

ARCHIBOLD NDIDZANO  
versus  
PAULINE GONDORA & 8 OTHERS

HIGH COURT OF ZIMBABWE  
PATEL J

Civil Trial

HARARE, 5 to 12 October 2010 and 11 January 2011

*Z.M. Kamusasa*, for the plaintiff  
*M.C. Mukome*, for the 1<sup>st</sup> defendant

PATEL J: This matter has had an unusually long and tortuous history dating back to January 2003. It has eventually come to trial on the following agreed issues: (i) whether the plaintiff bought Stand No. 6357, Glen View, Harare, from the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' late father; (ii) whether the 1<sup>st</sup> defendant was a *bona fide* purchaser of the property; (iii) whether the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were entitled to cede the property to the 1<sup>st</sup> defendant; and (iv) whether or not the cession should be reversed and title be passed to the plaintiff. Related to these issues is the determination of the issues arising from two other cases consolidated with the present case, to wit: (i) whether the plaintiff is entitled to the order he seeks in Case No. HC 743/03; and (ii) whether the order dated the 5<sup>th</sup> of November 2003 in Case No. HC 8050/03 should be rescinded.

#### Statement of Agreed Facts

Before the commencement of trial, counsel filed a Statement of Agreed Facts setting out the following background.

At some stage in the 1980s the plaintiff and his brother (Abisha Ndidzano) constructed a house on Stand No. 6357. At that time, the stand was registered in the name of one Caleb Mutyenyo. The latter (the deceased) died on the 31<sup>st</sup> of January 2001 in Harare, when the stand was still registered in his name.

In December 2002, the Master of the High Court appointed the 2<sup>nd</sup> defendant as the executor dative of the deceased estate. At the same time, the 2<sup>nd</sup> defendant was authorised to effect cession of the stand in question into the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup>

defendants. The 2<sup>nd</sup> defendant then attempted to evict the plaintiff and his family without success.

Meanwhile, in January 2003, the plaintiff instituted a claim demanding cession under Case No. HC 743/03. In March 2003, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants sold the property to the 9<sup>th</sup> defendant (Chitanha), who processed cession into his name but had to reverse it after encountering difficulties with the plaintiff. The Master subsequently issued a report in support of his decision, in reaction to which the plaintiff's lawyers filed a complaint in June 2003.

Thereafter, in August 2003, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants sold the property to the 1<sup>st</sup> defendant. The latter then sued for cession into her name and ejectment of "the tenants" at the property in October 2003, under Case No. HC 8050/03, and obtained judgment by default in November 2003. The plaintiff then instituted an urgent application in Case No. HC 10752/03 for stay of execution and rescission of the default judgment as well as cession of the property into his name.

The urgent application was opposed by the 1<sup>st</sup> defendant and the matter was subsequently referred to trial. All three cases were then consolidated in November 2007, as was later confirmed in July 2010 under Case No. HC 153/10.

### Evidence for the Plaintiff

Archibald Ndidzano is the plaintiff. His evidence was that he and his brother bought the stand in dispute in 1983 from one Chiradza, who had purchased it from the deceased shortly before. They constructed the house on the stand from 1983 to 1986 in accordance with building plans approved by the City of Harare in November 1983 [Exhibit 3]. After the stand had been developed, the parties signed the agreement of sale in November 1986 [Exhibit 1]. The full purchase price of ZW\$1,500 was paid within a few months thereafter. They also paid the monthly occupation charges to the City of Harare from July 1985 onwards [Exhibit 2]. Many years later, Chiradza located the deceased and they arranged to meet him. The latter did not dispute the sale and it was agreed that he would be paid \$50,000 in order to facilitate cession of the property into the plaintiff's name. He made the first payment of \$12,000 in August 2000 to the deceased himself and, following his death, two further payments of \$16,000 and \$22,000 were made to his widow in March and June 2001 [Exhibit 4]. She later refused to effect cession as had been agreed between the parties. When the 1<sup>st</sup> defendant came

to view the house, she was told that the house belonged to the plaintiff. He seeks rescission of the order granted by default in Case No. HC 8050/03 as he was not served with any papers in that case. The Deputy Sheriff's return of service effected in September 2003 is not reliable as the 2<sup>nd</sup> defendant was not residing at the house and had no authority to accept service of process on behalf of the occupants of the house. Under cross-examination, the plaintiff explained that he signed the agreement of sale [Exhibit 1] as a witness. It declared Abisha Ndidzano to be the purchaser as he was the elder brother. The latter was not joined as co-plaintiff in this matter because he was at his rural home when it was instituted. His brother had verbally authorised him to file this suit. The plaintiff has his own house in Budiro and, once he is granted cession of title *in casu*, he will cede the property to his brother.

