HH 669-17
CIV 'A' 165/14
REF: GL96/13

PAUL MARINYANE MHLANGA
versus
ESTATE LATE BAYENI HARDWELL CHIORORO

HIGH COURT OF ZIMBABWE
CHIWESHE JP & CHITAKUNYE J
HARARE, 20 January 2015, 5 February 2015 & 29 September 2017

Civil Appeal

C.K. Mutevhe, for the appellant
V. Mukwachari, for the respondent

CHIWESHE JP**:** The respondent, which was the plaintiff in the court *a quo* issued summons against the appellant (respondent in the court *a quo*) seeking an order evicting the respondent from the immovable property known as stand number 442, Gaza Township, Chipinge. This property was allegedly owned by the late Bayeni Hardwell Chiororo who died on 22 December 2004. The property is now part of the deceased's estate. Joseph Chiororo was duly appointed executor of this estate.

The respondent sought eviction of the appellant on the ground that the appellant occupied the property without its consent and without any legal basis. The appellant, notwithstanding demand, had refused to vacate the property. The respondent put the value of this occupation at $300.00 per month. The appellant entered appearance to defend the action. The matter was heard by the court *a quo* and after a full trial, the order of eviction was granted.

The appellant has now lodged the present appeal against that decision. The grounds of appeal are stated as follows:

1. " The learned Magistrate erred at law when he proceeded to hear respondent's case when it was;
   (i) Not shown or proved to the court that the representative had the necessary authority, the alleged respondent's representative did not exhibit the so called certificate of authority to show that he was entitled to represent the deceased estate.
   (ii) The general power of attorney did not confer any power on any other person to represent the deceased estate.

2. The learned magistrate erred at law when he chose to treat Rodgers Pangai as strictly speaking a defence witness to the extent that it was not desirable for him to be cross examined by appellant. The court *a quo* ought to have realized that the nature or role of the said Rodgers Pangai as a witness merited him being asked questions by the appellant so that the whole stories behind the house in question could be properly ventilated.

3. 3.1 The learned magistrate erred in his judgment when he failed to direct his attention to the proceedings of case number G/L 215/05 which had a bearing and would have shown him that Rodgers Pangai was not a truthful and credible witness. The witness version on his dealing with appellant differed in two matters.

   3.2 Case number G/L 215/05 should have revealed to the Honourable magistrate that the alleged breach of contract by non-performance was a lie.

   3.3 The learned magistrate ought not to have been swayed by the non-performance argument if regard had been made to the Agreement of Sale dated the 6th of July 2001 between appellant and the said Rodgers Pangai which was discovered and filed of record and was never challenged.

   That in the Agreement, Rodgers Pangai acknowledged that full payment was made throws away the whole breach argument.

4. The learned magistrates should have treated the case as one of a double sale in which the circumstances and the law favoured the appellant to remain on the property.

5. The learned magistrate ultimately erred in ordering eviction whilst acknowledging the existence of an improvement lien. The learned magistrate assuming a case of eviction was made ought to have ordered it subject to appellant first being compensed for the improvements he did to the property in question."

The background facts to this case are set out in the judgment of the court *a quo* and in the record of proceedings. The respondent issued out summons seeking the eviction of the appellant (respondent in the court *a quo*) from stand number 442 Gaza Township, Chipinge (the property). According to the papers this property initially belonged to Dairibord Pvt Ltd. The company sold the property to one Roger Pangayi in 1985 in terms of an agreement of sale filed of record. In turn, he then sold the property to the late Bayeni Hardwell Chiororo in terms of an agreement of sale dated 20 June 1997. Transfer to Chiororo was effected on 3 April 2001. The deed of transfer is filed of record. The said Bayeni Hardwell Chiororo died on 22 December 2004. The property is part of his deceased estate, the plaintiff in the court *a quo*, which estate is now the lawful and registered owner of the property. The contention by the plaintiff (respondent in this appeal) was that the appellant was in occupation of the property without its consent and despite demand the appellant has refused to vacate the property. After a full trial, the presiding magistrate found in favour of the plaintiff and granted the order for eviction. It is that order that is being challenged on appeal.

