

REVAI GANDAHWA  
versus  
ELTON MAZVARIRA

HIGH COURT OF ZIMBABWE  
CHIWESHE JP & MAKONI J  
HARARE, 28 November 2013 & 2 November 2017

### **Civil Appeal**

Appellant in person  
Z. Kajokoto, for the respondent

CHIWESHE JP: The appellant, a self-actor, issued summons out of the Magistrates Court, Bindura, wherein she sought the eviction of the respondent from stand 2030, Garikai Tsungubvi, Glendale in Mazowe District. The court *a quo* dismissed her claim with costs. Dismayed by that outcome she filed the present appeal against the decision of that court. The grounds of appeal read as follows:

- “1. The court *a quo* erred in holding that there was a valid agreement of sale entered into between the respondent and Stanford Kavhimba.
2. The court *a quo* erred by holding that the agreement of sale entered into by the appellant and Stanford Kavhimba was a nullity.”

She prays that the order of the Magistrate Court be set aside and in its place be substituted an order evicting the respondent and all persons claiming occupation through him.

The facts as outlined in her particulars of claim are as follows: The appellant married one Paradzai Muvezwa in terms of the then Marriages Act [*Chapter 37*]. The marriage was contracted on 8 October 1993. A copy of the marriage certificate is filed of record as Annexure “A”. In October 2009, and during the subsistence of the marriage, the couple “purchased” from one Stephen Kavhima a residential stand situated at Glendale, an area falling under the administrative purview of the Mazowe Rural District Council. This stand is described as No. 2030, Garikai Tsungibvi, Glendale. It is also known as House V 2030, Highway, Glendale.

Pursuant to the sale on 29 October 2009, the parties, attended at the office of the Mazowe Rural District Council to execute and file “the change of tenancy form” indicating the simultaneous vacation of the stand by the “seller” and occupation of the same by the “purchaser” and the “form of cession” wherein the “seller” ceded, assigned and transferred his rights in the stand to the “purchaser”.

The appellant’s husband, Paradzai Muvezwa, filled in the Stand Allocation Sheet (Mazowe Rural District Council) Form confirming allocation of the stand to him. This form was verified by a Council Official on 10 November 2009 and bears the council date stamp. On 27 July 2012 the Mazowe Rural District Council, by letter dated 27 July 2012 signed by the Acting District Engineer, advised the Clerk of Court of the result of the valuation exercise carried out by Council with regards the stand. Of significance is the fact that the appellant’s husband is indicated in that letter as the registered occupant of that stand. Further on 10 November 2009 the Mazowe Rural District Council endorsed a “stand allocation sheet” in the name of the late husband of the appellant.

The appellant’s husband, Paradzai Muvezwa, died in May 2010. On 30 July 2012 the Master issued a certificate of authority in favour of the appellant, authorising her to administer and distribute the estate of her husband, specifically stand 2030 Glendale.

Notwithstanding the above developments, the respondent took occupation of the stand. Believing that the respondent had no lawful authority to do so and despite her pleas for him to vacate the stand but to no avail, the appellant issued summons in the court a quo for the respondent’s eviction.

In his plea the respondent avers that the appellant had no *locus standi* in the matter as she was not the wife of the deceased but one Netsai Muchochomi. The appellant is for that reason “fraudulently claiming ownership and *locus standi*”. Further the respondent avers that he had bought the same stand from one Kavimba in 2009, well before the plaintiff’s deceased husband bought it. He had subsequently paid the required purchase price at Local Government Offices. He had also paid change of tenancy fees and rates at Mazowe Rural District Council and proceeded to build a two roomed cottage at the stand. He is presently living at that stand. He alleges that the change of ownership form filed by the appellant is fraudulent. He insists that the stand is not part of the deceased husband’s estate and challenges the certificate of heirship issued by the Master of the High Court on the grounds that it was issued “irregularly and unprocedurally”. He maintains that he is the rightful owner of the stand.

The appellant replicated as follows. She was the lawful wife of the deceased as confirmed by the marriage certificate filed of record. There are two children from that marriage. Her late husband erected a three roomed cottage with a toilet and a borehole at the stand. That was well before the respondent erected his cottage. He only did so after the death of her husband. She denies that the certificate of authority issued by the Master was irregular insisting it had been properly issued. She is adamant that the stand belonged to the deceased's estate and asserts that even statements from Mazowe Rural Council are still coming in the name of her deceased husband.

The issue for decision by the trial Magistrate was whether the appellant was legally entitled to evict the respondent from the stand or, conversely, whether the respondent was legally entitled to occupy the stand. After a full trial the court *a quo* dismissed with costs the appellant's claim for the eviction of the respondent. Displeased with that outcome the appellant lodged this appeal.

