

ELLEN SIMON  
versus  
FUNDA SAIMON

HIGH COURT OF ZIMBABWE  
KUDYA J  
HARARE 29 July, 15, 16 and 22 September and 28 October 2009

**Civil Trial**

*Ms. P. Chakasikwa*, for the plaintiff  
*S. Gahadzikwa*, for the defendant

KUDYA J: The plaintiff sues for the eviction of the defendant from her plot while the defendant counter-sues for the transfer of title, rights and interest in a portion of the same plot.

The plaintiff testified and called the evidence of two other witnesses who were her daughter Eneresi Simon and an employee of the Epworth Local Board Cagewell Muzangaza. The defendant gave evidence and called the testimony of two other witnesses who were Pastor Elizabeth Nyakudanga and Tedi Kagande. A total of 6 documentary exhibits were produced by both parties.

**THE PLAINTIFF'S CASE**

The plaintiff is an 83 year old woman. She cannot read or write. She has difficulty in walking. According to her summary of evidence, her husband died on 18 February 1982. In their pleadings both parties accepted that she was appointed an executrix dative on 22 August 2007 and subsequently became the legal holder of the rights, title, and interest in Stand 1125 Makomo Extension, Epworth in Harare. After the death of her husband she survived on handouts from well-wishers. She became a member of the Ambassadors for Christ Ministries; a church led by, amongst others, Kagande. Kagande doled out handouts to her and purporting to act under the auspices of the church built for her a more habitable two roomed structure on the stand in question. He requested her to sign a certain document on which he purportedly wrote out her grandchildren's names and the materials required for the construction of the more habitable structure. She did not know whether he built it from his or church funds. Thereafter he introduced her to the defendant, who was a teacher by profession, and a member of the same church. The defendant was supposed to look after her. She allowed the defendant

to build another two roomed house for his use on the stand after she was assured that he would be there for a short while. Defendant has been ensconced on her stand for the past 9 years. He neither pays rentals nor municipal charges.

She was adamant that she did not sell the smaller portion for \$16 000.00 or the bigger one for \$23 000.00. She disputed executing exhibit 1A and 1B averring that she was illiterate. She denied seeking the subdivision of the stand in 2000. She averred that it was in 2008 that she went with the defendant to the Epworth Local Board to have the dispute resolved; and not to seek the subdivision of the stand.

She was cross examined. She considered Kagande as a leader of the church in Epworth and did not know Pastor Nyakudanga and Pastor Matyora. She disputed that she advised Kagande in 1999 that she was selling a portion of her stand. She denied receiving \$16 000 in the presence of Kagande, the defendant's wife and her daughter Eneresi. She disputed that the amount in question was used by Kagande in the construction of her two rooms. She denied requesting Eneresi to sign exhibit 1A on her behalf before a Commissioner of Oaths. She also denied executing exhibit 1B. She disputed using her daughter to sign legal documents on her behalf.

She related how the defendant sought to evict her from her stand at the magistrates' courts. She did not appear to be aware of exhibit 2, the warrant for the ejection of the defendant which she obtained on 3 August 2001 in the Magistrates Court; exhibit 3, the affidavit signed on 16 May 2001 in her name in the hand similar to that of her daughter in exhibit 1A and exhibit 4, her application for a peace order dated 13 December 2001 in which she graphically set out how the defendant was disturbing her peace. She denied attending a funeral in Malawi using the proceeds of the sale of a portion of the stand. She was given money by her daughter who was her breadwinner. She denied informing Pastor Nyakudanga and Charles Shamuyarira of the sale of a portion of her stand to the defendant.

Eneresi stated that her mother never sold a portion of the stand to the defendant. She identified exhibit 1A as the blank document on which she wrote out the plaintiff's name and national identity number. She stated that her mother did not sell a portion of the stand for \$16 000 or \$23 000. She denied signing exhibit 1A before a commissioner of oaths.

She stated that her mother's trip to Malawi was funded by her daughter-in-law in Malawi. In 2008 she accompanied her mother and the defendant to the Epworth Local Board offices where they saw Mr. Muzangaza. The plaintiff was against the subdivision of her stand. She was cross examined. She admitted to signing a blank exhibit 1A but denied signing exhibit

1B. She stated that the defendant sought to evict plaintiff; notwithstanding that exhibits 2 and 3 indicated her mother as the plaintiff. That the defendant sought to evict the plaintiff from the stand was confirmed by exhibit 6, the summons issued out of the magistrates' court by him on 27 June 2002. She denied signing for her mother in exhibit 3 and 4. She disputed that \$16 000 was paid in her presence. She averred that her mother, who is of Nyanja origin, could not converse in Shona.

