

PRISCA TAGWIREYI

Versus

EZEKIAL MARIGA

And

MARY SIBANDA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 30 SEPTEMBER 2004

B Ndove for the applicant
G Nyoni for the respondents

Judgment

CHIWESHE J: Under case number HC 394/02 Mary Sibanda applied for and was granted a provisional order interdicting Prisca Tagwireyi and two others from disposing of “the property”, being certain piece of land situate in the district of Bulawayo commonly known as number 67 Shetland Drive, Queens Park East, Bulawayo held under deed of transfer number 3210/87 dated 21 September 1987. The provisional order was served on Ezekiel Mariga (1st respondent therein) on the 11 March 2002, on Prisca Tagwireyi (2nd respondent) through her legal practitioners Cheda and Partners on 7 March 2002 and on the Registrar of Deeds (3rd respondent therein) on 7 March 2002. The provisional order was confirmed on 25 April 2002 unopposed. However, in his report dated 13 March 2002 the Registrar of Deeds advises that the property was then registered in the name of Prisca Tagwireyi. The report does not state when the registration was effected and in particular whether it was before or after service upon the Registrar of Deeds of the provisional order. On the basis of that report the provisional order may well be a *brutum fulmen*. However,

in a report dated 14 February 2002, the same office issued a report in which it was stated that the Registrar of Deeds had no objection to the granting of the order as prayed. Needless to say the two reports are contradictory. No explanation has been given for that discrepancy.

There is another twist to this matter. In a letter addressed to Messrs Majoko and Partners (the applicant's legal practitioners) dated 30 May 2002 Messrs Cheda and Partners advise that they were served with the application on 30 May 2002 but that their client was in the United Kingdom and they did not have power of attorney to receive any court papers on her behalf. The application according to them had been erroneously served upon them and for that reason the validity of the order granted is questionable. According to the certificate of service the provisional order was served on Messrs Cheda and Partners on 7 March 2002. It took them up to 30 May 2002 to disown service, a period of more than two months. However, despite Messrs Cheda and Partners' protesting to the contrary on 25 March 2002 under case number HC 865/02 they filed summons on behalf of Prisca Tagwireyi in which it was sought firstly to eject the defendants therein namely Ezekiel Mariga (1st defendant) and March Sibanda 2nd defendant) from the property, alternatively the refund of the purchase price in the sum of \$600 000,00 plus interest and secondly costs of suit.

The first defendant has not filed any response to that summons. Technically he is in default. The second defendant entered an appearance to defend on 30 April 2002 and filed her plea on 28 Mat 2002. The plaintiff's case is predicated on the following facts according to the declaration. In September 2001 the first defendant Ezekiel Mariga sold to the plaintiff the property commonly referred to as number 67 Shetland Drive, Queens Park East, Bulawayo for the sum of \$600 000,00. A

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memorandum of agreement of sale was drawn up and signed by the plaintiff and the first defendant on 4 September 2001 and 24 August 2001 respectively. The plaintiff was made aware of the existence of the second defendant's tenancy at the property and was required in terms of the agreement of sale to give three months written notice to the tenant should she require vacant possession of the property. The plaintiff wrote on two occasions to the second defendant instructing her to vacate the property. The second defendant did not comply with these instructions. On 15 February 2002 she applied for transfer of title from the first defendant to herself. The transfer was effected on 6 March 2002. By virtue of that transfer the plaintiff as owner is entitled to eject any persons resident at the property without her authority. That is the order she seeks against the defendants failing which she would be content with an alternative order for the refund of the purchase price plus interest. The plaintiff also seeks costs of suit. It is also averred that the second defendant's status is that of a tenant of the 1st defendant and a former girlfriend of the first defendant.