The trial magistrate presided over a matter already the subject of a determination by the Master of the High Court. The effect of the Certificate of Authority issued by the Master in favour of the appellant on 30 July 2012 was that stand 2030 was part of the deceased estate of P. Muvezwa (appellant's husband). In other words, the property belonged to P. Muvezwa and not the respondent. Secondly the Master through the same document authorised the appellant "to administer and distribute the estate of the late Paradzai Muvezwa DR BIN 67/12" and under para 4 thereof it empowered the appellant to "Transfer title, rights and interest of property number 2030 Glendale".

The trial magistrate has no jurisdiction to review the determination made by the Master. The Master's decisions are reviewable by this court and not the Magistrates Court. In other words, once such determination has been made, the Magistrates Court is bound by it. Unless the determination is set aside by the High Court, the Magistrates Court cannot, as the trial magistrate has done, ride roughshod over it and issue orders contrary to or in conflict with the same. The order given by the magistrate flies in the face of the letters of administration properly issued by the Master of the High Court in favour of the appellant. The appellant is empowered to administer the stand which includes the right to evict persons occupying the same without lawful authority to do so. The appeal should succeed on that basis alone.

In its judgment the court *a quo* correctly noted that it was dealing with a case of the type normally referred to as "double sale". It correctly observed that the rule is that the first

sale should prevail over the second and subsequent sales. However, it failed to appreciate that the rule is not absolute and that it can be departed from on good cause shown. One must for example make a distinction between innocent second purchasers and those purchasers who knowing fully well of the existence of a first purchase, nonetheless proceed to purport to buy the same property the subject of an earlier sale to another purchaser. With regards innocent second purchasers, the court may at its discretion uphold the second sale and direct that the first purchaser's remedy for damages be met by the seller. Thus in the case of *Gundal Brothers (Pvt) Ltd v Lazarus NO & Anor* 1991 (2) ZLR 125 SC at 132 G the Supreme Court quoted with approval the following passage from an article by Professor Mckerron published in Vol 4 of the 1935 SA Law Times at p 178:

“It is submitted that where A sells a piece of land first to B and then to C – and the position is the same *mutatis mutandis* in the case of a sale of a movable of which the court could decree specific performance – the rights of the parties are as follows:

- (1) .....
- (2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of sale or at the time he took transfer, of the prior sale to B, and B's only remedy is an action for damages against A.

If, however, C had knowledge at either of these dates, B, in the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event C's only remedy is an action for damages against A.”

Thus in cases of double sales the general rule will apply but may be departed from where the second purchaser had no knowledge of the earlier sale and the balance of equities so dictate that departure.

In *casu* there is no suggestion that the appellant's husband knew, at the time he entered into the agreement of sale, of the existence of a prior agreement of sale involving the respondent. He should to all intents and purposes be treated as an innocent purchaser in which case the question must be asked whether given the circumstances of this case the balance of convenience does not lie in his favour. It was a misdirection on the part of the trial court not to consider that possibility. In the case of *Chimponda v Rodrigues & 2 Ors* 1997 (2) ZLR 63 (H) it was held that “if, in a double sale situation, the second buyer has knowledge of the first sale of the property, either at the time of sale or at the time it took transfer, then unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the second buyer. In such an instance, the second buyer's only remedy is an action for damages against the seller. In deciding whether there are special circumstances affecting the balance of equities, the court must bear in mind that the primary right of the

wronged first buyer is the remedy of specific performance which will be granted unless there is some equitable reason disqualifying him from obtaining such relief. It was further held that in the case before the court there were no special circumstances affecting the balance of equities disqualifying the first buyer from being granted his primary right of specific performance”.

On the other hand in *Guga v Moyo & Ors* 2002 (2) ZLR 458 (S) the court held in favour of the second purchaser. While acknowledging the general rule that in double sales, the first purchaser should be preferred over the second purchaser, the court acknowledged that where there were special circumstances exceptions to this general rule should be entertained. It noted that in the case before it there were various circumstances which cumulatively amounted to special circumstances, such as to justify ordering the transfer of the property to the second purchaser. It noted that the second purchaser had paid more money for the property than the first purchaser, he had taken possession of the property and had spent considerable sums on the house. The first purchaser had failed to protect his interests by registering a caveat against the title deeds to the property after he learnt that the seller was acting dishonestly and, in any event, as the monies paid by the second purchaser were still held in trust by a firm of lawyers, the court could order that the monies so held be paid to the first purchaser. On the basis of these special circumstances the court directed that the property be transferred to the second purchaser, and not the first purchaser, marking a permissible departure from the general rule.