In his plea in the court *a quo* the appellant proffered the following in its defence. He bought the property from the same Roger Pangayi, a Dairibord Pvt Ltd employee. Initially he entered into a verbal agreement of sale with the said Pangayi in terms of which he paid $28 000.00. This was sometime in 1996. This agreement was then reduced to writing on 6 July 2001. He was surprised in 2012 when the executor of the Estate Bayeni Chiororo claimed ownership of the property. He states that he, the late Chiororo and Pangayi were at the relevant time all employees of Dairibord Chipinge. The appellant avers that Pangayi had sold the house to the late Chiororo after he had already sold it to him. He avers that the title deed issued to Chiororo was based on a fraudulent sale and should for that reason be declared null and void. He further states that he had applied for an order compelling Pangayi to effect change of ownership which application was granted by the magistrate court sitting at Chipinge under case number GL 215/05. This is the appellant's version of the facts. He persisted with this stance during the trial. Moreso he

was not challenged in his assertion that the property was sold to him as a sitting tenant and that he had been resident at the property ever since for a period of eighteen years.

Richman Chiororo, who gave evidence by virtue of power of attorney granted by the executor, his elder brother, confirmed that the property had been registered in his father's name and that the title deed was proof of ownership. It was on that basis that the eviction of the appellant was being sought. He was unable to testify as to the circumstances surrounding the sale of the property to the late Chiororo, or, the sale of that same property to the appellant and the subsequent litigation in the same court under case number GL 215/05. He did say that when that case came up, the deceased had already passed on, having died in 2004.

The defendant gave evidence on oath. He stated that he had eight people living with him at the property. If evicted all these persons would be affected as they can only claim their right of or occupation through him. He reiterated that in another case, the seller, Pangayi, had been found guilty of a double sale. He had as a result been ordered to find another stand for the late Chiororo. He insisted that he had paid for the property although he did not have title deeds. He insisted that Pangayi had defrauded him. One Bobby More was also called as appellant's witnesses. He told the court that he was a workmate of both parties at Dairibord Chipinge and had been a member of the Dairibord housing committee. He said the property was sold to the appellant first. The houses did not have title deeds then but it was agreed that the deeds would be furnished later. He said the appellant paid off the full purchase price of Z$28 200.00 using the proceeds of his terminal benefits. He said pursuant to the sale the appellant extended the house. When the title deeds were out in 2006, the appellant approached Pangayi seeking transfer. Pangayi was summoned to court and ordered to provide transfer papers or face jail. Pangayi instead sold the same house to late Chiororo and gave him title deeds. He however said that Chiororo did not know that there had been a prior sale – he was an innocent purchaser.

The seller, Rogers Pangayi, was also called as appellant's witness. He told the court that he knew both parties in the matter. He had sold the property initially to the appellant in February 1996. He sold it for Z$6 000.00. He was paid Z$2 000.00 only and despite a

"whole year" of demand, the balance never came. He then told the appellant that he had cancelled the agreement because the appellant had not paid him the balance. However, he let the appellant occupy the property. In 1997 the appellant gave him the balance of Z$4 000.00. He accepted it but told the appellant that since he had cancelled the agreement of sale, this amount would stand in as rent. He never saw the appellant until 1999. He had expected him to look for alternative properties. He said when the appellant sued him for transfer of the property, he had already registered it in the name of the late Chiororo. They were told to seek an out of court settlement. In 2011 he offered to compensate the appellant but the appellant would have none of it. He said since the appellant had not raised the balance and he needed money as his wife was ill, he had sold the property to the respondent, the late Chiororo. He said Chiororo knew about the case and was aware of the appellant's interests in the property.

He sold the house for Z$30 000.00 to Chiororo, which was paid by way of a 50% deposit, the balance was paid later, in full. Thereafter they attended at council offices to effect change of names and cession of rights. Chiororo thereafter obtained title deeds to the property. He said he was prepared to compensate the appellant for the improvements he made to the property by way of extensions. The appellant was frustrated by the stance taken by Pangayi, suggesting to him that he had charged $25 000.00 for the property which he Pangayi raised higher when appellant failed to pay on time, calling the witness "a liar". Under cross examination Pangayi stated that Chiororo knew that the agreement of sale with appellant had been cancelled for failure to pay the purchase price – he told him so. It was for that reason that Chiororo bought the property.

He said that he, Chiororo and others had over the years been advising the appellant to vacate the premises in favour of Chiororo but he always resisted. He is prepared to compensate the appellant for the improvements made to the property, subject to evaluation of the same.

