

DISTRIBUTABLE (46)

Judgment No. SC 55/03
Civil Appeal No. 265/02

VIOLET TEWE v

(1) ANDERSON HANOKI (2) CLEVERSON MAKHWALA
(3) CONSTANCE MAKHWALA (4) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 8, 2003 & FEBRUARY 10, 2004

O Ziweni, for the appellant

No appearance for the first respondent

R Mapondera, for the second and third respondents

No appearance for the fourth respondent

ZIYAMBI JA: The appellant in this matter filed a court application
in the High Court claiming –

That the sale of the immovable property, being stand no. 407 Kambuzuma
Township, Harare, be rescinded;

That the transfer of the said property to the second and third respondents be
annulled;

That the fourth respondent cause such amendment to be reflected in his
records.

Alternatively, in the event that the court found itself unable to grant to the applicant (now the appellant) the order sought in paras 1 and 2 above, the appellant sought an order for the first respondent to pay her full share from the current market value of the said property or such fraction of its value as the court may deem fit in the circumstances.

The learned judge who heard the application was unable to decide the matter on the papers by reason of the disputes of fact on the papers. He accordingly referred the matter to trial.

At the pre-trial conference held in October 2001 the matter was referred to trial on the following issues:

- “(i) Whether the first defendant was entitled to sell stand no. 407 Kambazuma as he did or not;
- (ii) Whether the second and third defendants are innocent purchasers or not;
- (iii) Whether the plaintiff is entitled to a percentage of the net proceeds and if so how much;
- (iv) Whether the plaintiff should give vacant possession to the second and third defendants or not.”

Most of the facts of this matter were common cause. The appellant and the first respondent were married in 1955. In 1964 they purchased the property in question (“the property”). The property was registered in the first respondent’s name. Extensions were made to the property and by the time the first respondent left the matrimonial home in 1968 it was a six-roomed house. The appellant and the first respondent were divorced in 1984. The property was paid up in full and the first respondent advertised it for sale through estate agents in the newspapers. The second

and third respondents responded to the newspaper adverts and the first respondent, acting through the estate agent, sold the house to the second and third respondents on 27 March 1998 for the sum of \$220 000.00. On 19 June 1998 the property was transferred to the second and third respondents. It is common cause that the appellant was not consulted when the sale took place, nor did she receive a share of the proceeds.

The appellant gave evidence that after the first respondent left the matrimonial home in 1968, she single-handedly constructed a further two rooms on the property at a cost of \$20 000.00 - \$30 000.00 and since 1968 she had been paying all the Council rates and rentals as well as the balance of the purchase price due to the Council on the property.

The appellant was of the view that the price of \$220 000.00, at which the property was sold, was too low, as the property could have fetched a higher price. She told the court that she would like the first respondent to be ordered to pay her. However, she understood that he was unemployed and had no means to pay. In the circumstances, she wanted the sale of the property rescinded. Both the appellant and the first respondent were employed during the subsistence of the marriage and she gave her entire earnings to the first respondent. The first respondent, she told the court, was not honest with the second and third respondents when he sold them the property and they were unaware of the dispute between herself and the first respondent.

The learned judge was impressed by the appellant. He believed her evidence but found that she had failed to prove that the property was sold at an unreasonably low price. As against the first respondent he found that she was entitled to a 50% share of the matrimonial property.

Regarding the claim against the second and third respondents, the learned judge was aware that in order for the appellant to succeed she had to prove they were guilty of fraudulent intent, in that they were aware of her claim at the time of purchase of the property and intended to defeat her rights therein. The learned judge found that the second and third respondents were not guilty of fraudulent intent as they were not aware of the appellant's rights in the matrimonial home. They were *bona fide* purchasers of the property.

