EDWARD COLLIN GARDNER
versus
DAMPIER DEVELOPMEMT
and
V MANGAMI
And
KIDS MHANGAMI
and
EXPORT CREDIT & GUARANTEE CORPORATION
(PRIVATE) LIMITED
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKONI J
1 June 2009 and 12 May 2010

L Uriri, for the applicant
N R Mutasa, for the fist respondent
H Zhou, for the fourth respondent

MAKONI J: The applicant and the first respondent entered into an agreement of sale in respect of a 4.2% undivided share, being share number E 8 and 90.15% undivided share being share number J 4 of a certain piece of land situate in the District of Salisbury called the Remaining Extent of stand 759 A Greystone Township ("the property"). This was sometime in July 2004.

A misunderstanding arose regarding payment of the purchase price which culminated in the applicant suing the first respondent for an order of specific performance in case number 11495/04. Judgment was entered in favour of the applicant on 4 April 2006. The order was to the effect that the applicant was to tender the purchase price and the first respondent would then transfer its rights, title and interest in the property to the applicant. The first respondent appealed against the judgment and later withdrew the appeal.

In the meantime, sometime in March 2006, the first respondent sold the same property to the second and third respondents. It effected transfer of the property to the second and third respondents on 13 April 2006. The second and third respondents subsequently sold and transferred the property to the fourth respondent on 18 September 2007.

Against this background, the applicant, then brought the present application seeking an order in the following terms:

"It is declared that:

1. That the first respondent lost dominion in respect of a 4.2% undivided share, being share number E8 and a 0.15% undivided share being share number J4 of a certain piece of land situated in the District of Salisbury called the Remaining Extent of Stand 759A Greystone Township with the closure of pleadings in case number HC 11495/04.

2. The sale and transfer of the said property by the first respondent to the second and third respondents, and the subsequent sale and transfer of the same property by the second and third respondents to the fourth respondent is accordingly null and void.

Consequently it is ordered that:

3. The sale and transfer of the said property by the first respondent to the second and third respondents, and the subsequent sale and transfer of the same property by the second and third respondents to the fourth respondent be and is hereby set aside.

4. The first respondent shall, within seven days of the service of this order upon its registered address by the Deputy Sheriff, tender transfer of the said property to the applicant and shall do all such things as are necessary to effect transfer thereof to the applicant.

5. In the event of the first respondent failing to comply with paragraph 4 above, the Deputy Sheriff be and is hereby authorized to do all such things and to sign all such documents as will be necessary to effect transfer of the said property to the applicant.

6. The first respondent shall pay the costs of the application at the legal practitioner and client scale."

The applicant avers that he tendered payment in accordance with the judgment and same was rejected by the first respondent. He contends that the sale of the property to the second and third respondents was void because the first respondent had lost dominion of the property with the closure of pleadings. He retained an absolute right to repossess the property from whoever had title at the time of judgment if such title was obtained subsequent to joinder of issues.

The first respondent opposes the matter on the basis that the property was sold to the second and third respondents before the judgment in case number 11495/04 had been delivered. He disputes that it lost dominion over the property. In case number 10425/04 the

applicant's application to interdict the first respondent from disposing of the property was dismissed. It does not accept that the second and third respondent is title to the property was defective in any way.

The fourth respondent opposes the application on the same grounds as advanced by the first respondent.

It was submitted on behalf of the applicant that once the pleadings in HC 11495/04 were closed, the matter became *litis constatatio*. The parties lost dominion over the property which become *res litigiosa*. As such the property could not be disposed of before the termination of the proceedings. The proceedings in HC 11495/04 were only terminated with the withdrawal of the first respondent's appeal. It was further submitted that the sale of the property to the second and third respondents and subsequently to the fourth respondent was void because at the material time the first respondent had no dominion over same. The applicant is entitled to vindicate same.

It was submitted on behalf of the first respondent that the mere operation of the doctrine of *letigiosity* does not result in dominion over property being lost. It is an accepted principle of law that *res litigiosa* can be alienated.

It was further submitted that at no time did the applicant become the owner of the property. He did not pay the purchase price. He cannot therefore seek to vindicate property which is now owned by the fourth respondent.

The fourth respondent associated itself with the argument by the first respondent. It was further submitted on its behalf that the agreement of sale between a litigating party and the third party is valid inter parties.

The present application was equated to a vindicatory action in *exparte* Deputy Sheriff Salisbury in re *Doyle* v *Salgo* 1957 (3) SA 740 (SR). One of the essential elements of an *actio rei vindicatio* is that a party seeking such relief must establish the right of ownership. The author D Carey Miller in The Acquisition and Protection of Ownership(1986) at p 256 after making the above point goes on to stress that:

> "As Voet points out, the action is not available to those who have not yet obtained ownership as for example, a purchaser who has paid the price but not yet obtained delivery. Nor, indeed, is it enough for the plaintiff to gain ownership *pendente lite* because it cannot be competent for a party to institute a vindiatory action anticipating the acquisition of ownership".