Abisha Ndidzano is the plaintiff's elder brother and presently resides at the house in dispute. He confirmed that he had given the plaintiff his verbal authority to sue on his behalf. At the time that the action in Case No. HC 743/03 and the urgent application in Case No. HC 10752/03 were instituted, he was living at his rural home, about 250 km away from Harare. In his testimony, he clarified and generally corroborated the plaintiff's evidence as to the terms and circumstances of the agreement of sale [Exhibit 1] as well as the three payments made to the deceased and his widow [Exhibit 4]. In 2002, he learnt about the registration of the deceased estate *in casu*. He and the plaintiff were invited to a meeting with the Master and were asked to provide proof of their claim. At that meeting, in the presence of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, the deceased's widow confirmed that the property had been sold to the Ndidzanos. The plaintiff's lawyers then wrote to the Master in December 2002 [Exhibit 5] explaining the details of the sale, together with copies of Exhibits 1 and 4. Despite all of this, the Master issued letters of administration authorising cession into the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants [Exhibit 6]. Following the issuance of Summons by the plaintiff in January 2003, in Case No. HC 743/03, the Master made his report in May 2003 confirming that authorisation [Exhibit 7]. The plaintiff's lawyers again wrote to the Master in June 2003, objecting to his report [Exhibit 8]. Subsequently, when the 1<sup>st</sup> and 2<sup>nd</sup> defendants came to view the house, they were told that the house was under dispute and not for sale. Shortly thereafter, at the end of August 2003, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants entered into an agreement of sale with the 1<sup>st</sup> defendant [Exhibit 9]. The witness was not aware of the 1<sup>st</sup> defendant's application in Case No. HC 8050/03. The

return of service in that case was effected at the Deputy Sheriff's office. It is inaccurate because the 2<sup>nd</sup> defendant did not stay at the house and he was not authorised to accept service on behalf of its occupants. As appears from Exhibit 9, the 2<sup>nd</sup> defendant's place of residence at the relevant time was an address in Cranborne or Seke.

Jane Ndidzano is the plaintiff's sister-in-law and is married to Abisha Ndidzano. She testified that the 1<sup>st</sup> defendant first came to view the house in 2003 and was allowed to enter by her daughter. Shortly thereafter, when the witness was at the house for a short visit from her rural home, the 1<sup>st</sup> defendant came again, accompanied by the 2<sup>nd</sup> and 4<sup>th</sup> defendants. The witness denied them entry into the house and told the 1<sup>st</sup> defendant that it was subject to dispute and that she should not pursue her intended purchase.

#### Evidence for the 1<sup>st</sup> Defendant

Pauline Gondora, the 1<sup>st</sup> defendant, testified as follows. She went with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to view the house in early August 2003. They met a young woman who allowed them to inspect the property. She then went to the offices of the City of Harare and noted that the house was registered in the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. This was confirmed by the letters of administration furnished by the 2<sup>nd</sup> defendant. She then entered into the agreement of sale at the end of August 2003 [Exhibit 9]. As regards what transpired thereafter, the 1<sup>st</sup> defendant's evidence in-chief was generally vague and contradictory. She stated that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants voluntarily effected cession of the property into her name, but could not satisfactorily explain why she instituted the application in Case No. HC 8050/03 to compel such cession. She also changed her evidence as to when cession was effected and was unable to explain why this was done contrary to the terms of the provisional order granted in Case No. HC 10752/03.

Under cross-examination, the 1<sup>st</sup> defendant admitted that the City of Harare had not consented to cession into her name specifically because of that provisional order. Moreover, she could not explain why the City officials had not mentioned the dispute relating to the property, even though they were fully aware of it through service of summons in Case No. HC 743/03 in February 2003 and a subsequent cautionary letter from the plaintiff's lawyers in April 2003 [Exhibit 10]. She also denied having been served with the urgent application in Case No. HC 10752/03, despite service having

been effected in December 2003 at the address for service furnished by herself in her founding affidavit in Case No. HC 8050/03. Again, in the same affidavit, filed in September 2003, she cited the property in dispute as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' address for service, even though she was fully aware from the agreement of sale, concluded two weeks earlier in August 2003, that they resided in Cranborne and Seke. Coupled with the fact that service of her application was effected on the 2<sup>nd</sup> defendant at the Deputy Sheriff's office, it became quite evident that this was deliberately calculated to avoid service on the plaintiff himself. Lastly, she was unable to explain the provisions of a settlement agreement concluded by her with Hungwe & Partners and the 9<sup>th</sup> defendant in November 2003 [Exhibit 13]. This clearly showed that she was aware of the earlier sale to the 9<sup>th</sup> defendant as well as the plaintiff's claim to the property.

