

STEVEN VHAVHA
versus
MSIZI DUBE
and
THE DIRECTOR OF HOUSING, CHITUNGWIZA
and
MUNICIPALITY OF CHITUNGWIZA
and
NANCY KUTYAUROIPO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 6 February 2014

Civil trial

R. H Mapondera, for plaintiff
C. Nhemwa, for 1st defendant

CHITAKUNYE J. The plaintiff and fourth defendant were married in terms of the African Marriages Act [*Cap 238*] (now 5:07) in 1978. In 1980 plaintiff entered into a Memorandum of Agreement for the purchase of Stand 8237 Seke Township, Chitungwiza from the Chitungwiza Municipality and the Government of Zimbabwe. By virtue of that agreement the plaintiff became a registered holder of rights and interests in the said property.

In 1997 the plaintiff sued fourth defendant for the dissolution of their marriage. Though no copy of the court decision or judgement was tendered it appeared accepted that a decree of divorce was duly granted. The court order did not deal with the sharing or distribution of immovable property as this was not placed before court by either party.

On 18 May 2007 the fourth defendant obtained an order by default for the sharing of the Stand 8237 Unit K, Seke, Chitungwiza in the ratio of 70% to fourth defendant and 30% to plaintiff from Chitungwiza Magistrates Court in case No. CC13/07. That order reads as follows: -

“The house which the parties bought together namely House No. 8237 Unit K, Seke, Chitungwiza be sold and the applicant to get 70% and the respondent 30% of the selling price.”

On 20 June 2007 the plaintiff applied for a rescission of the default judgment and stay of execution. On 24 July 2007 the application for rescission of judgement was granted. (See exhibit 5).

It is common cause that the fourth defendant thereafter sold the property Stand 8237 Unit K, Seke, Chitungwiza to the first defendant through Sparkfin Properties (Pvt) Ltd. In the Agreement of Sale Nancy Kutyauroipo (fourth defendant), is described as the seller and the registered owner of the house no 8237 Unit K, Seke. She apparently sold the same property to more than 2 people as is evident from an extract of a court record of convictions tendered and supported by documents tendered unchallenged to the effect that the fraud convictions pertained to sales of the property the fourth defendant had done.

Clause 2.1 of the Agreement of Sale provided, *inter alia*, that:-

“Transfer to be processed within three months from the date of signing by both parties to the main agreement.

The purchaser shall be entitled to cancel agreement in the event that transfer is not completed within the agreed time.”

Clause 5 also provided that the purchaser can seek specific performance in the event that the seller is at fault in effecting transfer.

It is apparent that there were some challenges in the first defendant obtaining transfer hence he approached the High Court for relief in case No. HC 6685/08

On 7 January 2009 the first defendant obtained an order by default against the fourth defendant, Sparkfin properties (Pvt) Ltd and Director of Housing, Chitungwiza in case No. 6685/08. In that case the fourth defendant was cited as the first respondent, Sparkfin Properties (Pvt) Ltd was cited as the second respondent and The Director Housing was cited as the third respondent. The order stated that:-

“It is ordered that:-

- a) The 1st respondent be and is hereby ordered to make herself available at the 3rd respondent's offices within 48 hours upon service of this order on her in order to effect change of ownership in respect of House No. 8237 Unit K, Seke, Chitungwiza into Applicant's names

- b) The 1st respondent be and is hereby ordered to cede all her rights , title and interest over House No. 8237 Unit K, Seke, Chitungwiza to the Applicant forthwith.
- c) If clause 1 and 2 herein above is not complied with then the Deputy Sheriff be and is hereby directed and authorised to take all such necessary steps to sign the required cession forms and any other documents in order to effect change of ownership of the above mentioned property into the Applicant's names.
- d) The 3rd Respondent be and is hereby to consent to such transfer
- e) The 1st and 2nd Respondents jointly and severally with the one paying the other to be absolved pay costs of this application.”

As a consequence of this order on 5 February 2009 the second and third defendants approved cession to the first defendant of the property in question. On 18 February 2011 the first defendant obtained a Deed of Grant in respect of the said property.

In the meantime on 15 February 2011 plaintiff issued this court action against the four defendants. The plaintiff alleged that before the 20th December 2010 he was the registered owner of rights and interest to title of Stand 8237 Unit K, Seke, Chitungwiza. On that date the first, second and third defendants unlawfully ceded the rights to the first defendant.

