

DIVVYLAND INVESTMENTS (PVT) LTD
versus
DAVID CHIWEZA

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 21 March 2019 & 10 April 2019

Civil Trial

Advocate *S Hashiti*, for the plaintiff
IEG *Musimbe*, for the defendant

CHIKOWERO J: The absence of a written agreement of sale notwithstanding, the defendant proved that he purchased the entire property otherwise known as Stand number 12 Le Roux Drive, Hillside, Harare at a purchase price of US\$68 000.00.

He also proved that the plaintiff, with the connivance of Brian Machengo of Property Plus Realtors (Pvt) Ltd, frustrated his efforts to pay the sum of US\$14 384.01 being the outstanding balance of the purchase price, interest as at 30 August 2010 included.

It follows that the defendant's counter-claim succeeds.

This result also means the plaintiff's claim fails.

In fact, the plaintiff's case was riddled with inadequacies of evidence, manifestly illogical, pregnant with concessions favourable to the defendant, diametrically opposed to the documentary evidence, against the probabilities, wanting in credibility in respect of the sole witness called by the plaintiff and quite simply hopeless.

In a nutshell, this trial was a sheer waste of the court's time. The plaintiff was the engineer thereof. This matter should never have proceeded into trial at all.

On Thursday 27 August 2009 the Herald newspaper, on page C5, carried this advertisement:

PROPERTY PLUS
REALTORS
215 Fife Avenue
Harare

MARLBOROUGH CENTRAL
\$80 000.00

On 1 acre, solid 3 beds, dining, lounge, bar, pool, immediate occupation, no transfer fees, up to 12 months to pay;

HATFIELD (KILWINNING)
\$80 000.00

On 1 ¼ acre, 4 beds, mes, lounge, bar, triple garage, workshop, walled and gated. Immediate occupation, deeds, up to 12 months to pay.

HILLSIDE: \$70 000

Entertainers dream, 1 acre of panoramic views, 2 beds, dining, lounge, immediate occupation, no transfer fees. Payment terms up to 12 months. Bridging finance can be arranged.

Phone
Brian 0913 484213
Wimbi 0912 252209
Mike 0912 386173

In response to the advertisement, defendant appeared at the offices of the estate agency aforesaid.

There, on 30 August 2009, he talked to Brian Machengo, a property negotiator employed by Property Plus Realtors (Pvt) Ltd, and concluded an agreement of sale for the Hillside property.

It is only in respect of that transaction that the suit and counter suit are concerned with.

Before concluding the agreement of sale, however, Brian gave the defendant an offer form for completion by the latter.

Since Property Plus had been mandated to sell the property by the owner, the plaintiff herein, Brian knew the terms upon which the property was being sold, as well as the identity of the property being sold.

The offer form after defendant was through with it reads:

OFFER FORM

I/WE DAVID CHIWEZA I.D. NO. 70-124938Q42 DATE(S) OF BIRTH 20-11-60
RESIDENTIAL ADDRESS 17 BARGROVE CLOSE, GLEN LORNE, HARARE

PHONE NUMBER (WORK) 710193/6 (HOME 494630 (CELL) 011608992 HEREBY
OFFER \$68 000.00 (WORDS) SIXTY-EIGHT THOUSAND DOLLARS

To purchase property being 12 Le Roux, Hillside, Harare

METHOD OF PAYMENT DEPOSITE (*sic*) OF \$15 000.00 AND INTEREST OF 1%
ON THE BALANCE

I/WE UNDERTAKE TO PAY THE FULL AMOUNT NOT LATER THAN
30 AUGUST 2010 FAILING WHICH THE SELLER MAY PROCEED TO
TERMINATE THE AGREEMENT OF SALE.

Thus done and signed at HARARE on this 30th day of August 2009.

Signed

(signed)
.....
(Purchaser)

As witnesses

(signed)
.....

I/WE.....(the owner of the above mentioned property) do hereby accept this
offer.

Thus done and signed aton thisday of2009

Signed (not signed)
.....
(SELLER)

As witnesses (not signed)
.....

PROPERTY PLUS REALTORS (PVT) LTD
215 Fife Avenue
Harare
+263 792 737/792826/796241

Copies of the advertisements and offer form were admitted into evidence, as exhibits, by consent.

