

SHEPHERD ZENGWE
and
PRIMROSE ZENGWE
versus
MARIA A. SHANGU
and
LAMECK WINE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 2 March 2017 & 22 March 2017

Civil trial

R.K.H. Mapondera, for the plaintiffs
1st defendant in person

MUREMBA J: On 13 March 2015 the plaintiffs issued summons against the defendants. In their prayer they were asking for:

- “1. An order for eviction of the 1st defendant and all those claiming occupation through her from Stand 9568 Budiriro 5B, Harare.
2. An order that the 2nd defendant against payment of the balance of US\$1 700.00 (one thousand seven hundred United States dollars) tenders cession to the plaintiffs of Stand 9568 Budiriro 5B, Harare.
3. An order that 1st defendant pays costs of suit.”

Despite being served with the summons, the second defendant did not enter an appearance to defend. As a result, a default judgment was granted against him on 14 October 2015. The default judgment ordered him to tender and effect cession of his rights and interest to title in stand number 9568 Budiriro 5B, Harare to the plaintiffs against payment of US\$1 700-00 to him by the plaintiffs within 5 days. Upon his failure to comply with the court order the plaintiffs were to pay the US\$1 700-00 to the Registrar of this court. The first defendant did not comply with the court order and this resulted in the plaintiffs paying the US\$1 700-00 to the Registrar for his collection as per the court order. Upon payment of this money the Sheriff signed the necessary papers to effect cession of rights and interest in the stand to the plaintiffs. The second defendant subsequently collected the US\$1 700-00 from the Registrar

which means that he did not challenge or seek to rescind the default judgment that was granted against him. So at the time the trial commenced in this matter, the rights and interest in stand number 9568 Budiro 5B, Harare had already been transferred to the plaintiffs by virtue of the default judgment which was granted against the second defendant.

The trial in this matter therefore involved the plaintiffs and the first defendant only. After listening to evidence from both parties I can summarise the evidence as follows. The first defendant was customarily married to Exavier Chamunorwa Muwalo (Exavier Muwalo) who later went to Ireland leaving her behind with 2 children. In 2004 the first defendant learnt that the second defendant was selling a vacant stand which is now the subject of the dispute. She got in touch with him, viewed it and liked it. She informed her husband about it and he sent ZW\$15million for her to purchase it, which she did. However, in entering into the agreement of sale with the second defendant on 5 November 2004, the first defendant put the names of her husband as the purchaser. She did not put her names. Pursuant to the signing of the agreement of sale, the first defendant paid the purchase price. Together with the second defendant she went to City Council Offices in Budiro 5 to file the agreement of sale. Since no development had been done on the stand whatsoever as is required by the City Council, it was not possible for the second defendant to effect cession of rights and interest to Exavier Muwalo then. Cession was to be effected at a later stage after complying with the necessary requirements. However, the second defendant gave the first defendant some papers which enabled her to develop the stand. She had a plan for the house drawn and approved by council. She then had the foundation and footing done. She also built an illegal structure in the form of a 2 roomed cottage in January 2005 and took occupation thereof on 2 February 2005. In July 2005 she erected a durawall.

In 2007 the first defendant and her husband started having marital problems as he said that he now had another wife and no longer loved her. He told her to vacate the property. In 2014 he came back from Ireland and continued with his threats of wanting to evict her. She sought salvation in the courts and got a protection order which interdicted him from evicting her without a court order. Unfortunately for her, her husband went behind her back and with the help of the second defendant he had the property sold to the plaintiffs who are husband and wife. Since cession had not yet been effected in favour of her husband he could not sell the property himself hence he sought the assistance of the second defendant. This resulted in the second defendant entering into an agreement of sale with the plaintiffs on 11 September 2014. The purchase price was pegged at US\$12 700-00. The plaintiffs paid a deposit of

US\$11 000-00 to Elite Real Estate trust account since Elite Real Estate was handling the sale. Before the balance of US \$1 700-00 could be paid the first defendant got wind of the new sale agreement that had happened. She engaged lawyers who wrote a letter on her behalf to Budiriro City Council Offices complaining. Apparently, the agreement of sale that the plaintiffs and the second defendant had entered into had also been filed at the City Council, in second defendant's file. The first defendant was told in no certain terms by her husband that he had sold the stand to the plaintiffs and that she should vacate. She remained adamant resulting in the plaintiffs issuing summons in the present matter for her to be evicted and for the second defendant to be compelled to accept the balance of the purchase price and effect cession of rights and interest in the property to them.

