

KINGSTONE RINGISAI MAKARICHI
versus
CYPRIAN ALIAS CHAIPA TSUNGO
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 15 July & 26 October 2016

Civil continuous roll

M.C. Mukome, for the plaintiff
L. Chimuriwo, for the 1st defendant

MATANDA-MOYO J: The plaintiff made a claim against the defendants for the following relief;

- 1) That the first defendant effects change of ownership of a certain piece of land measuring 93,2567 hectares called Zviyambe 96, situate in the district of Wedza commonly known as farm number 96 Zviyambe East Wedza, within seven days of this order.
- 2) In the event that the first defendant fails to sign the transfer documents, an order authorising the Deputy Sheriff to sign all papers and or documents as required by the second defendant to effect change of ownership of the said property from the first defendant's name to the plaintiff.
- 3) That the first defendant pays costs of suit.

I have noticed that the Sheriff nor his deputy have not been cited in this claim. It is improper to grant an order for or against the sheriff or his Deputy without them being party to the proceedings. I will thus not deal with the second party of the order making reference to the deputy sheriff.

The plaintiff's case is a very simple one. He alleged he bought a farm from the first defendant. He further alleged that he has since paid the full purchase price and is entitled to transfer of the farm. The first defendant opposed the order sought on the grounds that he

never sold his farm to the plaintiff. No sale agreement was ever signed. The first defendant also denied having received any purchase price for the farm in question. He also challenged his citation in the summons. The first defendant prayed that the plaintiff's claim be dismissed.

At the Pre-Trial Conference the issues referred to trial were:

- (i) Whether or not the plaintiff entered into an agreement of sale with the first defendant for the farm and
- (ii) Whether or not the plaintiff paid the purchase price for the farm.

The plaintiff's testimony was simple and straight forward. He heard from his sister Jennifer that the first defendant was selling the farm. He then travelled to Zviyambe where he was accompanied by his sister to the first defendant's farm. There he met the first defendant in the company of his two wives and son Daniel Chipunza. They entered into negotiations for the sale of the farm. Initially the first defendant demanded a purchase price of ZW\$200 million. After much negotiations the price was lowered to ZW\$160 million, payable as follows; deposit of ZW\$60 million and thereafter instalments of ZW\$10 million until the whole purchase price had been settled. The plaintiff negotiated payment of the deposit in instalments which proposal was accepted by the first defendant. After paying the deposit the plaintiff was allowed to take possession of the farm towards the end of 2004. Because of inflation the plaintiff was asked to top up the purchase price to ZW\$210 million which he did. He paid the last instalment on 12 July 2005. The plaintiff produced what he termed agreement between the parties but in reality such document acted as receipts for monies paid towards the purchase of the farm. On that document is evident Daniel Chipunza signed for all amounts. The plaintiff testified that the first defendant had authorised Daniel to sign on his behalf. Daniel would however always handover the monies to the first defendant in the presence of the plaintiff. On one occasion when Daniel was not present, it was Richard, first defendant's son who signed for the money and handed same to the first defendant.

The plaintiff said he had been pestering the first defendant to effect transfer to no avail. This has prompted the plaintiff to approach this court to force the first defendant to transfer the farm to him. It was also his testimony that ever since he took possession of the farm, the first defendant has never claimed it back.

Under cross-examination he conceded the agreement he produced was not a proper agreement as a proper one was to be signed before lawyers after full payment of purchase price. He indicated Messrs Hove and Associates had drafted that agreement which the first

defendant refused to sign. He maintained that the first defendant never signed and authorised Daniel to sign on his behalf.

Jennifer Makamba testified on behalf of the plaintiff that she was the one who advised the plaintiff that the first defendant was selling his farm. She first heard first defendant announcing the sale of his farm at Muchena's homestead. The following day she visited the first defendant's farm where he confirmed that he was indeed selling the farm. After advising the plaintiff, he came to her place and the two of them proceeded to the first defendant's farm where some of the discussions were held in her presence. She witnessed the first defendant saying he wanted Z\$200 million for the farm. On that day the plaintiff paid ZW\$10 million towards the deposit of the farm. She confirmed the plaintiff took occupation of the farm in 2004 to date. She is the one currently on the farm. Under cross examination she stuck to her story. She also confirmed that in 2004 one of the first defendant's sons remained on the farm and was removed with the first defendant's consent.

