

MARGARET ZVINAVASHE Nee MUTAMBA
versus
L. KUROTWI
and
E. KUROTWI
and
SALTANA ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 & 22 September 2017

Civil Trial

J. Dondo, for the plaintiff
C. Mupungani, with him *F. Muserere*, for the 1st and 2nd defendants
No appearance for the 3rd defendant

ZHOU J: On 15 November 2012 the plaintiff issued summons against the defendants seeking an order declaring her to be the rightful owner of rights, title and interest in the property known as stand 7687 Warren Park Township of Warren Park, Harare, and for the ejection of the first and second defendants and all persons claiming occupation through them from that property. The plaintiff also seeks an order of costs against the first and second defendants. The claim is opposed by the first and second defendants.

The plaintiff gave evidence herself, and also called Anthony Ernest Pahwaringira, a former director of the third defendant, who gave evidence in support of her case. The first defendant gave evidence on behalf of himself and the second defendant. Evidence was also led for the defendants through Davy Fukwa Mutingwende who is a director of the third defendant.

From the evidence led on behalf of the plaintiff and defendants, the following facts are common cause. In March 2002 the first defendant representing one Alice Kurotwi entered into an agreement of sale with the third defendant in terms of which the latter sold to Alice Kurotwi the property known as Stand 7687 Warren Park Township of Warren Park measuring 1006 square metres. The first defendant paid the full purchase price in terms of the agreement. In fact, a letter written by one Cecil Madondo of Tudor House Consultants (Private) Limited who at some point was appointed Judicial Manager of the third defendant shows that the first

defendant actually paid much more than the purchase price set for that property. The agreement of sale between the third defendant and the first defendant was prepared by Borm Investments (Pvt) Ltd t/a Borm Real Estate, who were estate agents appointed by the third defendant. The estate agents also received the payments for the purchase price.

The plaintiff also purchased a property in the same area, known as 7671 Warren Park, Harare from the third defendant. In her declaration she states that she purchased the property in terms of a written agreement of sale. In her evidence before this court the plaintiff stated that when she sought to have architectural drawings prepared in respect of her proposed structure on Stand 7671 it was realised that no structure could be constructed on that property as the structure would interfere with electricity lines under the jurisdiction of the Zimbabwe Electricity Supply Authority. Upon raising the issue with Borm Real Estates she was referred to the third defendant who offered her an alternative property. That alternative property was Stand 7687 which, as noted earlier on, had been purchased by the first defendant on behalf of Alice Kurotwi. This double sale created the dispute which led to the instant proceedings being instituted by the plaintiff against the defendants. The court does not accept as sound the submission by Mr *Dondo* for the plaintiff that there was no double sale. The first defendant's agreement was never validly cancelled. No evidence of such cancellation was adduced in court. The judicial manager could not therefore repossess a property which was the subject of a valid agreement of sale. In any event there were no valid grounds for such cancellation which were proved in this court. The plaintiff led incoherent and inconsistent evidence as to the grounds of alleged repossession of the stand. While the letters attached to the plaintiff's bundle, exh 1, at pp 1 and 2, refer to arrears, the letter addressed by the judicial manager to the third defendant's director dated 1 April 2011, at p 16 of exh 2, shows that the first defendant in fact paid more than what is stated as the purchase price. The other two allegations that the property was purchased for a minor or that the first defendant was not vetted are not based on the agreement of sale between the first defendant and the third defendant.

The position of the law where a property already sold to one person is sold to another person is settled in this jurisdiction. The general preference of the law is to uphold the sanctity of contracts by giving effect to the first contract and leaving the second purchaser to pursue his claim for other remedies, such as damages for breach of contract. See *BP Southern Africa (Pty) Ltd v Desdan Properties (Pvt) Ltd & Anor* 1964 RLR 7 at (9) NH 1-1 1964 (2) SA 21 AT 25 a – H; *Mwayipaida Family Trust v Madoroba & Ors* 2004 (1) ZLR 439 (S) at 443 F – 444 C. This, of course, is not a principle of law that is cast in concrete. Thus, for instance, where

transfer has taken place in favour of a second purchaser who was ignorant of the claims of the first purchaser and took the transfer in good faith the court will not disturb the second purchaser real right. But if the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, the transfer in his or her name can be set aside. See *Crundall Brothers (Pvt) Ltd v Lazarus N.O & Anor* 1991 (20 ZLR 125 (S) at 131 E-F; *Mwayipaidza Family Trust v Madoroba & Ors (supra)* p 443 B-C. That situation does not present itself in the instant case because the plaintiff has not taken transfer of the property. In any event, the plaintiff would not have surmounted the fact that she had knowledge of the prior sale of the property to the first defendant given the fact that she is related to the first defendant in the sense that he is a son of her husband's sister and therefore her nephew. Also, on her evidence, she was with the first defendant's wife when she went to purchase her property – stand 7671. There are other factors which also show that she was aware of the first defendant's claim to the property. Her agreement of sale which was signed on 16 February 2007 in respect of the disputed stand does not record that she is getting that stand as an alternative allocation to replace stand 7671. By the time she signed the "Addendum to the Principal Agreement on 11 September 2012 she was already involved in a dispute with the defendants over the disputed stand. See also *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S) at 92 B-D.

