

JOSHUA MABHIZA
versus
ROSEMARY NEMHARA
and
OSCAR ZIWENI N.O
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 12 July 2016 and 7 September 2016

Opposed Matter

T Mpfu, for the applicant
C Nhemwa, for the 1st respondent

MTSHIYA J: This is an opposed application for the confirmation of a Provisional order granted by this court on 18 January 2002. The original Order read as follows:

“Terms of Order Made

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the 1st Respondent be and is hereby directed to executive/sign all necessary documents for the transfer of Stand Number 171 Smuts Road, Prospect, Waterfalls, Harare (ref Deed of Transfer Registration Number 1973/86) to the applicant within seven (7) of service of this order on him.
2. That in the event that the 1st Respondent fails or neglects to comply with Clause 1 above the Deputy Sheriff be and is hereby authorised and directed to sign the necessary documents for the transfer of Stand Number 171 Smuts Road, Prospect, Waterfalls, Harare (ref Deed of Transfer Registration Number 1973/86) to the applicant.
3. That the 2nd Respondent be and is hereby ordered to lodge with the 3rd Respondent all the necessary documents (in proper form) for transfer of Stand No 171 Smuts Road, Prospect, Waterfalls, Harare 9REF Deed of Transfer Registration Number 1973/86) to the applicant

within the signing service upon him of all necessary documents in terms of either Clause 1 or 2 above.

4. That the 3rd Respondent be and is hereby ordered to approve and effect the transfer of Stand Number 171 Smuts Road, Prospect, Waterfalls, Harare (ref Deed of Transfer Registration Number 1973/86 from Tapera Emmanuel Nemhara to the applicant.
5. That the 1st and 2nd Respondents are to pay the costs of this application.

Terms of the interim order granted

That pending the final determination of this application the applicant is granted the following relief:

1. That the 1st and 2nd Respondents are hereby interdicted and or restrained from selling, transferring, or alienating in anyway the property known as Stand Number 171 Smuts Road, Prospect, Waterfalls, Harare to any party/persons other than the applicant.
2. That the 3rd Respondent be and is hereby ordered not to approve/consent to the transfer of the property known as Stand No. 171 Smuts Road, Prospect, Waterfalls, Harare from Tapera Emmanuel Nemhara to any other person other than the applicant.”

The final terms of the above order were later amended to read:

“IT WAS ORDERED

1. That the first respondent be and hereby ordered t sign all documents necessary for the transfer to JOSHUA MABHIZA (THE APPLCIANT) from Emmanuel Tapera Nemhara:

CERTAIN piece of land situate in the district o Salisbury:

CALLED Stand 171 Prospect (commonly known as No 171 Smuts Road, Prospect, Waterfalls, Harare)

MEASURING two comma three zero five three 2,3053) hectares REGISTERED in the names of Emmanuel Tapera Nemhara under Deed of Transfer Regd No. 1973/86) dated the 4th day of April, 1986 (hereinafter referred to as “the property”).

2. That failing 1 above, the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorised to sign all documents necessary for the transfer of the property from Emmanuel Tapera Nemhara to the applicant.
3. That the Registrar of Deeds be and is hereby ordered to accept documents either signed by Matilda Nemhara or signed by the Sheriff of Zimbabwe or his lawful deputy transferring the property from Emmanuel Tapera Nemhara to the applicant.
4. That Matilda Nemhara be and is hereby to pay costs of this application
5. Applicant’s lawyers to handle the conveyancing or transfer.”

The parties to the above Provisional Order were the applicant, one Richard Nemhera in his capacity as Executor of the Estate of his late father, namely Tapera Emmanuel Nemhara, Oscar Ziweni N.O and the Registrar of Deeds (N.O) as respondents.

On 13 November, 2000 the said Richard Nemhara as Executor of the Estate of Tapera Emmanuel Nemhara, being assisted but Oscar Ziweni (Legal Practitioner), sold to the applicant a property known as stand 171 Smuts Road Prospect, Waterfalls, Harare measuring 2, 3053 hectares (the property). The property was sold for \$1.5 million (old Zimbabwe Dollar currency.)

