

KENNEDY MANGADZE
versus
THE EXECUTOR, ESTATE LATE CHARLES
MANYONGA
and
EDDIES PFUGARI PROPERTIES (PVT) LTD
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 11 March & 19 March 2014

Civil Trial

Ms *T. Chiminya*, for the plaintiff
1st Defendant In person
2nd, 3rd and 4th defendants In default

MATHONSI J: The plaintiff sued the defendants for an order declaring the sale agreement he entered into with the late Charles Manyonga on 25 June 2010 for the purchase of stands 4684 and 4685 of subdivision 2 Knowe, in Norton valid and enforceable. He also sought an order directing the first defendant, who is the executor dative of the estate late Charles Manyonga, to sign all documents necessary to effect transfer of those properties into his name or that the Sheriff for Zimbabwe be allowed to sign the transfer documents on the first defendant's behalf.

The plaintiff averred that following the signing of the sale agreement, he had paid the full purchase price but the seller died on 14 September 2012 before he could sign the documents necessary to pass transfer.

Only the first defendant contested the action and in his plea, he averred that he had no knowledge of the alleged agreement prior to receiving the summons and "is suspicious of the authenticity of the said agreement". He is also suspicious of the purchase price and why it was not paid to the seller directly but to Muchandibaya & Associates, the conveyancers

appointed in the agreement. He queried why the deposit of \$6000-00 was paid on 29 June 2010 instead of 25 June 2010, the date of signing of the agreement, as provided for in the sale agreement of the parties.

At the pre-trial conference of the parties the issues for trial were identified as:-

1. Whether the plaintiff and the late Charles Manyonga entered into a valid sale agreement involving stands 4684 and 4685 of subdivision 2 of Knowe, Norton.
2. Whether the plaintiff performed his obligations in terms of that agreement and within the stipulated time.
3. Whether Mr Muchandibaya was the late Charles Manyonga's legal practitioner and agent.
4. Whether the properties should be transferred to the plaintiff.

The plaintiff gave evidence at the trial and called one witness, Freddy Vengai Masuku. It was the plaintiff's evidence that in January 2010 he had decided to sell his property in Bulawayo as he had moved to Harare, in order to buy a similar property in Harare using the proceeds. He produced an agreement of sale prepared by Ken Estate Agents showing that he had sold his stand 144 Elliot Road, Manningdale Bulawayo for a purchase price of US\$11 500-00, to one Brain Bright Kagoro.

The witness stated that he had discussed his desire to purchase property with a colleague of his, one Freddy Masuku, who introduced him to an estate agent known as Mr Mapanda. The latter informed him that there were 2 stands being sold in Norton and the 2 drove there to view them. He was impressed by what he saw because the stands were half an acre each which suited his needs given that the property he had sold in Bulawayo was an acre.

Mapanda introduced the witness to the seller, the late Charles Manyonga, who in turn took the witness and his workmate Masuku, to his legal practitioner, Mr Muchandibaya at the offices of Muchandibaya & Associates in Harare, where negotiations for the purchase and sale took place. The parties eventually settled on a price of US\$9000-00 for the 2 stands and also agreed that he would pay \$500-00 agent fees to Mapanda and \$500-00 conveyancing

fees to Muchandibaya outside the agreement of sale concluded between them. He produced the sale agreement signed on 25 June 2010.

The plaintiff stated that although the agreement provided for payment of the deposit of \$6000-00 upon signing the agreement, he could not pay it on 25 June 2010 because his estate agent, Kennedy Ndebele of Ken Estate Agents in Bulawayo was holding on to the proceeds of the sale of his Bulawayo property but could not be immediately located to transfer it to Muchandibaya & Associates the agents of the seller, per the seller's instructions. This was explained to the seller who understood and allowed the witness to do so at a later stage.

He eventually located Ndebele who had gone to South Africa to attend a World Cup football match. It is for that reason that there was a slight delay in the payment of the initial deposit of \$6000-00. It was duly paid via transfer from Ken Estate Agents to the seller's agent on 29 June 2010. The delay was condoned by the seller.

The plaintiff went on to say that he paid the balance of the purchase price in accordance with the agreement. He produced copies of receipts showing that a sum of \$6000-00 was deposited into the Standard Chartered Bank account number 87 00207950509 belonging to Muchandibaya & Associates, by Ken Estate Agents on 29 June 2010, \$1000-00 was receipted by Muchandibaya & Associates on 5 July 2010; \$500-00 on 12 November 2010, \$500-00 on 22 November 2010 with the final payment of \$1000-00 being paid on 30 November 2010. These payments were made in compliance with clause 4 of the sale agreement and to the legal practitioners of the seller in terms of his instructions. It is also noted that in terms of clause 14, "the seller's conveyancers shall be Muchandibaya & Associates Legal Practitioners".