He further alleged that the first defendant misrepresented to the High Court that the fourth defendant was the owner of rights and interest to title in Stand 8237 Unit K , Seke, Chitungwiza and secured a court order in case No. HC 6685/08 against the fourth defendant, when for all intents and purposes the first defendant knew this was not the case. The second and third defendants then acted unlawfully by ceding plaintiff's rights to the first defendant when the order presented to them was against the fourth defendant and not the plaintiff.

In the circumstances the plaintiff sought an order:-

1. Declaring unlawful the cession of his rights and interests to title in Stand 8237 Unit K, Seke, Chitungwiza to 1st defendant.
2. Directing 2nd and 3rd Defendants to reverse the cession of rights and interests to title in Stand No. 8237 Unit K, Seke, Chitungwiza back into plaintiff's name, Steven Vhavha.

3. For the eviction of 1st defendant and all those claiming occupation underneath him from Stand 8237 Unit K, Seke, Chitungwiza.
4. For holding over damages at the rate of USD200.00 per month with effect from 1st December 2010 to date of ejectment.
5. Interest on the amount at the prescribed rate from date of service of summons to date of payment in full.

The first defendant was the only defendant to defend the action. In his plea, he contended that he is now the legal owner as the property is now registered in his name. He denied misrepresenting to court that the property belonged to the fourth defendant. He further contended that the property was matrimonial property and court had awarded the fourth defendant a 70% share and the property was then sold to him. As far as he is concerned the sale was proper and the cession and grant of title that followed were proper.

At a pre-trial conference the issues identified for trial were:-

1. Whether the plaintiff or the third defendant representing the Ministry of Local Government Rural and Urban Development was owner of property, being Stand No. 8237 Unit K, Seke, Chitungwiza at the time of the sale.
2. Whether the second and third defendants acted unlawfully in ceding plaintiff's rights and interest to title in Stand No. 8237, Unit K, Seke, Chitungwiza to the first defendant.
3. Whether the order in case No. HC 6685/08 affected the plaintiff's rights and interest to title in Stand 8237, Unit K, Seke, Chitungwiza.
4. Whether plaintiff is entitled to the order sought and holding over damages and quantum thereof or to a dismissal of his claim.
5. Which party to bear costs of suit and the scale.

At the commencement of trial the plaintiff's pleadings were amended by consent in the following manner: paragraph 1 of the relief sought to read:-

"In addition the Registrar of Deeds Harare be and is hereby ordered to cancel Deed of Grant Number 576/11 dated 7 February 2011 made in favour of 1st defendant, Msizi Dube (Born 9 August 1968).

An addition to the declaration of paragraph 10(b) to read:-

“In pursuant to the illegal cession the 1st Defendant proceeded to secure transfer of the property in his favour in the form of a Deed of Grant Registration number 576/11 dated 7 February 2011.”

The plaintiff gave evidence and tendered documentary evidence in support of his case. In his evidence he basically confirmed the sequence of events as outlined above. He confirmed that he acquired rights and interests in the said property in 1980 by virtue of a Memorandum of Agreement he entered into as purchaser on the one hand and Chitungwiza Municipality and the Government of Zimbabwe as seller on the other hand. That document was tendered as exhibit 1. In that agreement he is cited as the purchaser and his then wife Nancy Kutyauro is not cited as co-purchaser.

In 1997 he divorced the fourth defendant. He however allowed her to continue residing at the property in order to take care of their children.

When he learnt that 4th defendant had obtained a default judgement against him for the sharing of the immovable property in the ratio 70:30 on 18 May 2007 at Chitungwiza magistrates court in case no.CC 13/2007 he applied for the rescission of that judgement and the application was duly granted on 24 July 2007.

During this time he was resident at his place of employment whilst the fourth defendant was at the property with their children.

The plaintiff confirmed that he was not aware of the agreement of sale between the first defendant and fourth defendant. At no time had he authorised the fourth defendant to sell the property.

When the first defendant approached the High Court in case HC 6685/08, he was not cited as party and so was not aware of such proceedings till well after cession had been effected into the first defendant's name and occupants of the property were being evicted.

Under cross examination plaintiff denied knowledge that his purchase agreement with the Council and government had been cancelled. He argued that he was never served with a document cancelling the agreement referred to by the defence. In any case Council had at no time disturbed his holding of rights and interest in the property. As at the time cession to the first defendant was effected, he was still the registered holder of rights and interest in the property.

