JOHN KUZIWA MUTSEYEKWA
versus
KUMBIRAI ARCHIBOLD KUTIWA
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O
and
THE REGISTRAR OF DEEDS, HARARE N.O.

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 11, 12, 23, 25 November 2015 & 10 February 2016

Civil Trial

J Mandevere, for the plaintiff
T.G. Makanza, for the defendant

FOROMA J: In this matter the plaintiff sued the first defendant for an order for specific performance i.e. for transfer of an immovable property being an undivided 0.76% share in a certain piece of land in the District of Salisbury called stand 2143 Marlborough Township of Lot 4 of Marlborough measuring 1, 3 644 hectares in terms of an agreement of sale signed between the parties on 16 December 2011. The plaintiff joined the second and third defendants in their official capacity in order to ensure compliance with the order sought against the first defendant.

Only the first defendant entered an appearance to defend. The second and the third defendants understandably did not participate in the action as they would have been content to abide the order of this court.

In his plea the first defendant's admitted signing the documents that the plaintiff claimed were evidence of the sale to him by the first defendant of the immovable property in question but disputed that the documents constituted an agreement of sale but a sham which the plaintiff insisted he required as security for the repayment of a loan which the first defendant obtained

from the plaintiff. The first defendant further averred that he duly repaid the loan and secured return of his deed of transfer in respect of the property referred to in the sham agreement of sale.

At the pre-trial conference the parties agreed upon two issues for trial namely:

(1.1.) whether or not the agreement of sale entered by the parties is valid? If so whether or not the plaintiff discharged his obligations thereof.

(1.2.) whether or not the first defendant is liable to pass transfer of property to plaintiff?

It was also agreed at the pre-trial conference that the onus to prove the invalidity of the written agreement was on the first defendant. The parties appear to have agreed too that the duty to begin was on the first defendant as this did not appear to be an issue at the commencement of trial. The duty to begin is not to be assumed by virtue of the incidence of onus being agreed to shift to the defendant. As the duty to begin generally lies with the plaintiff it is always advisable that where parties have appreciated and agreed that it be varied that this recorded as part of the joint pre-trial conference minute in the interest of saving time at the commencement of trial.

It having been agreed at the pre-trial conference that both the onus to prove the invalidity of an apparently valid agreement and the duty to begin was on the first defendant the trial commenced with the first defendant opening his case.

The defendant's testimony was largely a repetition of his summary of evidence with a few aspects of detail being added for the purpose of completeness. He testified that he is employed as a Relationship Manager at Standard Charted Bank of Zimbabwe Ltd in Harare and came to know the plaintiff through the plaintiff's cousin with whom the first defendant attended primary school together and that he had known the plaintiff for about 10years. He also knew the plaintiff as a pharmacies and a money lender. He got to know the plaintiff as a money lender through one *Kanengoni* a legal practitioner who happens to be the plaintiff's cousin. The first defendant approached the plaintiff for an urgent loan as he had run short of feed for his piggery project and could not approach the bank as he had an unfinished loan from his employer. On approaching the plaintiff for a loan the plaintiff indicated that he could advance such loan on condition that the first defendant could provide some security in the form of an agreement of sale of an immovable property which on repayment of the loan such agreement would then be retired or abandoned. Apparently the first defendant had previously been loaned and advanced some money by the plaintiff before. The plaintiff suggested that they approach the plaintiff's legal

practitioner one Mr *Tawanda Martin Kanengoni* then practicing with a firm of legal practitioners in Harare practicing as Munangati and Associates at Tanganyika House. At Kanengoni's office on 16 December 2011 the plaintiff and the defendant had the sham agreement and the Power of Attorney to pass transfer and a declaration by seller signed after they told Mr *Kanengoni* they wanted to lend each other some money which loan they wanted secured by a sham agreement of sale. The first defendant not only signed the sham agreement of sale and the declaration by the seller and power of attorney to pass transfer in it which Mr *Kanengoni* was the nominated conveyancer bell handed to the plaintiff the original Deed of Transfer in respect of the property allegedly sold in terms of the sham agreement of sale. These documents were taken away by the plaintiff after paying the first defendant the sum of $1 500-00 (the loan) in the presence of Mr *Kanengoni*. The first defendant eventually repaid the loan and recovered his Deed of Transfer from the plaintiff.

