

JEROME OKEKE
versus
M DURO AND COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare 11 April and 21 June 2006

Mr Uriri, for plaintiff;
Miss Gasa, for defendant.

Trial Cause

MAKARAU J: The plaintiff hails from Nigeria and is in Zimbabwe on a permanent residence permit. His country of origin would have deserved no mention whatsoever in this judgment were it not for an unjustified attack on the people of his nation and other foreign nationals by the Cranford Court Home Owners Association, (“the association”), a voluntary organization that owns and administers a block of flats in Central Avenue, Harare.

The material facts of this matter are largely common cause are not seriously disputed. I mat summarise them as follows.

On 13 July 2001, the plaintiff and the defendant concluded a written agreement of sale whereby the plaintiff purchased “certain piece of land called stand no 52 central Avenue Harare situate in the District of Salisbury being 11 Cranford Court, held under share certificate no 17”(sic), for the price of \$640 000-00.

It is pertinent in my view to note at this stage that the agreement of sale between the parties contained two fundamental errors. Firstly, the plaintiff was not purchasing the piece of land at no 52 Central Avenue Harare, whatever its correct description is. It is common cause that the purchaser was purchasing the seller’s rights to Flat no 11 Cranford Court, which is situate at the street address given in the agreement.

As observed by McNALLY JA in *Gomba v Makwarimba* 1992 (2) ZLR 26 (S),

“As so often happens, the parties have used the word “sale” to describe what is in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council. Compare *Majuru v Maphosa* S 172-91 (not reported).

It is unfortunate that legal practitioners persist in ignoring the distinctions between sale and cession of rights in these cases, both because there are many such cases and because there are many such distinctions.”

Further, the agreement stipulated that the purchase price be paid to *Messrs Byron Venturas & Partners*, the nominated conveyancers of the property. It is further common cause that the rights were held by virtue of a certificate, issued by the association. As such, there was no freehold title to conveyance and the appointment of conveyancers was unnecessary.

The above errors, although legally fundamental, were common to both parties and thus have no effect on the validity of the agreement of sale between the parties. I simply highlight them for the guidance of the legal practitioners in future.

After the purchase price had been paid, the estate agency handling the transaction duly wrote to the association requesting it to issue a certificate in favour of the plaintiff. The request was unanimously turned down by the association and in turn, unleashed a xenophobic tirade of abuse against people from other countries who had occupied flats within the block, including people from the plaintiff’s country.

As a result of the attitude evinced by the association, the defendant as seller, instructed the agents to cancel the sale to the plaintiff and offered the property to a Zimbabwean national at \$650 000, who was accepted by the association and was duly issued with a certificate.

On 24 September 2002 some 14 months after the sale, the plaintiff issued summons against the defendant, claiming the sum of \$7,5 billion as damages for breach of contract.

Thus, the issue that was referred to me for trial was not whether or not the defendant had been unfairly treated in the circumstances by the association but whether the defendant is liable to the plaintiff for breach of contract in the sum of \$7,5 billion, being the replacement value of a flat similar to no 11 Cranford Court, Harare.

At the trial of the matter, the plaintiff gave evidence. His evidence was to a large extent a narration of the facts that are common cause and that I have already referred to above. He testified that when he was advised of the stance of the association, he took the issue to *Mrssrs Byron, Venturas & Partners* who advised him

that the association had no right to refuse him a certificate and that the issue would be taken up. While he was waiting for the lawyers to take action, he was advised that the seller would rather not wait for the ensuing legal battle between the plaintiff and the association and had found another buyer. He advised the lawyer of this turn in events and was told not to worry as the lawyer would deal with the issue as well. He thus left the purchase price with the law firm for a period of about 18 months before he withdrew the purchase price.

The witness further testified that in his opinion, the defendant cancelled the sale not because of circumstances beyond his control but because it had found another buyer who offered it more money for the same property.

After collecting the purchase price from the conveyancers, he kept it on his person and did not have time to purchase another property to mitigate his loss. He did not invest the money in any other manner.