The plaintiff's evidence was brief. As far as he is concerned the court order that led to the Council ceding the property to the first defendant pertained to the fourth defendant and not to the plaintiff's rights and interests in the property.

He also alluded to the fact that his claim for holding over damages had not been denied by the first defendant in his plea and so he deserved such.

The defendant on the other hand contended that the plaintiff's claim should be dismissed as he is now the holder of title to the property. He is now the owner in view of the Deed of Grant issued to him by the Government of the Republic of Zimbabwe.

In his evidence the first defendant stated that his ownership came about as a result of him buying the property from the fourth defendant. He duly paid the purchase price and the property was ceded to him after he had approached the High Court as the fourth defendant was not forthcoming to effect the cession or transfer.

Though it is common cause that this is how the first defendant acquired the property, the first defendant's effort at repelling the plaintiff's claim was riddled with inconsistencies and contradictions. He found himself having to change his stance at certain intervals. For instance, in paragraph 2 of his plea the first defendant denied that he misrepresented to court that the property belonged to the fourth defendant. He went on to say instead the property was matrimonial property of which the fourth defendant was awarded 70% and the plaintiff 30%. In his *viva voce* evidence the first defendant said that on his first visit to Chitungwiza Municipality Offices he was told that the property belonged to the fourth defendant. He was in fact shown confirmation of this on the Municipality's computers. In his amended summary of evidence he alluded to the fact that when he approached the Chitungwiza Municipality Offices it was confirmed to him that the fourth defendant owned the property. As a result of such confirmation he went on to buy the property.

The above stance is not consistent with paragraph 2 of his plea where he gives the impression he was aware the property was matrimonial property subject to an order for sharing.

In his initial summary of evidence the first defendant stated that he purchased the property from the fourth defendant with the consent of the plaintiff yet in the amended summary of evidence he seemed to admit the plaintiff was not involved in the sale as he did not know him. That initial summary of evidence further states, *inter alia*, that:- “

- a) he met plaintiff and the fourth defendant and they both showed him a court order for disposal of the property; that
- b) since the fourth defendant had 70% share in the said property the agreement of sale was supposed to be entered between him and the plaintiff also consented to that;
- c) after payment the fourth defendant promised to give the plaintiff his share of the proceeds;
- d) after lodging a complaint with police when transfer was delayed they went to court and at court they were advised to settle and he requested plaintiff and 4th defendant to pay his legal fees which they did.”

As it turned out from his amended summary of evidence and *viva voce* evidence all these aspects were not true. The plaintiff had never consented to the sale as the first defendant met him for the first time in 2009 well after the sale and court appearances referred to by the first defendant.

Under cross examination the first defendant admitted that it was the fourth defendant who sold the property to him in the absence and without the participation of plaintiff. He went on to concede that at the time he bought the property he thought the fourth defendant was the owner as she had ZESA and water bills in her name.

In approaching the High Court in HC 6685/08 the first defendant indicated that he did not produce any document confirming the fourth defendant as the registered holder of rights and interests in the property. He merely stated so. The first defendant further indicated under cross examination that when his name was being substituted as holder of rights and interests he discovered that the registered holder of interests and rights in the property was in fact Steven Vhavha and not the fourth defendant. He conceded that the High Court Order in HC 6685/08 was in fact obtained against the wrong party, a party who was not the registered holder of rights and interest in the property in question.

Despite this discovery he accepted cession into his name after which he proceeded to apply for and obtained a Deed of Grant.

From the above evidence it is clear the first defendant was not a credible witness. The contradictions and inconsistencies alluded to above coupled with the concessions he made under cross examination serve to confirm his desire not to be candid with court.

The evidence as outlined above from both parties brings to the fore such issues as:-

- a) Whose rights and interests did 1st defendant buy in stand 8237 Unit K, Seke, Chitungwiza;
- b) Did that person have such rights and interests in the property to sell?

