

FRED KANZAMA  
versus  
MINISTER OF HOUSING AND SOCIAL AMENITIES  
and  
ESTATE OFFICER – MINISTRY OF HOUSING AND SOCIAL AMENITIES  
and  
JOYCE MUNAMATI

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 19 February 2018 and 20 February 2018 & 14 March 2018

### **Continuous Roll**

*T G Musarurwa*, for the plaintiff  
*N M Muzuva*, for the 1<sup>st</sup> & 2<sup>nd</sup> defendants  
*IEG Musimbe*, for the 3<sup>rd</sup> defendant

DUBE J: This court is inundated with matters involving estranged couples who fight for ownership of property. These disputes are sometimes complicated by housing authorities who fail to deal with such disputes fairly and suitably. This is one such case of bungling by the Ministry responsible for administration of government houses.

The plaintiff and the third defendant were in a relationship and they stayed together at Number 16 Kipling Avenue, Fairbridge, Mutare, the house. The first defendant is the authority responsible for the administration of government houses, [hereinafter referred to as the Ministry]. The second defendant is its estates officer. The third defendant is the Provincial Registrar responsible for Mutare and is employed by the Registrar General's Office in the Ministry of Home Affairs. She was allocated the house for her use on the basis of a lease agreement and was the sitting tenant. On or about 25 June 2008, the plaintiff entered into an agreement of sale with the Ministry in terms of which he bought the house. When third defendant realized this development, she approached the Ministry which added her name onto the same agreement of sale entered into between the plaintiff and the Ministry as a co-owner. The Ministry cancelled the earlier agreement

with him. The plaintiff challenges the cancellation and the addition of the third defendant to the agreement. He seeks an order declaring him the sole registered owner of the house. He also seeks an order compelling the first and second defendants to delete the name of the third defendant from the agreement of sale between him and the Ministry thereby retaining his name as the registered owner of the stand.

The defendants oppose the claim. The third defendant in her plea claimed that the right to purchase the property accrued to her as a civil servant and tenant in accordance with government policy. The plaintiff fraudulently substituted himself as the lawful purchaser. When she confronted officials from the Ministry realizing that the plaintiff has misrepresented to them that he was entitled to purchase the property, they endorsed her name on the agreement as a co-owner. She claimed the property on the basis of this endorsement. She has filed a claim in re-convention. She seeks an order declaring her the sole owner of the stand and prays that the agreement of sale between the plaintiff and the Ministry be cancelled. The first and second defendants' position was that the plaintiff and the third defendant are joint signatories to the agreement of sale and hence own the house jointly.

The court was asked to determine the following issues,

1. Whether the agreement between the plaintiff and first defendant was lawfully cancelled.
2. Whether the subsequent act of adding the third defendant to the agreement was lawful.
3. Who is the lawful and true owner of the rights and interest in the stand?

The plaintiff testified in his own case as follows. The third defendant was his customary law wife and they parted ways in 2008. They lived together at the house. He was a Member of Parliament from 2005 to 2013 and ran a bakery business called Mutare Bakers. He entered into an agreement of sale for the property with the first defendant in 2008. He approached Mr. Ignatius Chombo the Minister then, to give him and the third defendant an opportunity to buy the property. He was told that the house could not be sold to the third defendant because she had another house in Messenger's Camp. Further that she had refused to relinquish the Messenger's Camp house so that she could be given an opportunity to buy this property. He proposed that he be allowed to buy the property and the Minister acceded to his request. Mr. Chimba an officer in the Ministry was tasked to assess the house and make an evaluation. He was offered the house, signed an agreement of sale and paid for it. He renovated the house and put up a wall. He discovered that the

agreement had been amended to add the third defendant as a co-owner in December 2008. The agreement now reflects both of them as purchasers and is signed by both. The Ministry wrote to him and indicated that they had withdrawn the sale of the property. He denied misrepresenting any fact to the Ministry or that he abused his office as an MP.

