

ESTATE LATE RICHARD MAKONI  
versus  
ESTATE LATE RUEBEN MUTUDA JARAVAZA  
and  
THE MASTER OF HIGH COURT  
and  
THE REGISTRAR OF DEEDS  
and  
THE DIRECTOR OF HOUSING AND COMMUNITY SERVICES  
and  
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 11 and 12 October 2017 & 18 October 2017

**Trial**

*Ms P Jambwa*, for plaintiff  
*Mr R Mahuni*, for defendants

MUNANGATI-MANONGWA J: “Dead men fighting” best describes the scenario in this case. One Reuben Mutuda Jaravaza now deceased, sold an immovable property known as Stand 17321 Salisbury Township also known as 17321 Elephant Close Borrowdale to the now late Richard Makoni in 2002. Long after the two have passed on, a battle rages on as to whether the purchaser, the late Richard Makoni breached the terms of the agreement of sale. His estate seeks a declaratur confirming the purchaser’s rights, and transfer of the immovable property into the purchaser’s estate. The seller’s estate has defended this action. Left to settle the score are the surviving spouses.

The following facts are common cause. On 1 November 2002 Reuben Mutuda Jaravaza now late (hereinafter referred to as “the seller” and his estate “the defendant”) entered into an

agreement of sale with Richard Makoni now late (hereinafter referred to “as the purchaser” and his estate “the plaintiff”) for the sale of Stand 17321 Salisbury Township also known as 17321 Elephant Close Borrowdale for Z\$30 000 000.00 (thirty million dollars) payable in three instalments. A deposit of Z\$10 000 000 (ten million dollars) was paid and the balance of Z\$20 000 000 was to be paid by way of 2 (two) instalments of Z\$10 000 000.00 each on 8 November 2002 and 31 December 2002 respectively. It was a term of the agreement that upon payment of a deposit vacant possession was to be granted and indeed the purchaser took occupation of the immovable property after payment of the deposit which was done upon signing of the agreement of sale. The purchaser’s family still occupies the property.

It is common cause that transfer of the property was never effected to date. The seller died in July 2003 and the purchaser passed on in July 2006. It is not in dispute that neither the seller in his lifetime nor his estate instituted any legal proceedings for either cancellation nor eviction of the purchaser nor his family. It is also not in dispute that the plaintiff did not register a claim against the estate of the late seller, neither did the estate of the late seller register a claim with the Master against the estate of the purchaser.

In 2015, the plaintiff instituted this action seeking the following relief.

- a) The agreement of sale of Stand 17321 Elephant Close Borrowdale entered into between the plaintiff and defendant on 1 November 2002, be and is hereby declared valid and effectual.
- b) The plaintiff be and is hereby declared the lawful purchaser of the rights, interests and title in Number 17321 Elephant Close, Borrowdale, Harare.
- c) The third defendant be and is hereby ordered to accept and approve documents signed by the fourth defendant transferring the property to the plaintiff failing which the third defendant be and is hereby ordered to accept and approve documents signed by the fifth defendant or his lawful deputy transferring the property to the plaintiff.
- d) Costs of suit.

In seeking this relief, the plaintiff argues that the full purchase price of \$30 000 000 (thirty million dollars) was paid and hence it is entitled to transfer.

The defendant indicated in its plea that transfer is not due as the plaintiff is in breach of the agreement of sale in that plaintiff failed to pay the purchase price in full.

The issues referred for trial are as follows:

- i) Whether or not the plaintiff breached a material term of the agreement in question
- ii) Whether or not the plaintiff paid the full price for the property in question
- iii) Whether or not the first defendant is liable to transfer title of the property in plaintiff's favour.

Plaintiff's case

The plaintiff called one Viola Mutengwa who indicated that she was married to the late purchaser of the property in issue. That her husband and the seller were friends and they were both businessmen. Although she never met the seller Mr Jaravaza she was aware that her husband had bought the immovable property from him. She was not present when the agreement of sale was signed but her husband informed her that his friend the seller had agreed to sell the property by way of instalments. Her husband also told her that he had paid the full purchase price. It was her evidence that in 2004 a family celebration for the purchase of the house was done and her husband told his relatives that he had fully purchased the property.

