

HAVEN CHIKUMBU
versus
AGRICULTURAL BANK OF ZIMBABWE
LIMITED

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 28 FEBRUARY 2013

Opposed Application

O Shava, for the applicant
J Dondo, for the respondent

KUDYA J: The applicant seeks the following contested order:

1. That the Note of Hand registered by the respondent on stand 237 Redcliff Township of Redcliff Estate, measuring 3 185 square meters and held under Deed of Transfer number 2190/2000 is hereby declared null and void and of no force or effect.
2. That the respondent shall forthwith surrender to the applicant the deed of transfer in respect of certain piece of land situate in the District of Kwekwe called stand 237 Redcliff Township of Redcliff Estate measuring 3 185 square meters and held under Deed of Transfer number 2190/2000.
3. That the respondent shall forthwith consent to cancellation of Notes on Hand numbers 6669/2004, 706/2006, 324/2007 and 1705/2007 and any other Notes of Hand not apparent from the holding deed failing which the Deputy Sheriff is authorised and directed to sign the consent to cancellation of the Notes of Hand on behalf of the respondent.
4. That the respondent shall pay costs of suit on the scale of attorney and client.

The facts in this matter are these:

The applicant purchased the stand in question on 26 June 2007 from Bryden Technical Services (Pvt) Ltd for ZW\$1, 9 billion. He paid the full purchase price on 28 June 2007. An attempt to cancel the agreement of sale was made by Hanyani, a director of the seller on 29 June 2007. The attempt resulted in a provisional order from this court of 11 July 2007 interdicting the seller from selling, disposing or in any way dealing with the property

while the Registrar of Deeds was ordered to register a caveat against the Deed of Transfer number 2190/2000. The provisional order was confirmed in a judgment dated 9 September 2009 of *Chikumbu v BrydenTechnical Services (Pvt) Ltd & Ors* 2009 (2) ZLR 140 (H). The effect of the confirmation was that the final order sought in the provisional order was granted. The seller was obliged to sign all the necessary papers to pass transfer of the property within 7 days of the service of the order upon it failing which the Deputy Sheriff Harare was authorised to execute all such papers.

The seller did not obey the court order. The Deputy Sheriff failed to obtain the original title deed from the seller. A certified copy of the title deed bore endorsements of loan notes by hand of the present respondent numbers 6669/2004, 706/2006, 324/2007 and 1705/2007. The mortgage bond 1705/2007 was registered on 26 October 2007 when the provisional order was in force. The respondent refused to consent to the cancellation of these mortgage bonds on the ground that Michael Hanyani a director and shareholder in the seller had in January 2010 borrowed US\$19 000-00 from the respondent and pledged the title deed in question as security under a note of hand registered on 20 January 2010. Apparently an amount of US\$6 600-00 remain unsettled by Hanyani. The respondent demanded that the applicant settle the debt before it could consent to cancellation of the mortgage bond.

The respondent opposes the present application on two grounds. The first is that the provisional order did not bind it as it was not party to those proceedings notwithstanding that the applicant must have been aware of its interest in the property in dispute. The second ground was that at the time the mortgage bond for the January 2010 loan was registered there was no registered caveat against the property in favour of the applicant. Apparently, it commenced proceedings against Hanyani in the Bulawayo High Court in HC 1208/11 and HC 1900/11 seeking payment of the outstanding sum of US\$6 600-00 and an order of execution against the property in dispute. The respondent refuses to release the deeds until the outstanding debt has been paid.

The only issue for determination is whether Hanyani could lawfully encumber the property in question by the note of hand of 20 January 2010. It seems to me that whether or not the applicant had prior knowledge or ought to have had such knowledge of the notes of hand registered prior to the grant of the provisional order is irrelevant to the determination of the real issue between the parties. In my view, notes of hand 6669/2004, 706/2006 and 324/2007 were extinguished by operation of law due to the demonetisation of local currency before they were honoured. Note 1705/2007 also meets the same fate as the other prior notes.

It also meets the same fate as the last note of hand registered on 20 January 2010 as it was registered some three months after the provisional order against the seller had taken effect. In fact, the respondent's opposition is not grounded in these earlier notes of hand but on the last one registered on 20 January 2010. Thus the purported risk taken by the applicant in purchasing an encumbered property on 28 June 2007 is not material to the determination of the validity of the last registered note of hand.

