

PENIAS NYAMWINO  
versus  
B. GWAFWA  
and  
SALTANA ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 8 & 9 February 2018 and 28 March 2018

### **Civil Trial**

*W. Bherebende*, for the plaintiff  
*T. Machaya* for the 1<sup>st</sup> defendant  
*T. Mudambanuki*, for the 2<sup>nd</sup> defendant

DUBE J: The plaintiff seeks an order for eviction of the first defendant from stand 7874 Belvedere West, Harare.

The plaintiff's claim is based on the following facts. On 23 August 2006 the second defendant, a property developer, sold stand number 7874 Belvedere West, Harare [hereinafter referred to as the stand] to the plaintiff. The parties entered into an agreement of sale and the plaintiff paid the full purchase price for the stand. On 6 November 2012, the first defendant moved onto the undeveloped stand without his consent and started developing the stand. The plaintiff asserts that the first defendant has no right to occupy the stand without his consent. He seeks the eviction of the first defendant from the stand. In the alternative, he seeks an order that the second defendant allocate another stand to him or compensate him in the sum of \$40 000-00, being the cost of a similar stand.

The first defendant is opposed to the claim. He lays claim to the stand and states that he acquired the stand in 2003. If the plaintiff and the second defendant entered into an agreement of sale of the stand in 2006, the sale is irregular and unlawful because he had already bought the stand. The second defendant supports the plaintiff's claim and asserts that he is the legitimate purchaser of the stand. It averred in its plea that the plaintiff bought the stand from directors of the second defendant and his sale agreement is authentic.

The following issues were referred to trial.

1. Whether or not the plaintiff has *locus standi* to evict the first defendant.

2. Whether or not first defendant has a valid agreement of cession in respect of Stand 7874 Belvedere West, Harare.
3. Whether the agreement between the second defendant and the plaintiff is valid and if so whether it supersedes the one entered into by the first defendant and Travolta Jana
4. If the answer to issue No. 3 is in the negative, whether second defendant should compensate the plaintiff and to what extent?

Penias Nyamwino testified in his own case and testified as follows. He bought the stand in 2006 from the second defendant. He realised in 2011 to 2012 that someone else was claiming the stand. There were a number of disputes and double allocations related to the second defendant's stands. At some stage the High Court directed that a joint management committee be put in place to supervise the stands and deal with the issue of double allocations of the stands. He was vetted to determine his ownership of the stand and this resulted in him being made to sign an addendum to the agreement of sale. He began to pay levies to develop the area. He was not aware of the existence of any previous purchasers. He was later told that the stand had previously been sold to someone who failed to pay for it leading to the stand being repossessed. That person later sold the stand to someone else who in turn sold it to the plaintiff. He was not aware that the second respondent was under judicial management when he bought the stand from it. He wants his stand back and should that fail, he wants the second defendant to give him \$40 000-00 to enable him to buy another stand.

He insisted under cross examination that the agreement of sale he entered into was with the second defendant and that it is still valid. He wants to be compensated by the second defendant should the court find in favour of the first defendant. He was not aware that the stand belonged to Mr Pahwaringira. If Mr Pahwaringira was the owner of the stand and he sold it to him, he is the person to reimburse him should the court find that the first defendant is the owner of the stand.

The plaintiff testified well and maintained a simple story. I believed his version of events. He began to show some confusion whilst under cross-examination when it was suggested to him that the stand was sold to him by Mr Pahwaringira and not the second defendant. Whilst he initially stated that it is the second defendant who should compensate him, he changed goal posts and indicated that Mr Pahwaringira should do so. Later under re-examination he changed yet again and said that he should be compensated by Saltana. Besides

this lapse, which was caused by the introduction of Mr Pahwaringira, the witness gave his evidence pretty well.

After the plaintiff closed his case, Bright Gwafa testified in his own case. He bought the stand in question from Travolta Jana in April 2003. Before that the stand had been sold on three separate occasions. The first agreement was between Terrence Sydney Kavande and the second defendant. Terrence Kavande struggled to pay for the stand resulting in him selling the stand to Patshedzo Manala. Borm Real Estate, [hereinafter referred to as Borm], who were the second defendant's agents were involved in the sale. Mr Manala paid the full purchase price for the stand to Borm. Mr Manala later sold the stand to Chenjerai Travolta Jana from whom he bought the stand. After he bought the stand, he dealt with Tudor House Consultants, (Pvt) Ltd, [hereinafter referred to as Tudor], and paid levies to them because the second defendant was under judicial management. Tudor confirmed that he was the owner of the stand. The second respondent refused to accept levies from him in 2014. He encountered the plaintiff in 2012 when he started building his house. The stand is his and he bought it well before the plaintiff did and the sale is above board. The plaintiff's recourse lies with the second respondent.