During trial the first defendant stated that she cannot be evicted from the property because she challenges the sale agreement that the plaintiffs and the second defendant entered into. She said that although her husband told her that he no longer loves her, they are still married because he has not yet given her a divorce token. She said that before the property was bought by the plaintiffs it belonged to herself and her husband because of the sale agreement that the second defendant and her husband entered into, which sale agreement she facilitated. She said that it did not matter that the sale agreement bore her husband's names only. She said that as husband and wife they had agreed that both their names would be inserted upon cession of rights and interest in the property from the second defendant. The first defendant said that the second defendant could not sell the same property to the plaintiffs because he had already sold it to her and her husband Exavier Muwalo. She said that because of that the property belongs to her and her husband.

Analysis

Firstly, what is clear from the evidence is that the first defendant was not a party to the sale agreement which her husband entered into with the second defendant. Her names are not in the sale agreement. It does not matter that she is the one who negotiated this agreement on her husband's behalf. What it means is that she only acted as his agent or representative. She cannot therefore seek to claim rights emanating from that contract because there is no privity of contract between her and the second defendant. The doctrine of privity of contract provides that contractual remedies are enforced only by or against parties to a contract, and not third parties, since contracts only create personal rights¹. Third parties cannot sue even if

¹ Innocent Maja *The Law of Contract in Zimbabwe* p 27.

they would be benefitted by the performance of the contract². The first defendant who acted as an agent of her husband cannot seek to enforce personal rights that emanated from the contract that she was not a party to. Being married to a person who is a party to a contract does not make one privy to that contract. There is no automatic transmission of privity of contract to a spouse by virtue of marriage, be it customary or civil. This is even evidenced by the conduct of the first defendant's husband who went ahead and sold the same property that the first defendant had negotiated on his behalf without involving her. Being the only one whose names appeared in the sale agreement he had no problems disposing of the property behind her back. At law a wife cannot stop her husband from selling the matrimonial home or other immovable property that is registered in his sole name since such property belongs only to him³. In the present matter we are dealing with the law of contract and not with distribution of matrimonial property arising from divorce which is governed by s 7 of the Matrimonial Causes Act [Chapter 5:13].

The second issue that is pertinent is that the default judgment that the plaintiffs obtained against the second defendant enabled them to have cession of rights and interest in the property to them. This was pursuant to a sale agreement which the plaintiffs entered into with the second defendant in respect of the same stand. On the basis that the first defendant was not a party to the sale agreement that her husband and the second defendant entered into she has no *locus standi* to challenge the sale agreement that the second defendant later entered into with the plaintiffs. Her husband is the only person who has the *locus standi* to make such a challenge of which he is not. If anything, he aided in the signing of the sale agreement between the plaintiffs and the second defendant. The plaintiffs being persons who were ceded the rights and interest in the property, they now have the *locus standi* to evict the first defendant from the property. The first defendant has no *locus standi* to oppose the eviction since the first sale agreement that the second defendant entered into was with her husband and not with her. The plaintiffs are therefore entitled to the eviction order that they are seeking against her.

Normally costs follow the cause, but in the present matter I am not inclined to grant costs against the first defendant considering the predicament that she is in. She genuinely believed that by virtue of being married to Exavier Muwalo who entered into the initial sale

² See Innocent Maja *The Law of Contract in Zimbabwe* p 27

³ *Muswere v Makanza* HH 16/2005

agreement with the second defendant, she is entitled to challenge the sale agreement that the plaintiffs and the second defendant entered into and to remain at the property. This is moreso considering that she played a very active and crucial role of looking for the stand, facilitating the signing of the agreement, having a plan drawn for the house, having the foundation and footing done and erecting a durawall. She had even erected a cottage even though it was an illegal structure. She did all this by herself when Exavier Muwalo was in Ireland. This is a place she has called home since 2005 when she took occupation. Although she still regards Exavier Muwalo as her husband on the basis that he has not yet given her a divorce token, that man long abandoned her in 2007. She is in this whole mess because of him. She has 2 children to take care of yet with this eviction order she no longer has anywhere to stay with them. I will order that each party bears its own costs.

In the result, it be and is hereby ordered that:

1. The first defendant and all those claiming occupation through her are evicted from stand 9568 Budiro 5B, Harare within 14 days of this order.
2. Each party bears its own costs.

Mapondera & Company, plaintiffs' legal practitioners