The first defendant testified that he never sold his farm to the plaintiff. He testified that he authorised his son Daniel to sell the farm on his behalf. Once he found a buyer he was to bring the buyer and lawyer to him for the transactions. He had also instructed that a valuation of the farm be done first. His son never came back to him until he saw the plaintiff demanding original title deeds. The first defendant said he asked the plaintiff whether he had finished paying for the farm, to which he replied in the positive. The plaintiff informed him that Daniel had asked him to top up six beasts before transfer could be effected. This witness testified that he told the plaintiff to bring six beasts and thereafter Daniel and a lawyer. The plaintiff never did.

This witness denied ever discussing with Jennifer the sale of his farm. He denied ever entering into an agreement of sale of his farm with the plaintiff. He initially denied ever authorising his son to sell the farm but turned around and said he instructed Daniel to keep all the monies he was receiving from the plaintiff until the agreement by the lawyer. He admitted he told the plaintiff to pay an extra US\$12 000-00 but explained he was referring to the six beasts. He maintained the plaintiff was on his farm illegally.

Under cross-examination he said the plaintiff could have occupied his farm due to the fact that he had accommodation problems. He said the plaintiff forcibly occupied his farm. He said he did nothing about it as the plaintiff's parents were known to him. He also admitted he authorised his son Daniel to sell the farm but only after valuation. He admitted he demanded six beasts as top up on the purchase price which was hit by inflation. He conceded

that had the plaintiff paid an extra US\$12 000-00 or six beasts, he would have had no problems transferring the farm.

From the evidence above it is clear that there was an agreement of sale of the farm. The plaintiff gave his evidence well. He struck me as a truthful witness. The same goes to Jennifer. I cannot say the same of the first defendant. The first defendant's testimony was tainted with contradictions. It became clear that the first defendant was only attempting to save his farm. The fact that the plaintiff has had undisturbed possession of the farm for almost twelve years tend to corroborate the plaintiff's case that he bought the farm. It is also common cause that the plaintiff is responsible for taxes and rates pertaining to Farm 96 Ziyambe. The plaintiff has not been paying rentals for the farm since he took possession of the farm. The totality of the above evidence points to the fact that the plaintiff bought the said farm. The first defendant's story could not be believed. He failed to completely distance himself from the sale of the farm. He started by refuting he had ever seen the plaintiff nor heard that he purchased the farm. He then changed his story to say his son Daniel told him he found a buyer. He however admitted that when the plaintiff sought transfer from him, his first question to the plaintiff was whether he had finished paying for the farm. Such words are indicative or commensurate with a person with knowledge on the sale of the farm. I am of the view that the first defendant sold his farm to the plaintiff and it was him who received the purchase price. Daniel would hand over the purchase price to the first defendant. Daniel would receive money on behalf of the plaintiff.

On the issue of the farm name not appearing on the purported agreement it is my finding that the first defendant owned only that farm. He sold the farm whilst he was still resident thereon. I am of the view that in the minds of both parties the farm being sold was farm 96 Ziyambe.

The purchase price was also agreed initially at ZW\$160 million and later raised to ZW\$210 million. On the purported agreement there is an endorsement by Daniel that on 12 July 2005 the ZW\$30 million received represented the last payment. It is clear from that endorsement that the whole purchase price was paid.

The plaintiff and his witness stated that the money would be handed over to the first defendant in the presence of his two wives. Daniel handed over all monies except on one occasion where the first defendant's other son Richard counted the money, signed for it and handed money to the first defendant. Surprisingly the first defendant did not see it necessary to call any of those witnesses to dispute the facts. Richard was even in court on the day. It is

my opinion that the first defendant did not want those witnesses contradicting his story. The first defendant was not truthful and I accordingly discarded his evidence.