Hopemore Arufandika is the 2<sup>nd</sup> defendant and the executor of the deceased estate *in casu*. His evidence was that he did not defend Case Nos. HC 743/03 and HC 10752/03 because he was not served with the papers in both cases. He denied any knowledge of Chiradza and of any sale of the property in question to Chiradza or the plaintiff. He also stated that he had lived at the house as a young child. According to him, the plaintiff was staying at the house as a rent paying tenant. As executor of his father's estate, he decided to sell the house to the 1<sup>st</sup> plaintiff after checking all the relevant papers with the City of Harare and the Master's office. He went to view the house with the 1<sup>st</sup> defendant and met a young woman but never met with Jane Ndidzano. In Case No. HC 8050/03, he accepted service on behalf of all the respondents, including the tenants at the house, as their representative. He notified the plaintiff but did not take the papers to him.

Under cross-examination, he conceded that he had tried to sell the house to two other buyers, in addition to the 1<sup>st</sup> defendant. He also admitted that he did not refuse to give cession to the 1<sup>st</sup> defendant but was told by her to go to the Deputy Sheriff's office to accept service of the papers in Case No. HC 8050/03. As regards notice of the plaintiff's position, he could not remember receiving a letter from the plaintiff's lawyers in November 2002 which expressly spelt out the plaintiff's claim to ownership of the property [Exhibit 11]. More significantly, he was unable to deny the contents of several documents which clearly demonstrated, quite contrary to his evidence-in-chief, that he was duly notified of the action and urgent application instituted by the plaintiff. These include the following: the plaintiff's special plea *qua* defendant in Case No. MC

13440/03, filed in May 2003 [Exhibit 12], which cites the pending action in Case No. HC 743/03; the Deputy Sheriff's return of service in that case in February 2003, following which Hungwe & Partners filed their notice of assumption of agency on his behalf in March 2003 and were then served with notice to plead in April 2003; the certificate of service of the application in Case No. HC 10752/03, effected in December 2003 on his wife at his address in Seke; the certificate of service of the notice of set-down in that case, effected in December 2003 at the same address.

When questioned by the Court regarding his claim of having lived at the house as a child, the 2<sup>nd</sup> defendant stated that he had stayed there with his parents as a child below the age of 3 years, having been born in August 1980. The house would therefore have been built in or before 1983. His assertions in this respect are patently false in view of the fact that the building plans for the house [Exhibit 3] were only approved by the City of Harare in November 1983.

### Findings

Having regard to all of the evidence before the Court, on a balance of probabilities, I make the following findings of fact.

The plaintiff, together with his brother, jointly purchased the undeveloped stand No. 6357 from one Hosiah Chiradza in 1983, as recorded in an agreement of sale signed by the parties in November 1986. Chiradza himself had previously purchased the stand from Caleb Beta/Mutyenyoka (the deceased). The plaintiff and his brother then developed the stand and constructed the house thereon from 1983 to 1986. They also paid to the City of Harare all of the charges of occupation relating to the property. In effect, they have exercised all of the rights of use and occupation ordinarily associated with ownership continuously since 1983.

Throughout the relevant period, the deceased remained the registered owner of the property. He was eventually located in August 2000 and he agreed to effect transfer to the plaintiff and his brother for a fee of ZW\$50,000. This sum was paid to him and, after his death, to his widow in three separate instalments.

The Master's Office misdirected itself in authorising cession of the property into the names of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. The property had been sold to the plaintiff and his brother prior to the death of the deceased and, therefore, did not form part of the deceased estate for the purpose of distribution.

The 1<sup>st</sup> defendant was fully aware of the pending dispute and litigation pertaining to the property at the relevant time. Despite this knowledge, she wilfully chose to disregard the dispute and decided to purchase the property nonetheless. Furthermore, she deliberately falsified the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants' address for service in her founding affidavit in Case No. HC 8050/03. She then connived with the 2<sup>nd</sup> defendant to avoid service of the founding papers in that case on the plaintiff. In short, she was not a *bona fide* or innocent purchaser.

The plaintiff was not served with the relevant papers in Case No. HC 8050/03 and was unaware of the proceedings in that case. Therefore, he was unable to defend the case and was not in wilful default.

As regards plaintiff's *locus standi* in this matter, it would obviously have been preferable for the plaintiff's brother to have been joined as co-plaintiff or for the plaintiff to have obtained his written authority to sue. Nevertheless, I am fully persuaded by the explanations proffered by the plaintiff and his brother as to their mutual intention to purchase the property jointly and the verbal authority given to the plaintiff to sue on his brother's behalf, as well as the non-availability of the latter at the time that the plaintiff instituted the initial action and subsequent urgent application. Accordingly, I am satisfied that the plaintiff has the requisite *locus standi* for present purposes in relation to all three cases.

