

ZONDIWE DHLOMO
versus
DAVID DHLOMO
and
BARBARA VHUTUZA
and
EMMANUEL ANESU VHUTUZA
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 27 February 2017 and 24 & 27 March 2017 and 7 June 2017

Trial

C. Chauke, for the plaintiff
D. Drury, for the third and fourth defendants

MUNANGATI-MANONGWA J: The actions of an Anglican Church priest David Dhlomo the first defendant, in selling his deceased mother's house to second and third defendants without the knowledge of his siblings have resulted in the plaintiff (his sibling) dragging both the man of the cloth and the purchasers to court. The transaction has resulted in far reaching consequences for the parties factually, legally and financially.

The following facts are common cause. One Sizi Njini a registered owner of a property called 6336 Highfield Township measuring 244m² held under Deed of Transfer 7 349/94 (hereinafter called "the property") died intestate on 23 April 2002. She was survived by six adult children. Of the six, 4 (four) have since died and only the plaintiff and her brother David the priest are surviving. The first defendant David Dhlomo (hereafter called "David") managed to register his mother's estate, was appointed executor and acquired transfer of the property into his name under Deed of Transfer 1603/2007.

He then sold and transferred that property (the property in issue) to the second and third defendants who are husband and wife. The second and third defendants (hereinafter called the "Vhutuzas") currently hold title to the property under Deed of Transfer No. 1196/2009.

It is common cause that the plaintiff (hereinafter referred to as “Ms Dhlomo”) then issued summons against her brother David, and the Vhutuzas seeking the cancellation of the deed of transfer No 1603/2007 made in favour of David and cancellation of deed of transfer No 1196/2009 made in favour of the Vhutuzas. David defaulted at pre-trial conference stage and on the 22 January 2013 upon an application by Ms Dhlomo a default judgment was granted against him. This resulted in the cancellation of Deed of Transfer 1603/07 made in favour of David. The order for such cancellation remains extant as the Vhutuzas never pursued the application for rescission of judgment which they had filed. Further, it is common cause that upon the Vhutuzas purchasing the property from David they had razed to the ground the initial house. It is not in dispute that Ms Dhlomo visited the property when it had already been bought by the Vhutuzas and found that demolition was in progress and raised issue with the sale. It is not in issue that a new structure stands where the old house used to be. It has 4 bedrooms, a lounge, a toilet with wash basin and a combined bathroom and toilet.

For his actions of registering the estate and ultimately transferring property into his name and disposing it to the Vhutuzas the first defendant was charged with and convicted of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act. He was sentenced to 24 months imprisonment of which 6 months was suspended for 5 years on condition of good behaviour with the remaining 18 months commuted to community service. The Vhutuzas did not participate in the criminal proceedings although they were aware that David was being charged of the offence.

At pre-trial stage the following were agreed to be the issues for determination:

1. Whether or not the first defendant properly obtained title in the disputed Property, if not,
2. Whether or not the second and third defendants are entitled to stand 6336 Western Triangle Highfield, Harare, if not,
3. Whether or not the plaintiff is entitled to the relief sought.

Plaintiff's Case

The plaintiff gave evidence to the following effect: Before her mother passed on she had reposed the title deed to the house with her and that all the siblings knew of this. After the mother's death the children agreed that male members of the family were to lead the process of winding up the estate. The plaintiff was at the time taking care of a sick sister. Livingstone an elder brother was to lead the process. The plaintiff stated that prior to their

mother's death, a brother, Jonathan lived at the property with his family and continued after the mother's death. Jonathan had tenants and rentals were shared. Richard took over from Jonathan and at that time in 2006, David who was not in good books with the rest of the family members would cause havoc as he violently demanded rentals.

When David took title in June 2007 none of the siblings was aware. It was only around November or December 2008 whilst attending a funeral that the plaintiff heard from relatives that David had sold the house but the purchaser was not mentioned. It was difficult to confront David as his whereabouts were unknown and he was not communicating with other family members. It was through follow ups at Council and ultimately at Deeds Registry in March 2009 when she got aware that David had changed title into his name. On another visit to the deeds office that is when she was further informed of the transfer into the Vhutuzas names. She explained that she got the information on the changes in March 2009 because she was unwell from the time she heard of the sale. Ultimately David admitted to his actions. The family members were not aware of the registration of the estate, nor the holding of the edict meeting as David did not inform anyone. When the edict meeting was held, Richard the father figure was alive but very ill and could not have attended the meeting.

