

JANE TAKAWIRA
versus
WALTER CHIKEREMA
and
WILSON CHIKEREMA
versus
AND REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 19, 20 October 2017 & 15 November 2017

Continuous roll

J Dondo, for the plaintiff
M Mavhunga, for the 1st & 2nd defendants
No appearance for the 3rd defendant

DUBE J: The plaintiff seeks an order for the setting aside of a sale of stand 14172, Norton Township, Norton, [the stand], an order for cancellation of transfer of the stand and ejection of the first and second defendants therefrom.

The plaintiff's claim is based on the following synopsis. On 25 April 2005 the plaintiff acquired the stand from Norton Town Council. On 10 May 2013 the first and second defendants fraudulently prepared an agreement of sale purporting that the plaintiff had sold the stand to the first defendant when she had not done so and transferred it into the first defendant's name. The defendants knew or ought to have known that the plaintiff had not sold the stand to them. The first defendant has erected a structure on the stand without the consent of the plaintiff. The second defendant has taken residence on the stand and has continued to effect improvements on the stand despite protests from the plaintiff. The purported sale and transfer of the property is illegal and unlawful.

The defendants defend the claim. They deny that they fraudulently caused to be prepared an agreement of sale. They maintain that the plaintiff signed and executed all documents relating to the sale. The defendants built a cottage which cost \$15 000, 00. In the event that the court finds in favour of the plaintiff, the defendants plead right of lien pending reimbursement of expenses that they incurred for construction of the cottage.

The following issues were referred to trial,

1. Whether the plaintiff sold the property in dispute to any of the defendants.
2. Whether there is a valid agreement of sale in respect of the property as between the plaintiff and the two defendants.
3. Whether the transfer of the property in question to the first defendant was wrongful and fraudulent and if so whether same should be set aside.
4. Whether the first and second defendants ought to be ejected from the stand in dispute.

The plaintiff's evidence is as follows. She does not know the two defendants. She first met the second defendant at the Harare Central Police Station on 6 August 2015. She purchased the stand in 2002 through Robert Root Estate Agents and got it transferred into her name in 2005. She later learnt that the stand had been transferred into the name of the first defendant in 2015. She did not sell the property to him or anyone. She suffers from diabetes and was ill during the time that her stand was sold. She developed cataracts and went blind. As at May 2013, she was not in a position to sign any agreement. She does not know a lawyer by the name Nyamushaya, who facilitated the sale of her stand to the defendants. The second defendant said that he had been introduced to Nyamushaya by Voley. She never met Voley. It is not true that the second defendant met her at Nyamushaya's offices as she never went there.

As soon as she realised that the second defendant was putting up a cottage which was at roof level at the stand, she reported the matter to the police. The second defendant phoned after she left her cell phone number with a neighbour. He told her that he had been sold the stand by Jane Takawira a lady in her 60's, who owns a farm in Banket and stays in Glen View. She told him that she is the owner of the stand and did not sell it. She never stayed in Banket or Glenview.

There are two agreements of sale of the stand. The first has a wrong ID number which was said to be hers. The second had the correct ID number. Both were purportedly signed by her. The first was given to her by the police after second defendant took it there and the second she obtained from the Zimbabwe Revenue Authority [ZIMRA] offices. She never signed any of the agreements. She did not sign the power to pass transfer of the stand to the first defendant and first saw the power of attorney when she was following the paper trail of how that sale was processed. She never applied for replacement of her title deeds because she has them. She did not sign an affidavit applying to the Registrar of Deeds for the issuance of a certified copy of

her deed of transfer. She never attended any interviews at ZIMRA for the sale of her stand nor did she pay any capital gains tax in respect of the stand.

The police organised an informal identification parade where she was asked to sit in an office and the second defendant would come and try to identify her. The second defendant moved around the offices and he failed to identify her. There were many people in the office including police officers and other ladies. It is only when she was called back to the office, when she was being introduced by the investigating officer to the second defendant that he said that the plaintiff is the one who sold him the stand.

When she realised that the defendant was constructing a cottage, she told him to stop construction because there was a dispute. He said he was going to continue building because he had papers. He threatened her with death. She did not consent to the improvements. The building can be demolished. She does not need the improvements on the stand. She wants the agreements nullified, her deeds replaced, cancellation of first defendant's deeds and eviction of the defendants and those staying on the stand.