At this juncture, it is prudent that I take up the contents of the plaintiff's declaration commencing from para 3 thereof:

- “3. In or about September 2009 plaintiff and defendant entered into a verbal agreement for the sale and purchase of a portion of property at number 12 Le Roux Drive, Hillside, Harare, through plaintiff's agent, Property Plus Realtors (Pvt) Ltd.
4. The terms of the agreement pleaded in para 3 above were as follows;
 - 4.1 Defendant would pay US\$75 000 in total for purchase of the property in question.
 - 4.2 the payment would be by way of deposit of US\$15 000 on agreement;
 - 4.3 the balance of US\$60 000 was to be paid at US\$5 000 *per* month for twelve consecutive months.
 - 4.4 The interest on the purchase price would be settled at the rate of 1% *per* month.
 - 4.5 The full purchase price would be paid on or by 30 August 2010.
 - 4.6 Defendant would take immediate occupation of the property.
- 5 As contemplated in the agreement, plaintiff gave defendant immediate occupation of the property.
- 6 In breach of the agreement, defendant failed to pay the full instalments by the due date and became indebted to plaintiff in the sum of US\$39 100 being principal and US\$32 844 in agreed interest.
- 7 Defendant acknowledged in writing on 30 March 2017 that it had not paid the full purchase price.
- 8 On 17 May 2017, plaintiff served defendant with a notice to rectify its breach within 30 days by clearing all the arrears.
- 9 In spite of the said notice being furnished, defendant failed or neglected to comply with the terms of the agreement and or pay the amounts then owed.
- 10 As a result of the defendant's failure to rectify breach in terms of the notice, plaintiff cancelled the agreement on 23 June 2017 and demanded vacant occupation.
- 11 In spite of such demand, defendant has failed or neglected to vacate the property.
- 12 Consequent upon the cancellation, defendant is liable to the plaintiff in damages in the sum of US\$58 800 calculated as the reasonable rental income at US\$700 *per* month which plaintiff would have realised from the property from the date of occupation to date of summons.

13 The defendant is liable to the plaintiff in the sum of US\$700 *per* month commencing on 1 August 2017 to the date when defendant gives plaintiff vacant occupation.

14 Due to defendant's unjust occupation of the property after failure to remedy the breach, plaintiff has been put unnecessarily out of pocket and is entitled to recover costs of the present proceedings on the higher scale of legal practitioner and client from the defendant."

The relief sought is essentially eviction, payment of damages in the sum of US\$58 800, holding over damages at US\$700 *per* month from 1 June 2017 to date of eviction and costs on the higher scale.

On his part, defendant averred that the purchase price agreed between the parties, *per* the verbal agreement, was the sum of US\$68 000.

The parties, on the pleadings, are agreed that a deposit of US\$15 000 was payable with the balance to be liquidated in monthly instalments of US\$5000.

Defendant averred further that the deposit and subsequent instalments were paid with the result that an outstanding balance of US\$16 000 was owing as at 1st May 2010.

Defendant, so it is pleaded, could not continue effecting payments as the plaintiff failed and refused to come up with the written agreement which would have enabled the defendant to also be able to obtain a mortgage loan to pay off the balance of the purchase price in the sum of US\$16 000-00.

As a compromise to their verbal agreement the parties on 4 December 2014, agreed that upon payment of the agreement fee of US\$300-00, the written agreement would be drafted by the plaintiff and signed by both parties.

The defendant paid the agreement fee on 4 December 2014. The plaintiff failed to draft the written agreement.

Instead, the plaintiff unilaterally and without the defendant's knowledge sought to subdivide the immovable property. As a result, the defendant gave notice to the plaintiff through a letter by the former's legal practitioners dated 30 March 2017, to draw up and sign the written agreement of sale and to refrain from its act of subdividing the immovable property.

The plaintiff, instead of complying with the notice given to it, gave to the defendant a notice to rectify the non-existent breach of the verbal agreement. The said notice, so it is averred, was null and void. The subsequent purported cancellation of the verbal agreement by the plaintiff of 27 June 2017, was also null and is no force and effect.

The plaintiff was the one in breach of the verbal agreement as further compromised on 4 December 2014. As a result, the defendant was justified in counter-claiming for remedies flowing out of plaintiff's breach of the agreement.

Defendant denied that plaintiff suffered and was entitled to any damages.

Further, the defendant disputed plaintiff's entitlement to the sum of US\$700-00 per month.

Defendant also denied plaintiff's entitlement to costs, let alone on the higher scale.

The above, then, constituted the defendant's plea to the claim.

Essentially on the same averments, the defendant counter claimed for an interdict restraining the plaintiff from subdividing the property in question. Further, defendant counter-claimed for an order directing the plaintiff to draw up the agreement of sale in terms of the verbal agreement entered into between the parties.

Finally, both in praying for dismissal of the plaintiff's claim and for the granting of its own counter-claim, defendant sought costs on the higher scale.

In due course, the matter proceeded to the Pre-Trial Conference stage.

The Joint Pre-Trial Conference Minute issued on 23rd May 2018 reads:

“JOINT PRE-TRIAL CONFERENCE MINUTE

It being accepted by both parties that there was an agreement of sale pertaining to stand number 12 Le Roux Drive, Hillside, Harare.