The plaintiff's receipts also show that a sum of \$500-00 was paid to those lawyers on 28 September 2011 which he says was the conveyancing fee they charged for them to attend to transfer of the properties to the plaintiff. He stated that he also paid Mapanda his agency commission as agreed. He produced a copy of a letter dated 1 December 2010 written to the Norton Local Board by Muchandibaya & Associates requesting a rates clearance certificate and stating that they had instructions to attend to transfer from the second defendant to the plaintiff.

He went on to say that there was a delay in the conveyancing because the conveyancer had demanded his fee up front and it took him time to raise it. When he finally

did he was later informed that the seller had passed away and that he had to wait for the winding up of the estate to commence. As far as he was concerned, he fulfilled all his obligations and is therefore entitled to take transfer of the properties. He was disappointed to discover that the first defendant was trying to sell the properties forcing him to approach the court.

The plaintiff gave his evidence extremely well, with conviction and dignity. What he said was supported by clear documentary evidence and nothing meaningful was done to impeach his testimony. I accept his evidence. His testimony on what transpired at the signing of the sale agreement was corroborated by Freddy Vengai Masuku who also signed as a witness.

The first defendant gave very brief evidence. An accountant by profession, the first defendant is the brother of the deceased seller, who is the executor of the estate. He was aware that his late brother was selling the 2 stands and that he had enlisted the services of “several lawyers” who failed to secure a buyer. Mr Muchandibaya was one such lawyer. The witness stated that after the death of his brother, they had contacted Mr Muchandibaya enquiring whether he was in possession of a will drawn by the deceased. The erstwhile legal practitioner had stated to them that not only did he not possess such a will, but also that he did not have any outstanding instructions from the deceased.

He was therefore surprised when, 2 months later, Mr Muchandibaya produced an agreement of sale signed by the deceased and the plaintiff stating that he had outstanding instructions to transfer the stands. When he was given the agreement of sale, it looked genuine, in fact it was genuine at the time it was concluded but he could not accept it as valid because Mr Muchandibaya could not furnish him with proof that after receiving the purchase price, he passed it onto the deceased.

Significantly, the first defendant’s testimony is in sharp contrast with his plea in which he denied knowledge of the sale agreement, which he says he only got to know of after being served with the summons.

The first defendant insisted that the receipts issued to the plaintiff were fake, interestingly without justifying that belief, and that he had reported the matter to the police and the Law Society of Zimbabwe. He still awaits the outcome of their investigations.

It would seem that the entire contest mounted by the first defendant is anchored on suspicion and that once the conveyancer chosen by the seller had received the money paid by

the plaintiff, he did not pass it on to the seller. His entire testimony does nothing to rebut the evidence of the plaintiff.

The deceased contracted to have the purchase price paid to Muchandibaya & Associates as his conveyancers. He was entitled to do so. The plaintiff has produced uncontested evidence that the whole purchase price was paid to that firm in terms of the agreement. Public policy dictates that the sanctity of contract must be respected at all times. As stated by SANDURA JA in *Delta Operations (Pvt) Ltd v Origen Corp (Pvt) Ltd* 2007(2) ZLR 81(5) 86 F-G:

“By doing so, he violated one of the most important tenets of public policy i.e. the sanctity of contracts. As JESSEL MR said in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465:

‘If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract’”.

It is not the business of the plaintiff that the executor has not been furnished with proof that the purchase price was passed on to the seller, although I have accepted his evidence that he witnessed the passing to the seller of all the instalments except for the deposit of \$6000-00 deposited in Bulawayo by Ken Estate Agents. In my view it is enough for him to show that he paid to the conveyancer chosen by the seller. That way he discharged his obligations under the agreement.

Nothing has been placed before me impeaching the agreement of sale entered into between the parties. I find therefore that the plaintiff did enter into a valid agreement with the deceased in terms of which he purchased stands 4684 and 4685 of subdivision 2 of Knowe, Norton. I find as proven that the plaintiff paid the purchase price as required of him, thereby fulfilling his obligations, in terms of the agreement.

There can be no doubt that Messrs Muchandibaya & Associates were the legal practitioners of the seller because clause 14 of the agreement says so. In receiving the purchase price from the plaintiff the way they did, they were doing so in their capacity as the agent of the seller.

Having performed his part of the bargain, the plaintiff is entitled to take transfer. The first defendant, having stepped into the shoes of the deceased as executor, is obliged to give effect to the agreement.

In the result, it is ordered that:-

1. The agreement of sale entered into between the plaintiff and the late Charles Manyonga on 25 June 2010 involving the purchase and sale of stands 4684 and 4685 of subdivision 2 Knowe, Norton is hereby declared valid.
2. The first defendant is hereby directed to sign all documents necessary to pass transfer of the said stands into the name of the plaintiff.
3. In the event of the first defendant's failure to comply with para 2 above then the Sheriff for Zimbabwe or his lawful Deputy, is hereby authorised and directed to sign the said documents to pass transfer on his behalf.
4. The first defendant shall bear the costs of suit.

Chiminya & Associates, plaintiff's legal practitioners