The witness insisted under cross examination that she never sold the stand to the defendants and that she is not known to all the people that were involved in the sale of her stand. She denied that she was introduced by Voley to second defendant .She insisted that the second defendant failed to identify her during the informal identification process and denied that he pointed at her when the police called her into their office , insisting that the police introduced her to him rather than him identifying her. She denied meeting him at Nyamushaya's offices. She denied conniving with Nyamushaya whom she does not know. The witness maintained her story under cross-examination. She gave a consistent story and the court believed her.

The plaintiff called Assistant Inspector Collius Mushambi who is the investigating officer, [I.O] in the criminal matters reported by both the plaintiff and second defendant. The second defendant reported to him that he had been tasked by his brother who is based in the UK to look for a stand to purchase for him. He had communicated the information to Voley a neighbour. Voley later informed him that there was a stand up for sale which he viewed. He was taken to a legal practitioner called Nyamushaya where an agreement was reached. The seller was available at Nyamushaya's offices where an agreement was reached and signed. An application for replacement of a lost deed was done by Nyamushaya and the stand later transferred into his brother's name. The second defendant stated that he could identify the seller who was a widow in her 60s. He reported that the seller had some problems concerning

her daughter who was ill and was disposing of the stand. He told him that Voley was once employed by Nyamushaya as a site clerk when Nyamushaya was a director of Martin Brook which dealt in stands. He also interviewed Voley who stated that in 2013 he was called by Nyamushaya who told him that he had a stand that he was selling in Galloway. He told the second defendant and he took him to Nyamushaya resulting in the sale of the stand being concluded. The second defendant brought a copy of the agreement as proof that he had bought the stand. He conducted an informal ID parade where he placed people in an office with lady police officers. The second defendant was taken around the offices for him to try and identify the seller but he failed to do so.

He visited the Deeds Registry office where he obtained a history of the property, title deeds, a power of attorney purportedly done by the seller authorising Nyamushaya to transfer the property. There was a power of attorney done by first defendant authorising the second defendant to transact on his behalf. He obtained the record of interview of the purchaser and seller and the original agreement of sale from ZIMRA .The agreement of sale brought by the second defendant was different from the one recovered at ZIMRA in that the signatures are different. The addresses of the seller were non- existent. He discovered that Nyamushaya had processed all the papers connected to the sale of the stand. He identified the main perpetrator as Nyamushaya who has fled the country and is on the wanted list He concluded that both defendants must be victims of fraud perpetrated through Nyamushaya. He failed to arrest anyone in connection with this matter. He engaged the services of a handwriting expert to investigate the signatures involved in this case. The second defendant continued constructing of the cottage. He told him to stop construction until the dispute was resolved but he did not take heed.

The witness maintained under cross examination that the second defendant failed to identify the plaintiff as the seller at an informal ID parade. He refuted that the defendant was able to identify the plaintiff as the seller when the plaintiff entered his office.

The plaintiff called Mr Nhari a handwriting expert in support of. He was given a power of attorney and two agreements as questioned documents by the Investigating officer in the criminal matter. He came to the conclusion that the documents had common authorship. The special power of attorney is supposed to have been done by the first defendant and the agreement of sale by the second defendant. He concluded that the documents were signed by the same person. He also analysed copies of the capital gains receipt, affidavit, agreements and power of attorney to pass transfer done by the seller. He compared these to three photocopies

of three POSB withdrawal slips and a medical report in respect of plaintiff as standard writings of plaintiff and used these as comparables. He found that the design and construction on the disputed documents are not similar and therefore not consistent with plaintiff's writing. He concluded that the signatures on the questioned documents are consistent with forgery.