In a nutshell the above is the totality of the evidence upon which the magistrate based his decision to order the eviction of the appellant. In his terse judgment the trial magistrate failed to address the salient features of this case. Firstly, the court *a quo* should

have cautioned itself in accepting, as it seems to have done, the evidence of the seller, Pangayi. This witness is at the centre of the dispute. He is not an honest broker, his interests in the outcome of the case is obvious. The court *a quo* did not assess him on his credibility – in fact there is no reference in its judgment as to which of the witnesses the court had found credible and the reasons thereof. That surely is one of the primary roles of a trial court. The seller sold the same property to two different persons, a fraudulent act in itself. For that reason, he is bound to give an account that exonerates his conduct and justifies the end result, at the expense of the appellant. The evidence of such a witness cannot be accepted without proper scrutiny. For example, Pangayi says he cancelled the agreement with the appellant because the appellant had failed to raise the balance of the purchase price. Yet in the agreement of sale filed of record dated 6 July 2001 the same Pangayi confirms that he was paid the full purchase price and that there was nothing outstanding.

The appellant's account of events is the more probable of the two versions. He entered into an agreement of sale, paid the purchase price and moved into the property. He has occupied this property for a period of eighteen years. During that period neither the seller Pangayi nor the late Chiororo moved to evict him from the property. Pangayi's assertions that he and the late Chiororo visited the appellant on four or so occasions asking him to vacate the property is not consistent with the facts of this case. They watched the appellant during that long period extend the house from a mere two rooms to no less than eight rooms! No action was taken to interdict him from doing so or to evict him. Thus in contrast the late Chiororo, who claimed to have bought the property, did nothing to assume occupation but somehow, and unknown to the appellant, obtained title deeds! He must have known that the appellant occupied the property as owner. Indeed, he knew, if Pangayi is to be believed, that there was an agreement of sale between Pangayi and the appellant. The probability of connivance between Pangayi and the late Chiororo is ever so high given the circumstances of this case. I agree with the appellant's submissions that what the trial court was dealing with was a case of a "double sale" which should have been dealt with as such. The principles to be applied in such cases have been traversed in various cases in

this jurisdiction. The general rule is to order specific performance in favour of the first purchaser (in this case the appellant) and let the second purchaser pursue his remedy for damages as against the seller. This rule should only be departed from in special circumstances such as in the case of innocent second purchasers where the balance of convenience dictates such departures. The late Chiororo, having known of the existence of the first sale but proceeded nonetheless to purport to buy the same property, does not fall into this category of innocent purchasers. See *Crundal Brothers v Lazarus no and Anor* 1991 (2) ZLR 125 (S), *Guga v Moyo* 2000 (2) ZLR 458(S0, *Chimponda v Rodriques and Ors* 1997 (2) ZLR 63.

The appellant did not just occupy the property for a long eighteen years. He took all reasonable steps to secure his rights. He sought and was granted a court order to compel transfer. Through that order there was effected cession of rights in his favour. He is now told that the late Chiororo obtained title deeds to the same property. This brings me to the other dimension of this case, namely, if there was a court order in favour of the appellant, presumably granted by another magistrate at Chipinge in the form of case number GL 215/05, was it competent for the trial magistrate to preside over the same case, involving the same parties and the same cause of action? The attention of the trial magistrate was brought to the existence of the order under GL 215/05 yet he has not in his judgment made any reference to it. Is the order in that case still extant? Has it been set aside? If still extant, is the trial magistrate not bound by it? Should it not stand as the order of the Magistrates Court which the trial magistrate, his court having become *functus*, could not have interfered with? Failure to address this aspect of the case depicts a serious failure on the part of the trial magistrate to apply his mind to the issues before him. The proceedings are reviewable and liable to being set aside on that basis.

The appellant has argued that the court *a quo* should not have accepted the power of attorney given by the executor authorizing his brother to represent the Estate in the proceedings. However, this was never raised in the court *a quo* and in any event nothing much turns on it. The power of attorney can, given its timing, only be read to be limited to legal proceedings in this particular case and even if a wider application could be inferred,

it does not amount to abdication by the executor of his duties and obligations as executor. For that reason, I would dismiss this point off hand. See *Goredema v Magwenzi* HH 223-10.

I would conclude therefore that this case should have been decided on the principles governing the disposal of cases of "double sale". The trial magistrate failed to appreciate the nature of the case before him and came to the wrong conclusion. The totality of the evidence and the balance of convenience are in favour of the appellant's case. He may if he so wishes proceed to take such steps as may be necessary to set aside the title deeds issued in the respondent's name.

In the result the appeal is allowed. The order of the court *a quo* is hereby set aside and substituted with the following:

"The plaintiff's case be and is hereby dismissed with costs."

Chitakunye J …….. I agree

Mugadza Chinzamba & Partners, appellant's legal practitioners
Mhungu & Associates, respondent's legal practitioners