During cross-examination the first defendant was taken to task for (1) not taking legal action to declare null and void the alleged sham agreement seeing as the plaintiff was seeking to enforce it as an agreement of sale and his reason was that he did not consider it necessary as he was now in possession of his deed of transfer and once sued in court for specific performance he had opted to defend the matter and also took comfort in the fail that he had engaged a legal practitioner whom he expected knew best how to handle the case. He was insistent that he did not sell his property at all and would not have sold it for the price of $15 000-00 considering that it was worth $45 000-00 on the open market.

It is significant to note that after the loan of $15 000-00 secured by the sham agreement of sale as claimed by the first defendant the relationship between the plaintiff and the first defendant remained amicable and the two went into at least two more transactions of mutual benefit namely:

(i) the purchase and resale of a vehicle which the first defendant identified a cheaply priced. (a SUBARU Vehicle) whose purchase the plaintiff wholly funded in the sum of $3 500-00.

(ii) when one Kuda Chizu wanted to buy the first defendant's Mazda Preance for $6 000-00 and could not raise balance of $2 000-00 the first defendant referred Kudza Chiza to the plaintiff for a loan which was loaned to Kuda Chiza at some exorbitant interest rate

and which loan for the convenience of the plaintiff was advanced in the first defendant's name as evidenced by exh 1. The plaintiff was not prepared to loan Kuda Chizu directly as he did not know him and opted to loan through the first defendant.

(iii) The first defendant also borrowed in May 2013 the sum of $5 000-00 from the plaintiff as confirmed by exh III. The two loan agreements caused the first defendant to be put on the spot during cross examination as he had to explain why the plaintiff would resort to a sham agreement of sale of an immovable property as security if he could secure his loan by means of acknowledgments of debt as well as a gentlemen's agreements. In response to this the first defendant indicated that the plaintiff had been prosecuted for operating illegally as a money lender without a licence and thus at some point needed to change his *modus operandi.* This repose on need for a change in the *modus operandi* was not seriously challenged during cross examination neither did the plaintiff dispute it in his testimony when he took the witness stand.

The first defendant then called Kuda Chizu who confirmed having been advanced a loan of $2 000-00 by the plaintiff at an exorbitant interest rate as he was required to pay back $2 650-00 per exh 1 within 30days. His evidence was not seriously disputed by the plaintiff even though it had the effect of showing that the plaintiff was a loan shark an allegation the defendant had also made in his plea.

Next the first defendant a called *Tawanda Martin Kanengoni. Kanengoni* testified that he was approached by both the plaintiff and the defendant who had an agreement of sale already signed and he did not quite appreciate why the two had come to see him with it. The plaintiff and the first defendant however told him that they wanted to lend each other some money and they produced the agreement of sale which he thought was an agreement to loan each other money. He said he had a quick browse of the document but did not advise on it as he would have billed them had he advised on it. He was emphatic that the parties came to his office this once and indicated they wanted to loach each other money in his present but he had not been involved in the drafting of the agreement. He also confirmed that the parties exchanged some money in his presence and the first defendant gave the plaintiff an original Deed of Transfer in his presence. As regards the Power of Attorney to pass transfer and the declaration by seller *Kanengoni* testified that he neither prepared them nor were they not exchanged in his presence as only the agreement of sale was brought to his office. He commented that the agreement of sale, Power of

Attorney to pass transfer and declaration by seller appeared to be evidence of a sale but the parties knew what exactly they wanted these documents to represent. He further testified that the parties did not leave the documents with him. He also testified that the plaintiff did not advise him that the first defendant was selling to him a property or that he was purchasing a property from the first defendant.

He confirmed that the plaintiff was related to him and the first defendant was his friend and he did not want to be involved in their transactions as someone who knew both parties. *Kanengoni* also testified that the plaintiff did not consult him on how to recover rent in respect of the premises he had bought from the first defendant.

Kanengoni disputed that the plaintiff gave the first defendant an amount of money which could be anywhere near $15 000-00. He thought the plaintiff gave the first defendant an amount close to $ 2000-00 but he could not say how much. He was quite firm that when the parties came to him on this occasion the first defendant was borrowing money from the plaintiff and he was not aware of any other occasion when the first defendant borrowed money from the plaintiff in his presence.

