved the proposed cession does not assist the applicant. This is so because the Council would simply have been acting in compliance with the earlier order of this Court, which order was subsequently set aside and rendered defunct. Moreover, such approval would have been given well after the sale agreement had already been concluded. In any event, as I have already indicated, there is no evidence before the Court that the Council did in fact approve the cession of the property as averred by applicant's counsel.

Secondly, clauses 8, 12 and 13 of the Council Agreement impose various conditions pertaining to the sub-letting and maintenance of the property which the purchaser is obliged to comply with "until title to the property has been granted to the Purchaser by the Government". Clauses 17 and 18 provide for the transfer of title to the purchaser only after the fulfilment of stipulated conditions relating to the completion of specified improvements and the payment of principal and interest outstanding and other charges.

It is trite that *nemo dat quod non habet* and that *nemo plus iuris ad alium transferre potest quam ipse habet* : no one can give what he does not have and no one can transfer any right greater than he himself possesses. See Silberberg and Schoeman: *The Law of Property* (2nd ed.), at pp. 72-73. Transfer or delivery effected by a person who is not the owner, or who is not authorised by express mandate or authority to act for the owner, is ineffectual to pass ownership to the transferee. See Massdorp's *Institutes of South African Law, Volume II: The Law of Property* (10th ed.), at p. 62.

Having regard to the provisions of the Council Agreement, it is clear that title to the property *in casu* has not as yet vested in the 1st respondent. In terms of the Sale Agreement, the 1st respondent undertook to sell and transfer title to something which at that time undoubtedly did not belong to him. His undertakings in regard to the property were clearly incapable of

being performed or enforced at the time that he concluded the Sale Agreement.

For the reasons stated above I conclude that the Sale Agreement *in casu* between the applicant and the 1st respondent was null and void *ab initio*. It is therefore unenforceable and the applicant's claim for cession of title to the disputed property and the eviction of the 3rd respondent therefrom must fail. The application is accordingly dismissed.

Turning to the 3rd respondent's counter-application, her averments in support of her contributions and claim to the property, and her consequent right to continue in occupation thereof, were not meaningfully challenged by the applicant or the 1st respondent in their respective affidavits. Having regard to her uncontroverted evidence and the balance of convenience as between the parties, I am satisfied that she is entitled to the relief she seeks.

Costs

It is clear from the evidence before the Court that the 1st respondent entered into a transaction with full knowledge of his inability to deliver what he had promised at the relevant time. By virtue of his reckless conduct, he has invited the institution of the proceedings *in casu*. In my view, it is just and equitable that he should bear the costs of the application as well as the counter-application.

Order

In the result, it is ordered that:

1. The agreement of sale, transfer and cession between the applicant and the 1st respondent concluded on the 7th of January 2000, in respect of Stand 15724, Unit "P" Seke, Chitungwiza (the Property), be and is hereby set aside.

2. The 1st respondent be and is hereby interdicted from entering into or concluding any agreement with any person for the sale, transfer or cession of any right, title or interest in the Property unless and until:
 - (a) the prior written permission and consent of the 2nd and 3rd respondents are first obtained; or
 - (b) an order of a competent court as to the distribution of matrimonial property, arising from any action for the dissolution of the marriage between the 1st and 3rd respondents, is obtained.
3. The 2nd respondent be and is hereby interdicted from attending to the transfer or cession of any right, title or interest in the Property unless and until either of the events referred to in paragraph 2 occurs.
4. The 1st respondent shall pay the costs of the application and the counter-application in this matter.