It was her evidence that since the parties bought the property up till 2006 the time her husband died, no-one had come or confronted them seeking or talking of the balance of the purchase price. She only became aware of the allegation that the property was not fully paid for, sometime in 2014 after Mr Magwaliba the legal practitioner handling the estate called her to discuss a letter received from the defendant's lawyers alleging none payment of the full purchase price. Having been resident on the property for 15 years she was surprised as to why the family would be allowed to reside thereat for so many years without the defendant claiming what was due. In her own words, "where was the defendant?" Her attention was brought to the receipts plaintiff was to rely on to prove payment and she stated that she only saw them in the file kept by her lawyers.

In cross-examination she maintained that the house was paid for in full as borne by the endorsement on one receipt on exh 2 for Z\$8 300 000.00 which clearly stated that payment as a "last payment". She insisted that as friends, the parties could have paid each other somehow. She confessed that she was not aware of most terms of the agreement but was clear that the full purchase price was paid given what her husband told her and the endorsement pertaining to a last payment.

This witness was a simple unassuming woman who was honest to admit when information was not to her knowledge. No attempt was made to manufacture evidence, neither did she evade answering any questions. She struck the court as a credible witness who is a simple housewife who was content to leave everything to her husband and hence was not into the nitty-gritties of how the agreement of sale was concluded.

The plaintiff's second witness was Mr Magwaliba an advocate. He gave evidence that he was approached by Mr Makoni, the purchaser in 2005 to make a will for him. The now deceased had three immovable properties, one in Highfield, the other in Houghton Park and the Borrowdale property which is the subject of this case. Of the three properties only the property in issue had no title. He stated that he advised Mr Makoni to furnish him with proof that he had rights to the property, wherefore he was furnished with an agreement of sale exh 1 and a set of receipts exh 2. Whilst the purchase price was indicated as Z\$30 000 000.00 Mr Makoni explained that the receipts amounted to \$28 3000 000.00. The \$1 700 000.00 difference consisting of \$1 500 000.00 agent's commission and \$200 000 VAT had been paid directly to the Estate Agent. The total paid therefore amounted to \$30 000 000 the full purchase price. He stated that he was satisfied with that explanation and was thus fully convinced that the full purchase price had been paid for the property as further evidenced by the endorsement on one of the receipts that related to what was termed a last payment.

Mr Magwaliba later became the Executor of plaintiff. He in turn engaged Tudor House Consultants to assist with the administration of the estate. He stated that he got aware of the defendant's allegation that the full purchase price was not paid from a meeting with Mr Mashonganyika of Tudor Consultants and that was around 2007.

It is also common cause that the parties had a round table and Mr Magwaliba indicated that he demanded for the basis of the claim by the defendant and none was forthcoming. He then proceeded to finalise Mr Makoni's estate. The first and final distribution account for the estate shows that same was confirmed on 30 January 2009.

Mr Magwaliba confirmed and corroborated the first witness' evidence that Mr Makoni and Mr Jaravaza were friends and due to the special relationship between them they separately discussed other issues and gave an example of how the terms of the initial offer ultimately differed from the agreement they concluded. He insisted that there was no variation of the

written terms of agreement between the parties. What was varied was the manner of performance however ultimate compliance occurred as the full Z\$30 000 000.00 was paid although Z\$1 700 000.00 was paid directly to the estate agent.

Mr Magwaliba was not swayed during cross examination impressing the court as a professional who testified in an efficient and clear manner as regards his interaction with the purchaser, the service he rendered to him and ultimately the estate. He confirmed that Mr Makoni was during his lifetime never sued for breach of contract nor for specific performance or eviction neither was his estate ever taken to court on those allegations. He persisted to the end in his belief that the whole purchase price was paid. This witness' credibility cannot be questioned. The plaintiff closed its case having led evidence from the two witnesses.

#### Defendant's case

The defence led evidence from one Lancelot Mutuda, the seller's son. His evidence was that his father had sold the Borrowdale property in issue but was never paid in full. At the time of his death, him and his siblings pursued the balance of the purchase price. This was about six (6) months after the death of his father which would be around the end of 2003 and beginning of year 2004. According to him, they approached Mr Makoni's family in Borrowdale and met his wife a nurse at Parirenyatwa and her 18 year old daughter. The wife confirmed knowing that there was an amount outstanding but was to get back to them. At that juncture the seller's family was having financial problems as the witness and his siblings were in school. As they waited, Mr Makoni passed away and ultimately they briefed a lawyer Mr Matsanhura to claim the balance that was due which was \$2000.00 revalued. The purchaser's wife the nurse passed on without paying the balance.