He testified that although the second defendant issued a certificate of repossession, the second agreement between Mr Kavande and Mr Manala supersedes the repossession because the money was paid in full to Borm Real Estate. Borm Real Estates was the respondent's agents and was involved in the sale of the stand to Mr Manala. Borm represented the second defendant in the sale so the second respondent knew what was happening. The second defendant is aware of the sale to him that is how his name ended up in the records of Tudor. The witness testified generally well and gave a clear narration of the sequence of the sales of the stand before he bought the stand. He maintained his story under cross-examination.

Dave Pfukwa Mutingwende testified on behalf of the second defendant. He is an executive director of the second defendant. The second defendant appointed Borm Real Estates to market its stands for them. The procedure agreed to was that any buyer who wished to buy a stand would be required to sign a form and two directors of the second defendant would be required to sign the form as developers. The directors of the second defendant are the ones who would sign the agreements of sale. The stand was initially bought by Mr Kavande sometime around 2002/3 and he paid for it. The directors of second defendant signed the agreement in accordance with procedure. The second defendant was placed under judicial management. Mr Kavande failed to pay his subscription in breach of the agreement of sale. In

2003 they cancelled the sale and repossessed the stand and issued a certificate to that effect through Borm. In 2005 they agreed with Borm that directors of the second defendant be allocated stands as they were not getting salaries. They did not have any information of subsequent buyers at that time. The said stand was allocated to Mr Pahwaringira a director, who later sold it to the plaintiff. The agreement of sale with the plaintiff reflects the second defendant as the seller because there was no certificate of compliance in the name of the director. The agreement was executed by Deep Horizons Estate Agents on behalf of the second defendant. He does not know if the plaintiff was told that the second defendant was under judicial management at the time of the sale. The stand belongs to the plaintiff. He even signed an addendum to the agreement of sale after an audit of the stands was done confirming that he is the owner of the stand.

When the judicial manager handed over, that is when they discovered that there were subsequent sales after the sale to Mr Chivande. Once repossessed, a subsequent sale of a stand was supposed to have an offer form signed by directors to show that the first purchaser had cleared himself with the developer. They later learnt that Borm was involved in the second sale. The name of the first defendant was in the records before the appointment of the judicial manager. It also ended up with the judicial managers because Borm submitted his name to them. They never received the purchase price after the sale to Mr Manala. Borm had no proof of payment. Borm ought not to have conducted the sale without authority and without the directors of the first defendant having signed the offer form and cleared the first purchaser. The conduct of Borm is very questionable and confused clients because it is the same Borm that gave notice to cancel the sale but failed to bring subsequent buyers to sign the offer form. Mr Kavande had no right to transfer the property to anyone else as he was not fully paid up. The judicial manager had no power to govern stands which he knew belonged to directors. There was connivance between Borm and Mr. Kavande that is the reason why no offer form was signed. The first defendant should go to Mr Jani for a refund of the purchase price he paid for the stand. The value of a similar stand was US\$20 000-00 to US\$25 000-00 in 2016. Mr Pahwaringira should compensate the plaintiff should the court find in favour of the first defendant. The second defendant can reimburse him levies he paid to it.

It is common cause that Borm was contracted to sell stands on behalf of the second defendant. The second defendant sold the stand to Mr Kavande. According to a letter written to Mr .Kavande by Borm in November 2002, the sale was subsequently cancelled and the stand repossessed for failure to pay the required subscriptions. Mr Kavande later sold the stand to Mr

Manala. Borm was aware of this sale and received the proceeds of the sale from Mr Manala who later sold the stand to Mr Jana. Mr Jana later sold the stand to the first defendant in April 2003. The first defendant paid for the stand. It was not disputed that when the second defendant sold stands, the agreements of sale would be signed by the directors of the second defendant on its behalf. That is the procedure followed when Mr Kavande bought the stand.