ISSUES

1. What were the initial and later compromise terms of the agreement?
2. Whether or not the defendant breached any of the terms of the agreement.
3. Whether or not the plaintiff should not be interdicted from subdividing the property?

ONUS

1. On both parties in respect of issue number 1.
2. On the plaintiff in respect of issue 2.
3. On defendant in respect of issue 3.

ADMISSIONS

1. Plaintiff admits to receiving US\$300 for the purposes of drafting an agreement of sale.
2. Defendant is presently in possession of the property.”

In evidence, each party had to prove its version of the verbal agreement. The success of either meant the failure of the other.

To begin with, defendant proved that what was sold was the entire property and not a proposed subdivision thereof. The advertisement and the offer letter reflect that the entire property was for sale. Further, various documents generated by the defendant and the seller's agent also confirm that the entire property was sold. The reconciliation of account prepared by Brian Machengo and the defendant, the estate agent's receipt of 04 September 2009 to acknowledge payment of the US\$15 000 deposit, the defendant's letter of 10 December 2009, the defendant's handwritten endorsement to Brian Machengo on copy of the cash deposit slip of 9 November 2009 for \$4 500 as well as the estate agent company's receipt of 27 November 2009 for \$500 are all to this effect.

These receipts, issued out of Property Plus Realtor's Business Receipt Book, read, in relevant part "part payment for 12 Le Roux Hillside"

This narration, in all cases, was written out in long hand, on the receipts, by the plaintiffs own agent.

I think it useful that I reproduce defendant's letter of 10 December 2009.

It appears as follows:

"David Chiweza, Dip MSC
(Strategic Management)
10 December 2009
The Manager
Property Plus
215 Five Ave
Harare

Dear Sir

RE: MONTHLY INSTALLMENTS FOR THE PURCHASE OF PROPERTY 12 LEROUX DRIVE; HILLSIDE: BRIG GEN DAVID CHIWEZA

I am writing to request change of repayment dates for the above referred to property from the 1st of every month to payment by the 10th of every month.

The reason for that is that the income stream that enables me to pay for this property comes also by the 10th of every month.

I kindly request your understanding and cooperation in this regard.

Yours faithfully

(signed)

D Chiweza
Brig Gen (Ret) Client”

In this letter, defendant clearly spells out, not once but thrice, that 12 Le Roux Drive, Hillside was the property he had purchased.

I was not shown any correspondence in which either the agent or the plaintiff, or both, refuted reference to 12 Le Roux Drive, Hillside as the property bought by the defendant.

All the documents I have referred to were produced as exhibits, by consent.

They corroborate the defendant’s version that the entire property was sold. I cannot stand in the way of the irresistible finding that this paper trail drives me to.

There was overwhelming evidence that the entire property was sold.

This means I reject as cooked up the plaintiff’s lone document to the contrary. I am referring to the undated mandate to sell wherein Caroline Williams purportedly signed instructing the estate agent company to sell a portion of the property.

An undated document is of no evidentiary value.

According to the Form CR 14 produced at the trial, James Nqindi and Caroline Williams are and were the directors of the Plaintiff at all material times.

Despite Brian Machengo conceding under cross-examination that these two directors would be better placed than him on what it was that the Plaintiff sold to the defendant, these two directors never set foot in Court throughout the trial.

Nor did any other employee of the plaintiff give evidence.

I am still puzzled as to the source of the US\$75 000 which the plaintiff claimed in its papers as being the purchase price. Brian Machengo had no option but to admit that there was completely no documentary evidence before me tending to show that indeed the purchase price was US\$75 000.

The undated mandate form given to Property Plus, purportedly signed by Caroline Williams, reflects that the property was to be sold for \$90 000 yet the purchase price per the advertisement by Property Plus was for \$70 000. This is \$20 000 less than instructed. It simply does not make sense.

What is logical is defendant's version that his offer of \$68 000, which was \$2 000 less than the advertised price was accepted by Brian on behalf of the plaintiff.

Indeed, the reconciliation of account prepared by defendant reflects the purchase price as \$68 000. I disbelieve Brian's testimony that he did not go through that reconciliation of account with the defendant. If that were so, there would be no explanation on who ticked some of the items on that account, crossed out others and added, in long hand, payments originally left out, and why.

The exercise carried out is the essence of a reconciliation. I find, because it accords with the probabilities, that Brian carried out the reconciliation of the account with the defendant.

In any event, Brian accepted under cross examination that it would be reasonable for defendant and himself to have reconciled the account. I have already found that it was not only reasonable but that the two actually did so.

Two meetings were held with Nicholas Vanhoogstraten, Plaintiff's consultant, but said at the time, by Brian, to be essentially the owner of the property.