### Double Sales

The approach to be adopted in the case of a double sale of immovable property was lucidly restated in *Chimphonda v Rodrigues & Others* 1997 (2) ZLR 63 (H) at 65-66. In the absence of special circumstances affecting the balance of equities, where the second purchaser has notice or knowledge of the prior sale of the property at the time of the second sale or when he takes transfer, the first purchaser is entitled to recover the property from the second purchaser, in which event the second purchaser's only remedy is an action for damages against the seller. See also *Crundall Brothers (Pvt) Ltd v Lazarus N.O. & Another* 1991 (3) SA 812 (ZH); *Guga v Moyo & Others* 2000 (2) ZLR 458 (S).

In effect, the second purchaser is bound by the rights of the first purchaser in the property, and it is a species of fraud on his part if he attempts to defeat those rights. See *De Jager v Sisona* 1930 AD 71 at 74. In this regard, it is not necessary to prove any

intention to frustrate the rights of the first purchaser. The mere fact that the second purchaser is aware of the existing rights and nevertheless continues to enforce his own rights, and thereby defeats or infringes the earlier rights, constitutes a species of fraud upon the first purchaser. See *Kazazis v Georghiades & Another* 1979 (3) SA 886 (T).

### Disposition

As I have already found *in casu*, the plaintiff and his brother purchased the property in 1983. Many years later, in 2000, the seller agreed to effect cession but, after his death in 2001, his widow and beneficiaries reneged on that agreement. Thereafter, the 2<sup>nd</sup> defendant sold the property on several occasions and eventually concluded an agreement of sale with the 1<sup>st</sup> defendant in 2003. At the time of that sale and later, when she attempted to take cession, the 1<sup>st</sup> defendant was fully aware of the earlier sale to the plaintiff and his claim to the property. It follows that she acted *mala fide* at all relevant times.

As for the equities, the plaintiff and his brother constructed the house and have lived there since 1986. They have thereafter paid all the charges levied on the property by the City of Harare. Subsequently, after his rights were disputed, the plaintiff took all necessary steps to notify all of the defendants *in casu* and to protect his rights through litigation. On the other hand, the 1<sup>st</sup> defendant has not as yet processed cession into her name. More significantly, she acted with deliberate deceit to evade service of court process on the plaintiff in Case No. HC 8050/03. In my view, the balance of equities undoubtedly favours the plaintiff.

Having regard to all of the above, the plaintiff is entitled to the relief that he seeks, including rescission of the order granted by default in Case No. HC 8050/03. As regards cession, I think it just and equitable to order cession into the joint names of the plaintiff and his brother, in keeping with the fact of their joint purchase of the property.

As for costs, the 1<sup>st</sup> defendant has not only acted *mala fide* in relation to her purchase of the property and manipulation of court process but has also falsified her evidence before this Court. Similarly, the 2<sup>nd</sup> defendant, as executor of the deceased estate, has acted fraudulently in his dealings with the property, and has contemptuously compounded his fraud by weaving a veritable tapestry of falsehoods on the witness stand. His siblings, the 3<sup>rd</sup> and 4<sup>th</sup> defendants, are also complicit in his conduct by virtue

of their tacit acquiescence throughout these proceedings. All of these defendants are eminently eligible for a punitive award of costs against them.

In the result, judgment is entered in favour of the plaintiff as follows:

1. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants be and are hereby ordered to cede Stand No. 6357 - 89<sup>th</sup> Crescent, Glen View 3, Harare, to the plaintiff, Archibold Ndidzano, and his brother, Abisha Ndidzano, failing which the 7<sup>th</sup> defendant, the Deputy Sheriff, Harare, be and is hereby authorised to sign all the requisite papers in order to effect the cession of the said Stand into the joint names of the plaintiff and his brother.
2. The 5<sup>th</sup> defendant, the City of Harare, be and is hereby directed to register the cession of the aforesaid Stand into the joint names of the plaintiff and his brother.
3. The judgment and order granted on the 5<sup>th</sup> of November 2003 in Case No. HC 8050/03 be and are hereby rescinded.
4. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, jointly and severally, the one paying the others to be absolved, shall pay the costs of suit on a legal practitioner and client scale.

*Kamusasa & Musendo*, plaintiff's legal practitioners  
Mvingi, Mugadza & Mukome, 1<sup>st</sup> defendant's legal practitioners