The defendants called the second defendant in support of their case. He testified as follows. The first defendant is his brother who is based in the UK and he asked him to find him a stand. Voley a neighbour told him that there was a lady by the name Jane Takawira who was selling a stand and he viewed it. He met Voley and the seller in town at Nyamushaya's and Kasasu Legal Practitioners' office. The seller told them that she lost her title deeds and the agents were going to apply for replacement of the title deeds. The following day, he went back to the agent's offices and an agreement of sale was concluded. A power of attorney was required so that he could represent his brother and the first defendant sends a power of attorney from the UK to Nyamushaya. He paid \$15 000.00 for the stand. He went to Zimra for interviews and title deeds came out and he started constructing a cottage. He was given the plaintiffs telephone number by a neighbour and when he phoned her, she denied having sold the stand. He reported the issue to the police. He was called by police from the fraud section after the plaintiff also made a report. He was asked to go round the offices and identify the seller in the offices. He moved around the offices in a bid to identify her and failed to identify the seller. When he went back to the I.O's office, the plaintiff came in and when she removed her glasses in trying to wipe her eyes, he immediately identified her.

He is aware of only one agreement of sale but he did not give it to the police. He did not sign the power of attorney, which his brother signed and send directly to Nyamushaya. He denied that he did not co-operate with the police when asked to bring samples of his signatures for examination. He denied that he told the plaintiff and the police that the seller was a woman in her 60's. He maintained that the transactions leading to the sale were above board. The plaintiff advised her to stop constructing the cottage but there was no reason to stop as he had title deeds and everything was above board. The witness denied under cross examination that he signed the agreement of sale with the wrong ID. He denied forging the power of attorney.

The main issue is whether the plaintiff sold her stand to the defendants. R H Christie, *Business Law in Zimbabwe*, 2nd Ed, Juta & Co Lt at p149-150 says the following of property sold without an owner's consent,

“An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring a vindicatory action to recover his property from anyone, including a *bona fide* buyer in whose

hands he finds it. The general rule that the seller can give no better title than he has operates in favour of the true owner, unless the purchaser proves that the true owner is estopped from denying the seller's authority to sell".

In *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) 438 C the court stated as follows,

"The Roman-Dutch law protects the right of an owner to vindicate his property, and as a matter of policy favours him against an innocent purchaser. See for instance *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 a-c. The innocent purchaser's only defence is estoppel".

In Maasdrop's *Institutes of South African Law of Property* 10 ed by CG Hail at p 63 the authors state as follows,

"A thief, therefore, cannot by delivery pass a valid title to property stolen by him even to a *bona fide* purchaser for a value who has no knowledge of the theft; as no one can transfer to another any greater right than he has himself, it follows that the person to whom a thief has delivered stolen property is he more competent to pass valid title to ... than the thief himself *Mutler v Chadwick and Co* 1906 TS 20, Voet 6.1.7].

Consequently the owner may recover such property from the possessor, even if the possession be *bona fide* without refunding the price paid. [Voet 6.1.7]"

The common law vindicatory action gives an owner of property a right to recover his property from whosoever possesses it without his consent. An owner cannot be deprived of his property against his will. A property sold through fraud can be recovered from the buyer where it is shown that the owner did not give his consent and authority to sell the property "The law does not recognise sales and transfers of property by persons who do not possess rights in property. A sale conducted by a person without an owner's consent or authority is a nullity and has no force of law. The *nemo dat quod non habet* and *nemo plus iuris* and *alium transferre potest quam ipse habet* principles of law are applicable to the circumstances of this case. The *rei vindicatio* is available to an owner even in cases where the property is sold to an innocent person.

Identity of the seller

The second defendant told the plaintiff when she enquired about the identity of the seller of the stand over the phone that a woman in her 60's had sold him the stand. She resided at a farm in Banket and had a house in Glen View. The second defendant also told the police the same story. The court's own observations of the plaintiff reveal that the plaintiff is nowhere near 60 years old. She does not reside in Banket or Glenview. This description of the seller does not match the plaintiff. The police conducted an informal parade and the second defendant failed to identify the plaintiff as the person who sold him the stand. The plaintiff and the

investigating officer both told the court that after the informal parade the plaintiff was invited back to an office. It was only after the plaintiff was introduced to the defendant that the second defendant said that she was the one who sold her the stand. The plaintiff refuted the second defendant's allegation that as she entered the office she removed her spectacles and he was able to identify her before she had been introduced to her. I believed the plaintiff and I.O's version of what happened in that office. They corroborated each other on what transpired. The idea that he was able to identify her after she removed her spectacles to wipe her eyes is an afterthought. It was not suggested to the plaintiff during cross-examination that she was identified in those circumstances. The idea only emerged in cross-examination of the IO. It can be concluded that the reason why he failed to identify the plaintiff is because she is not the one who sold him the stand. She maintained that she did not know Nyamushaya and never went to his offices. I believed the plaintiff when she said that she never met the second defendant or Voley at Nyamushayas' office. She remained consistent with her version that she never sold her stand. The second defendant failed to identify the plaintiff as the person who sold her the stand. I am not convinced that the person who sold the defendants the stand is the plaintiff.