It is significant to note that during cross examination *Kanengoni* denied having prepared the three documents i.e agreement of sale, Power of Attorney to pass transfer and declaration by seller for signature by the plaintiff and the first defendant. He also insisted that the agreement of sale was prepared elsewhere and no power of attorney and declaration by seller was brought to his office. He was not in a position to say that the agreement of sale was a sham. When asked by the court what the parties said to him as they produced the agreement of sale he answered that they said the document was to be used to secure loan or some words to this effect. He said he only got to know that the first defendant had got back his Deed of Transfer after the parties had already sued each other.

The first defendant closed his case at the end of *Kanengoni's* testimony and the plaintiff opened his case to rebut the defendant's case.

The plaintiff opened its case by taking to the witness stand and gave the following evidence. That he has known the first defendant for the past 5 years and that he was in court because he entered into an agreement of sale with the first defendant in terms of which he bought an unmovable property which the first defendant no longer wants to part with. He testified that

the agreement of sale was entered into at his residence on Herbert Chitepo on 16 December 2011. He indicated that the first defendant told him that he was selling his property for $15 000-00 where upon he offered to buy it at the price. The agreement of sale was produced as exh 2. He went on to say that he paid the sum of $15000-00 cash for the house and no receipt was issued for the payment rather the first defendant signed an agreement of sale and also signed a declaration by seller acknowledging receipt of the amount and also signed a Power of Attorney to pass transfer. The power of attorney to pass transfer was produced as exh 3 and the declaration by seller was produced as exh 4. The plaintiff confirmed that none of the documents had been cancelled neither had the first defendant sought to nullify the documents. When asked whether he had moved onto the purchased property in light of the provisions of the agreement regarding the passing of risk and profit on signature of the agreement he answered that he could not take over the property as there were certain documents he was trying to get now. He further claimed that the delay in instituting the cause action was on account of the several but unfulfilled promises made to him by the first defendant. The plaintiff acknowledged having made several loans/advances to the first defendant where in some cases he insisted on some security such as surrender of registration book of a vehicle and sometimes simply accepted his commitment to pay by word of mouth or caused him to sign an acknowledgement of debt.

He said that he had not yet paid any rates for the property as the property was not in his name yet. He also indicated that he needed the rental but would take his claims one at a time. The plaintiff indicated that he drafted the agreement of sale from information provided. When asked how he was able to draft a power of attorney to pass transfer he indicated that he has precedents of these documents on his computer as he has been involved in property business for a long time. The plaintiff denied having signed the agreements and power of attorney as well as the declaration by seller at Kanengoni's office claiming that they were all signed at his residence. The plaintiff actually denied having visited Kanengoni's office in relation to the agreement of sale in question. He disputed that the document exh 2 was a claim as claimed by the first defendant insisting that if it had been a loan he would have recorded and secured it by appropriate documentation. He denied ever using an agreement of sale as a security for a loan. The plaintiff indicated that the first defendant was a friend.

On being cross examined the following emerged from the plaintiff's testimony:

(i) He did not do a deeds search in respect of the property he being contended by the deed of transfer which the first defendant supplied him for purposes of extracting information to put in the agreement of sale.

(ii) He did not know the street address of the property in question.

(iii) He never inspected the property he claimed to have bought and so did not know its position structure e.g he did not know how many bedrooms, toilets etc.

(iv) He did not know the flat number whether it is carpeted or floor-tiled

(v) He did not know who was the tenant and how much rental the tenant paid.

(vi) He was not given vacant possession of the property.

He had not been paying rates for the property since the date he claims to have paid $15000.00 as purchase price and not apply to be a member of the flat Owner's Association.

(vii) He claimed that he last was at the property when the first defendant was purchasing the property.

(viii) No provision for capital gains was made in the agreement of sale.

(ix) He claimed that he did not visit the property to inspect it as the first defendant dissuaded him from doing so fearing that such visit could result in the tenant defaulting in the payment of rent as he will have got to know that the flat was on sale.

(x) He never visited Kanengoni's office with the first defendant in connection with this transaction.

(xi) He denied that he was given the deed of transfer in Kanengoni's office or that he paid the first defendant the money whether the purchase price or loan in Kanengoni's presence.

The plaintiff closed his case after giving his evidence and did not call any witness despite having indicated in the joint pre-trial conference minute that he would be calling 2 witnesses

At the close of the plaintiff's case the parties were invited to make oral closing submissions with each side urging upon the court to find in his favour.