The essential elements of a sale are that:

1. The seller must intend to sell and the buyer must intend to buy;
2. The subject matter of the sale must be clearly identified and agreed upon and
3. The selling price must be agreed upon; see Mackeurtan (Sale of Goods in South Africa at pa 1).

From the evidence led it is clear that the first defendant intended to sell. He advertised the sale of his farm and when approached by Jennifer he confirmed he was selling. Even by his own evidence the first defendant said he instructed Daniel to sell. That the plaintiff intended to buy has never been an issue. That is common cause and I need not dwell on that. The second requirement is that the *merx* must be clearly identified. Evidence led proved that the first defendant intended to sell his farm in Zviyambe, that is the very farm upon which he used to reside. It became clear that the first defendant only owned that one farm. There is therefore no doubt which farm the first defendant was selling. Everyone involved understood and agreed that Farm 96 Zviyambe was being sold. I am thus of the view that the second requirement was met.

The third requirement is the selling price must be agreed upon. The first defendant submitted that no purchase price was agreed upon. He argued that valuation had to be done first. However the plaintiff on the other hand argued that the purchase price was agreed at ZW\$ 160 million payable as follows; \$ZW60 million deposit and thereafter ZW\$ 10 million per month until the whole amount was paid in full. He produced an agreement which was mainly used as a receipt to bolster his argument. Both parties oral evidence supported the plaintiff's version of events. Under cross-examination first defendant made it clear that he was aware of the agreed purchase price.

From the agreement the plaintiff was to finish off paying for the farm by end of October 2005. The agreement submitted was endorsed the last payment of ZW\$30 million was made on 12 July 2005. The plaintiff therefore abided with the agreement and even settled the agreed amount earlier than 30 October 2005. I am satisfied that the third requirement for a sale agreement was satisfied. The purchase price was agreed at ZW\$10 million. In *Nimmo v Klinkenberg Estates Co Ltd* 1904 TH 310 at 314 the court said:

“The word ‘sale’ is used with various meanings. To lawyers it means the time when the parties have arrived at a valid and binding agreement, apart from any question whether the purchase price has been paid or whether there has been delivery of article sold.”

CORBETT JA in *Westinghouse Brake and Equipment v Bliger Engineering (Pvt) Ltd* 1986 (2) SA 555 at 574 B-C said:

“It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree on some external standard by the application whereof it will be possible to determine the price without further reference to them.”

The price must be serious, fixed or capable of ascertainment and must sound in current money. All the above requirements were satisfied in the matter *in casu*.

The first defendant argued that the *merx* was not properly defined. As I have already ruled above from their conduct the parties knew the *merx* sold. At all times the parties negotiated and agreed on the sale of Farm 96 Zviyambe.

The defendant argued that his son Daniel who entered into a sale agreement with the plaintiff had no authority to transact on his behalf. I am not persuaded by that argument as I have already found that the first defendant is the one who entered into the agreement of sale. The plaintiff discussed the sale with the first defendant. Even the payments, though received and counted by Daniel were handed over to the first defendant in the plaintiff's presence.

Even assuming Daniel was the first defendant's agent, the end result would be the same.

The other strong factor weighing in plaintiff's advantage is that ever since he moved onto the farm in 2004, he has had undisturbed possession of same. The first defendant conceded that he has up to now not attempted to retake possession of the farm. This conduct is consistent with that of a person who is fully aware he sold the farm in question.

Having concluded that, there existed an agreement of sale and that as confirmed by the receipt the last instalment was received on 12 July 2008, there is nothing to stop the granting of the order sought. I however do not believe that this is a matter where first defendant should be penalised by paying costs on a higher scale.

Accordingly I order as follows:

- 1) That the first defendant be and is hereby ordered to effect change of ownership of a certain piece of land measuring 93 2567 hectares called Zviyambe 96 situate in the district of Wedza commonly known as Farm number 96 Zviyambe East Wedza within seven days of this order.
- 2) That the first defendant pays costs of this order.

Lawman Chimuriwo Attorney at law, plaintiff's legal practitioners
MC Mukome, defendant's legal practitioner