The witness gave the impression of a shrewd business person, meriting the description given him in the summons that he came to this country to invest in the economy. He gave his evidence generally well and parried most of the questions put to him under cross-examination with ease and confidence. But I did not believe him when he said he kept his money at the conveyancers for over a year hoping that the lawyers would somehow have the sale ratified by the even though he now knew that the property had been sold to a third party to whom a certificate had been issued. I also did not believe him when he testified that he did not know where to invest the money and kept it on his person up to the date of the trial.

The plaintiff also called Raymond Muzembe, Wilfred Mukuna and Pardon Kangamwiro, property negotiators who gave the current market value of the property in dispute as falling between \$4,5 billion and \$5 billion. I have no reason to doubt the veracity of their respective testimonies in this regard.

In addition to giving an estimated value of the flat, Raymond Muzembe also testified as to how his agency handled the sale of the flat to the plaintiff. In this regard, he struck me as a forthright and honest witness. His evidence was mainly a corroboration of the facts that are common cause in this trial.

The defendant's founder and managing director took to the stand and testified in defence of the claim. His evidence was also a narration of the events that are common cause and that led to the defendant canceling the agreement of sale after the owners association had declined to accept the plaintiff and issue a share certificate in his name in respect of the flat.

The witness who appeared hard of hearing gave his evidence in a winding manner which gave rise to *Mr Uriri* for the plaintiff urging me to find him evasive. Rather than find the witness evasive, I found him quite emphatic in his denials and honest in his testimony.

Next to testify was Sergeant Kalumba who was subpoenaed by the defendant. At the time of the sale of the property to the plaintiff he was secretary to the Cranford Court Homeowners Association. He penned the letter wherein the plaintiff was denied a certificate in respect of the flat he had purchased. At the time of testifying, he was the Chairperson of the association.

The witness was most unhelpful in his testimony declined to testify on behalf of the association hiding behind the allegation that he did not have the authority of the association to do so. I shall not rely on his evidence as it was selective and in any event, did not advance either of the parties' cases.

The plaintiff's case as formulated in the declaration is based on breach of contract. It is plaintiff's specific averment that the defendant sold the property to a third party thereby prejudicing the plaintiff's rights in the agreement of sale. The defendant has admitted that it sold the property to a third party but avers that the subsequent sale was not concluded with the intention to breach the sale agreement with the plaintiff but after the association had declined to issue a certificate in favour of the plaintiff.

In my view, the issue that arises between the parties is whether the defendant breached the sale agreement by selling the property to a third party in the circumstances of this matter. In argument, *Mr Uriri* further narrowed the issue down to whether after the association had declined to accept the plaintiff as the lawful occupier of flat no 11, the defendant had an obligation to wait for the plaintiff to compel the association to accept him before canceling the agreement.

It is common cause that title to the flat in dispute is held by way of share certificate. As such, the plaintiff did not buy the immovable property on which the flat is situated. He simply bought the right to exclusively occupy the flat subject to the approval of the owner of the piece of land.

The system of share transfer is a fairly recent concept in home ownership in Zimbabwe wherein the ownership of a block of flats vests in a legal persona such as a body corporate or a voluntary association that then grants the rights to individuals to exclusively occupy certain units in the block. As it is aptly put by *L Mhishi* in his book “*The Law and Practice of Conveyancing in Zimbabwe*” at p86, the share certificate is not proof of ownership of the immovable property but proof of shareholding in the entity owning the property.

In the light of the nature of landholding that pertained to the flat, an analysis of the transaction that the plaintiff and the defendant entered into then reveals that the plaintiff bought the right to exclusively occupy a part of a property that the Cranford Court Homeowners Association owned.