Credibility of Witnesses

The court found the defendant to be a credible witness. Despite being subjected to vigorous cross examination by the plaintiff's counsel he maintained his own. He was criticised for not taking legal action to nullity the sham agreement of sale which he explained on the basis that since he had retrieved his deed of transfer he did not believe that the plaintiff would succeed in his effort to enforce the sham agreement. He was further pressed to explain why he had not counter claimed for the an order declaring the agreement null and void after being sued for specific performance to which he responded by indicating that he left the matter to his legal counsel to determine as to how best to deal with the matter. Although his evidence was not corroborated by *Tawanda Martin Kanengoni* on some material respects this did not detract from his general credibility. In fact where his evidence disagrees with that of Kanengoni's testimony the court finds his evidence to be more reliable and therefore accepts it. He testified that the plaintiff and himself visited Tawanda Martin Kanengoni's office where Kanengoni prepared the sham agreement of sale, power of attorney and declaration by seller for signature by the plaintiff and himself which was contradicted by Kanengoni who disputed that he prepared these documents claiming that the parties only brought the agreement of sale already signed. It is not difficult to understand why Kanengoni would have denied his role in the preparation of the sham agreement. As a legal practitioner and officer of the court it would not augur well for his professional reputation to be found to have been party to such unsound advice which had the penitential of exposing him to disciplinary action for unprofessional conduct. Kanengoni who happens to be a cousin of the plaintiff and a friend of first defendant was hard placed to testify as a neutral witness and it is this court's finding that his evidence was significantly edited for obvious reasons. As indicated above where the first defendant's evidence differed with that of Kanengoni the court preferred the first defendant's version. It is important to note that Kanengoni's evidence corroborated the first defendant's version in the following respects:

(a) That the parties visited him and indicated that they wanted to lead each other some money and wanted to use the documents as security or words more or less to the same effect.

(b) That the plaintiff gave the first defendant an amount nowhere near $15 000-00 in his presence

(c) That the first defendant gave the plaintiff a deed of transfer in his presence in his office. The court finds as established that the loan agreement secured by a sham agreement of sale was transacted in Kanengoni's office. This finding is fortified by the fact that even Kanengoni could not explain why the parties would have found it necessary to come to him with an already signed agreement signed elsewhere and then give each other some money (the loan) and the deed of transfer in his presence.

The evidence of Kudakwashe Chiza was quite brief and not seriously challenged by the plaintiff. It basically reinforced the first defendant's contention that the plaintiff was a loan shark. He borrowed $2 000-00 from the plaintiff (after the first defendant introduced him to the plaintiff) which he was required to repay within 30 days with interest in the sum of $600-00 and legal fees in the sum of $50-00. Despite having repaid the loan within 12 days hoping to have the interest amount adjusted he was still required to pay $600-00 interest in full. The court finds Kudakwashe a credible witness and accepts his testimony.

The plaintiff did not impress the court as a credible witness and in this regard the plaintiff's counsel urged the court to prefer Kanengoni's evidence where it complicated with that of the plaintiff and the first defendant. His evidence did not have a ring of truth and he seemed to believe that he could take comfort in the fact that he had an agreement of sale and other documents i.e the power of attorney and declaration by seller which on the face of it evidenced a valid agreement of sale. He denied having attended at Kanengoni's office on the 16 December 2011 with first defendant to transact the loan agreement which he preferred to call an agreement sale of the first defendant's flat. Despite claiming that he is heavily involved in real estate business the court finds it highly improbable that the plaintiff would have proceeded to purchase an immovable property of and part with the sum of $15 000-00 without satisfying oneself through a physical inspection as to the features of the property and its internal configuration and general condition. The court does not accept that the sham agreement of sale and its supporting documents namely the power of attorney to pass transfer and declaration by seller which were prepared by the plaintiff. As indicated hereinabove these were prepared by Kanengoni.

Several other factors fly in the face of the plaintiff's contention that the sham agreement of sale was a genuine agreement of sale. These are:

(i) The plaintiff did not know the street address of the property allegedly purchasers.

(ii) Clause 3 of the agreement of sale Exh 2 provides as follows "Risk and profit in the property indicating liability for payment of rated and all other outgoings in respect of the property shall pass to the purchase upon signing. The seller shall pay whatever payments are due and payable to the Local Authority up to the date this agreement is signed." And yet plaintiff never paid a single cent towards rates never sought to recover rentals. The court dismissed the plaintiff's suggestion that he intends to recover rentals but prefers to pursue his claims one at a time as one not seriously made.