Cagewell Muzangaza is a building inspector for the Epworth Local Board. In that capacity he deals *inter alia* with sub-divisions of residential stands in Epworth. He told the Court that the stand is registered in the plaintiff's name. He stated that temporary structures, which are not based on an approved plan, are on the stand. He explained that a subdivision of a stand is initiated by the registered holder who writes to the local authority and fills in a special document to this effect identifying to whom the sub-division is to be registered. The housing department vets the information and makes its recommendations and forwards these to his department. The witness checks the stand on his master plan prepared by town planners and approved by the Department of Physical Planning in the Ministry of Local Government to satisfy himself whether it is feasible to subdivide the stand. He forwards his recommendations to the Urban Development Corporation (UDCORP). He stated that it is only the local authority which approaches UDCORP and not the registered holder or for that matter anyone else. He stated that in the file of the stand in his custody is a request purportedly made by the plaintiff in 2000 for a subdivision in favour of the defendant. The application was rejected for two reasons. Firstly, she was not the registered holder; her husband was and secondly, there was no subdivision permit for the stand.

He further revealed that on 20 December 2007 UDCORP wrote an unsolicited letter, exhibit 5, to the local authority. The local authority ignored it because it had not originated from it. He categorically stated that a sale of a portion of a stand cannot be approved by the local authority prior to sub-division.

He was cross examined. He disputed the averment that he was interested in the portion that was allegedly disposed to the defendant. He denied that UDCORP wrote its letter in response to that of the local board. At one time in 2008 the parties came to see him. The defendant wanted sub division but the plaintiff was against it as the matter was pending in Court and alleged that the defendant was forcing her to sub divide the stand.

As will more fully appear when I determine the issues referred to trial, I believed the plaintiff and her witnesses. They gave consistent and credible testimony.

### **THE DEFENDANT'S CASE**

The defendant stated that he purchased a portion of the stand from the plaintiff through the medium of Kagande. He paid \$16 000 to the plaintiff in the presence of his wife, Kagande and Eneresi in September 1999. They drove into town to Mr. Gode a Commissioner of Oaths before whom Eneresi signed for her illiterate mother on exhibit 1A. The plaintiff persuaded him to buy the bigger portion of the stand by an additional payment of \$7 000. She accepted periodic payments. The latter agreement was recorded as exhibit 1B and executed for the plaintiff by her daughter, Eneresi. He commenced construction and started to reside on the stand on 1 February 2000. Even though the stand was in her late husband's name, the plaintiff submitted an application for sub-division to the local board. The application failed because the plaintiff had not constructed the main house on the stand. The plaintiff was not in a position to do so; so he suggested that he build the main house and have it registered in his name. She took the view that he wanted to evict her and all hell broke loose.

The plaintiff issued summons for his eviction and obtained a default judgment on 19 May 2001 in case number 7926/2001 as shown in exhibit 2. She deposed in an affidavit, exhibit 3, on 16 May 2001 that the defendant was her grown up son who was giving her problems. It was purportedly signed by her; her full names were handwritten above her typed name.

He confirmed the visit to Muzangaza in 2008 where the plaintiff refused to have the stand sub divided into his name. He produced exhibit 5, a letter written to the local board by UDCORP on 20 December 2007 for stand 1171. The typewritten stand number 1171 was cancelled by pen and the number 1125 inserted. The cancellation was not countersigned. It does not refer to any previous correspondence from the local authority. Its authenticity is questionable. In my view, it does not assist the defendant in his case.

He was cross examined. He stated that he borrowed \$16 000 from his employers. Kagande told him of the purchase price and it was confirmed by the plaintiff. Kagande's young brother authored exhibit 1A. He further averred that the sum of \$16 000 was paid in the presence of the young brother after he had drafted exhibit 1A. On 28 October a new agreement on the additional payment for the bigger portion was executed. The typed agreement exhibit 1B was typed by Kagande at his town offices. By then the plaintiff had commenced building

her two roomed structure. He commenced building on the portion sold to him after the execution of exhibit 1B. He paid the installments of \$7 000.00 in two batches of \$3 000 and 4 000 in February and April 2000, respectively, to the plaintiff in the presence of Eneresi.

