

1. FRANCIS SAMURIWO HC 12543/15
versus
KUNDAYI EVELYN MAZAIWANA
and
KUDZAYI McDONALD MAZAIWANA
and
REGISTRAR OF DEEDS
2. KUNDAYI EVELYN MAZAIWANA HC 2923/15
and
KUDZAYI McDONALD MAZAIWANA
versus
FRANCIS SAMURIWO

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 13th, 14th & 20 March 2019

Trial

M Muvhundisi, for the Plaintiff
M Moyo, for the Defendants

CHIKOWERO J: A consent order granted on May 17th 2016 records the consolidation of these matters. The same property and virtually the same parties are involved in both cases.

The first is an action where the plaintiff claims:

- (a) an order for confirmation of the agreement of sale entered into by and between Plaintiff and Theophilus Melusi, in his capacity as the guardian of first and second defendants at that time on or about 28th February 2005 in respect to stand 957 Strathaven Township 11 of Stand 970A Strathaven Township, Harare (hereinafter referred to as the “property”)
- (b) an order that the late Theophilus Melusi received the sum of US\$90 000 from Plaintiff as the purchase price of the property which money was to be used for payment of the school fees of first and second Defendants who were studying in Australia

- (c) an order that first and second defendants take all necessary steps to pass transfer of the property to plaintiff pursuant to an agreement of sale entered into between the Plaintiff and Theophilus Melusi in his capacity as guardian of the first and second defendants at that time, in terms of which plaintiff has fully complied with his obligations including paying off the purchase price in the sum of US\$90 000 to the said Theophilus Melusi.
- (d) an order that if first and second defendants fails (sic) within seven (7) days of the court's order to take necessary steps to effect transfer into plaintiff's name, the Sheriff of the High Court or his lawful deputy be authorised and directed to take such steps in the place and stead of the defaulting first and second defendants and transfer into plaintiff's name within 7 days of service of this order upon them.
- (e) Costs of suit on a legal practitioner and practitioner scale.

IN THE ALTERNATIVE

- (a) an order for restitution by first and second defendants to plaintiff of the sum of US\$90 000 which was duly paid by the plaintiff as the purchase price of the property and which money plaintiff understands the late Theophilus Melusi in his capacity as the guardian of the first and second defendants at that time used to pay towards their school fees in Australia.
- (b) interest on the said sums in paragraph (a) above at the prescribed rate of 5% per annum from the date of issuance of summons to date of full and final payment.
- (c) costs of suit on a legal practitioner and client scale.

Matter number 2 is a court application for eviction of the respondent and all those claiming through him from occupation of the same property described in the main relief section of the summons in the first matter.

Costs are sought on the higher scale.

The basis of the eviction application is applicants' ownership of the property in question coupled with respondent's refusal to vacate despite requests to do so.

On 12 September 2018 the parties in the summons matter signed and issued a statement of agreed and disputed facts.

The agreed facts were set out as follows:

1. The property at the centre of the dispute is Stand 957 Strathaven Township 11 of stand 970A Strathaven Township, Harare (hereinafter called the property).
2. The property belonged to 1st and 2nd defendant's father the late Irimayi Macdonald Mazaiwana whose estate was registered with the Master of the High Court under DR 1524/93.
3. Upon the death of Irimayi Macdonald Mazaiwana, the property was to be transferred to his surviving spouse, Sifanele Margret Mazaiwana and to the 1st and 2nd defendants who were minors at the time.
4. Sifanele Margret Mazaiwana's estate was subsequently registered with the Master of the High Court under DR 139/12. The property was listed among her assets. The estate was duly administered, advertised and distributed in terms of the Administration of Estates Act [*Chapter 6:01*].
5. The plaintiff lodged his claim with the Executor of Sifanele Margaret Mazaiwana's estate who considered and dismissed it.
6. The Executor then transferred the property to 1st and 2nd defendants under Deed of Transfer 1066/15. The transfer was duly approved by the Master of the High Court. The Master's decision is extant and plaintiff has not challenged it to date.
7. 1st and 2nd defendants were staying with Theophilus Melusi at the time of Sifanele Margret Mazaiwana's death.
8. Theophilus Melusi was neither a legally appointed guardian of the 1st and 2nd defendants nor Executor of either of the estates.
9. 1st defendant was a minor at the time plaintiff allegedly purchased the property from Theophilus Melusi, having been born on 28 January 1986.
10. The plaintiff is currently occupying the property but he is not paying rent to 1st and 2nd defendants, being the registered owners of the property.
11. 1st and 2nd defendants have instituted eviction proceedings against the plaintiff under case number HC 2923/15 on the basis that they are the registered owners of the property and plaintiff is occupying the property without their consent.