The witness conceded under cross-examination that the third defendant was entitled to stay at the house by virtue of her lease agreement. Further that documents available show that the third defendant offered to relinquish ownership of the Messengers Camp house so that she could buy this house. He accepted that if the authorities had been aware of documents showing that she was prepared to relinquish ownership of the defendant house and that the province had recommended her to purchase the property, they would not have sold the house to him. He did not know that she had a lease agreement with the government. He was aware that as a civil servant she is entitled to benefit from the house. He denied that the Ministry made a mistake when they sold the property to him. He contended that the policy of giving priority to sitting tenants by Government when selling its houses lapsed in the year 2000.

Mr. Chizunza testified on behalf of the first and second defendants. He is a Provincial Estates Officer based at Mutare and is responsible for allocating leases and collection of rentals. He dealt with the third defendant's offer to buy the house. The third defendant has a valid lease with the first defendant and is a sitting tenant in the house. She was entitled to offer to purchase the house and did apply to purchase the house. They received a request to purchase the property from the third defendant and her offer was still being processed at the time of the sale of the house to the plaintiff. She relinquished her interest in the Messengers Camp house in order to buy this house... The property is still registered under the Ministry. The policy was to let only sitting tenants purchase government property and the policy is still in place. It is odd that the property was sold to the plaintiff. The proper person to whom the property ought to have been sold is the third defendant and yet the offer was made to the plaintiff. A spouse can only be made part of an agreement if the spouse with the right to purchase government property elects to include him. It is odd that the third defendant was added to the agreement. The plaintiff was required to approach his office when intending to purchase the property and the agreement of sale processed in Mutare. He has never been a sitting tenant. The property was sold to him in error. He does not know how the mistake occurred or whether it was caused by the plaintiff. When he realized that the plaintiff

had signed the agreement he queried this with Mr. Chimba his boss. The agreement was cancelled .When asked if it was proper for the third defendant to be added to the agreement, his response was that she was supposed to have signed the agreement in the first place and not the plaintiff.

Joyce Munamati testified in her own case. She occupies the property which is a government house reserved for provincial registrars and she has a lease agreement with government which is still extant. She offered to purchase the property in her own right as a sitting tenant and offered to relinquish the Messengers Camp house which had been offered to her when she was a clerk. When she was promoted to the post of provincial registrar, she moved to the property meant for provincial registrars. The house was in a state of disrepair and she would make repairs to it at her own cost. Her first offer through to purchase the house was turned down and she persisted. She was later recommended to purchase the property. She refuted that she hit a brick wall in trying to purchase the property and that the plaintiff approached the Minister on her behalf in order to lobby him because she had refused to relinquish the other house. He never told her that he was going to meet with the Minister and went there behind her back. The plaintiff intercepted her offer and went and put the property in his name behind her back. The plaintiff wielded a lot of power. That is how he went straight to the Minister. Both the Minister and Mr. Chimba made a mistake. The house was bought from funds generated from the sale of her kombis, the bakery they owned and some money from her.

After she discovered that the plaintiff had bought the house, she went to the Ministry and saw Mr. Chimba. She agreed with Mr. Chimba to have her name added to the agreement and sign it instead of removing plaintiff's completely. She did not agree to be a co-owner but was afraid to have his name removed completely. The dispute over ownership of the property would be resolved at court.

She refuted under cross examination that she is married to the plaintiff. He only paid some money to her parents because they had a child together. She wrote in her papers that she is customarily married to him because she is afraid of him.

The witness was a bit emotional but remained consistent with her story and maintained her version under cross examination.

It is common cause that the third defendant had a lease agreement over the house in dispute and was the sitting tenant. At the time the plaintiff entered into an agreement to purchase the house,

the third defendant had offered to purchase the house, and had been recommended to purchase it. The third defendant conceded that her addition to the agreement between the plaintiff and the Ministry was irregular and is of no consequence. The second issue falls away. The simple issue before the court is the validity of the agreement between the plaintiff and the Ministry.

