

PANGANAI MASUNDA
versus
MARNVAL COMPUTERS (PVT) LTD
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 15 October 2019, 11 November 2019 and 20 November 2019

Trial

V. Mukwachari, for the plaintiff
N Mugandiwa with *S Bhebhe*, for the 1st defendant
No appearance for the 2nd defendant

CHIKOWERO J: "... since time immemorial, at every stage of human evolution, societies have suffered the inevitable unfortunate phenomenon of having in their midst, an array of thieves, fraudsters, robbers, cutthroats, the throwbacks in evolution etc with no qualms whatsoever in employing force or chicanery to dispossess fellow humans of ownership of their property. If the law did not jealously guard and protect the right of ownership and the correlative right of the owner to his/her property, then ownership would be meaningless and the jungle law would prevail to the detriment of legality and good order" per HOLMES JA in *Oakland Nominees Ltd v Gelria Mining and Investment Co Ltd* 1976 (1) SA 441 (A) at 452A."

These remarks were cited with approval by MATHONSI J (as he then was) in *Cosmas Luckson Zavazava and Vongai Zavazava v Jonah Tendere, Tendai Anania Tendere, Thermco-Dynamics Real Estate and The Registrar of Deeds* N.O HH 740/15.

They are also pertinent to the matter before me.

THE PLAINTIFF'S CASE

He is a Zimbabwean born British citizen.

He received his primary, secondary and university education in Zimbabwe.

His desire to purchase immovable property in Zimbabwe led him to the offices of Tony West Real Estate.

There, in 2002 and in the company of his sister, the estate agent led them to stand 32 Guildford Estate Township of subdivision 11 of Guildford of Borrowdale Estate.

This piece of land having been identified to the plaintiff, Tony West Real Estate, as agents of the owner of the property, sold it to plaintiff at a price of \$5 800 000-00.

A deposit of \$3 325 000 was payable upon signing of the agreement of sale.

The balance of \$2 475 000 was payable to Tony West Real Estate, in 6 monthly instalments, for onward transmission to Hotland Enterprises (Pvt) Ltd.

The latter was the owner of the property. It was also the seller.

Since the plaintiff was leaving for the United Kingdom, he signed a General Power of Attorney in favour of his sister, M J Masunda, to handle his affairs.

The Power of Attorney appears on p 1 of the plaintiff's bundle of documents.

That bundle was produced, by consent, as exhibit 1.

The plaintiff identified his signature on the General Power of Attorney as well as that of his witness, Brian Charehwatenda. Brian is brother in law to the plaintiff. The General Power of Attorney was signed on 18 July 2002.

The agreement of sale was signed on 19 August 2002. Miriro Masunda, the sister, signed on behalf of the plaintiff.

While in the United Kingdom, the plaintiff channelled the purchase price through his sister. In due course, the purchase price was liquidated.

Miriro Masunda had forwarded the purchase price through the estate agent for onward transmission to the owner.

Likewise, follow up on progress relative to meeting City of Harare's requirements before transfer could be effected was made by Miriro through the estate agent.

The plaintiff paid the transfer fees and stamp duty in full.

However, Andrew Logan Attorneys, the conveyancers earmarked to handle the transfer, phoned Miriro advising that the firm was stopping practising law in Zimbabwe. Henceforth, the transfer would be handled by the firm of Chirimuuta and Associates.

Hence the eventual drawing up of the transfer papers by the latter firm and lodging of the same with the Registrar of Deeds.

In August 2009, on visiting the property in the company of his sister, the plaintiff was shocked to see some developments being carried out on the property in question.

This saw him linking up with a conveyancing clerk from Chirimuuta and Associates to conduct a deeds search.

The search revealed that a fraudster had posed as the plaintiff and sold the property to the first defendant in 2008.

Transfer had then been effected in favour of the first defendant.

The first defendant, just like the plaintiff himself, had fallen victim to the fraudster.

It was common cause that it was not plaintiff who had sold the property to the first defendant.

It therefore was common cause that it was not from plaintiff that first defendant obtained transfer of the property.