It was his evidence that demand had been made through the estate agent (although no proof was tendered), directly to the family, and to Tudor Consultants. Ultimately they consulted Messrs Lawman Chimuriwo. The current lawyers acting for them were the 4<sup>th</sup> (fourth) set of lawyers.

It became clear during cross examination that this witness was (8) eight years old when his father died. He however claimed that the whole family knew of the debt although he did not know how much exactly was owed and only got to know what it was when he grew older. He had difficulty in explaining the logic behind the allegation by Lawman and Chimuriwo in

their letter of demand that only \$10 000 000.00 had been paid leaving a balance of \$20 000 000.00 when in fact more than Z\$20 000 000.00 had been paid. He explained it away as a typographical error. When advised that similar allegations were contained in the summary of evidence prepared by his current legal practitioners and could not have been a typing error he could not answer to that. Ultimately this witness conceded that he did not have full details of how the payment modalities worked and was not aware of some terms of the agreement hence he could not explain certain things. The witness was not impressive at all. Clearly this witness is a bright young man who simply accompanied his mother, was able to read through the papers and listen to his legal practitioner. He believed with this acquired knowledge he could pull it through as a witness, the plan however failed dismally. His statements were inconsistent, he got tangled in untruths and confusion regarding the documents which defendant sought to use.

The second defence witness was Grace Mahuni the customary wife of the seller and executor of first defendant. Her evidence was that she is aware of the agreement of sale of the immovable property in issue and she signed as a witness thereto. She stated that the house was not fully paid for and the purchaser's wife a nurse once came to her home in Avondale to discuss payment before she died. She even offered her a motor vehicle as mode of payment and she refused. She confirms going to a round table meeting to discuss the issue with the executors but could not tell the court what exactly transpired thereat. Neither could she state the amount allegedly paid by the purchasers stating that the figures are confusing as they involve old currency. She ultimately said \$2 000 000.00 (two million dollars) was outstanding but could not explain why Messrs Chimuriwo stated that only \$10 000 000.00 had been paid leaving a balance of \$20 000 000.00 (twenty million dollars) the fact that her current legal practitioners also restated. This is despite the fact that she is the one who instructed her lawyers and she claimed that she had given them documents from Dolphin Real Estate the agents involved. She could not answer as to why the estate agent would indicate that a certain payment was a last payment if at all it was not.

She stated that she had not approached Mr Makoni during his life time to demand the balance as she believed that he should have taken action when she advertised for claims against the estate. She alleged that as early as February 2017, her child had discovered that

the City of Harare files for the stand had been changed from her husband's name to Mr Makoni's estate. This had not been put to the plaintiff during cross-examination and neither was any proof tendered to support this allegation. She maintained that the full purchase price was not paid hence there was no change of ownership.

Despite being a signatory to the agreement it was clear that this witness had no first-hand information as to the execution of the agreement. Her evidence did nothing to advance the first defendant's defence as her evidence contradicted that of her son and information contained in her own papers filed of record. In her capacity as executor and as the representative of defendant, much was expected of her in terms of rebuttal evidence since she was a witness to the signing of the agreement of sale and indeed the seller's wife supposedly having first-hand information. Yet the court did not benefit anything from her evidence in the light of formidable evidence presented by the plaintiff.

#### Analysis

Both legal practitioners in this case are agreed that the pertinent issue is whether or not the full purchase price was paid, and if not, that would therefore constitute a breach of the material term of the contract. It is not in dispute that \$28 300 000.00 has been proven to have been paid. It is the balance of \$1700 000.00 that remains to be accounted for. Whilst the defendant's witnesses sought to say \$2 000 000.00 (two million dollars) was outstanding that cannot be said to be the correct position given the sums. Evidence show that the defendant's witnesses were not sure how much had been paid.

This is apparent when one considers that in a letter of demand of 14 May 2014 \$10 000 000.00 was stated as the only amount paid towards the purchase price and this was repeated in the defendant's summary of evidence prepared by the defendant's current lawyers. The executor agreed she gave instructions to her lawyers and such inconsistencies can only be read to mean defendant was taking chances. Paramount is the fact that Mr Mahuni admitted in his submissions that both defendant's witnesses seem not to know how much was paid by the executor of the estate but were aware that there was an outstanding amount. That, is not good enough. How then can defendant rebut evidence that the full amount was paid.