At the first meeting, attended by defendant and Brian, Nicholas stubbornly refused to have the agreement of sale reduced to writing although insisting that the outstanding balance of the purchase price be paid.

At the second meeting which now included Bishop Mapfumo and his wife, it was agreed that the agreement of sale be reduced to writing. Nicholas instructed Brian to draft the agreement. The purchase price was never in issue.

The fee for drawing up the document was agreed to as US\$300. It was paid on 4 December 2014 at the offices of Plaintiff's estate agent. Esther Mapfumo, spouse to Bishop Mapfumo, paid that fee on behalf of the defendant. The purpose of the payment is recorded as "Agreement of sale."

It was common cause that, despite the payment having been effected, the agreement of sale was never reduced to writing.

The defendant wanted the document to apply for mortgage finance.

He said Brian began to duck and dive. He was no longer behaving like an estate agent. In fact, even under cross-examination, Brian continued ducking and diving. It is true that he made multiple concessions in favour of the defendant. But he was extremely evasive. He was a very poor witness indeed.

All hell broke loose when the Mapfumos, who were in occupation of the whole property on behalf of the defendant, advised the latter that Brian was on the property for the purpose of subdividing it.

This led to Brian's arrest at the instance of the defendant. A letter from defendant's legal practitioners to the estate agency was authored. A written agreement of sale was demanded. So was a cessation of the subdivision.

Only after Brian's arrest was the letter responded to. The plaintiff's current legal practitioners represented both the plaintiff and the estate agency. I say nothing about possible conflict of interest.

At the trial held before me Brian and Brian alone testified for the plaintiff.

The subdivision permit was issued on 10 February 2015. The verbal agreement was entered into on 30 August 2009. The latter was issued six years after the whole property was sold.

Besides being illegal to sell a proposed subdivision of a property without a subdivision permit, see *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (SC); *Chioza v Siziba* 2015 (1) ZLR 252 (S), I find that the plaintiff, with connivance of Brian Machengo, deliberately refrained from reducing the agreement of sale into writing to disable the defendant from raising and paying the outstanding balance of the purchase price.

The act of causing letters to be authored alleging non-existent breach and cancellation of the verbal agreement was nothing but a ploy to endeavour to defeat the defendant's rights under the contract. See *Ndlovu v Murandu* 1999 (2) ZLR 341 (H).

The summons seeks to rope in this court to give fruition to that agenda.

No doubt, by subdividing the property behind the defendant's back, the plaintiff wanted to resell the property. I have failed to understand the inspiration behind such greed.

This suit is proof that the plaintiff also wants not only to have the defendant evicted, but also to retain all that has been paid towards liquidating the purchase price and further saddle the defendant with rentals for occupying the whole property. I am unable to place a premium on such deceit. The parties entered into an agreement of sale, not lease.

This judgment has demonstrated that there is completely no merit in the main claim. The plaintiff cannot found a cause of action on its own wrongdoing.

I agree that this action is a flagrant abuse of court process.

Further, the defendant was needlessly put out of pocket both in resisting the main claim and in pursuing the counter-claim.

Since the subdivision permit has already been granted, I cannot interdict that which has already occurred. That, however, does not stop me from finding, as I already have, that the subdivision permit number SD/CR/15/14 dated February 2015 is null and void.

In the result, I order as follows:

1. The plaintiff's claim is dismissed.
2. The defendant's counter-claim is granted.
3. The plaintiff shall take all the necessary steps to prepare an agreement of sale within ten (10) days of the handing down of this judgment reflecting the terms of the verbal agreement entered into on 30 August 2009 including the following:
 - 3.1 that plaintiff sold to the defendant certain piece of land situate in the district of Salisbury called stand 10830 Salisbury Township of Salisbury Township Lands measuring 3033 square metres held under Deed of Transfer number 11900/2005 in favour of Divvyland Investments (Private) Limited
 - 3.2 that the agreed purchase price for the immovable property was the sum of US\$68 000 (sixty eight thousand United States dollars).
 - 3.3 that the defendant paid a deposit in the sum of US\$15 000 (fifteen thousand United States dollars) on 04 September 2009.
 - 3.4 that the defendant has paid a total of US\$56 900 (fifty six thousand nine hundred United States dollars) to date towards liquidating the purchase price inclusive of interest.
 - 3.5 that the defendant shall pay the outstanding balance of \$14 384-01 (fourteen thousand three hundred and eighty four United States dollars and one cent) through a bank loan.
4. The plaintiff shall pay the defendant's costs of suit in respect of both the main claim and the counter-claim on the legal practitioner and client scale.

Mushoriwa Pasi Corporate Attorneys, plaintiff's legal practitioners
IEG Musimbe and Partners, defendant's legal practitioners