

BERNARD NYAJEKA
versus
FIDELITY LIFE FINANCIAL SERVICES (PVT) LTD
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 16 December, 2019

Civil Trial

C. Chiturumani, for the plaintiff
K. Tundu, for the first defendant
E.T Moyo, for the second defendant

ZHOU J: The plaintiff instituted the present action seeking payment of a sum of money as compensation for the loss of his undivided share in the immovable property known as certain piece of land situate in the District of Salisbury called stand number 2565 Glen Lorne Township of stand 2560 Glen Lorne Township measuring 5772 square metres (hereinafter called “the property”). The original claim was for payment of \$51 300, interest thereon at the prescribed rate from the date of summons to the date of payment, and collection commission. The claim arises from the sale of the plaintiff’s 50% undivided share in the property which was sold by the second respondent in execution of a judgment granted in favour of the first defendant against the plaintiff’s wife, Sheila Tumani Nyajeka.

Both defendants contest the claim and deny that their conduct was wrongful. Three issues were referred to trial, namely, (a) whether the property was wrongfully sold; (b) if the sale was wrongful, whether or not the plaintiff accepted the sale of his 50% share thereby waiving any rights; (c) whether or not the defendants are liable to the plaintiff in the sum claimed or part thereof if so, whether jointly and severally, and (d) costs of suit.

The plaintiff was the first witness in support of his case. His evidence was that he did not authorise the sale of his share in the property. He also stated, and this was confirmed by the second defendant, that after the sale he was telephoned by the second defendant. in the telephone

conversation second defendant told him of the sale and that he should collect the sum of money representing this share in the property. He was told that if he failed to collect it, the money would be deposited into a government fund from which it would be difficult to recover. He therefore went and subsequently provided his attorney's account number into which a sum of \$38 700 was paid.

Plaintiff's second witness, Daniel Chawira Madziva, testified on the value of the property. He produced two valuation reports which he was involved in preparing as part of the team which valued the property. The first valuation report puts the open market value at US\$180 000 as at 26 November 2018. After the abolition of the multicurrency system and the introduction of the local currency a "Revaluation" Report was prepared in terms of which the open market value was put at ZW\$2 560 000.00. On the basis of this revaluation the plaintiff revisited his claim by amendment which was granted by consent. The new claim was now for a sum of ZW\$1 241 300.00, being half of ZW\$2 560 000 less the sum of \$38 700 which the plaintiff received.

The first defendant gave evidence through Naison Nanda, its recoveries Manager. His evidence was that after the first defendant had obtained judgment it issued a writ of execution for the attachment of the judgment debtor's 50% undivided share in the property. It did not attach the plaintiff's share in the property and never instructed the second defendant to sell that share.

Second defendant, Smart Moyo who should properly have been cited in its name, gave evidence. He is the Messenger of Court for Harare. He attached only 50% share in the property in accordance with the writ of execution. He attributed the sale of the whole property to the auctioneer who conducted the sale.

From the evidence, the following facts are common cause. The plaintiff did not consent to the sale of his 50% share in the property. The property was sold at less than the Open Market Value. It was sold for a sum of US\$86 000. The plaintiff received a sum of US\$38 700.

The wrongfulness of the sale of the plaintiff's share arises from the fact that he did not authorise or consent to the sale. There was also no legal basis for his share to be sold. On these grounds alone the sale was per se wrongful. The question of whether that wrongful conduct is attributable to the defendants is what has to be assessed. It is common cause that the plaintiff's 50% share was never attached. Yet both defendants became aware that the whole property was being advertised for sale and did not stop the sale of the entire property. After the property was advertised for sale the first defendant's legal practitioners wrote a letter to the second defendant

highlighting the irregularity of the advertisement. The letter is dated 28 February 2018. But the first defendant did nothing to stop the sale of the plaintiff's share other than merely writing the letter. This sale was being conducted at its instance. It cannot shelter behind the involvement of third parties. More significantly, the same legal practitioners for the first defendant who were aware that the plaintiff's property had not been attached in execution were the conveyancers. They went on to transfer the whole property into the name of the purchaser. The conduct was clearly wrongful and willful at the very least but in any event, clearly negligent. Their knowledge of the circumstances of the sale and transfer is imputable to the first defendant vicariously.

As for the second defendant, he acted contrary to the instructions given to him in the writ of execution and also contrary to his own instructions as contained in the notice of attachment in execution. This notice which is dated 28 September 2017 explicitly stated that only half share was being attached. Yet the whole property was sold. The second defendant confirms that he received the letter from the first defendant's legal practitioners dated 28 February 2018 which has been related to earlier on. His evidence was that after receiving the letter his secretary telephoned the auctioneer to advise that the advertisement was wrong. The auctioneer was not called to confirm this, but even if that is what happened, it is inadequate given the seriousness of the irregularity involved. The second respondent occupies such an important office that demands that he acts diligently always to avoid loss to third parties as happened in *casu*. But, his conduct clearly went beyond negligence, because he did not stop the sale. He contradicted himself regarding how the sale was conducted. During cross-examination of the plaintiff, Mr *Moyo* for the second defendant consistently attributed the sale of the plaintiff's property to the auctioneer. The attempt was to give the false impression that the auctioneer was to blame for the sale of the plaintiff's share in the property. However, when the second defendant took to the witness stand he gave two conflicting versions of what happened. Initially he sought to shift the blame to the Provincial Magistrate whom he referred to as his supervisor. He stated that on the date of the sale the Provincial Magistrate made a public announcement to the bidders that the sale was only for a 50% share in the property and not for the whole property. Later on during cross-examination he stated that that announcement was made by the auctioneer himself. Both the Provincial Magistrate and the auctioneer were not called to testify, but the inconsistencies adequately expose the falsity of the evidence. In any event, why would such an office advertise the whole property only to announce on the day of the sale