Plaintiff testified that an unknown person somehow got false information onto Deed of Transfer number 6762/07 (which plaintiff contends is his own Deed of Transfer) and, using that deed of transfer to launch the fraud, sold and transferred the property to first defendant.

Neither plaintiff, his conveyancer nor agent managed to receive the former's Deed of Transfer (Regd number 6762/07) prior to the fraudster using that title deed to in turn transfer the property to first defendant.

What the conveyancer received was *prima facie* proof of transfer in favour of plaintiff, in the form of the conveyancer's certificate, because the Deed of Transfer itself was forwarded by the Registrar of Deeds to the Surveyor-General's office for purposes of deduction because the land in question was a subdivision.

A police report filed by the plaintiff, according to the investigating officer, revealed the following facts.

The imposter, Panga Masunda, used false details. A check with the Registrar General Of Births and Deaths' office revealed that no one was registered and issued with a national registration card under the name Panga Masunda. The given national registration number, 75-065427 D 75, was also fake. Also non-existent was 21 Leonard Drive, Cheviot, Waterfalls, Harare given as the address of Panga Masunda who entered into the written agreement of sale, in respect of plaintiff's property, with the first defendant. That agreement of sale shows that Panga Masunda sold the rights, title and interest in the piece of land in question to first defendant at Harare on 19 December 2008.

It is common cause that Vhurandeni Makuku of Tizirai Chapwanya legal Practitioners then drew up the conveyancing documents which resulted in first defendant obtaining transfer, from Panga Masunda (born 17 March 1975), under Deed of Transfer Regd No. 2434/09.

FIRST DEFENDANT'S PLEA

While admitting that first defendant did not purchase the rights, title and interest in the property in question from the plaintiff, the first defendant challenged the plaintiff to prove that the plaintiff was the owner of the property at the time that the property was sold to the first defendant at Harare on 19 December 2008.

THE ISSUES

They were couched as follows in the joint pretrial conference minute filed of record on 8 March 2013:

- “1. Whether or not the plaintiff was the true and legal owner of the property at the time of its sale to the first defendant?
2. Whether or not the purported seller of the property to the first defendant was the true and legal owner of the property?
3. Whether or not the purported seller of the property to the first defendant was legally entitled to sell the property?
4. Whether or not Deed of Transfer No. 2434/09 should be cancelled and Deed of Transfer No. 6762/07 restored?”

It is clear that issue number 2 is the flip side of issue number 1.

It also is evident that if I resolve the first issue in favour of the plaintiff the answer to issue number 3 would be a resounding no.

Cancellation of Deed of Transfer No. 2434/09 would follow as a matter of course.

Despite some arguments woven around the legal standing of Deed of Transfer 6762/07 by first defendant’s counsel, I will rule in favour of its revival if I find for the plaintiff on the first issue.

THE FIRST DEFENDANT’S CASE

The first defendant opened and closed its case without leading any evidence.

In its summary of evidence, however, first defendant took the position that it bought the property from one Panga Masunda who was not the plaintiff.

In any event, this was common cause. Plaintiff maintained that the said Panga Masunda was the fraudster.

THE ANALYSIS

This matter ought not to have been the subject of a trial at all.

What the first defendant succeeded in doing was to simply waste the court’s time.

I am not surprised that the first defendant did not adduce any evidence.

The only evidence it would have adduced would have been through the fraudster, Panga Masunda “born” on 17 March 1975 with “National registration number” 75-065427 D 75.

I do not know whether there were police officers seated in court during this trial but if a person had stepped into the witness stand for the first defendant, admitted that he was the Panga Masunda who sold the property to the first defendant resulting in the impugned transfer, I have no doubt that the police would have pounced on that person as soon as he left the court room. The fraud docket closed as “undetected” so many years ago would promptly have been reopened.

It was always clear, right from the word go, that the plaintiff’s claim was irresistible as long as the first defendant did not produce any paper trail disclosing how its “Panga Masunda”

acquired rights, title and interest in the property in question as well as from whom, when and for how much that acquisition was made.