In terms of the agreement, the above cash price was to be paid as follows:

- “2.1 It is further agreed that the Purchaser shall pay a deposit of \$800 000.00 to the Sellers immediately upon the signing of this agreement.
- 2.2 The purchase price of the property is 1,5 million (dollars) payable in Harare, free of bank commission or other charges.
- 2.3 The purchaser has authorised the sellers to use the deposit aforesaid before transfer is effected.
- 2.4 The balance sum \$700 000.00 shall be payable by way of monthly instalments in the sum of \$75 000.00 on or before the 1st of each succeeding months, commencing from the 1st of January 2001 until the balance is liquidated.”

The applicant duly paid the full purchase price, with the last payment being made through Messers Ziweni & Company Attorneys on 30 November 2001.

Notwithstanding the payment of the full purchase and transfer fees of \$167 500.00 price the property was not transferred to the applicant. The urgent application which led to the granting of the provisional order was, according to the applicant, due to the fact that:

- “9. ... despite the fact that I have complied with my part of the bargain transfer has not yet been effected. Instead I have information (which I have no reason to doubt) to the effect that the 1st and 2nd Respondents have sold the property to another person who is to me presently unknown for a sum of \$3 500,000,00. In the result the property may be transferred into that other person’s name any time from now.”

In order to fully appreciate the issues herein, I shall quote at length from the opposing affidavits of the then first respondent (Richard Nemhara – late) and Oscar Ziweni (also late), filed on 11 February 2002.

In his opposing affidavit the then first respondent averred:

“5. Ad Paras 5,6,7,8,9 and 10
Yes an attempt was made to sell the property to the Applicant but he repeatedly breached the Sale Agreement by firstly not paying his instalments timeously and lastly by insisting for a period in excess of 3 months that he had fully paid the purchase price when he had not.

That was being *mala fide* and this prejudiced the estate until a collective decisions was arrived at that the sale had to be rescinded. The other irregularity regarding the sale is that the minor’s consent to the sale and the consent of the beneficiaries had not been procured by me. As a result the minor child beneficiary and other beneficiaries have refused to ratify the sale. Actually because of this, I had to pay back the whole purchase price paid by the Applicant into the trust account of Ziweni & Company Attorneys. I annex hereto as “A” a copy of the proof of payment.

5.1 The beneficiaries of which I am one refused to accept the proceeds of the sale on the grounds that the Applicant had taken too long contrary to the stipulations of the Sale Agreement to tender full payment of the purchase price and further that the purchase price was unreasonably too low and further that the mother’s consent had not been properly sought and procured in the first place. The sale agreement is therefore pervaded with vitiating irregularities warranting its rescission by this Honourable Court.

5.2 The Sale Agreement has been rejected by the beneficiaries and reference has been made to clause 4 of the will copy of which is appended hereto ad “B” which stipulates thus

‘...my plot in the Prospect Area of Harare known as a certain piece of land situate in the District of Salisbury ... shall not be sold until the youngest child has completed her education or is self-sufficient. I further direct that this property shall be let out at current selling rates in the Real Estate market as a usufruct to be invested in financial markets to realize interest for the benefit of the following beneficiaries ...’.

5.3 The estate has the means to refund Applicant with interest and any other appropriate expenses he might have incurred by reason of the cancellation.

5.4 When the Sale Agreement was drafted by the 2nd Respondent, I did not advise him that the beneficiaries had revoked their decision to sell the property so when I sold the property I did it without the approval of my co-beneficiaries for I genuinely believed that they would resultantly ratify it. They unfortunately refused to ratify it and called for its rescission.”

The above is supported by the then second respondent, Oscar Ziweni (now late) in the following terms:

“3. That the 1st Respondent and myself were co-executors in the estate of the late E.T. Nemhara.

4. That as regards to the sale of the remaining asset of the estate the 1st Respondent had full authority without me and in conjunction with his co-beneficiaries to negotiate the sale of the immovable property.