It is also common cause that the plaintiff entered into an agreement with the second defendant for the sale of the same stand in 2006. The first defendant bought the stand before the plaintiff did in 2006. The plaintiff was unaware of the sale of the stand to the first defendant when he bought it. He was unaware that the second defendant was under judicial management at the time of the sale. The issue that this court is being called to determine is who between the first defendant and the plaintiff is the legitimate owner of the property.

The plaintiff claimed that he is the legitimate owner of the stand which was sold to him by the second defendant. He only got to know of the interest of Mr Pahwaringira in the stand at the trial. The first defendant maintained that he is the lawful owner of the stand having bought it well before the plaintiff did. The first defendant insisted that the person who sold the stand to the plaintiff is the second defendant as reflected by the agreement of sale. Second defendant maintained that the stand belongs to the plaintiff. The second defendant's witness testified that the first defendant is not the legal owner of the stand as the sale of the stand to Mr Manala was irregular. Whilst the plaintiff believed that the stand belonged to the second defendant, the second defendant insisted at the trial that the stand sold to him belonged to Mr Pahwaringira and that it was Mr Pahwaringira who sold the stand to him. The second defendant claims that it did not authorise Borm to facilitate the sale between Mr Kavande and Mr Manala and to receive the purchase price on its behalf. It further claims that it did not receive the purchase price. It has sought to distance itself from the activities of Borm and alleged fraud on the part of Borm.

It is clear from both the plaintiff's evidence and that of the second defendant's witness that the plaintiff was never told that the stand belonged to Mr Pahwaringira when he bought the stand. He bought the stand on the understanding that it belonged to the second defendant and entered into an agreement with it. There is a letter to Tudor House Consultants, the judicial managers of the second defendant, written in July 2006 that states that the stand had been allocated to Mr Pahwaringira and belonged to him. What is puzzling about this suggestion is that the plea filed on behalf of the second defendant does not mention the involvement of Mr Pahwaringira at all. The second defendant in its plea stated that the plaintiff is the legitimate

purchaser as evidence by the agreement of sale which shows the name of the parties to the agreement of sale as the plaintiff and the second defendant. The suggestion that Mr Pahwaringira was the owner of the stand emerged at the trial and was not pleaded. The suggestion actually took the plaintiff by surprise when he was being cross-examined by counsel for the second defendant. Mr Pahwaringira was not called as a witness in this case. Borm would have been in a better position to comment on the authenticity of the letter had its representative been called to testify.

Even assuming that Mr Pahwaringira is the owner of the property, the plaintiff did not enter into the agreement for the sale of the stand with its owner. The second defendant purported to be representing Mr Pahwaringira but had no authority to act in that capacity. The stand was sold by the second defendant at a time the second defendant had no legal capacity to sell the stand as it was under judicial management.

The history of the stand also shows that the stand was sold to Mr Kavande by the second defendant who struggled to pay the subscriptions required. Borm wrote to Mr Kavande indicating that the agreement of sale between him and the second defendant had been cancelled and the stand was repossessed. The suggestion by the second defendant is that after the stand was repossessed, it was allocated to Mr Pahwaringira. Mr Kavande managed to arrange a purchaser and sold the stand to Mr Manala after the stand had been repossessed. When the stand was sold by Mr Kavande, it was with the knowledge and participation of Borm. The agreement between Mr Kavande and Mr Manala is on a Borm Real Estate letter head. It is not signed by the directors of the second respondent as happened in the first sale of the stand between Mr Kavande and second defendant. There was no evidence that he cleared himself with the second defendant first. This suggests that the sale may not have been authorised by the second defendant and that the second defendant was not aware of that sale. Evidence is clear that Borm was mandated to sell stands on behalf of the second defendant. The proceeds of the sale of the stand to Mr Manala were paid to Borm by the buyer. Borm was not called to explain the circumstances surrounding the sale and what it did with the money. It is difficult to find that the second defendant became aware of the sale or received the proceeds of the sale of the stand to Mr Manala in the absence of the evidence of Borm.