The plaintiff testified that she obtained the first agreement of sale from the police after it was given to them by the second defendant. She obtained another one from Zimra. The police officer who testified on her behalf confirmed that there were two agreements. It however did not become clear regarding who exactly gave the plaintiff the other copy at the police station. The fact that the two agreements had two different ID numbers is suggestive of fraud. There is no reason why the plaintiff would fail to give her correct address in the agreements if she had been selling the stand. The need for two agreements was not explained. The sale agreement and all other documents used to facilitate the sale were forged. The evidence of Mr Nhari established that the plaintiff did not sign the agreements or give Mr Nyamushaya authority to sell the stand.. His evidence demonstrates that the second defendant signed the sale agreement on behalf of his brother as well as the power of attorney to pass transfer giving himself power to represent his brother based in the UK which is irregular .Whilst the second defendant may have been duped into buying a stand by an imposter of the plaintiff and Nyamushaya, his conduct of giving himself authority to act on behalf of his brother was irregular. The special power of attorney giving authority to transfer the stand to the first defendant was also shown to have been forged. The stand was sold without the knowledge and consent of the plaintiff. Nyamushaya then fled the country. This conduct supports the assertion that the stand was fraudulently sold.

The law permits an owner whose property is fraudulently sold and transferred to a third party to recover the property from the third party even though he bought the property innocently without knowledge of the fraud. The sellers of the property stole the identity of the plaintiff and sold her property pretending to be her. The sale transaction cannot pass as a valid sale. It ought to be set aside. It does not matter that the defendants may have been innocent purchasers. The sale and transfer of title in this stand is invalid. The first defendant's title to the property is tainted and the defendants ought to be ejected therefrom. The plaintiff is entitled to recover the stand from the defendants.

The counterclaim

The first defendant seeks compensation for unjust enrichment and seeks an improvement lien. A mistaken improver is a person who makes improvements to another person's property on the belief that his title to a property is valid. He can only be compensated for improvements he made on another's where he is able to show that he did so through a *bona fide* mistake and that the real owner of the property has been unjustly enriched at his expense. He must show that the enrichment was unjustified. See *Industrial Equity v Walker* 1996 (1) ZLR 259(H), *African Diamond Exporters (Pty) Ltd v Barclays Bank International* 1978 (30 SA 699 @713G-H).

This means that in order for the improver to succeed in an action for unjust enrichment for improvements on another person's property on the basis of a supposed title, a mistaken improver must show that he improved the property under a mistaken belief that he was entitled to do so and that had title to the land. He must convince the court that his mistake has culminated in the real owner of the land being unjustly enriched at his expense and that he is *prima facie* entitled to be compensated for the cost of the improvements. A claimant, who makes improvements in good faith, becomes entitled to the reasonable cost of the improvements. Compensation for unjust enrichment is limited to claimants who lacked knowledge of the true ownership of the land. The requirement for mistake serves to preclude compensation in cases where a person improves another's property well knowing the true state of affairs. There is a school of thought that if it is merely brought to the improver's attention that another person asserts a right over the property, and no determination has been made on ownership, nothing should hinder him from making improvements on the property and subsequently recover them. Another school of thought is that a person who effects improvements to a property when he is aware of a dispute over ownership of property is not entitled to recover expenses incurred in putting up the structure. He should only be able to

claim to the extent of improvements he made before he knew of the existence of the new owner. He by his conduct, risks further loss without compensation. My view is that a claimant who merely becomes aware that there is a dispute over a property, where *rei vindicatio* proceedings have not been brought and determined, should not face any limitations to compensation when the dispute is finally determined and he does not succeed. He should be entitled to full compensation for his expenses.