He disputed issuing summons to evict her contrary to exhibit 6, the summons in his name dated 27 June 2002 for the eviction of the plaintiff alleging he had purchased the stand. He maintained buying the bigger portion of the stand and denied conniving with Kagande to defraud the plaintiff of a portion of her stand.

He called the evidence of Elizabeth Nyakudanga, a pastor of the church attended by the parties in 1999. The pith of her testimony was that the plaintiff informed her that she had sold a portion of the stand so that she could use the proceeds to build a better house. Her church was not involved in humanitarian work at the time of the sale.

Under cross examination she alleged that the defendant paid the full amount of \$23 000 in 1999. She revealed that the defendant refreshed her memory of the events of 1999 in January 2009.

The last witness to testify for the defendant was Tediug Kagande. He stated that he was asked by plaintiff to find a buyer and he connected her to the defendant. He took him to plaintiff and handed \$16 000 to Eneresi who was with the plaintiff. On his suggestion exhibit 1A was executed. It was drawn up by his young brother and signed before a commissioner of oaths.

He built the cottage of cement blocks for her after listing the required materials. The materials cost half the amount paid by the defendant. He did not charge her for his labour. He did not supply her with free food handouts. She later approached him for the sale of the bigger portion and he referred her to the defendant. He was not involved in the latter agreement.

Under cross examination, he revealed that the defendant raised the purchase price without viewing the stand. The price was fixed by the plaintiff and her daughter. His brother was not at the plaintiffs where the money was paid but was in town. The first agreement was signed at his town offices and taken to a commissioner for affirmation only. He denied cheating the plaintiff.

For the reasons that will become apparent when I determine the issues referred to trial, I found the defendant and his witnesses incredible witnesses.

## **THE ISSUES**

At the pre-trial conference that was held on 1 July 2009, the matter was referred to trial on the issues set out in the defendant's minute of 20 May 2009. The issues for determination are as follows:

1. Whether the plaintiff sold to the defendant a subdivision of Stand 1125 Makomo, Epworth
2. Whether the plaintiff should cede or assign her rights, interests and title to the subdivision to the defendant
3. whether the plaintiff is entitled to evict the defendant from the property

## **RESOLUTION OF THE ISSUES**

1. *Whether the plaintiff sold to the defendant a subdivision of Stand 1125 Makomo, Epworth.*

The onus to show that an agreement of sale was executed lies on he who avers that such an agreement was concluded. In the present matter the incidence of proof falls on the defendant. He relied on exhibit 1A and 1B.

Exhibit 1A is a *pro forma* of an affidavit that is sold at Kingstons Booksellers and Stationers. It was common cause that the name of the deponent and her national identity number and address were handwritten by Eneresi. Eneresi stated that she was the one who wrote out the plaintiff's name, national identity card, address and signature in exhibit 1A. The plaintiff purportedly swore that she had sold a subdivision of stand 1125 Makomo to the defendant who had paid the full amount of \$16 000.00. She further indicated that she was granting him change of ownership. The affidavit was purportedly executed on 23 September 1999 before R. Gode, a commissioner of oaths.

The defendant did not disclose where exhibit 1A was drawn. He stated that it was signed before the commissioner of oaths by Eneresi in the presence of the plaintiff because the plaintiff could not read or write. The defendant's witness, Tedi Kagande, disclosed that the affidavit was purchased at Kingstons when the parties were on their way to his town offices. Kagande further indicated that the contents of the affidavit were written by his young brother at his town offices and signed by Eneresi before the parties proceeded to a commissioner of oaths. The commissioner of oaths simply confirmed with the plaintiff the contents of the

affidavit. The version of the plaintiff and her daughter differed from that adduced by the defendant. The plaintiff stated that Kagande brought the affidavit, in the absence of her daughter, and requested her to fill in her personal details and signature ostensibly as a record of the building materials he would purchase for her. The daughter confirmed that when she visited her mother as she was wont to do at the end of each month, she wrote out her mother's details and signed the affidavit for her. Both mother and daughter were adamant that Eneresi signed a blank document and denied the present contents in the affidavit.