In my view, the rights of the parties to this transaction are largely similar to the rights of parties who are purchasing properties from local authorities under suspensive agreements of sale. It is debatable whether the rights possessed by the occupiers of such properties are rights in the agreement of sale or are rights that attach to the immovable property itself. I prefer the view that such rights are derived from and attach to the agreement between the parties and do not necessarily attach to the immovable property itself as there is no registration of such rights against the title of the immovable property. Such rights, whatever their origin, though not real, can be sold and bought and can be ceded to the purchaser with the consent of the local authority enjoying real rights in the land. (See *Gomba v Makwarimba* 1992(2) ZLR 445 (S); *Magwenzi v Chamunorwa & Another* 1995(2) ZLR 332(S) and *Mukarati v Mkumbu* 1996 (1) ZLR 212 (S)).

Likewise, it is my view that the defendant’s right to exclusively occupy the flat could be sold and bought without the prior consent of the association. As between the parties, a valid agreement of sale came into being. However, the plaintiff as purchaser

could not compel the defendant to pass title to him as the defendant was not possessed of such title.

I would associate myself with and wholeheartedly adopt the remarks of EBRAHIM JA in *Mukarati v Mkumbu (supra)* at 215D-F, as representing the correct position at law. In giving his opinion that the holder of rights under a suspensive agreement of sale with the City Council of Harare could sell her rights under the agreement although she could not pass title, the judge had this to say:

“Consequently, while the would-be buyer cannot force the seller to pass title or even to give him occupancy, he is not without a remedy. One thing he can do is claim the return of any purchase price paid and the cost of any improvements made. It would also, in my view, be reasonable to hold that a contract of this nature is a conditional one, with an implied term that the sale is subject to the approval of the Council. If the traditional officious bystander had said to the parties: “You know that the seller will need to apply to the Council for its consent to the transfer”, they surely would have said: “Yes, of course that is what she will do.” this would cast a duty on the seller to seek the Council’s approval. If she failed to do so, she could be compelled to, though the council could not be compelled to give its approval. If the Council gave its approval, the transfer would take off. If the Council declined to give approval, the contract would be unenforceable until such time as the seller was in a position to pass title.”

In *casu*, it is common cause that the purchase price of the property was kept in the trust account of *Byron Venturas & Partners* pending the issuance of the certificate by the association. It was thus impliedly accepted by the parties that the sale would only be complete once the plaintiff was issued with a certificate in respect of the flat. Then, the plaintiff would be entitled to the purchase price. When the consent of the association was withheld, the sale of rights as between the plaintiff and the defendant could not be enforced and thus fell through.

On the basis of the foregoing, I would hold that the defendant could not be in breach of a conditional sale that fell through when the condition precedent was not met. There was no sale agreement to breach and the defendant had no contractual obligation to keep the offer open for an indefinite period.

Assuming I have erred in holding that the sale agreement between the parties was a conditional one that fell through when the consent of the association was withheld, I would have found for the defendant on another basis. In my view, the transaction

between the parties may be better understood if it is viewed as a triangle of rights and obligations. One side of the triangle is made up of the agreement of sale between the plaintiff and the defendant while the other side of the triangle is made up of the transfer of the rights sold from the defendant to the plaintiff by the association. At the base of the transaction or of the triangle of rights and obligations is the existing certificate of occupation issued to the plaintiff by the association. Viewed in this manner, it becomes untenable for the plaintiff to allege that a refusal by the grantor of the rights to grant such rights to the plaintiff amounts to breach of the obligations the defendant had in terms of the agreement of sale. It is common cause that the defendant had no obligation to consent to the cession. In fact, it could not. Thus, the refusal by the association to consent to the cession cannot be a breach of the defendant's obligations under the agreement between the parties.

I would therefore resolve this matter on the simple basis that after agreeing to sell its property to the plaintiff and advising the association of the sale, the defendant was under no further obligation to ensure that the owners of the property consented to the cession. The refusal by the association to issue a certificate in favour of the plaintiff was not a breach of the sale agreement or of any other obligation the defendant had, giving rise to a cause of action in contract to the plaintiff.

In the result, the plaintiff's claim is dismissed with costs.