This is not placing any onus on the first defendant at all.

It simply means first defendant, to successfully repel the claim, had to come up with competing evidence, both oral and documentary, to that adduced by the plaintiff.

I agree with Mr Mukwachari that the totality of the evidence for the plaintiff amply proves the case for the plaintiff on a balance of probabilities.

All the witnesses who testified for the plaintiff were credible.

In addition, the testimony of the plaintiff and his sister was substantiated by the documentary evidence.

Despite the General Power of Attorney, Agreement of Sale and Deed of Transfer Registration No. 6762/07 recording his forename as “Panga”, I am satisfied that it was the plaintiff who purchased the property in question from Hotland Enterprises (Pvt) Ltd. I accept that through usage, the plaintiff recorded his first name, shortened, as “Panga” instead of its full rendition “Panganai.”

Plaintiff’s correct date of birth is 30 March 1969. It is reflected as such both in the Agreement of Sale entered into with Hotland Enterprises (Pvt) Ltd and in his British passport appearing on p 18 of exh 1.

His full name “Panganai Masunda” appears in that passport, with the date of birth I have already referred to.

Although his Zimbabwean national registration card was not produced, it was never maintained that plaintiff’s national registration number 63–791163 V 04 did not exist. Detective Inspector Blessing Mandizha, who also gave evidence for the plaintiff, confirmed that the Registrar-General’s office bears plaintiff’s registration as a holder of a national registration card.

That Mandizha brought nothing in writing from that office changes nothing. It was never put to him that his oral testimony was not the truth.

Mandizha was a good witness. His evidence was coherent. It was not at all dented under cross-examination.

In fact, Mandizha’s evidence that there was nobody answering to the name of Panga Masunda, that person’s given address in the impugned agreement of sale was bogus and the national registration number also bogus is confirmed by the failure of anyone turning up at the trial, for the first defendant, to contend otherwise.

I find that plaintiff purchased the property in question from Hotland Enterprises (Pvt) Ltd. His then United Kingdom address appears on both the General Power of Attorney and the Agreement of Sale entered into with Hotland Enterprises (Pvt) Ltd. The latter is under the letterhead of Tony West Real Estate (Pvt) Ltd, the seller's agent.

Plaintiff's residential address at the time was 7 Swinley Close, Redhill Street London NW1 4BA United Kingdom.

I have already found that it was plaintiff and not the fraudster who bought the property in question from Hotland Enterprises (Pvt) Ltd.

Deed of Transfer 6762/07 simply incorrectly recorded the plaintiff's date of birth and shortened plaintiff's forename.

Otherwise everything else about Deed of Transfer 6762/07 is factually correct. The conveyancer was indeed Mr Francis Chirimuuta, who used plaintiff's agreement of sale with Hotland to draw up the transfer papers. The property transferred is also correctly captured.

The fraudster was Panga Masunda (born 17 March 1975).

This person then sold and transferred plaintiff's property to first defendant.

As was spelt out in the *Zavazava* judgment I referred to above, the subsequent sale and transfer to first defendant is null and void.

Plaintiff remains the owner.

He is legally represented. Counsel will no doubt advise on what he needs to do to ensure that Deed of Transfer 6762/07 is rectified. The rectification will result in plaintiff's name and date of birth appearing on his title Deed. But that does not stop me from reviving that Title Deed. It seems to me that plaintiff could also competently have prayed for cancellation of both title deeds to pave the way for an untainted transfer to be registered afresh from Hotland to himself. The relief sought, however, in the peculiar circumstances of this matter, is not wrong.

These fraudulent forays into registration of properties come in different shapes and sizes.

KWENDA J was faced with a slightly different factual scenario in *Emily Badza v Priscilla Zhou, National Social Security Authority, Registrar of Deeds and Nyikadzino, Simango and Associates* HH 318/18.

The present matter demonstrates that a mere deeds search is no longer adequate, by way of due diligence, before one makes a decision to purchase immovable property.