The disputed facts were couched thus:

1. The plaintiff bought the property from Theophilus Melusi on or about 18 February 2005 for a sum of US\$90 000-00.

2. The property was sold to raise school fees for the 1st and 2nd defendants and the purchase price was used for that purpose.
3. Theophilus Melusi surrendered the original title deeds of the property to the plaintiff pursuant to the agreement of sale.
4. Plaintiff registered the estate of the late Sifanele Margret Mazaiwana and paid costs for registration of the estate through 1st and 2nd defendants' erstwhile legal practitioners Messrs Chikumbirike and Associates on the understanding that the estate would pass on transfer of the property to him.
5. Plaintiff only learnt that transfer of the property had been effected to the 1st and 2nd defendants through an application filed with this court under case number HC 2923/15.

The two matters having been consolidated on 17 May 2016, referral to trial then ensued as proved by a Joint Pre-Trial Conference Minute issued on 21 September 2018 which reflected the issues for trial, in the now consolidated matter, as the following:

- “1. Whether or not the plaintiff purchased the property from Theophilus Melusi if so;
2. whether or not the alleged agreement of sale between Theophilus Melusi and the plaintiff was lawful? If so
3. Whether or not plaintiff is entitled to transfer of the property or refund of US\$90 000-00 in the alternative.
4. Whether or not 1st and 2nd defendants are entitled to evict the plaintiff and all those claiming occupation through him from the property?
5. What order should be made as to costs?”

The onus was captured as being on the defendants only in respect of the 4th issue, with the plaintiff bearing the burden of proof in respect of issues 1-3. The 5th “issue” should not have been included in the Joint Pre-Trial Conference Minute at all.

At the commencement of the trial, and before any evidence was led, I asked counsel for the plaintiff whether the main relief in the summons was maintainable in view of the invalidity of the agreement of sale. Such invalidity arose from the fact that estate property was allegedly sold by a person who was not an Executor and at a time when the deceased estate in which that property was an asset was not even registered.

After consulting with the plaintiff, counsel advised that the plaintiff expressly abandoned the entire remedies claimed in the main.

Trial therefore commenced, but only in respect of the alternative claim for restitution of the sum of US\$90 000-00, and the claim for eviction.

The basis for the former was the allegation that the plaintiff had paid US\$90 000-00 to Theophilus Melusi, which Melusi had gone on to use to pay the first and second defendants' school fees.

The plaintiff gave evidence, so did Pius Matambanadzo. The plaintiff closed his case.

This triggered an application for absolution from the instance. I heard submissions from counsel for both parties.

At the conclusion of the submissions I absolved the defendants from the instance, with costs. Because of the intertwined nature of the matters before me, and with the agreement of both counsel, I immediately pronounced myself on the eviction matter. I granted that claim with costs.

These are the reasons for the judgment that I made at the trial.

In the matter of *J and J Transporters v Ernest Porusingazi* HH 32/19 I traversed the principles applicable in an application for absolution from the instance at the close of the plaintiff's case as set out and applied in the courts. Those principles being settled, I find it tedious and unprofitable to re-state them.

Instead, it is preferable that I simply apply the law to the evidence. This I now do.

DID PLAINTIFF PURCHASE THE PROPERTY FROM THEOPHILUS MELUSI FOR US\$90 000-00?

The starting point is that even if I assume that it was shown, *prima facie*, that such sale occurred, the common cause position at the trial was that such contract would be illegal and invalid.

The seller, not being the Executor, had no authority to sell the rights, title and interest in that property.

It was common cause that the property was still held in terms of a Deed of Transfer registered in the name of the first and second defendants' father, one Irimayi Macdonald Mazaiwana, at the time of the purported sale.

Irimayi was dead by then.

His estate was not yet registered with the Master of the High Court.

The Master's consent to the sale could not and was not therefore obtained.

Disposal of property belonging to a deceased's estate without complying with the provisions of the Administration of Estates Act [*Chapter 6:01*] is invalid. An estate can only be represented by a duly appointed Executor. Consent of the Master to sale of the immovable property belonging to an estate is required when disposing of such property per s 120 of the Administration

of Estates Act [*Chapter 6:01*]. This, the legal position, is laid out in *Alfred Muchini v Elizabeth Mary Adams and 4 Others* SC 47/13, as well as in *Joshua Kandengu & 2 Others v Olga Kandengu & 2 Others* HH 113/06.

