

BARBARA MUKANGA  
versus  
GODFREY NZOMBE  
and  
SALTANA ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 29 June and 16 August 2017

### **Opposed Application**

*T. Mudambanuki*, for applicant  
*Z. Kamusasa*, for first respondent

MUSAKWA J: This is an application for confirmation of a provisional order that was granted on 25 November 2016. The relief that is now being sought is an order declaring the applicant to be the owner of stand number 7804 Belvedere West, Harare.

In the founding affidavit it is averred that the applicant purchased the property from the second respondent on 23 May 2002. In 2015 the applicant discovered the first respondent was in occupation of the stand which he was in the process of developing. The applicant then commenced litigation which was subsequently withdrawn in favour of action proceedings in HC 8643/16 which now included the second respondent. In November 2016 the applicant discovered that the first respondent had resumed developments.

In opposing the application the first respondent contends that the applicant has not availed proof of payment of the purchase price. He also contends that the agreement of sale that was concluded between the applicant and the second respondent is a sham. This is because payment of levies in 2009 predates the signing of an amendment to the agreement in 2010. It is also contended that the applicant acquired interest in the property on 24 October 2006. He further contends that he is an innocent purchaser and that the balance of equities lies in his favour. The applicant is said to have been issued with an alternative stand, number 7786.

Mr *Mudambanuki* submitted that the judicial manager who sold the property to the first respondent acted improperly. The property was fully paid for as the developers confirmed receipt of payment. The first respondent was approached twice to stop developing the property. The applicant did not commence to effect improvements as she was waiting for a permit from the second respondent. He also submitted that there are no special circumstances in favour of the first respondent.

On the other hand Mr *Kamusasa* blamed the judicial manager for being responsible for the situation the first respondent finds himself in. Thus he took issue with the non-citation of the judicial manager. He also submitted that the land in question belongs to the City of Harare. He further submitted that the City of Harare should also have been cited. Mr *Kamusasa* also submitted that the applicant cannot be declared the owner of the property as the property is still owned by the City of Harare. As regards the balance of convenience he submitted that as of 2014 the first respondent was already residing on the property.

It is now well settled that in cases of double sale of immovable, the first purchaser prevails unless there are special circumstances warranting a departure from such position. In this respect see *Barros and Anor v Chimphonda* 1999 (1) ZLR 58 (SC), *Reserve Bank of Zimbabwe v Siwawa's Estate Executor* 1999 (1) ZLR 185 (SC), *Sawyer v Chioza and Others* 1999 (1) ZLR 203 and *Crundall Brothers Limited v Lazarus NO and Anor* 1991 (2) ZLR 125.

Mr *Mudambanuki* sought to argue that there was no double sale. This is premised on the contention that the judicial manager who sold the property to the first respondent acted irregularly. Related to this was the submission that there had been no cancellation of the agreement between the applicant and the second respondent. Mr *Mudambanuki* sought to rely on the case of *Nelly Gonyora v Zenith Distributors (Pvt) Ltd and Ors* HH 44-04 which he claimed was on fours with the present matter. I do not see any parallels in the two matters as the Gonyora matter involved the sale in execution of a property that that was jointly owned where a co-owner was not a party to the proceedings leading to the judgment debt. In that case GOWORA J (as she then was) did not even consider the issue of whether the person who had purchased the property in execution was bona fide.

Ordinarily, a court should endeavour to determine a matter such as this on the papers before it.<sup>1</sup> However, the parties are not even agreed on the nature of improvements that were effected by the first respondent. The first respondent claims to have taken possession of the

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<sup>1</sup> *Masukusa v National Foods Ltd and Another* 1983 (1) ZLR 232

property some ten years previously and proceeded to construct a dwelling. The nature of the dwelling is not elaborated. The applicant prefers to term it a shack. It is not clear if at all why the applicant terms it a shack. In his answering affidavit, the applicant averred that the building structure was not approved by the City of Harare. There is also the contention that the first respondent flouted the City's by-laws as he was not on the housing waiting list and purchased the property through an estate agent.

The provisional order that the applicant sought in the present matter was premised on HC 8463/16. Apparently, case number HC 8463/16 is an action matter that was instituted on 21 November 2016 and is still pending. An urgent application giving rise to the provisional order was then instituted on 25 November 2016. In HC 8463/16 the applicant cited the City of Harare and Tudor House Consultants (Pvt) Ltd as some of the defendants in addition to the respondents in the present matter. The citation of Tudor House Consultants (Pvt) Ltd is quite appropriate as it was the judicial manager for the second respondent. Both parties have been at pains to fault the judicial manager for placing them in the present predicament.

The applicant also previously instituted proceedings in case number HC 7834/14 which were subsequently withdrawn. However, in those proceedings the first respondent counter-claimed. The first respondent has evinced an intention to pursue the counter-claim. In terms of r 123 of the Rules of the High Court, a counter-claim can be proceeded with notwithstanding that the plaintiff's claim has been discontinued, dismissed or abandoned.

I invited both counsels to file supplementary heads of argument to address the propriety of the final order that is sought to be confirmed. The authorities that Mr *Mudambanuki* sought to rely on do not address the issue. The simple issue is that a provisional order was granted pending the determination of case number HC 8463/16. The applicant cannot seek to be declared owner of the property in question as he has not yet acquired title from the City of Harare. What the applicant has only amounts to personal rights. In this respect see *Machiva v Commercial Bank of Zimbabwe Limited and Anor* 2000 (1) ZLR 302 (HC). There is merit in Mr *Kamusasa's* alternative submission that the provisional order be confirmed in the same terms pending the resolution of the cases that are still pending.

On costs, the applicant did not make a case for the granting of a declaratory order as prayed in the draft. The applicant's counsel did not seek for amendment of the draft order and the court has had to do so on its own accord. It is only proper that costs be in the cause.

In the result, the provisional order is confirmed as follows:

- (a) The first respondent is hereby ordered not to further develop, alienate or encumber stand number 7804 Belvedere West, Harare pending finalization of case numbers HC 7834/14 and HC8463/16.
- (b) Costs shall be in the cause.

*Jarvis Palframan*, applicant's legal practitioners  
*Kamusasa & Musendo*, first respondent's legal practitioners