The plaintiff took issue with the cancellation of the sale agreement between him and the Ministry. The plaintiff contended that he should be declared the purchaser. The plaintiff testified that he was entitled to buy the house and that there is no policy that favors sitting tenants to buy government houses ahead of all other people. The defendants insisted that the plaintiff had no right to purchase the property. The defendants led evidence to the effect that the third defendant was a holder of a lease agreement with the first defendant and was entitled to buy the house as the sitting tenant. The evidence from Mr. Chizunza was that there is a government policy that entitles government workers who are sitting tenants to purchase government houses. Mr. Chimba made a mistake when he signed an agreement of sale with the plaintiff and hence the cancellation. They maintained that the plaintiff went behind the third defendant's back, used his influence and signed the agreement of sale when he was not entitled to buy the house.

The plaintiff testified that he went to meet the Minister to lobby on behalf of the third defendant so that they would be able to buy the house. One would expect that before he went there he would have established what the third defendant's position was. He knew what was happening on the ground. I did not believe the plaintiff when he said that it is the Minister who told him that the third defendant did not qualify to buy the house. The probabilities are that he is the one who told him that she does not qualify and offered that he buy the house himself. The Minister would not if he had done his investigations say so because she did qualify. He did not tell the court what he told the Minister, preferring instead to say only what the Minister said to him. It is clear that he did not go there with the intention of lobbying the Minister so that both of them would be able to buy the house but to represent his own interests. All he seems to have done was to offer to buy the house himself. He says he was married to her.

The court accepts that it is government policy to sell property to sitting tenants who are usually civil servants. The third defendant's lease is still extant and being the sitting tenant, would have been entitled to buy the house. At the time that the plaintiff bought the house the third defendant had applied to purchase the property and had been recommended by the Ministry's

provincial officer in Mutare. Her application was being considered. She had relinquished her interest in another house to enable her to buy this house. The third defendant's evidence on this point was corroborated by an officer from the Ministry. It is not correct that the Ministry was reluctant to sell her the house. The communication between the third defendant and the Ministry shows that she had actually been recommended to purchase the house. She was not disqualified from buying the house and the Ministry intended to sell the house to her. Although initially reluctant to sell the house to her, she later recommended to purchase the house. Mr Chizunza's view is that the Ministry sold the property to him through mistake.

There are a number of procedural irregularities surrounding this agreement of sale. There is no track record of the offer made by the plaintiff to the Ministry. The Minister directed that the house be sold to him in clear disregard of government policy and the correspondence regarding the third defendant's offer. This scenario is indicative of exertion of undue influence and, inducement and abuse of office. The plaintiff went directly to the Ministry to purchase the house without going through the provincial offices. The agreement ought to have been signed at the province instead of the head office. It was unprocedural to sell the house to the plaintiff since he was not a sitting tenant neither was he a civil servant. He had no qualification to stand on his own and purchase the property in his own right. If he was married, he was required to produce proof of the marriage. No such proof was given to the Ministry. The fact that he was a member of parliament did not make him a government official. The cumulative effect of the procedural errors is clearly that the Ministry acted unprocedurally in entering into an agreement of sale with the plaintiff and in the face of a written offer to purchase the property by the third defendant. Even the Ministry itself has failed to advance a plausible explanation why it would offer the house to plaintiff instead of the third defendant. It is possible that the Ministry made a mistake when it sold the property to the plaintiff ahead of the third defendant.

The sale to the plaintiff was premised on an incorrect position of the situation on the ground. The plaintiff pulled the carpet from under her feet. He approached the Minister and purchased the house without the knowledge of the third defendant. If the Minister sold the house to him without finding out the position of the house from the relevant officers, he made a mistake and ended up selling the property to an undeserving. The plaintiff has not shown any entitlement to purchase the house.