Further, the contract would also be illegal for contravention of the Exchange Control Act [*Chapter 20:05*] as read with the Exchange Control Regulations Statutory Instrument 109/96. Plaintiff admitted that he had no exchange control authority to pay the purchase price in foreign currency.

Section 5 (1) (a) (ii) of the Regulations actually criminalizes failure to comply with the provisions of the Act and Regulations.

Both plaintiff and Melusi therefore committed a crime if in fact the purchase price was paid by the former to the latter in foreign currency.

Further first defendant was a major at the time of the purported sale. No evidence was led that she authorized Melusi to contract on her behalf.

An illegal agreement which has not yet been performed either in whole or in part will never be enforced by the court. See *Chioza v Siziba* 2015 (1) ZLR 252 (S).

The result is that the matter would have been allowed to proceed into the defendant's case due regard being had to relaxation of the *in pari delicto* principle.

Such relaxation is permissible where both parties are equally in the wrong in order to do justice between man and man. See *Dube v Khumalo* 1986 (2) ZLR 103 (S); *Hativagone & Another v CAG Farms (Pvt) Ltd & Ors* SC 152/14.

DID PLAINTIFF ESTABLISH, PRIMA FACIE, THAT HE PAID US\$90 000.00 TO THEOPHILUS MELUSI?

He failed dismally.

No documentation whatsoever was tendered to suggest such payment.

Plaintiff admitted no such documentation was ever in existence.

Yet US\$90 000.00 is not a trifling amount of money even in the Zimbabwean 2015 economic environment.

Plaintiff testified that the payment was made in cash, as a lump sum.

Pius said no, three instalments were made. Pius did not know the total amount paid nor the *quantum* of each instalment.

No one testified that he was present and saw plaintiff effecting the payment of the purchase price to Melusi.

Pius admitted that he was not present when the purchase price was paid, as a lump sum or in instalments.

Melusi had died at the time of the trial.

The agreement of sale itself, exh 1, reflects the purchase price as ZW\$90 000 000.00 and not US\$90 000.00.

In these circumstances, it would have been mischievous were I to find that plaintiff had established, *prima facie*, payment of the sum of US\$90 000 000.00 or any amount for that matter.

DID PLAINTIFF ESTABLISH, PRIMA FACIE, THAT THE US\$90 000.00 WAS USED AS SCHOOL FEES FOR 1ST AND 2ND DEFENDANTS?

This was a total disaster.

Plaintiff and his witness confessed that they had completely nothing to show me as evidence that the US\$90 000.00 was expended towards the school fees.

In fact the two spoke about Melusi as a heavy borrower, monies expended towards the upkeep of the first and second defendants, towards their airfares and towards their school fees. No figures were mentioned. Both admitted inability to go beyond these vague statements.

Quite clearly, this was a hopeless case right from the outset.

What plaintiff and his witness told me was a story. That story came nowhere near establishing why I should have ordered the matter to proceed to the defendants' case.

Even if the defendants were to open and shut their case without leading any evidence, there was no way that I could have made a mistake, let alone a reasonable one, and gave judgment for the plaintiff.

It would have been a complete waste of time to go beyond the plaintiff's case. Mr Moyo's reference to *Ernest Tekere vs Previous Sibanda* HB 90-18 was apposite in this regard.

Since the plaintiff had abandoned his claim that transfer of the rights, title and interest in the property be effected in his favour, it left Deed of Transfer number 1066/15 in favour of the applicants in the eviction matter unchallenged. In any event, that title deed stood and still stands. There was at law no defence to the claim for eviction. See *Silver Zhuwaki v Tazvitya Mutandwa*,

Brender Carol Leeper, The Deputy Sheriff Harare, the Registrar of Deeds and Clever
Mandizvidza N.O SC 18/14

DISPOSITION

The above constitute the reasons why on conclusion of submissions, I ordered that:

- (A) In respect of case number HC 12543/15:
 - (1) 1st and 2nd defendants are absolved from the instance.
 - (2) Plaintiff shall pay the costs of suit.
- (B) In respect of HC 2923/15:
 - (1) The respondent shall vacate certain piece of land situate in the district of Salisbury called stand 957 Strathaven Township 11 of stand 970A Strathaven Township also known as house number 13 Christ Church Avenue, Strathaven Harare held under Deed of Transfer Number 1066/15 in favour of Kundayi Evelyn Mazaiwana and Kudzayi Macdonald Mazaiwana failing which the Sheriff shall evict him together with all those claiming through him.
 - (2) Respondent shall pay the Applicant's costs of suit.

Chivore Dzingirayi Group of Lawyers, plaintiffs' legal practitioners
Dube-Banda Nzarayapenga and Partners, 1st and 2nd defendants' legal practitioners