This being a double sale in which transfer has not passed to either of the two purchasers, the first purchaser, the defendants *in casu*, should succeed unless special circumstances dictate otherwise, see *Chimponda v Rodrigues & Ors* 1997 (2) ZLR 63 (H) at 69 E-F; *BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd & Anor, (supra)*, at 11 G-H, *Guga v Moyo & Ors* 2000 (2) ZLR 458 (s), at 459 E-H. No special circumstances have been established by the plaintiff which would tilt the balance of equities in her favour. The statement by the plaintiff that she had caused plans to be drawn for a proposed house on the disputed property was not backed by evidence. In any event, in the light of the fact that it is common ground that the first defendant has constructed a cottage and principal dwelling house on the property, the mere drawing of plans would not constitute a special circumstances for the purposes of this case. The plaintiff also stated that she placed ten thousand bricks at the property which she alleges were utilized by the defendants. That, too, does not constitute a special circumstance. When she delivered the bricks she already knew that the defendants were claiming title over the property.

All the evidence placed before the court shows that the plaintiff was not only misled by those who sold the property to her but that she also misled herself by persisting to demand the

property in the face of the extant rights of the defendants over that property. All the evidence placed before this court which the plaintiff would have had access to if she wanted, shows that the agreement of sale of the first defendant was never cancelled.

Anthony Ernest Pahwaringira who gave evidence on behalf of the plaintiff was being deliberately untruthful and sought to mislead the court. Initially he gave evidence that the first defendant had failed to pay the full purchase price for the stand hence it was reposed and allocated to the plaintiff. When he was confronted with documentary evidence showing that the first defendant had in fact paid more than the purchase price he changed his evidence by suggesting that the agreement was cancelled because one of the purchasers was a minor child and that Lovemore Kurotwi had not gone through the vetting process of the City of Harare. Not only was there no evidence of those allegations as grounds of cancellation of the agreement; the evidence of this witness was not based on personal knowledge as he was not even involved in the purported allocation of the disputed property to the plaintiff which was done by the Judicial Manager. Further, the City of Harare was not a party to the agreement of sale with the first defendant.

The defendant in their plea asked for costs to be awarded *de bonis propriis* against the plaintiff's legal practitioners or, in the alternative, costs on the attorney-client scale. The prayer for costs *de bonis propriis* was not persisted with in argument. This claim is clearly a vexatious claim in which the plaintiff's legal practitioners clearly rendered less than a diligent service to their client. On that account costs *de bonis propriis* would certainly be justified, as the action constitutes an unacceptable abuse of the procedures of this court which the legal practitioners should have discouraged, see *Doelcam (Pvt) Ltd v Pichanick & Ors* 1999 (1) ZLR 390 (H); *Nyandoro v Sithole & Ors* 1999 (2) ZLR 353 (H) at 357B. The only ground upon which the court is prepared to excuse the plaintiff's legal practitioners from the order of costs is that the plaintiff herself was not entirely blameless. From her evidence she did not care that the agreement of sale signed with Lovemore Kurotwi was not cancelled. As noted earlier, she clearly was aware prior to accepting allocation of the disputed stand that the property had been sold to the first defendant representing Alice Kurotwi. In her evidence she gave the impression that Lovemore Kurotwi was a total stranger to her only to readily concede her close relationship to him under cross examination. Even in the face of evidence of a principal residence and a cottage having been constructed on the stand in question she persisted with this action, yet she states that she has her own drawings for the structures that she contemplates building on an already built up area. That attitude is an unreasonable abuse of court process which justifies

censure through a punitive order of costs. See *Sibanda v Nyathi & Anor* 2009 (2) ZLR 171 (H) at 178 C-D.

In the result, IT IS ORDERED THAT:

1. The plaintiff's claim be and is hereby dismissed;
2. The plaintiff shall pay the first and second defendants' costs on the legal practitioner and client scale.

Dondo & partners, plaintiff's legal practitioners
Manase & Manase, 1st & 2nd defendants' legal practitioners