5. That initially in year 2000 the Master of the High Court had issued his consent to the disposal of the property and 1 annex hereto as “A” a copy of such proof.
6. That the 1 Respondent came with the Applicant to our offices and they had essentially agreed on the terms and conditions to form the agreement of sale which my offices merely recorded. In the consonance with what both parties agreed to produce what was recorded was the sale agreement whose rescission is now being sought.
7. That the 1st Respondent advised me that everything was regular for he had the requisite authority and mandate from his co-beneficiaries. I believed him. I had no reason to doubt him. The agreement was recorded and the parties signed it.
8. That Applicant failed to pay the purchase price as per the agreement and I was then surprised when the other co-beneficiaries stated that their consent to the sale had not been sought and procured. The purchase price paid by Applicant was then re-deposited into our trust account so that Applicant could be refunded his money.
9. That since the other beneficiaries are saying they cannot ratify the sale on the grounds that the property was grossly under-priced then it will be a palpable inequity and a travesty of justice not to rescind the Agreement Sale in question.”

It is important to note that the first and second respondents were Co-Executors, properly appointed in terms of law. That therefore entails joint decisions.

It is also important to note that the Master’s consent was obtained. That is common cause.

It is, however, unfortunate that, of the actual parties who executed the sale of the property only the applicant is surviving. Both Oscar Ziweni and Richard Nemhara passed on before the dispute was resolved. Richard Nemhara (late) was replaced by Matilda Nemhara as Executor dative. Matilda Nemhara also passed on before the dispute was resolved. On 20 May 2014 Matilda Nemhara was replaced by Rosemary Nemhara as Executor dative. Rosemary Nemhara is the current Executrix Dative and is therefore cited herein as the first respondent.

However, the events narrated above do not, in my view, greatly impact on the rights of the parties created under the sale agreement of 13 November 2000.

Prior to this matter being heard, the parties had agreed that it be consolidated with cases HC 4324/08 and HC 6934/08. However, at the commencement of the hearing Mr *C Nhemwa*, for the first respondent, announced that matters HC 4324/08 and HC 6934/08 had been abandoned.

Both parties *in casu* raised preliminary issues.

The applicant argued that the first respondent was barred because, whilst applicant's heads were filed on 1 August 2008 the first respondent's heads of argument were only filed on 30 May 2016. I need not be detained by this issue because it is common cause that, prior to engaging Messrs C Nhemwa & Associates, the first respondent was a self-actor, who, under rules is under no obligation to file heads of argument. The first respondent could have legitimately called upon Messrs C Nhemwa & Associates to come and argue the matter on the hearing date without them filing heads of argument. However, Messrs C Nhemwa & Associates deemed it appropriate to file heads at short notice in order to properly assist the court. It would therefore be against the interests of justice to entertain a bar against the first respondent. That point *in limine* cannot be upheld.

The preliminary issues raised by the first respondent are in the heads of argument filed on 30 May 2016 by legal practitioners.

It was argued that the matter was not properly before the court because a judgment of this court had not been rescinded.

On 20 November, 2013 Tsanga J issued the following order in default:

“IT IS ORDERED THAT:

1. The application to amend the final order be and is hereby granted.
2. The 1st respondent be and is hereby ordered to sign all documents necessary for the transfer of **Joshua Mabhiza** (the applicant from Emmanuel Tapera Nemhara:-

**Certain piece of land situate in the district of Salisbury;
Called Stand 171 Prospect (commonly known as No. 171 Smuts Road, Prospect,
waterfalls, Harare)**

MEASURING two comma three zero five three (2,3053) hectares REGISTERED in the names of Emmanuel Tapera Nemhara under Deed of Transfer (Reg No. 1973/86) dated the 4th day of April, 1986 (herein after referred to as “the property”)

3. Failing 1 above, the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorized to sign all documents necessary for the transfer of the property from Emmanuel Tapera Nemhara to the applicant.
4. The Registrar of Deeds be and is hereby ordered to accept documents either signed by Matilda Nemhara or signed by the Sheriff of Zimbabwe or his lawful deputy transferring the property from Emmanuel Tapera Nemhara to the applicant.
5. Matilda Nemhara be and is hereby ordered to pay costs of this application.

6. Applicant's lawyers to handle the conveyancing or transfer."

The above is the amended final order referred to at p 2 herein.

First respondent contended that since the above order had not been specifically rescinded it remained extant. I do not agree.