The versions of the defendant and Kagande were contradictory on whether Eneresi signed the document before a commissioner of oaths or prior to the visit. A commissioner of oaths worthy his salt would have requested the plaintiff to append her mark and thumb print on the document. He would have known that it was improper for Eneresi to sign as the plaintiff without indicating that she was signing as her duly authorised agent. The defendant did not disclose why and how Kagande's young brother became involved in the matter. It does not appear that the plaintiff was ever given a copy of the affidavit in question. Neither Kagande's young brother nor the commissioner of oaths was called to confirm the versions of the defendant and Kagande. The two defence witnesses also contradicted each other on when the money was paid. Kagande averred that it was paid at the plaintiff's home. The defendant prevaricated. In his evidence in chief he averred that it was paid at the plaintiff's home while under cross examination he alleged that it was paid after the affidavit had been compiled. While the defendant stated that Kagande's young brother was present at the plaintiff's home when the money was paid, Kagande stated that his young brother was never at the plaintiff's home. Notwithstanding that Kagande was of the view that the purchase price of \$16 000 was too high in comparison with similar stands in Glen View at the time, the defendant borrowed the money and paid it before he had visited the site. He did not negotiate for a lower price.

The contradictions in the defendant and Kagande's testimonies and the other shortcomings that I have highlighted show that exhibit 1A is a questionable document. I am not satisfied that the defendant has discharged the onus on him to show on a balance of probabilities that it was executed by the plaintiff.

Exhibit 1B was purportedly executed on 28 October 1999. The plaintiff purportedly sold her rights in the portion of the stand where the main house was to be built for an additional payment of \$7 000.00. The amounts were to be paid on 30 February and 30 April 2000 in the sum of \$4 000 and \$3 000 respectively. Again, the document indicates that the

plaintiff signed the document. The defendant averred that it was signed by Eneresi for her mother. The signature in exhibit 1B appears to be similar to the one in exhibit 1A and exhibit 3. The latter was an affidavit filed by the plaintiff for default judgment against the defendant but is different from the one in exhibit 4, an *ex parte* application for a peace order that she filed on 13 December 2001. The defendant alleged that exhibit 1B was typed by Kagande. In his testimony Kagande expressed ignorance about it. Unlike the defendant, Kagande alleged that he facilitated the purchase of the larger portion of Stand 1125. The defendant alleged that he paid the \$7 000 on the due dates. He did not produce any proof of payment. The agreement records 30 February as a date for the payment of the first installment. Such a date does not exist. The application failed because the plaintiff was not then the registered holder of rights in the property, as averred by Muzangaza and not because of the absence of a main house on the stand, as alleged by the defendant. The contradictions outlined above call into question the authenticity of exhibit 1B, especially in the face of the denials by the plaintiff and her daughter that they were involved in its creation and execution.

Mr. *Gahadzikwa*, for the defendant, submitted that the agreements were authentic. He predicated his submission on the basis that the plaintiff permitted the defendant to build a cottage on the stand and allowed him to reside thereat without paying rentals. The plaintiff stated that she fell under the influence of Kagande, whom she trusted as an elder in her church and as a philanthropist who helped her with food handouts and built a two roomed cottage for her. I found that her age and low intellect adequately explained her naivety, which Kagande and the defendant exploited to the latter's advantage. In any event, notwithstanding his allegations that he had purchased a portion of the stand, the defendant never volunteered to pay for his proportional measure of the supplementary charges due to the local board. I am unable to find the non-payment of rentals by the defendant indicative of the authenticity of the agreements.

Mr. *Gahadzikwa* further submitted that the attempt by the plaintiff in 2000 to register a portion of the stand in the defendant's name was conclusive evidence that she had disposed her rights to him. It was common cause that the plaintiff is illiterate. Cagewell Muzangaza highlighted the elaborate paper work that is required of the registered holder in seeking a subdivision permit. The defendant did not produce the application in question. He did not adduce evidence on how the plaintiff applied for the sub division in his favour. As she is illiterate it could very well be that some one else completed and signed the forms that are

required. The plaintiff denied ever having done so. The defendant did not produce any credible evidence to show that she made the application in person. Cagewell's statement as to what he found in his file is insufficient to show that the plaintiff sold the stand to the defendant.

There were unsatisfactory features in the plaintiff's version concerning her professed inability to understand Shona; her apparent ignorance that she once sued the defendant for eviction and the source of the funds she used to go to Malawi. These were, however, irrelevant to the resolution of the first issue. Pastor Elizabeth Nyakudanga did not assist the defendant discharge the onus on him as it became clear when she was cross examined that she was relying on what the defendant said to her in January 2009 rather than on her own recollection of events. She contradicted herself on the terms of the agreement of sale. I found her evidence unreliable. Accordingly, I hold that the plaintiff did not sell her rights in a portion of stand 1125 Makomo Extension to the defendant.