The first defendant pleads right to lien pending reimbursement of monies expended in constructing the cottage. A lien was defined in *Gunman N O v Ansari* [2011] ZAGPJHC 124 as follows,

“A lien (right of retention, *ius retentionis*) is the right to retain physical control of another’s property, whether movable or immovable, as a means of securing payment of a claim relating to the expenditure of money or something of monetary value by the possessor (termed “retentor” or “lien holder”, while exercising his or her lien) on the property until the claim has been satisfied. See *Brooklyn House Furnishers Pty Ltd v Knoetze and Sons* 1970 (3) SA 264(AD) at 270 E”

A lien can be a real lien, salvage and improvement lien or an enrichment lien. An improvement lien allows a defendant who has spent money or done work on another’s property; to hold onto the other person’s property until all his expenses are paid. An improvement lien affords a defence afforded to a possessor of property who challenges a *rei vindicatio* action. A litigant who relies on an improvement lien is required to show that he has possession of the thing claimed and that the expenses he incurred were necessary for the salvage of the property or that they were useful for the improvement of the property. See *Pheiffer v Van Wyk* (2014) ZASCA 87. The effect of a lien is that the owner of the property, cannot succeed on the *rei vindicatio* and recover his property until the defendant has been paid all his expenses or security has been given for payment of the expenses. He holds the property he possesses only as security. See *Singh v Santam Insurance Ltd* 1979(1) Sa 291(SCA). The court dealing with a n improvement lien is entitled to grant a *rei vindicatio* temporarily on condition that the owner performs first or temporarily dismiss the *rei vindicatio* and to allow the owner of the property to meet the expenses first and later institute the action again. See an article titled, *The legal nature of a lien in South African law* by M. Wease, *PER vol .17 n, 6 Potchefstroom 2014*.

Once a court is satisfied that a claimant mistakenly improved property belonging to another person and he seeks to recover his expenses equity considerations kick in. A court dealing with an unjust enrichment claim is required to strike a balance between the interests of the real owner

and those of the improver .In this case; the court must balance the improver's right to a remedy against the unfairness of necessitating the owner to accept the cost of an uninvited improvement. When the defendants commenced making improvements on the stand, they were unaware of the plaintiff's interest and title in the land. They believed that they had bought the stand from the real owner of the property and had valid title. They started to put up improvements on the understanding that their title was good and lacked knowledge of the correct position. The defendants were at those stage innocent and mistaken improvers. The second defendant was advised well before he finished roofing the cottage that the stand belonged to the plaintiff and was advised to stop further construction. The second defendant stubbornly continued to effect improvements on the plaintiff's stand. A person who effects improvements to a property when he is aware of a dispute over the property but does so before the dispute is determined is not barred from recovering expenses incurred in putting up the structure. I have also considered that by the time that the second defendant was advised of the true state of affairs he had almost finished construction of the structure. It would be unfair to let the plaintiff get away without paying compensation. The plaintiff stands to benefit from the cottage. The plaintiff will be unjustly enriched if the defendants are ejected without compensation. The equities of the case demand that the defendants be compensated for the cost of the cottage which cost has not been challenged. I have in the exercise of my discretion decided to grant an order for compensation for the improvements on condition that the plaintiff pays the expenses incurred by the first defendant before she ejects the defendants and all those claiming occupation through them.

In the result it is ordered as follows;

1. The memorandum of Agreement of Sale of Stand Number 14172 Norton Township of Stand 14191 Norton Township is set aside.
2. Transfer of Stand Number 14191 Norton Township of stand 14191 Norton to the first defendant under deed of transfer No 3253/13 is hereby cancelled.
3. The first and second defendants are ejected from Stand Number 14172 Norton Township of Stand Number 14191 Norton Township together with all persons claiming title through them.
- 4 The plaintiff is to pay to the defendants \$ 15 000, 00 for improvements to Stand Number 14172 Norton Township of Stand 14191 Norton Township
5. The operation of clause 3 of this order is suspended pending the payment of \$ 15 000.00 by the plaintiff to the defendant.

6. The defendants are to bear the plaintiff's costs.

Dondo, and Partners, for the plaintiff
Mavhunga & Partners, for the defendants