On 30 July 2015, at the instance of the first respondent represented by Messrs C. Nhemwa and Associates, this court, through Ndewere J, issued the following order:

"It is ordered that:

1. The order of her Ladyship Justice Tsanga in HC 186/02 granted on 20 November 2013 be and is hereby declared null and void, the order having been issued against the late Richard Nemhara and the late Oscar Ziweni.
2. The transfer in terms of the above order of certain piece of land situate in the district of Salisbury called Stand 171 Prospect measuring 2,3053 hectares held by the late Tapera Samuel Nemhara under Deed of Transfer Number 1973/86 dated 4th April 1986 (hereinafter called the "property") to the 1st Respondent be and is hereby declared null and void.
3. The 3rd Respondent be and is hereby ordered to cancel the transfer of the above property to the 1st Respondent and reinstate Deed of Transfer Number 1973/86 dated 4th of April 1986 held by the late Tapera Emmanuel Nemhara.
4. The 1st Respondent shall pay the Applicant's costs of suit at an attorney-client scale."

The above order, in my view, clearly states that nothing happened on 20 November 2013. The proceedings were a nullity. This is precisely the relief that the first respondent had sought. The parties were therefore placed where they were on 13 November 2000 when they executed the agreement of sale. Our law recognizes a nullity for what it is and it would add no value to seek to go further and rescind a nullity. There is no need to rescind what is not there. In other words, there is nothing to be rescinded. Accordingly that point *in limine* cannot be sustained under our law.

The second point *in limine* raised by the first respondent is that the sale violated ss 120 and 122 of the Administration of Estates Act [*Chapter 6:02*] in that this was estate property where the interests of a minor were involved. It was argued that the master required the authority of the High Court to dispose of the property. Implicit in that submission is the point that and as confirmed by Oscar Ziweni the Master's consent for the disposal of the property was indeed

obtained. Richard Nemhara or any of his successors cannot be allowed to distance themselves from the averments of Oscar Ziweni. There was co-executorship entailing joint decisions by properly appointed executors of the estate of Tapera Emmanuel Nemhara.

I also want to state that, apart from this issue being new, as can be seen from the extensively quoted averments of both Richard Nemhara (also late) and Oscar Ziweni (late), this issue was being raised for the first time. The opposing affidavits gave different reasons for the need to resile from the agreement of sale, which agreement was, however, never cancelled. Furthermore, the Act relied on offers remedies where the Master's decision is unacceptable. The consents given by the Master under a transaction that was supervised by Richard Nemhara and Oscar Ziweni as Co-Executors was never challenged. In fact, a proper reading of Ziweni's averments supports the applicant's case. It is therefore not surprising that, apart from raising the two points *in limine*, the heads of Argument are dead silent on the merits of the case. That, to me, is a clear acknowledgment of the fact that, on the basis of an agreement that was never cancelled, and with the applicant having complied with his obligations thereunder, there is no basis for denying him the relief he seeks, namely specific performance. Accordingly the applicant is entitled to the final order in the provisional order, as amended.

It is therefore ordered as follows:

“IT IS ORDERED THAT:

1. The 1st respondent be and is hereby ordered to sign all documents necessary for the transfer to **Joshua Mabhiza**, the applicant, from Emmanuel Tapera Nemhara, of:-

**A certain piece of land situate in the district of Salisbury;
Called Stand 171 Prospect (commonly known as No. 171 Smuts Road, Prospect,
waterfalls, Harare) MEASURING two comma three zero five three (2,3053) hectares,
REGISTERED in the names of Emmanuel Tapera Nemhara, under Deed of Transfer
(Reg No. 1973/86) dated the 4th day of April, 1986 (herein after referred to as “the
property”)**

2. Failing 1 above, the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorized to sign all documents necessary for the transfer of the property from Emmanuel Tapera Nemhara to the applicant.
3. The Registrar of Deeds be and is hereby ordered to accept documents either signed by the first respondent or by the Sheriff of Zimbabwe or his lawful deputy transferring the property from Emmanuel Tapera Nemhara to the applicant.
4. The 1st respondent be and is hereby ordered to pay costs of this application; and

5. Applicant's lawyers shall handle the conveyancing or transfer."

Chihambakwe, Mutizwa & Partners, applicant's legal practitioners
C Nhemwa & Associates, 1st respondent's legal practitioners