I agree with the submission made by Mr *Dondo*, for the respondent, with reference to *Maasdorp's Institute of South African Law Vol 2: The Law of Property* at p 112. On the authority of *Barclays National Bank Bpk v Regstrateur van Aktes Transvaal 1975 (4) SA 936 (T)* the learned authors' state:

“This real right attaches and adheres to the mortgaged property itself as a deduction from the rights of the owner. The effect of this rule is that, if by some oversight, the property over which the mortgage is operative is without the holder's consent, transferred to a *bona fide* purchaser free of the mortgage, there is no cancellation of the bond. The mortgagee's rights are enforceable against the property despite the clean deed of transfer in the purchaser's favour.”

This statement of law, however, does not override the provisions of s 50 (1) (a) of the Deeds Registry Act [*Chapter 20:05*]. It reads:

“50 Transfer of hypothecated property

(1) No transfer of mortgaged land shall be attested or executed by the registrar, and no cession of a mortgaged lease of immovable property, or of any mortgaged real right in land, shall be registered until the bond has been cancelled or the land, lease or right has been released from the operation of the bond with the consent in writing of the holder thereof:

Provided that no such cancellation or release shall be necessary if the transfer or cession is made—

(a) in execution of the judgment of any court by the competent officer; or”

It seems to me that the transfer of a real right in immovable property encumbered by a mortgage bond by a competent court of law such as the High Court is unimpeachable. Section 50(1) (a) of the Deeds Registry Act recognises the power of a competent court of law to transfer real rights in immovable property that is encumbered by a mortgage bond. The section merely prevents the registrar of deeds from transferring the immovable property that is encumbered. It does not prevent a court of law from ordering such a transfer. Once the court of law makes such an order, the registrar of deeds is obliged to obey the order even in the face of the encumbrance.

In the present matter, when the respondent registered the note of hand on 20 January 2010, there was in existence an order of a competent court of law dated 9 September 2009 directing the seller to transfer the property to the applicant. The effect of the order was that with effect from 9 September 2009, the real rights in the property vested in the applicant. In other words, the seller was divested of real rights in the property in question on that date. No binding mortgage bond existed on the property on that date. The only binding mortgage bond took effect on 20 January 2010. It was made by Hanyani. The respondent did not disclose whether Hanyani took that on behalf of or with the authority of Bryden Technical Services (Pvt) Ltd. It did not disclose why it registered a mortgage bond against property it believed belonged to Bryden Technical Services against a personal loan to Hanyani. But even if it had shown that Hanyani was authorised to mortgage Bryden Technical Services' property, as that property, by operation of law, did not belong to the mortgagor but to the applicant; it could not be mortgaged without the consent or authority of the applicant.

It is clear to me that Hanyani misrepresented to the respondent that he had the power and authority to mortgage the property in question when as a matter of hard fact he did not possess such power and authority. The respondent acted to its potential prejudice in advancing the loan to him which he failed to repay in full. Hanyani defrauded the respondent. The mortgage bond executed between the respondent and Hanyani was based on fraudulent misrepresentation. It was therefore not binding on the applicant. As was pointed out by LORD DENNING in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

In the same vein are the words of MAKARAU JP, as she then was, in *Katirawu v Katirawu & Ors* HH 58-07 at p 5 of the cyclostyled judgment that:

“Nothing legal can flow from a fraud. His appointment was null and void *ab initio* on account of the fraud. It is as if it was never made. It is a nothing and upon which nothing of consequence can hang.”

The respondent has correctly sued Hanyani in the Bulawayo High Court for the recovery of the outstanding debt. It cannot seek satisfaction of such a debt on property that did not belong to Hanyani at the time the mortgage bond was executed.

In my view, when the mortgage bond was registered on 20 January 2010, there was in existence a valid court order of 9 September 2009 that transferred the real rights in the property to the applicant. By parity of reasoning, the note of hand of 26 October 2007 was invalidated by the prior provisional order of 11 July 2007. The seller or Hanyani registered the penultimate note of hand in fraud of the provisional order. Such a registration was void as against the applicant.

I therefore hold that the note of hand of 20 January 2010 was void and of no force and effect as against the applicant. It cannot prevent the registration of title of the property in favour of the applicant.

Accordingly, the application is granted in terms of the draft order as set out at the beginning of this judgment.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Chinamasa, Mudimu & Dondo, respondent's legal practitioners