The HOLY BIBLE CONCORDANCE King James Version The Expositor's STUDY BIBLE contains this passage from II Kings 4:38-41:

“THE POISONOUS POTTAGE

- 38 And Elisha came again to Gilgal: and there was a dearth in the land; and the sons of the prophets were sitting before him: and he said unto his servant, set on the great pot, and seethe pottage for the sons of the prophets
- 39 And one went into the field to gather herbs, and found a wild vine, and gathered thereof wild gourds his lap full, and came and shred them into the pot of pottage: for they knew them not
- 40 So they poured out for the men to eat. And it came to pass, as they were eating of the pottage, that they cried out, and said, o you man of God, there is death in the pot. And they could not eat thereof.
- 41 But he said, then bring meal. And he cast it into the pot; and he said, Pour out for the people, that they may eat. And there was no harm in the pot.”

The fraudster connived with the officials at the Deeds Registry to register a mermaid Deed of Transfer 6762/07.

It appears the syndicate included Chirimuuta and Associates’ conveyancing clerk who drew up the draft deed of transfer for 6762/07. I do not accept Francis Chirimuuta’s testimony that the use of a template in drafting caused the “error” in recording Panga Masunda’s date of birth as 17 March 1975. The plaintiff’s Agreement of Sale with Hotland Enterprises (Pvt) Ltd clearly captured the purchaser’s date of birth as 30 March 1969.

If it was an error, it does not explain why the “unintended beneficiary”, the fraudster, went on to create fictitious national registration numbers for himself and a non-existent address in entering into an agreement of sale with the first defendant.

I record that the Conveyancer ought to have drafted the transfer documents himself rather than opening a leeway for fraudulent conduct by delegating his function to a conveyancing clerk. He ended up signing a draft deed of transfer through which the fraud was perpetrated.

Conveyancers need to tighten up the practice of this branch of the law. The Chief Registrar of Deeds needs to ensure that Deeds lodged for registration are not manipulated in pursuance of fraudulent activities. Prospective purchasers of registered property need to go as far as checking the authenticity of copies of national registration cards or other identity documents accompanying a registered title deed, among other things, before purchasing immovable property registered at the Deeds Office.

Gone are the days when a deeds search was all one could safely rely on. There could be “death in the pot.”

My analysis of this matter has shown that the first defendant’s application for absolution from the instance at the close of the plaintiff’s case was manifestly without merit. The Agreement of Sale founding the first transfer bore plaintiff’s date of birth, national registration number, United Kingdom address, his sister’s name and signature and not those of the fraudster. I dismissed the application.

SCALE OF COSTS

I agree that first defendant’s conduct is deserving of an order of costs on the higher scale.

It sought, in the face of overwhelming evidence to the contrary, to defend a fraud perpetrated against both the plaintiff and itself. This unnecessarily put the plaintiff out of pocket.

First defendant had no evidence whatsoever to protect its title to the property. It led no evidence at all. Yet it raised all sorts of frivolous arguments, as well as mounting a frivolous application for absolution. All these were efforts to frustrate and harass the plaintiff. The efforts were totally misdirected. Instead of defending this suit first defendant should have been hunting down the fraudster failing which it should have accepted its unlucky position and moved on.

THE ORDER

In the result, the following order shall issue:

1. Deed of Transfer registered number 2434/09 dated 11 May 2009 pertaining to stand number 32 Guildford Estates Township of Guildford of Borrowdale measuring 4003 square metres registered in favour of Marnval Computers (Private) Limited be and is cancelled.
2. Deed of Transfer registered number 6762/07 dated 22 October 2007 pertaining to stand number 32 Guildford Estate Township of Guildford of Borrowdale measuring 4003 square metres registered in favour of Panga Masunda be and is revived.
3. The 2nd defendant shall make all the necessary entries and endorsements in his records and system to reflect the cancellation of Deed of Transfer No. 2434/09 and to reflect the revival of Deed of Transfer 6762/07.
4. The 1st defendant shall pay plaintiff’s costs of suit on a legal practitioner and client scale.

T H Chitapi and Associates, plaintiff's legal practitioners
Kantor and Immerman, 1st defendant's legal practitioners