The plaintiff gave evidence that she then visited the property and found that demolition was going on. This she discovered when she went to deliver a letter from the Police inviting the defendants to come and discuss the issue. Despite the defendants being aware of the problem they continued to demolish and build. She indicated that she never visited the place from the time that litigation started. She produced an affidavit exh 2 wherein the first defendant had entered into an out of court settlement with the plaintiff conceding that the sale and subsequent transfer of the property was improperly done as the priest had not consulted the plaintiff and other beneficiaries of their mother's estate. He further undertook to reverse the transfer of the property from the second and third defendant's names and from his name into the names of the late Sizi Njini their mother. This was on 11 September 2009 before the subsequent conviction and sentence of the first defendant. The plaintiff indicated to court that she did not ascertain whether he ultimately negotiated with the Vhutuzas. During cross examination the plaintiff maintained that the actions of the first defendant were not sanctioned by the siblings who were beneficiaries and that the Vhutuzas had been aware of the irregular sale and transfer long before the conviction and disregarded her warning, as they did not respond when she informed them. She has not interacted with David since 2010.

Defendants' Case

Mr Emmanuel Vhutuza gave his evidence first. He indicated that he works for Equity Properties a property development entity. The second defendant is his wife. In a bid to secure self-owned accommodation the parties through a colleague got information that an Anglican priest David Dhlomo, the first defendant was selling a house. They engaged him, had sight of the property and decided to purchase it. Before purchasing it for \$15 000-00 their legal practitioner Mr Chasakara did the necessary checks at the deeds registry office and found the property to be clean and registered in the first defendant's name. The sale agreement was concluded on 21 November 2008 and transfer was effected on 25 February 2009. It is the first defendant's evidence that at the time of sale he was not aware that the property in question had been a subject of a deceased estate nor that the seller had gotten title from the deceased estate.

After purchasing the property the parties moved in at the end of April 2009 having given the resident tenants the requisite 3 months' notice. The property as per his description was an old house built in the 1960s and consisted of the following: 6 rooms and a small kitchen with an outside toilet. Demolitions were carried out as parties started building from the back. A new structure now stands in the old house' place as mentioned earlier on and he states that this structure is completely different from the previous one. US\$30 000 was spent on the renovations. This witness confirms that at the commencement of demolitions the plaintiff came to the property and left a message for him to appear at Machipisa Police Station where the parties later met. He stated that the plaintiff did not tell him to stop building. He had a discussion with the police and the matter was referred to serious fraud department but he did not take part in the criminal proceedings. He then only read of the first defendant's conviction and sentence in the Herald. He believed that he should have been informed when the criminal proceedings were in progress.

The witness professed ignorance of the affidavit by the first defendant in which a settlement was reached indicating that he only became aware of it during the current proceedings. He believes that there could be collusion between the plaintiff and David Dhlomo the brother as they both stand to benefit from the cancellation of the deed as the only two surviving siblings. Under cross-examination the third defendant conceded that he had applied for rescission of default judgment granted against the first defendant and he knew the default judgment would have implications as the parties' title would be threatened. He further indicated that although he had had the master's report which indicates the possibility of the edict meeting not having been properly held, he maintained that the statement was devoid of

in depth analysis and had not been put to test. The third defendant stated under cross-examination that he did not take action when he became aware that fraud had been perpetrated because in his view there were a lot of grey areas and the seller David was pleading innocence. He had further proceeded with demolition on advice from the lawyers that the plaintiff was making frivolous claims and also David continued to say he was innocent.

It further came out during cross-examination that the third defendant was in contact with the first defendant as he confirmed seeing the first defendant on the first day of trial and conceded to having communicated with him on the phone. According to the third defendant's evidence, the first defendant had told him he could not make it to court.

Second defendant's evidence

This defendant is the third defendant's wife and she is an attested member of the Zimbabwe Republic Police, carries the rank of Inspector, and is seconded to the first lady's office. Her evidence was in sync with that of her husband *viz* the acquisition of the property and the registration of title. She confirmed that the parties were not aware of the prior ownership of the property nor that there was an edict meeting in 2005. In essence she and her husband were not aware of the history of the house. When the issue of fraud arose she was out of the country and the husband attended at the police station.

The parties did not take part in the criminal proceedings and they only heard of the conviction in 2010 through the press. She believed that the seller got a lighter sentence because he may have committed the fraud together with other family members for example one Richard.

