

WIRELESS NGILAZI
versus
EDITH MTEMAH
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 27 November 2014

Civil trial

M. Hungwe, for the plaintiff
J. Mandevere, for the 1st defendant

CHITAKUNYE J: This case begun as a Court Application and was referred to trial upon realising that there were serious disputes of facts. The order referring the matter to trial provided that the applicant's founding papers were to stand as summons commencing action and the respondent's notice of opposition was to stand as notice of appearance to defend. The applicant was given 10 days within which to file his declaration and the matter was to thereafter to proceed in terms of the rules.

The parties did as directed. The plaintiff filed the requisite declaration and the defendant the requisite plea. The replication was duly filed.

The plaintiff's initial claim was for the reopening of the estates of the late John Smart Mtemah and the late Florence Mtemah. This was subsequently amended to a claim for a declaratory order declaring that:-

- a) That Stand No. 7194 Mabvuku, Harare, also known as House No. 11 Muzari Street, new Mabvuku, Harare, does not form part of Estate late John Smart Mutemah, nor Estate late Florence Mtemah, but it belongs to the plaintiff.
- b) The Deputy Sherriff be directed to effect cession of the aforesaid house from whoever had taken cession, into the plaintiff's name.
- c) The first defendant shall pay costs of suit on attorney- client scale.

The plaintiff alleged that on the 22nd December 1981, he entered into an agreement of sale with the late John Smart Mtemah. The late John Smart Mtemah was the owner of the stand in question. That agreement of sale was in writing. In pursuance of the agreement of sale he duly paid the purchase price in three instalments. Two of the instalments were endorsed on the agreement of sale on the dates he made the payments. On the date he paid the last instalment the seller handed to him security items of the house comprising the keys, house card, (referred to as lodger's card) and vacant possession and occupation of the house. He took occupation in March 1982 and has enjoyed such occupation since then. From the time he took occupation he made several unsuccessful arrangements with the late John Smart Mtemah for them to meet at the local authority's offices to effect cession but on each occasion the late John Smart Mtemah would not turn up.

John Smart Mtemah died before cession could be effected. Unbeknown to the plaintiff, after the demise of John Smart Mtemah the house in question was included in the estate late John Smart Mtemah and was passed onto the first defendant. The first defendant had then passed it onto her late daughter Florence Mtemah. At the demise of the late Florence the house was registered in the name of the first defendant. Upon returning from the rural areas where he had relocated to for most of the time since about 1986, the plaintiff made effort to have the first defendant attend to the issue of cession. It was then that the first defendant hit back with a claim for rentals against him. Upon realising that the first defendant would not voluntarily accede to cession he then approached this court.

The first defendant in her plea contended that the plaintiff's claim has prescribed as the cause of action arose in 1982. She also contended that there was no valid sale as between the plaintiff and her late husband as the property was jointly owned by her and her late husband. She had not consented and was not part of the sale. She further contended that the plaintiff was at all material times a tenant at the property in question. Further on the first defendant contended that the plaintiff should have lodged his claim when the estate late John Smart Mtemah was duly advertised. Since he did not do so he cannot seek to reopen that estate now.

At a pre-trial conference the following issues were referred to trial for determination:-

- a) Whether or not the plaintiff bought the property from the first defendant's late husband.
- b) Whether or not the plaintiff's claim is prescribed.

- c) Whether or not the agreement of sale which was entered into by the plaintiff and the first defendant's husband is valid.
- d) Whether or not the first defendant demanded rentals from the plaintiff and whether or not the plaintiff did at any point pay rentals to the first defendant.
- e) Whether or not the plaintiff's claim is competent in law and whether the relief sought by the plaintiff is competent.
- f) Whether or not the plaintiff is suing the right party.

The plaintiff gave evidence and tendered documentary evidence in support of his claim. The first defendant thereafter testified and tendered some documents in support of her contention. From the evidence adduced it is common cause that the plaintiff has been in occupation of the property in question since March 1982. The plaintiff and the first defendant had apparently not been known to each other till this court case.

The plaintiff's evidence was to the effect that the late John Smart Mtemah was his workmate at GMB Harare. On about 15 or 16 December 1981 the late John Smart Mtemah indicated to him that he was selling his house in Mabvuku. He expressed interest. On the 17th December 1981 the two of them entered into an agreement of sale in respect of the property in question. That agreement of sale was reduced to writing on the 17th December 1981 and signed by the parties on the 22nd December of the same year. The purchase price was agreed at Z\$ 1000.00.