Since the rights of husband and wife are personal and do not as a matter of law affect third parties, for the appellant to succeed against the second and third respondents she had to show not only that they were aware of her rights in the property but that they were attempting to defeat her rights therein. See *Muzanhenamo & Ano v Katanga & Ors* 1991 (1) ZLR 182 (S) at pp 186G-187A where McNALLY JA stated:

“It might have been different if he had been attempting to defeat her claim for relief in matrimonial proceedings. But I do not believe that a wife can raise such a claim just because the husband is disposing of an asset. There must be some evidence that he is disposing of the asset ‘at undervalue to a scoundrel, the accomplice of the husband’ (*Chhokar v Chhokar* 1984 FLR 313), or that in some way he is attempting to defeat her just rights.”

See also *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 at 485G where LORD UPJOHN remarked:

“So, as a matter of broad principle, I am of the opinion that the rights of husband and wife must be regarded as purely personal *inter se* and that these rights as a matter of law do not affect third parties.”

Thus, in the words of LORD HODSON at p 479B of the same report:

“Where there is a genuine transfer, there is no reason why the wife’s personal rights against her husband, which are derived from her status, should enter the field of real property law so as to clog the title of an owner.”

See also *Cattle Breeders Farm (Private) Limited v Veldman* (2) 1973 (2) RLR 261.

The evidence of the second and third respondents was that they responded to an advertisement in the newspaper. They saw the estate agent, who took them to view the property but they could not enter therein as there was no-one at the house. They were, however, satisfied with what they saw and decided to purchase the property. They did not meet with the seller prior to the conclusion of the sale. They dealt with the estate agent throughout and were not aware of the dispute between the appellant and the first respondent regarding the property. They agreed to pay the appellant for the additional two rooms which she had constructed on the property.

The learned judge in the court *a quo* believed this evidence and found that the second and third respondents were unaware of the appellant’s claim and rights to the property at the time of the purchase thereof and therefore had no fraudulent intent. He was satisfied therefore that the appellant had no claim against the second and third respondents.

Accordingly, the learned judge found that the first respondent was entitled to sell the property; that the second and third respondents were innocent purchasers; that the appellant was entitled to 50% of the net proceeds realised from the sale of the matrimonial home; and that the appellant should give vacant possession of the property to the second and third respondents. The appellant's main claim was dismissed but the alternative claim was granted.

The appellant appealed to this Court. She attacked the finding of the learned judge that the second and third respondents were *bona fide* purchasers. She also attacked the award of 50% of \$220 000.00 as being a serious under-valuation of the property. The appellant sought an order cancelling the sale of the house by the first respondent to the second and third respondents. In the alternative the appellant prayed:

“That she effects restitution to the second and third respondents of the purchase price paid to date, by them, to the first respondent so that the house is fully awarded to her as her rightful and sole property”.

A reading of the evidence, as well as the judgment of the court *a quo*, reveals no misdirections. The learned judge found that it was understandable that the second and third respondents did not suspect the existence of a dispute between the appellant and the first respondent as the sale was properly and publicly advertised in the media by an estate agent and was concluded through that estate agent.

The appellant adduced no evidence that the second and third respondents were aware of her claim on the property. In cross-examination she

conceded that they were unaware of her rights and that the first respondent was not honest with them. Thus, the finding of the court *a quo* cannot be faulted.

The award made to the appellant was 50% of the net proceeds of the sale of the matrimonial home. It was common cause that the property was sold for \$220 000.00. The appellant did not adduce any evidence, nor was there any on the record, to prove that the value of the property was greater than the sum of \$220 000.00. It was the duty of counsel for the appellant to place before the court evidence in support of the allegation that the property was worth more than the price realised for it. This the legal practitioner failed to do and the court acted on the basis of the evidence before it.

The alternative prayer in the notice of appeal amounted to an entirely new claim – one which was not raised in the court below. Besides, the court having dismissed the appellant's claim against the second and third respondents, there was no basis on which we could grant the order sought.

Accordingly the appeal is devoid of merit and is hereby dismissed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Ziweni & Co, appellant's legal practitioners

Mapondera & Co, second and third respondents' legal practitioners