It is not in dispute that the applicant is not and has never been the owner of the property. Further what the applicant acquired through the judgment is a personal right. The doctrine of *res litigiosa* applies in an action in *rem* and not in a personal action.

In para 1 of the draft order, the applicant seeks a declarator that the first respondent lost dominion in respect of the property with the closure of pleadings in case number HC 11495/04. The issue then is whether the operation of the doctrine of l*itigiosity* results in dominion over property being lost. No authority to that effect was quoted to the court by the applicant and I have been unable to find any.

Mr *Uriri* in his reply made a concession that dominion is not lost but that it is diminished. He did not however seek to amend para 1 of the draft order.

The concession was properly made. The defendant's real rights as *dominius*, in a *res litigiosa* are diminished to that extent to which he cannot dispose of the thing to the prejudice of the plaintiff. See *Exparte* Deputy Sheriff Salisbury in re *Dayle supra* and Siberberg and Schoeman's The Law of property 3rd ed p 304. *Dominus* is not lost as a result of litigiosity. Paragraph 1 of the draft order is therefore not the correct position in law.

In view of my finding above, the relief being sought by the applicant in para 1 of the draft order cannot be granted.

In para 2 of the draft order, the applicant seeks a declarator to the effect that the sale to the first and second respondents and the subsequent sale and transfer of the same property to the fourth respondent is accordingly null and void.

From the wording of para 2, in particular the use of the word "accordingly", it would appear that the granting of para 2 is linked to the granting of para 1. Having made a finding that I cannot grant para 1 it follows that para 2 falls away.

Assuming I am wrong on this point I will proceed to determine the next issue which is the validity of the sale of the property to the first and second respondents and the subsequent sale and transfer of the property to the fourth respondent.

It is now settled in our law that the fact that a thing is *res litigiosa* does not preclude or prevent it from being alienated or similarly dealt with, so long as the rights of the non-alienating litigant in the *res* are protected. The above position come out clearly in the recent case of *Supa Plant Investments*(*Pvt*) *Ltd* v *Edgar Chidavaenzi* HH 92-09 at p 6 – 7 wherein MAKARAU JP analysed the authorities on the point.

The authors Siberberg and Shoeman in the *Law of Property* 3rd ed at p 304 made the point that the agreement of sale of the *res litigiosa* between the litigating party and a third party is valid *inter partes*. They go further to say that the purchaser is bound by the judgment in the action and the successful party can recover it from the new possessor by execution and without fresh proceedings.

The issue that confronts me in this matter is not of a third party who contracts with the litigating party but that of a party who purchases from the third party.

It was submitted on behalf of the fourth respondent that recovery of the property would only apply if the property is in the hands of the second and third respondents and not against the fourth respondent. I was referred to the case of *Menezes* v *McGaili* 1971 (2) SA 12 (c)

In that case a certain vanSchoor had been prohibited by an order of court from passing transfer of certain property to any person other than Mcgaili. In breach of the prohibition vanSchoor passed transfer to one Eckard who in turn sold the property to Menezes. Mcgaili argued that because of the existence of the prohibition, Menezes had not validly acquired ownership. It was held that the transfer from vanSchoor to Eckard had not been void even though it was done in violation of a court order. STEYN J at p 14 G made the following remarks:

> "Provided however that the transaction between vanSchoor and Eckard complied with the requirements of a valid sale, in that, e.g., it was a genuine and not a simulated transaction negotiated with the object of defeating the court's order the mere prohibition would not, in my opinion, render the transfer from vanSchoor to Eckard void. Probably such transfer is voidable, but until it has been set aside, it stands, and if then Eckard transfer the property to a *bona fide* transferee, the latter transfer is valid".

The learned judge went further and explained his reasoning which was the consideration that if a transfer effected in breach of an order of court were to be held void, a series of transfers might have to be set aside. This would constitute a serious inroad upon the unavailable title of a *bona fide* transferee and could lead to grave inconvenience and uncertainity.

I share the views as expressed by STEYN J in the *Menezes* case *supra*. The applicant has not alleged any *mala fides* on the part of the fourth respondent. The fourth respondent would therefore be a *bona fide* transferee. In any event the applicant only acquired a personal right, if any, through the court order and he cannot successfully claim the property from the fourth respondent as his rights are only enforceable against the first respondent.

The author D Caney Miller *supra* lends support to the point that the successful litigant can recover the *res* by execution from the third party only when he states at p 257:

> "In essence the successful plaintiff could recover the thing from the one who had acquired from the defendant merely by recourse to execution – based upon the judgment against the defendant and without the need for vindication". (my own underlining).

In the result, and on the basis of the foregoing I make the following order:

1. The application is dismissed.
2. The applicant to pay costs of suit.

Kantor & Immerman, applicant's legal practitioners
Costa & Madzonga, first respondent's legal practitioners