Generally an agency agreement is created where a person has authority to act and contract on behalf of another. An agent who enters into a contract on behalf of his principal with a third party whilst he is in the course of his ordinary business, binds the principal. The

act of the agent is taken to be that of the principal. *H. Christie in Business Law in Zimbabwe, Juta & Co 1998 at p 332* states as follows on the liability of an estate agent,

“An estate agent is sometimes said not to be an agent at all, as he does not conclude a contract on behalf of his principal and does not undertake a mandate. This is true as far as it goes but, as will be seen, he is treated as an agent for some purposes. It is equally important not to think of him as an agent to whom all the rules of agency apply as it is not to think of him as a non-agent to whom none of these rules apply”.

An agreement with an estate agent is a contract that is *sui generis*. Generally, the estate agent does not conclude the contract of sale on behalf of his principal unless he has specific authority to do so. He has no mandate and will sell the property where he is able to do so. He is paid for introducing the parties rather than for concluding the contract of sale. The practice is that an estate agent receives instructions from a property owner to sell a property and is tasked to find a buyer whom he may introduce to the seller of the property. It is up to the seller and buyer to conclude a contract of sale.

When Mr Kavande sold the stand to Mr Manala, he did so after the sale had been cancelled and the stand repossessed. Mr Kavande no longer had any legal ground to be selling a stand that no longer belonged him. It is Borm that issued a certificate of repossession of the stand and directed it to him. It knew that Mr Kavande had ceased to be the owner of the stand and still proceeded and facilitated the sale to a third party. It collected the money paid for the stand and no one knows what it did with the fact that Borm was involved in the sale does not clothe the sale with legality. It was not shown that Borm was an agent for any other purpose, except to sell stands belonging to second defendant. It was not shown that Borm had the mandate from the second defendant to facilitate subsequent sales by buyers of the stands to third parties without involving its principal. The sale of the stand to Mr Manala in the face of the cancellation of the sale and repossession of the stand is a nullity and is of no force or effect. Once the agreement of sale was cancelled, Mr Kavande was divested of all rights and interest in the property and was no longer entitled to deal with the property in any manner whatsoever without the consent of the second defendant. Every subsequent sale that followed after the sale to Mr Manala is a nullity and has no force or effect. The sale of the stand by Mr Jana to the first defendant is not a valid sale. The first defendant's claim to the stand has no leg to stand on.

When the second defendant sold the stand in August 2006 it did so during the period when it was under judicial management. This was during the time that Tudor Housing Consultants had been appointed to act as Judicial Managers from around April 2006. The

directors of the company had been divested of all powers and could not purport to act on behalf of the company. The sale of the stand to the plaintiff was irregular because it was sold by the second defendant when it was under judicial management. Any purported dealing with the land by the second defendant is invalid.

Even if one accepts the standpoint that the stand belongs to Mr Pahwaringira, the second defendant failed to show that it had authority to act on behalf of Mr Pahwaringira. The second defendant could not legally sell a stand that did not belong to it without the authority of the owner of the stand. The parties to the contract are simply wrong. The sale would still be irregular because the second defendant has not shown that it did so with the authority of the owner of the stand. The agreement of sale entered into between the second defendant and the plaintiff also a nullity for the reason of lack of authority. The agreement of sale agreement between the second defendant and the plaintiff is invalid. Once it is accepted that the sale between the plaintiff and the second defendant is invalid, there is no sale to talk about. The fact that the plaintiff has been paying levies for the stand does not advance his case regard being had to the fact that the sale was void *ab initio*. The plaintiff has no *locus standi* to evict the first defendant from the stand.

The second defendant is the one that misled the plaintiff into believing that the stand was available to it and sold it to him. The plaintiff does not know Mr Pahwaringira. The plaintiff's claim for reimbursement of the stand lies against the second defendant. The second defendant has caused the plaintiff's demise. The plaintiff is entitled to an amount of money that will enable him to buy a similar stand. The valuation report shows that the current market value of the stand is \$30 000.00. The plaintiff is entitled to compensation from the second defendant. The second defendant shall bear the costs of these proceedings. It is the one responsible for this mix up and should bear the consequences.

It is accordingly ordered as follows.

1. The plaintiff's main claim is dismissed.
2. The second defendant is to compensate the plaintiff for the stand in the sum of \$30 000.00.
3. The second defendant is to pay the costs of both the plaintiff and the first defendant.

*Bherebhende Law Chambers*, plaintiff's legal practitioners  
*C. Mpame and Associates*, 1<sup>st</sup> defendant's legal practitioners  
*Jarvis Palframan*, 2<sup>nd</sup> defendant's legal practitioners