She confirmed that the old structure was razed to the ground, her husband rebuilt the property in two stages and that a new structure is in place as described in the husband's evidence. She added that no caveat was placed on the property by the plaintiff neither did she stop them from building. She conceded under cross-examination that the parties became aware of the problems to the house before full demolition of the structure but proceeded on assurance by the first defendant, the seller and their legal practitioner that everything was above board. She further confirmed that the application for rescission of judgment was never finalised.

Analysis

Whether or not 1st Defendant properly obtained title in the disputed property

The plaintiff gave her evidence well maintaining that David the first defendant had no mandate to register the estate on his own. He had fraudulently gotten title without the other siblings' knowledge. By his own admission in an affidavit he had undertaken to reverse the transaction. She maintained that the Vhutuzas had proceeded knowing of the risks which aspect the Vhutuzas do not dispute. I find the plaintiff to have been credible and there is no evidence of any collusion between her and her brother whom she last communicated with in 2010.

This is supported by the Master's report which was discovered and placed before the court. The Master indicated that it appears the Edict meeting was not properly constituted. David had further proceeded to benefit alone at the exclusion of other beneficiaries without regard to s 68 D subs 2 (a) and (b) of the Administration of Estates Act. The Master could not rule out "the possibility of misrepresentation of information." Suffice to say David was convicted of fraud. As submitted by the plaintiff's legal practitioner David could not have been a legitimate owner. He fraudulently obtained title hence his actions were a nullity.¹ In that regard first defendant did not properly obtain title. Even if this conclusion were to be assumed to be incorrect, there are hurdles which become insurmountable for the Vhutuzas. The default judgment granted by BERE J on 22 January 2013 remains *extant*. It cancelled Deed of Transfer No 1603/07 which had been made in favour of David, the implications of which shall be dealt with in due course.

Whether or not the 2nd and 3rd Defendants are entitled to Stand 5336 Western Triangle

Having reached the conclusion that the first defendant did not properly obtain title it would naturally follow that the presence of an illegality would taint all actions that follow. Nonetheless I am forced to consider the above issue for purposes of transparency and clarity to parties.

Mr *Chauke* for the plaintiff submitted that the Vhutuzas cannot be entitled to the property as no rights could pass to them from a fraudulent act. In his submissions he stated that David's appointment was irregular and hence a nullity. Nothing could flow from his acts. The fact that he advertised for a lost deed when same was never lost showed a criminal intent. He stated that, the fact that the Vhutuzas were innocent purchasers is deemed irrelevant as they have bought not from an owner but a fraudster in which case the seller

¹ *Katirawu v D. Katirawu & 3 Others* HH 58/07
Chitsinde and Another v Musa & 2 Others HH274/10

remained a convict in respect of that property. The Vhutuzas recourse lies in suing the first defendant.

For their part, the Vhutuzas submitted that they were innocent purchasers in so far as they were not aware of the progression of the issues surrounding the property from an estate to David who sold to them. Mr *Drury* submitted that the court should take a robust approach and not adopt the narrow application of the law on fraud as this will result in an unjust and manifestly unfair result. This will mean property reverting to the deceased estate with plaintiff and her fraudster brother and children of the deceased beneficiaries' benefitting which will be an affront to considerations of justice and fairness. In citing *Zimmat Insurance Co Ltd v Chawanda*², Mr *Drury* urged the court to adopt the dynamism advocated therein by being responsive to the socio-economic dictates and "altering views" of justice. He further submitted that judges must not be slaves to precedence in reference to the cases duly cited by the plaintiffs.

Mr *Drury* further submitted that in the absence of evidence by the Master nothing can turn on the Master's report. The report having been filed in terms of r 248 of this court's rules would not be applicable as this is not an application. Further that David's executorship was not set aside and the estate remains finalised. That the plaintiff did not act from the time of her mother's death in 2002 to 2009 taints her case. He argued that the plaintiff had not satisfied the essential elements of fraud.

Whilst admitting that the concept of innocent purchasers usually applies to double sales he moved for the principle to apply *in casu* where the purchaser was "entirely ignorant of the claims of the first purchaser and took transfer in good faith."³ Invoking such a principle would mean non-disturbance of the Vhutuzas's rights. He thus sought to persuade the court to apply the principles thereto in guiding it to a just result.

It is common cause that plaintiff does not seek the setting aside of the first defendant's executorship. She sought the reversal of consequent acts by the executor. It is not in dispute that David held himself as the only party interested in the estate and misrepresented facts to the Master. He has since been convicted of fraud. That it took time for plaintiff who had the title deed to register the estate has been duly explained. The family was not ready to proceed due to illnesses and deaths of several people in the family. That

² 1990 (2) ZLR 143 SC

³ *Crundall Brothers v Lazarus N O & Another* 1999 (2) ZLR 125 (S)

could not justify David sidelining all the other beneficiaries in the course lying that the title deed was lost.