From the pleadings filed of record and evidence adduced it is clear that whilst the parties seemed to believe that the property was owned by the person in whose name it was registered this is not so. The Memorandum of Agreement that plaintiff entered into with the Chitungwiza Municipality and the government clearly shows that this was a case of cession and not ownership or title in the property. Ownership lay in the government

The issue of such properties has been commented upon by these courts on several occasions. Parties and their legal practitioners have been called upon to take heed of the fact that properties in High Density suburbs fall into different categories. These include:-

- 1) Simple tenants under a lease agreement with the Local Authority or Central Government;
- 2) Tenants- to- buy, under an agreement which permitted them to take title once the property was surveyed and the full price paid; and
- 3) Owners, who graduated from category two, in the fullness of time.
(see *Hundah v Murauro* 1993(2) ZLR 401 (S).

Each category has aspects that need to be considered. The need for legal practitioners, magistrates and estate agents dealing with such properties to be alive to the categories alluded to above cannot be overemphasised. The capacity of parties to dispose of the property is sometimes dependant on the category of rights and interests held.

In *casu* the agreement between the plaintiff on the one hand and Chitungwiza Municipality and Central government on the other hand fell into category two which upon payment of full purchase price would graduate to category three.

In that regard Clause 19 of the agreement states that:-

“The purchaser shall not part with possession of the property or any part thereof nor cede nor assign nor hypothecate without the previous consent in writing of the Council.”

There is no denial that when the first defendant purported to buy the property from the fourth defendant no consent whether in writing, as required, or in any manner had been

obtained from the Council. When the first defendant obtained cession it was because the Council felt compelled by a court order and not that Council was giving its Consent.

In *Hundah v Murauro (supra)*, Council found itself having to accede to cession in order to comply with a court order. The Honourable McNALLY JA, at p 405, had this to say regarding such scenario:-

“But Mr. *Biti*, for Mr. Murauro, argues that the Municipality has cured the invalidity. He has produced a letter dated the day before the postponed hearing of the appeal on 25 November 1993. The letter contains the following relevant sentence:
‘Please be advised that Council will abide by the Supreme Court’s decision just as it has done with the High Court’s Order.’

The honourable judge of appeal went on to say this letter and the fact that Council had gone on to consent to an agreement of cession between Hundah and Murauro with the deputy Sheriff signing in place of Mr Hundah, was not a waiver of rights by Council but a compliance with a Court Order.

Such act of compliance did not validate the cession at all.

In *casu*, it is clear Council acceded to cession in order to comply with a court order. This is evident from the fact that in May 2009 the Council, through its Director of Housing purported to apply for the reversal of the cession. In the founding affidavit the Director of Housing Chitungwiza stated in paragraph 5, *inter alia*, that:-

“ 2nd respondent (Nancy Kutyauro) apparently had sold the said property which is registered in the name of Stephen Vhavha her ex-husband- to 1st respondent (MSIZI DUBE) relying on judgement in case Number CC13/07 which judgment the Municipality had also relied on in approving cession until we got another judgment CC13/08 (*sic*) which ordered non-disposal of the property.”(emphasis is mine)

It is common cause that case CC 13/07 did not cite the Chitungwiza Municipality or the Government of Zimbabwe as a party and neither had the Council’s consent been obtained for this property to be sold as ordered by the court.

It is my view that at the time the fourth defendant purported to sell the property she had no property to sell. The judgment she paraded as granting her property to sell, at the most only granted her personal rights against her ex-husband. It is nevertheless the judgment the Director of Housing said Council relied on in consenting to cession.

The High Court Order in HC6685/08 which the fourth defendant said he utilised to obtain cession was not against the holder of rights and interests in the property, but against the fourth defendant who had given out herself as owner of the property when she was not.

That order –

- calls upon 4th respondent to make herself available for change of ownership when, as is common cause, she was not the owner;
- it orders 4th defendant to cede all her rights title and interest over house no. 8237 Unit K Seke, Chitungwiza to 1st defendant when, as has been shown above, she had neither title nor rights and interests to cede.

The order further compels the Council to consent to transfer when there was no transfer to be effected.

It is apparent to me that the order in HC 6685/08 was obtained after serious misrepresentations were made. These included that the fourth defendant was the owner and thus holder of title, registered rights and interests in the property in question which she could transfer when in fact and in truth this was false.

The first defendant's housing application form, exh 8, has an endorsement dated 5 February 2009 stating that:

“Cession approved per court order No. 6685/08”.