The above constitutes the kind of legal and factual inquiry that the court *a quo* should have traversed in order to arrive at a fair determination of the parties' rights to stand 2030 Glendale. A tabulation of the factors in each party's favour and disfavour would have led the trial court to only one reasonable conclusion, namely that there were special circumstances operating in favour of the appellant, the second purchaser.

The factors in favour of the appellant are these:

- (1) All Mazowe Rural District Council papers indicate that the stand was allocated to the appellant's late husband, Paradzai Muvezwa.
- (2) The appellant produced a marriage certificate proving that she was married to the deceased and was therefore the surviving spouse.
- (3) The Master of the High Court, who is the authority for the administration of deceased estates, issued letters of administration to the appellant, authorising her to “transfer title, rights and interest” of stand 2030, Glendale.

- (4) Such letters of administration constitute legal authority and remain so until revoked by the Master or set aside by this court.
- (5) The said letters have not been so revoked or set aside.
- (6) The appellant's deceased husband further asserted his rights by building a three roomed cottage thereon.

The main factor against the appellant is that the agreement of sale she relies on bears a later date than that signed by the respondent.

On the other hand:

- (1) The respondent's agreement of sale preceded that of the appellant's late husband.
- (2) The respondent has built a two roomed cottage on the stand.
- (3) The respondent is presently in occupation of the stand.
- (4) The respondent has produced some documents showing some payments to Ministry of National Housing and to Mazowe Rural Council.
- (5) He has produced a handwritten note from Ministry of National Housing tending to indicate that the stand has been allocated to him.

However, a number of factors militate against the respondent. He does not dispute that it was the appellant's husband who first built a three roomed cottage at the stand and let it to tenants. He caused the eviction of those tenants, gaining occupation for himself. It was only then that he built his two roomed cottage where he now lives. The legality of that eviction has not been interrogated by the court *a quo*. If it was lawful it would have been done pursuant to a court order. The trial court should have examined the relevance of any such court order to the proceedings before it and made appropriate comments *vis a vis* the rights of the parties in light thereof and whether or not the matter was not *res judicata*.

The respondent asserts that he was hospitalised for a year and that it was during that period when he was unable to follow through registration processes that the seller took advantage and sold the property to the appellant's late husband. Although during the trial the respondent's legal practitioners drew the respondents' attention to two documents, namely a police accident report and a medical report, the record does not disclose whether the appellant had sight of these documents or indeed whether the court itself had seen them. There is no indication in the record whether any of these documents had been formally produced as evidence. Indeed the record sent on appeal, certified as having been inspected by the parties, does not include these documents. The issue is important as these documents would have

corroborated the respondent's assertions that having bought the property he was disabled from pursuing registration of the property into his name. Conversely it may be inferred, in the absence of such documents, that he was not telling the truth, or that he was not diligent in pursuing his rights to the stand.

The stark difference between the papers presented by the parties is that the appellant's documents show a logical chain of events. Indeed the latest official correspondence show that the stand is registered in the name of appellant's deceased husband. This fact lends credit to the appellant's assertions that even to this day council utility bills come in the name of her late husband.

On the other hand, the respondent's papers lack clarity. Some of them are handwritten and others, such as payments to the Ministry of Housing, do not state the purpose for which payment was made. The respondent's papers are not convincing. Their authenticity is dubious.

In conclusion, the trial magistrate's hands were tied by the letters of administration issued by the Master of the High Court in favour of the appellant. The letters of administration not having been revoked or set aside by a competent court, the trial magistrate was obliged to give effect to them by granting the relief sought by the appellant. The trial court had no jurisdiction to review the letters of administration. In any event there was no application before it seeking such revocation.

Secondly, the trial court failed to properly apply the law regarding double sales to the facts of the case. If it had done so it would have granted the relief sought by the appellant as the balance of equities were tilted in her favour.

It was for these reasons that we ordered as follows:

1. The appeal be and is hereby upheld with costs.
2. The order of the court *a quo* be and is hereby set aside and, in its place, be substituted the following:

The respondent and all those claiming occupation through him be and are hereby directed to vacate stand number 2030 Garikai Tsungubvi Glendale by the 31<sup>st</sup> December 2013 failing which the Deputy Sheriff be and is hereby authorised to evict the said respondent and all those claiming occupation through him from the said property.

MAKONI J agrees.....

*Kajokoto & Company*, respondent's legal practitioners