The scenario *in casu* can never be compared to a double sale scenario. The principles attended thereto are in my view inapplicable as Mr *Drury* would like the court to believe. This is because the seller *in casu* had no rights to pass by virtue of the fraud. As MAKARAU J (as she then was) concluded in *Furure Katirawu v David Katirawu & others*⁴

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“.....the “rights” that the second respondent believes to have purchased and acquired from the first respondent are tainted by the same illegality and amount to nought by token of the same reasoning. It is as if there was never a sale between her and the first respondent and consequently, no rights can from a non-sale in her favour. The sale and the consequent cession of rights in her favour amount to nothing at law for nothing legal can flow from a fraud.”

The above legal position subsists in this case. The fraudulent conduct of the first defendant nullifies subsequent transactions he engaged in. He got title through fraud hence he had no rights to pass to the Vhutuzas. The purchasers suffer the consequences of a nought transaction, there was nothing to buy and to receive as the purported seller had no right to pass on.

Apart from this finding, it is common cause that this court has already granted the plaintiff relief as against the first defendant. The rights acquired by David in the property as set out in deed of transfer 1603/07 were set aside by virtue of the cancellation of his title.

The Vhutuzas’ title is born of or from David’s rights. David had transferred his “rights” to them and the court has ruled that the document he held the rights from is cancelled. Title deeds being sequential and arising from parentage, the Vhutuzas’ title cannot hold as one needs ask, “whence from cometh their real rights?”

The Vhutuzas saw this fatal result coming. This is supported by their admission that they embarked on a mission to have the default judgment rescinded as they were aware of the implications of the cancellation of first defendant’s title. Mr Vhutuza admitted during cross examination that he knew they stood to lose more and indeed that stands to be so. Whilst appreciating that the fraud allegations were serious, the Vhutuzas proceeded with demolition as per their evidence relying on assurances from their lawyer and the first defendant. Innocent and unaware they might have been of the history of the property, there came a time they were aware of the situation. Indeed, there might not have been a caveat or an interdict

⁴ Cited supra at

for them to stop building, but with the knowledge of serious allegations of fraud levelled against their seller, caution should have been exercised in developing the property.

Mr *Drury* seeks that the court be proactive and apply principles of equity to avoid the enrichment of one party at the expense of the other. According to him this entails considering that plaintiff had taken considerable time before asserting her rights and by the time she sought to act the property was now in the hands of a different party with a new structure in place. Hence, the plaintiff should not be permitted to benefit from the *bona fide* actions of the Vhutuzas who developed a property for themselves only for the estate to be enriched. I believe this argument cannot augur as the sale is vitiated by fraud.

It is due to the foregoing that proactive though the court might want to be within the broad context of law development as permitted by the Constitution, the principles invoked and utilized in *Concalves v Rodriques*⁵ cannot be applied. I thus find that the second and third defendants are not entitled to stand 6336 Western Triangle, Highfield, Harare.

It may also be noted that s 11 (1) (a) of the Deeds Registries Act provides that transfers of land and cessions of real rights shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership with other real right in the land accrued to the persons successively becoming vested with such right.

A departure to such is not lawful except where the Registrar is satisfied that the circumstances are exceptional and he consents to such departure as per the proviso provided in s 11 (1) (b) (1) the instances of which do not cover this case.

Where the court has annulled or reversed the rights purported to have accrued to first defendant the sequence had not only been broken but in essence there were no rights to pass to the Vhutuzas. It follows that their title deed cannot stand.

To all intents and purposes, the Vhutuzas can therefore not be entitled to the property. It then follows that the plaintiff is entitled to the relief sought. The second and third defendants may well have recourse as against the first defendant, David the errant priest, and the estate of the late Sizi Njini but that is not this court's concern at the moment.

Accordingly, it is hereby ordered that

⁵ 2004 ZWHCC 199

1. The deed of transfer no. 1196/2009 made in favour of the second and third defendants be and is hereby cancelled.
2. Stand 6336 Highfield Township shall revert to the late Sizi Njini.
3. The second and third defendants to pay costs jointly and severally the one paying the other to be absolved.

Uriri Attorney -At- Law, applicant's legal practitioners
Honey & Blanckenburg, 2nd and 3rd defendant's legal practitioners