In pursuance of that agreement he paid Z\$ 500 on the date of signing the agreement, Z\$ 300 on the 5th March 1982 and the balance of Z\$ 200 at the end of March 1982. After he had paid the balance he was handed over a copy of the Agreement of Sale on which was endorsed the first two instalments, the house card referred to as the lodger's card and the keys to the house. It was on that occasion that he was given vacant possession as he had fulfilled his side of the bargain. The plaintiff tendered a copy of the Agreement of Sale into evidence as exhibit 1 and copies of the lodger's cards as exhibit 2. The only outstanding issue was to effect cession.

The plaintiff testified that the agreement met all the constituent elements of a valid agreement of sale. Court should thus find that there was indeed an agreement of sale between plaintiff and the late John Smart Mtemah.

The first defendant on the other hand contended that the plaintiff did not buy the property; if there was any sale such sale was not valid. She alluded to the fact that as a wife to

the late John Smart Mtemah she was not aware that the house had been sold to the plaintiff. To her knowledge the house had in fact been sold to her daughter Florence.

The first defendant's challenge to the purported sale was also premised on her belief that as the wife she was supposed to give her consent if the house was to be sold. It is pertinent to note that in her plea the first defendant never alluded to the property having been sold to her daughter. Her defence was simply that she was a joint owner of the property by virtue of the marriage and she had not consented to the sale.

The first defendant conceded that from the time the plaintiff took occupation of the houses, she had never collected any rentals from him. That task she believed was being done by her husband. When the husband died, for some unexplained reasons, she still did not demand or collect rentals from the plaintiff till after the plaintiff had sought legal assistance to have the house ceded to him. This was in the year 2009 whereas her husband had died on 10th July 2000.

The issue of whether the plaintiff bought the property or not and the validity of any such sale can be resolved by firstly understanding the basic requirement for sale. A sale is basically the transfer of a right or interest in a property to another in exchange for some value, in this case money. The parties to an agreement of sale must have capacity to transact. There must be an agreement of the minds of the contracting parties mutually communicated with the intention of contracting a sale; there must be certainty as to the subject matter of the sale; price to be paid; any other terms or conditions expressly or impliedly regarded by the parties as material.

The presence of the above confirms a meeting of the minds of the parties. Where, as in this case, the agreement is reduced to writing such should be discernible from the document.

A careful examination of the agreement of sale tendered shows that it contains the above elements. The parties appeared to have been clear on the subject of the transaction and the purchase price was clear.

The first respondent's contention that the agreement of sale is not valid because she did not give consent to the transaction is without merit. It is common cause that the rights and interests in the property were registered in the name of John Smart Mtemah. Such rights were not jointly held. The late John Smart Mtemah as holder of the rights could enter into a valid agreement of sale of those rights. A wife cannot stop her husband from selling matrimonial

property registered in his sole name even if she contributed directly or indirectly towards the purchase of that property. The wife's consent or lack of it, to the selling of such property is of no consequence.

The first defendant, as wife, only enjoyed personal rights against her late husband. Where there has been a genuine sale to a third party by her husband the wife's personal rights against her husband do not enter the field of property law to defeat the third party's claim. *Muswere v Makanza* 2004(2) ZLR 262 (H) and *Maponga v Maponga* 2004 (1) ZLR 63 (H). From the evidence adduced I am of the view that the plaintiff bought the property from the late John Smart Mtemah. There is nothing to counter his assertion that it was only after paying the purchase price in full that he was given the lodger's cards, the keys to the house and vacant possession and occupation. His occupation of the house was never challenged till 2009 when he sought to compel the first respondent to effect cession. I am also of the view that the agreement of sale is valid as it met all the basic elements of a sale transaction.

The next issue pertains to whether or not the first defendant demanded rentals from the plaintiff and whether or not the plaintiff did at any point pay rentals to the first defendant.

The evidence adduced from both parties was such that it was common cause that the first defendant had no evidence to show that the plaintiff ever paid rentals for the property in question. Thus the plaintiff's evidence that he took occupation after payment of the purchase price in full and hence he was not required to pay any rentals went unchallenged.

It may also be noted that after the demise of the late John Smart Mtemah, the first defendant was appointed executrix. In administering the estate of late John Smart Mtemah she never demanded rentals from the plaintiff. Even after initially awarding the property to herself as the surviving spouse, she never sought rentals from the plaintiff. When she subsequently transferred the property to her late daughter Florence, there is nothing to suggest that either herself or the late Florence ever approached plaintiff seeking rentals. After Florence's death the first defendant was again appointed executrix of estate late Florence. It is interesting to note that she still did not approach the plaintiff seeking rentals. She purported to be administering the property without dealing with the occupants of the property. She even had the property re-registered in her name without interfering with the occupants.