The answer to the question on the payment of the full purchase price lay in Mr Magwaliba's evidence. His evidence that Mr Makoni advised him that the \$1700 000.00 was

paid directly to the Estate Agents is not only reasonable but accounts for the balance of the purchase price. Clause 1 of exh 1 the agreement of sale states that the agent's commission was to be \$1500 000.00, and if VAT were to be added thereto the total would come to \$1700 000. He indicated that as the commission was to come from the purchase price a payment to the estate agent would not constitute any variation of the terms. Suffice to say the purchase price was to be paid through the estate agent anyway.

Mr Magwaliba's evidence that he was informed by the purchaser that the purchase price was paid in full is further buttressed by the endorsement on exh 2 receipt No 088 which says "Last payment for 1732 Elephant Close, Borrowdale."

Last payment simply means final payment. This endorsement was made by the recipients of the purchase price Dolphin Estate Agents, the very entity which drafted the agreement of sale and the ones mandated to receive and receipt the purchase price. If the full purchase price had not been paid there would not have been any need to make such an endorsement.

I also consider the person who issued the receipts for Dolphin Real Estate to have been diligent and the three receipts on exh 2 show it is one and the same person. The initial receipt for \$10 000 000.00 was clearly endorsed "deposit for 17321 Elephant Close Borrowdale" and indeed this was a deposit. The second receipt No 1470 simply says "payment for 17321 Elephant Close Borrowdale" and the last one duly endorsed "last payment..."

These endorsement not only show consistency but appreciation of the progression in payment.

These facts taken together show that indeed the full purchase price for the immovable property was paid.

The argument by Mr Mahuni that plaintiff should have called the estate agent to confirm that payment was made in full does not hold. The plaintiff already had in its possession confirmation by the estate agent by way of exh 2 that payment was made in full. Further, the court notes that the agreement of sale exh 1 under terms of payment required the balance of \$20 000 00.00 to have been paid by 31 December 2002. Evidence was led that the last payment was done on 15 January 2003 and the seller who was still alive never raised issue. He only passed on 6 months later. The fact that first defendant never registered the

claim with the Master of High Court for the balance of the purchase price nor institute any legal action to recover the purported outstanding amounts is inconsistent with the behaviour of a creditor. That the plaintiff did not register a claim for transfer as against the seller's estate was duly explained by Mr Magwaliba that the purchaser had not been advised by the family who the executor was neither was he possibly aware of the advertisement flighted by first defendant in 2004.

It does not escape my mind that the first defendant did not raise a counter claim either seeking cancellation of the agreement, nor enforcement. Mr Mahuni indicated that first defendant wanted to rather settle. No one will begrudge first defendant for taking such a stance however I find that the defendant has failed to rebut the evidence placed before the court which points towards fulfilment of the terms of the contract.

The standard of proof in a civil matter is on a balance of probabilities see *ZESA v Dera* 1998 (1) ZLR 500 S.

Given the totality of the evidence and the circumstances of the case, coupled with the inconsistencies characterizing first defendant's case, I find that the plaintiff has proven its case on a balance of probabilities. The reasonable conclusion to be drawn is that the full purchase price was paid. That being so, there was no breach of the material terms of the agreement. In that regard the plaintiff has satisfied and passed the test as required and is therefore entitled to the relief sought

Accordingly, the following order as amended be and is hereby granted.

- a) The agreement of sale of stand number 17321 Elephant Close, Borrowdale entered into between the plaintiff and defendant on 1 November 2002 be and is hereby declared valid and effectual.
- b) The plaintiff be and is hereby declared the lawful purchaser of the rights, interest and title in number 17321 Elephant Close, Borrowdale, Harare.
- c) The fourth defendant be and is hereby ordered to sign all necessary documents facilitating the registration of rights, interest and title in Stand 17321 Salisbury Township also known as No. 17321 Elephant Close Borrowdale into plaintiff's name.
- d) The third defendant be and is hereby ordered to accept and approve documents signed by the fourth defendant transferring the property to the plaintiff failing which the defendant be and is

hereby ordered to accept and approve documents signed by the fifth defendant or his lawful deputy transferring the property to the plaintiff.

- e) The first defendant to pay costs of suit.

*Magwaliba & Kwirira*, plaintiff's legal practitioners  
*Mahuni Gidiri Law Chambers*, 1<sup>st</sup> defendant's legal practitioners