In any event it was common cause that when the purported agreements of sale were executed, the rights in stand 1125 vested in the deceased estate of the plaintiff's late husband. The only person who has control of property in a deceased estate is the executor duly appointed to that office by the Master. The plaintiff was appointed an executrix dative on 22 August 2007. At the time she allegedly disposed of rights in the property she lacked the legal capacity to do so. She could not lawfully dispose of rights that she did not have. See *Nyandoro & Anor v Nyandoro & Ors* HH 89/2008 at page 9.

I hold that the plaintiff did not sell a portion of Stand 1125 Makomo, Epworth to the defendant.

The resolution of the first issue in the plaintiff's favour would dispose of the matter both in the main and in reconvention. However, in the event that I am wrong on the first issue, I proceed to deal with the alternative submissions that were made by counsel.

2. *Whether the plaintiff should cede or assign her rights, interests and title to the subdivision to the defendant*

It was common cause that the onus lay on the defendant to show that he was entitled to take cession. Mr. *Gahadzikwa* contended that such cession was predicated on the validity of the agreement of sale. He submitted that the agreement of sale was valid. Ms. *Chakasikwa* on the other hand submitted that even if the agreements were entered into, they were invalid *ab initio* for two reasons. The first reason being that no sale was concluded as the merx was not

ascertainable. She correctly set out the three essential elements of a contract of sale. These are agreement (consensus ad idem); a thing sold (merx); and a price (pretium). On the authority of *Chanock v Barnard* 1921 OPD 207 at 208 she submitted that no contract of sale was executed in the absence of an agreement on the merx. She contended that the defendant had failed to describe and identify the portion of the stand that was sold to him. Mr. *Gahadzikwa* on the other hand contended that the portion sold was capable of ascertainment. We are dealing with land. The portion of land sold can only be identified by area often expressed in square meters. The defendant was not able to use this medium to identify the portion of land sold to him. The obvious impediment being that Stand 1125 is an indivisible unit. It was not subdivided at the time or at present. Thus had I found that the parties concluded exhibits 1A and 1B, I would have found those agreements invalid for failure to meet an essential requirement of a contract of sale. The defendant cannot rely on Exhibit 5, the letter from UDCORP; whose authenticity is questionable. The letter actually confirms that Stand 1171, or if it correctly refers to Stand 1125, has not been subdivided.

The second reason advanced by Ms. *Chakasikwa* was that the agreement of sale contravened section 39 of the Regional Town and Country Planning Act [*Cap 29:12*]. She submitted on the authority of *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S) 355A-C that an agreement for the change of ownership of an unsubdivided portion of a stand is prohibited by the section in question. The contention by Mr. *Gahadzikwa* that the agreement was for cession and not ownership may legally be correct; but it runs contrary to the contents of exhibit 1A wherein the plaintiff is alleged to have declared that she was granting change of ownership to the defendant in these words: “therefore, I now grant the change of ownership without delay”.

Mr. *Gahadzikwa* with reference to *Chanda v Mutadzi & Anor* SC74/94 and *Mukarati v Mkumbu* SC 36/96 submitted that the Regional Town and Country Planning Act is excluded from the purview of cessions involving local boards. That submission runs contrary to *X-Trend-A-Home* case, *supra*. In any event the two cases he referred to involved the sale of rights in single units. They did not involve sales of unsubdivided portions.

I would uphold the submissions made by Ms. *Chakasikwa* and deny the defendant cession of an unsubdivided portion of Stand 1125 of Makomo Extension, Epworth. *A fortiori*, the defendant’s counter claim fails.

3. *Whether the plaintiff is entitled to evict the defendant from the property*

The corollary to my findings on the first two issues is that the plaintiff holds cession in Stand 1125. The defendant has no legal basis to be on that stand. Accordingly, she is entitled to the order of eviction that she seeks.

## **DISPOSITION**

It is ordered that:

1. The defendant and all those claiming occupation through him be and is hereby evicted from Stand No. 1125 Makomo Extension, Epworth Harare.
2. The defendant's counterclaim be and is hereby dismissed.
3. The defendant shall pay the plaintiff's costs of suit for both the claim in convention and counter claim.

*Kantor & Immerman*, plaintiff's legal practitioners  
*Gahadzikwa & Mupunga*, defendant's legal practitioners