The only time the first defendant sought to evict the plaintiff was in reaction to the plaintiff's demand that she avails herself for cession. The first defendant's conduct was

indicative of someone who had knowledge of the nature of occupation of the property enjoyed by the plaintiff.

The first defendant also sought to thwart the plaintiff's claim by contending that the claim has prescribed. She contended that if the plaintiff bought the property in 1982, he ought to have sought cession during the lifetime of the late John Smart Mtemah. He also ought to have lodged his claim or objected to the confirmation of the distribution account of the estate late John Smart Mtemah when it was advertised in terms of the Administration of Estates Act [Cap 6:01]. The first defendant's contention in this regard appeared premised on the initial relief sought by the plaintiff. The plaintiff's claim as amended is for a declaratory order.

Section 14 of the Prescription Act [Cap 8:11] provides for the extinctions of debts by prescription. Section 15 thereof specifies the relevant periods of prescription in respect of different debts.

A debt is defined in s 2 as:-

'without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.'

The above definition does not cover the case of a declaratory order. As aptly noted in *Ndhlovu v Ndhlovu and Another* HB 18/13 at p3

'it is clear from the pleadings that the plaintiff's claim is for a declaratory order. .. In my view, a declaratory order is a remedy to secure the public interest of certainty or correct legal position. Such a remedy cannot prescribe.' See *Oertel NNO v Director of Local Government* 1981 (4) SA 491.

In *casu*, the plaintiff's claim is for a declaratory order to the effect that it was wrong to include stand no. 7194 New Mabvuku in the Estate late John Smart Mtemah and late Florence Mtemah as the property had been validly sold several years ago and in effect the rights and interests in that property were now held by plaintiff who has enjoyed undisturbed possession of the property since that time.

The plaintiff was granted possession and occupation in reciprocity to his payment of the purchase price. It remained the seller's obligation to effect cession. In *River Ranch ltd v Delta Corp ltd* HH1-10 Patel J had this to say of the obligations of parties in such sales:

"where the sale of immovable is involved, the purchaser's obligation to pay the purchase price is ordinarily reciprocated by the seller's obligation to give occupation

and effect transfer. The parties' obligations are reciprocal because they arise from what is essentially a bilateral or synallagmatic contract."

In *casu*, after receipt of the purchase price John Smart Mtemah gave vacant possession to the plaintiff but did not proceed to effect cession. The plaintiff testified to the numerous occasions they arranged to meet in order to attend to cession but John Smart Mtemah would not make the appointment. It was as a result of the seller's failure to attend to cession that such was not passed to plaintiff. As further noted in *River Ranch ltd v Delta* case, (*supra*)

"a declaratory order is not founded on an obligation in contract or delict. It is essentially a proprietary claim for 30 years of open, adverse and uninterrupted possession and the prescriptive period does not operate to a party's claim for ownership."

In *casu*, the plaintiff has been in occupation of the property since March 1982, which is a period in excess of 27 years as at the time of instituting these proceedings. During that period he enjoyed open and uninterrupted possession and occupation of the property. He enjoyed the fruits of the property as purchaser of the rights and interests in the property and not as tenant. The first defendant's conduct during this period tended to confirm the plaintiff's stance. Clearly had the plaintiff been a tenant the first defendant would have demanded rentals but she never did. The probability is that she did not make such demand because she knew the plaintiff was occupying the property as purchaser and not tenant.

I am of the view that in the circumstances of this case a defence of prescription cannot be sustained.

The next issue is whether the plaintiff sued the wrong person and whether the relief sought is competent.

From the pleadings filed of record and the evidence led in court I am of the view that the plaintiff has sued the correct party. It is clear that the first respondent is the one in whose name the rights and interest in the property in question have been registered. She is the one to be affected by any declaratory order. It was only proper that she be given the opportunity to challenge the declaratory order being sought. The relief being sought is equally competent and enforceable. I am of the view that the property in question ought not to have been included as part of Estate of late John Smart Mtemah.

Accordingly a declaratory order is hereby granted as follows:-

1. It is hereby declared that Stand number 7194, New Mabvuku, Harare, also known as number 11 Mzari Street, Mabvuku, Harare, does not form part of either estate late John Smart Mtemah or Florence Mtemah as the rights and interests in it were validly acquired by the plaintiff.
2. That the Sheriff or his Deputy shall sign all necessary documents to effect cession from the first defendant to the plaintiff.
3. The first defendant shall pay costs of suit on the general scale.

Hungwe and partners, plaintiff's legal practitioners
Kadzere, Hungwe and Mandeverere, 1st defendant's legal practitioners.