that the sale is only for a half share when the potential purchasers are already in attendance? But here are other aspects of the second respondent's conduct which show that he was aware that what he had sold through the auctioneer was the whole property and not a 50% share in it. When he received the purchase price it was for the whole property. He telephoned the plaintiff to come and collect his share of the proceeds, which means that he knew that he had sold the whole property. When he telephoned the plaintiff the property had not yet been passed to the purchaser. It is an unacceptable excuse from the second defendant that there was nothing that he could have done at this stage. If, as he wanted the court to believe, a public announcement had been made on the day of the sale that only 50% of the property was for sale it would have been easy for him not to receive a purchase price for the whole property. However, not only did he receive the purchase price he went on to sign the seller's declaration and power of attorney to pass transfer of the whole property.

Thus the plaintiff's half share in the property was sold through the wrongful conduct of both the first and second defendants, jointly.

The second issue is whether the plaintiff accepted the sale of his share. In other words, the question is whether he consented to the sale. He could not have consented and did not consent to the sale. This is because he never became aware of the sale until after it had taken place. Mr *Moyo*, for the second defendant submitted that the plaintiff waived his right to claim the difference between the forced sale value and the market value of his property by accepting the purchase price. It is a trite principle of law that there is a presumption against waiver of rights. The onus is on the party alleging such waiver to prove on a balance of probabilities that the plaintiff waived his rights in relation to the subject of the claim. No evidence was led to rebut the presumption against waiver. The mere fact that the plaintiff did not protest against the sale of his property when he received the \$38 700 is not sufficient evidence to rebut the presumption. The sale had already taken place then. Also, the evidence which is common cause between the plaintiff and second defendant is that, when plaintiff was telephoned he was told that if he did not collect the money it would be deposited into a fund from which it would be difficult to recover it. In order to mitigate his damages he collected the \$38 700. A few days later on 7 December 2018 he issued summons claiming the difference between what he had collected and what he considered to be the reasonable value of his lost property. His conduct is inconsistent with an intention to waive his rights. For these reasons, the argument that he waived his rights is without merit.

On the quantum of the loss, the plaintiff amended his claim to a sum of ZW\$1 241 300 at the commencement of the trial which figure he arrived at by subtracting \$38 700 from ZW\$1 280 000. The formula by which he arrived at the amount claimed is incorrect. \$38 700 was in the currency of the US dollar which is shown on the proof of payment. These are two different currencies which were being transacted in at different times. The relevant valuation report is therefore the one of 26 November 2018 and not the one of 11 November 2019. In terms of that valuation report the plaintiff, as per his original claim was entitled to \$51 300.00 if the court accepts that the sum of US\$180 000.00 represents the reasonable value of the property as at that date and also that that is the date on or about which the loss should be assessed. The Finance Act (No. 2) 2019 set 22 February 2019 as the date on which the bond note and the RTGS currency became currencies in Zimbabwe at a rate of 1:1 with the US dollar. This means that from that date the plaintiff's claim of \$51 300.00 must be read to mean RTGS\$51 300.00.

The defendant challenged the valuations on the basis that they did not contain the lower limit and upper limit of the value and that they did not take into account the fact of the attachments of the 50% share in the property which belonged to the plaintiff's husband. There is no requirement at law that a valuation report must contain an upper and a lower limit in respect of its market value. The forced sale value is also irrelevant because plaintiff's share was not attached in execution. The plaintiff's witness, Daniel Chawira Madziva, gave his evidence well regarding the various factors which he took into account in arriving at the reasonable open market value of the property. These factors included the comparable properties and the going market prices in the area. The attachment of the wife's 50% share was only one factor affecting the ultimate reasonable value. Mathematical exactitude can never be realised in valuation reports. The defendants did not lead any evidence as to the extent of the impact of that attachment on the value of the plaintiff's 50% share.

On the question of costs, which is the last issue in the joint pre-trial conference minute, the plaintiff had asked for collection commission in his declaration. No basis was established for claiming collection commission. The plaintiff did not move for any special order of costs. These would have been seriously considered if they had been sought given the reprehensible conduct of the defendant leading to the sale and transfer of the plaintiff's 50% share in the property. Costs, will therefore be awarded on the ordinary scale.

In the result, it is ordered that:

1. Judgment be and is hereby granted in favour of the plaintiff against the first and second defendants jointly, and severally the one paying the other to be absolved for payment of:-

- a) The sum of ZW\$51 300.00
- b) Interest on the sum of ZW\$51 300 from the date of the summons to the date of full payment, and
- c) Costs of suit.

Chiturumani & Zvavanoda Law Chambers, plaintiff legal practitioners
Chihambakwe, Mutizwa & Partners, 1st defendant's legal practitioners
Scanlen & Holderness, 2nd defendant's legal practitioners