The defense of mistake was discussed in the case of *University of Zimbabwe V Gudza* 1996

(1) ZLR 249, where the court stated that,

“where an offeror mistakenly makes an offer that is accepted by the offeree, the offeror will only be able to rescind the contract if-

- a) the offer was induced by fraudulent misrepresentation by the offeree, or,
- b) the mistake was a material one the offeree knew or ought to have known that the offer had been made in error.”

The same sentiments were quoted with approval in *Smith v Zesa* 2003(1) ZLR 158. Professor Christie in *The Law of Contract in South Africa 4<sup>th</sup> Ed at p 365* deals with the effect that a mistake has on a contract and states as follows,

“Unless the mistaken party can prove that the other party knew of his mistake, or that as a reasonable person he ought to have known it, or that he caused it, the onus of showing that the mistake was a reasonable one justifying release from the contractual bond will not be easy to discharge”

A mistake is an erroneous belief that certain facts are correct. Where the defense of mistake is raised successfully, it can lead to a contract being held to be *void ab initio* or voidable. In the case of a unilateral mistake, it must be shown that the mistake is material and that the offeree knew or ought to have known that the offer had been made in error.

In *De Jager v Sisana* 1930 AD 71 Curlewis JA at p74 said the following,

“Various decisions of the courts of South Africa were quoted to us in which the principle was laid down that a purchaser of any property, movable or immovable, who buys with the knowledge of the rights of a third party to or in such a property, is bound thereby, and that it will be a species of fraud on his part if he attempted to defeat such third party’s rights”

The plaintiff was aware of the surrender of the other house and the offer to purchase the house when he met the Minister. He did not alert the Minister of the correct position. The plaintiff admitted in evidence that in view of the paperwork available, there is no way that the Minister would have offered him the house if he had been aware of the actual position. The Minister clearly labored under the mistaken view that she did not qualify to buy the house. If the Minister had been told that the defendant had relinquished the other house and her papers were being processed, he would not have acceded to the plaintiff’s request to sell him the house. He was neither a civil servant nor a sitting tenant. The plaintiff did not qualify to buy this house. The plaintiff bought the property with the knowledge that the third defendant had rights to the property. This was not a clean sale. There is an element of deceit and chicanery in the manner in which the plaintiff bought

the property. His conduct of going behind the third defendant's back and purchasing the property behind her back amounts to fraud .He is not a bona fide purchaser. This court ought to come to the aid of the third defendant and protect her against the improper actions of the plaintiff. I find that the agreement was validly cancelled regard being had to the procedural irregularities surrounding the sale. The sale remains cancelled and there is no agreement to speak about. The court cannot declare the third defendant the purchaser firstly because her offer has not yet been accepted and she did not buy the property and secondly the agreement that she purported to have entered into with the Ministry has no leg to stand on. Both agreements are not valid legal processes. The court does not make contracts for parties. The parties are taken to their original positions. The third defendant's lease is still extant and she is still in occupation of the house. It is up to the third defendant her to pursue her offer. The court cannot accede to the third defendant's request to cancel a contract that has already been cancelled but can simply confirm the cancellation. To that extent, the third defendant's claim in reconvention partly succeeds. The plaintiff being the unsuccessful party shall pay the third defendant's costs.

In the result it is ordered as follows,

1. The plaintiff's claim is dismissed with costs.
2. The third defendant's claim in reconvention succeeds in part.
3. Cancellation of the agreement of sale between the Ministry and the plaintiff is hereby confirmed.
4. The plaintiff is to pay the third defendant's costs for the counterclaim.

*Titan Law Chambers, plaintiff's attorneys*  
*Civil Division of the Attorney General's Office, 1<sup>st</sup> & 2<sup>nd</sup> defendants' attorneys*  
*Bere Brothers, 3<sup>rd</sup> defendant's Attorneys.*