At p 56 of the defendant's bundle of documents is a Chitungwiza Council document dated 5 February 2009 apparently reflecting a discussion within Council culminating in the decision to allow cession. The document reads:

“Upon consultation with the Director of Housing, it has been agreed that cession to Mr. Dube proceed since order for disposal of property still stands. Mr. S. Vhavha can proceed against Nancy for any recourse.”

This in my view confirms that Council was merely complying with a court order. This should not be seen as validating the sale agreement between the fourth defendant and the first defendant. The consent to dispose could only be sought by the person with rights and interests in the property; that is the plaintiff. Had it been plaintiff who had purported to sell it could be said that as a holder of rights under a suspensive agreement of sale with Chitungwiza Municipality, he could sell his rights under the agreement but he could not pass transfer/ title as he had none. The fourth defendant not being a holder of rights in the property is far removed from plaintiff's scenario. She clearly had nothing to sell.

The fourth defendant contended that since he has been granted title he should retain it as the owner. I am however of the view that he sought and obtained title well after he had become aware that the person who had purportedly sold the property to him was neither the owner nor the holder of rights and interests in the property. He was then aware of the correct registered holder of rights and interest in the property but chose not to cite that party. It is my view he acted in bad faith in proceeding as he did. He clearly acted dishonestly in proceeding to obtain cession and then title when he had become aware of the truth regarding the holder of rights and interests in the property.

The above adequately answers the issues referred to trial. It is clear that in terms of the Memorandum of Agreement between the plaintiff and Council, the property in question was not owned by the plaintiff but by the government of Zimbabwe, the Central government as owner of the Land, and the local government as owner of the dwelling on that Stand. (See the 2nd and 3rd paragraphs on pages 1 of the agreement). The plaintiff was a holder of rights and interests in the property at the time of the sale to the first defendant.

I also make a finding that the second and third defendants acceded to the cession purely to comply with a Court order. Unfortunately the court order referred to rights, title and interest of the fourth defendant in the property and she had none of that in the property. The second and third defendants therefore acted unlawfully in ceding the plaintiff's rights and interests in the property when what was sought were rights, title and interests of the fourth defendant. They ought to have indicated that according to their records the fourth defendant had no rights, title and interest in the property.

As regards whether the order in HC 6685/08 affected the plaintiff's rights and interests in Stand 8237 Unit K, Chitungwiza, that goes without saying. His rights and interests were ceded to the first defendant without his consent or even knowledge.

I am of the view that the plaintiff is entitled to have his rights and interests in the property restored to him.

The plaintiff sought an order for holding over damages. From the evidence adduced in court no denial was made that the plaintiff is entitled to holding over damages if he succeeds on the other claim. The first defendant's contention was on the quantum of which he said the property is fetching 150 United States dollars per month and not the 200 or 300 per month claimed by the plaintiff. The plaintiff on his part could not adduce evidence to counter that

contention. In the circumstances holding over damages in the sum of 150 United States dollars per month is reasonable.

On costs I am of the view that the first defendant should pay the plaintiff's costs on the general scale. The circumstances do not warrant costs on a higher scale.

There is also a prayer for eviction. I believe there is no reason not to grant such.

In view of the above findings it is hereby ordered that:-

1. The cession of the plaintiff's rights and interest in Stand 8237 Unit K, Seke, Chitungwiza to 1st defendant was unlawful
2. The 2nd and 3rd defendant's are hereby directed to reverse the cession in favour of plaintiff, Steven Vhavha within 30 days
3. The Registrar of Deeds Harare be and is hereby directed to cancel Deed of Grant Number 576 dated 7 February 2011 made in favour of the 1st defendant, Msizi Dube (Born 9 August 1968)
4. An order be and is hereby granted for the eviction of 1st defendant, Msizi Dube, and all those claiming occupation through him from Stand Number 8237 Unit K, Seke, Chitungwiza within 14 days from the date of service of this order failing which the Sheriff, Chitungwiza be and is hereby authorised to evict the 1st defendant and all those claiming occupation through him.
5. First defendant shall pay holding over damages to plaintiff in the sum of 150 (one hundred and fifty United States dollars) per month with effect from 1st December 2010 to date of eviction.
6. 1st defendant shall pay interest on the above sum at the prescribed rate from the date of service of the summons to the date of payment in full.
7. First defendant shall pay plaintiff's costs of suit on the general scale.

Mapondera & Company, plaintiff's Legal practitioners
C. Nhemwa & Associates, first defendant's Legal Practitioners.