The plaintiff's contention that he did not approach the court with his claim until the time he did because the first defendant kept giving him unfulfilled promises does not convince the court as truthful. If anything seems to give support to first defendant's argument that his loan had been discharged way back in 2012.

The Law

Diplock L.J in the case of *Stoneleigh Finance Ltd* v *Phillips* 1965 2 Q B 537 at 569B remarked:

> "No authority is needed for the proposition that it is the duty of the court in any given case to look behind the form of ant transaction such as that at present under consideration and to ascertain its real substance"

This court similarly need not quote any authority to justify its duty to look behind the documents produced *in casu* to ascertain the real substance of the transaction they purport to be evidence of.

In a majority judgement with Russel J in the matter of *Snook* v *London and West Riding Investments* 1967 2 Q B 786 with Lord Denning MR dissenting Diplock J quoting *Stoneleigh Finance Ltd* above and *Yorkshire Railway Wagon Co* v *Maclure* 1882 (2) chd 309 CA had the following to say-

> "But one thing I think is clear in legal principle morality and the authorities that for acts or documents to be a "sham" with whatever legal consequences follow from this all the parties thereto must have a common intention that the cats or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a shammer affect the rights of a partly whom he deceived."

This court has found that the plaintiff and the first defendant with the assistance of Kanengoni legal practitioner brought until existence an agreement of sale to act as a security for

the repayment of a loan clearly as contended by the first defendant such agreement of sale was never a disposal of his property as it was a sham. Once the court has found in favour of the first defendant that the agreement was a sham it becomes clear that the plaintiff and the first defendant had a common intention that the documents were not to create the legal rights and obligations which they gave the appearance of creating.

Hoexter AJA in *Vasco Dry Cleaners* v *Twycross* 1979 (1) SA 603 quoted Watermeyer JA in the assenting judgement in the matter of *Mac Adams* v *Fianders Trustees and Bell N.O* 1919 AD 207 to have said regarding at p 395-6 where the Chief Justice described a disguised transaction is essence as

> "dishonest in as much as the parties to it do not really intend it to have inter parties the legal effect which its terms convey of the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between them".

There can be no simpler and clearer definition of what a sham agreement is than that given by the learned Chief Justice Watermeyer. In *casu* the plaintiff's counsel submitted that the onus is upon the defendant to prove that the agreement accepted by the parties was a sham or a dishonest transaction. This much as an issue was agreed and resolved at the pre-trial conference. The question must be asked whether the defendant has discharged such onus?

It is clear from the foregoing that the defendant has adequately discharged the onus.

The plaintiff's counsel submitted that it was improbable that the plaintiff who had served his loan agreements by acknowledgement of debts on a number of occasions before and after the transaction in question would have needed to enter into a sham agreement of sale-more so taking into account to the fact that in some instances that the plaintiff was content to loan or transact on the basis of a gentlemen's agreement-a very forceful argument indeed. However the plaintiff needs to be reminded that the defendant's unchallenged evidence was that the plaintiff had been arrested for illegally operating as a money lender and needed to change his *modus operandi*. This evidence was not challenged.

The plaintiff's counsel also submitted that the plaintiff was corroborated by the evidence of Kanengoni. A proper understanding of the evidence of Kanenegoni will inevitably demonstrate that it effectively disputed the plaintiff's case in material respects and infact corroborated the defendant's case in material respects.

Kanengoni testified to an exchanged of money between the parties in his presence which was closer to the amount contended by the defendant involving i.e. an amount for less than $15 000-00 and an exchange of the defendant's deed of transfer (all this in his office). It is significant to reiterate that Kanengoni testified that this was the only other transaction at which an agreement of sale (the sham) was produced.

In the light of the foregoing the court is satisfied that the plaintiff has not convinced it that the transaction he has sued on was a genuine sale of the defendant's property. The plaintiff's conduct before and after the alleged transaction does not support a genuine sale of the first defendant's property.

In the result the plaintiff's claim is dismissed with costs.

Kadzere, Hungwe & Mandevere, plaintiff's legal practitioners
Nyamayaro Makanza & Bakasa, defendant's legal practitioners