In her plea the second defendant states that she is not a tenant but first defendant's customary union wife. She also states that the purported sale of the property was declared null and void by an order of this court dated 25 April 2002. She avers further that the property was bought through her joint efforts with the first defendant. She alleges that by the time the application papers for transfer were lodged on 15 February 2002 the urgent chamber application had been served upon the plaintiff's legal practitioners and that she has proof of such service upon the said legal practitioners and upon the Registrar of Deeds. The lodging of transfer documents was for that reason *mala fides* she insists. She demands that the transfer be set aside as it was not only *mala fides* but expressly forbidden by an order of this

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court. She says that the plaintiff's representative one Tom Gumbo was aware of her position *vis-à-vis* the property and had undertaken not to purchase the property but instead advise his principal to look for another property. To that end it is argued the plaintiff should not be regarded as a *bona fide* purchaser. Such is the nature of the defence outlined in the second defendant's plea. Attached to her plea is a copy of the first page of the urgent chamber application tending to show that it had been served on the plaintiff and the Registrar of Deeds.

The plaintiff's response to that plea is an application for summary judgment lodged under case number 1493/02 on the basis that the second defendant has no defence to the plaintiff's claim and that appearance to defendant has been entered solely for purposes of delay. That application is devoid of any merit. The issues raised in the second defendant's plea in the main case (HC 856/02) constitute a defence to the plaintiff's claim. If such facts as alleged are proved to be true at the trial, the defendant will be absolved. Firstly it is clear that the property was transferred in flagrant violation of an order of this honourable court made under case number HC 394/02. That order still stands. Until it is rescinded or otherwise set aside, the plaintiff cannot pursue the present claim. And until that happens the second defendant has a first class defence. The plaintiff cannot seek to enforce an arrangement that has been declared null and void by order of this court. Further the defendant alleges that the plaintiff is not an innocent buyer. She alleges that the purchaser or her agents knew of her interest in the property as the first defendant's customary union wife who had contributed towards its purchase. The plaintiff's agent had told her they would not pursue the sale. She also alleges that the plaintiff acted *mala fide* in transferring the property well knowing that a court order had been

obtained or was being sought barring such transfer. These factors if proved at the trial will fortify the second defendant's defence to the claim.

Accordingly I would for these reasons dismiss with costs the application for summary judgment. Under case number 1495/02 the plaintiff in case number HB 865/02 seeks an order rescinding judgment of this court given in default under case number HC 394/02. To succeed she must show that she was not in wilful default, that she has a reasonable explanation for the delay and that on the merits she has a *bona fide* defence.

I do not given the probabilities in this case believe that the applicant's default was not wilful and for that reason it cannot be held that her explanation for the delay is reasonable. Whilst in the absence of *viva voce* evidence I am hard-pressed to decide the issue on the basis of credibility, the facts of this matter are such as would justify a robust approach and in that sense a resolution of the matter on the papers as they stand.

In his founding affidavit in support of the application for rescission of the judgment given under case number HC 394/02, the applicant's agent one Tom Gumbo, states that the applicant was not served with the provisional order and had been therefore unaware that an application had been filed against her. He further states under paragraph 8(1) of the founding affidavit that applicant stays in the United Kingdom and it was obviously difficult to obtain instructions from her. Implied in that assertion is the fact that the gent was aware of the impending papers but was unable to communicate that fact to her. But this agent held a power of attorney authorising him to act on her behalf at least so far as the purchase of the property was concerned. He could have instructed the applicant's legal practitioners to either file

opposing papers or seek the extension of the *rule nisi*. He did not do so. Further he does not explain given modern communication technologies in what way he attempted to communicate with his principal and if so, what difficulties he encountered in attempting to do so. For these reasons I am of the view that the explanation given for the delay is not reasonable. Further, the applicant's legal practitioners were served firstly it would appear with the application for a provisional order on 14 February 2002 and the resultant provisional order on 7 March 2002. The legal practitioners have disclaimed such service upon them stating that they had not been furnished with power of attorney to so receive papers on behalf of the applicant. Surprisingly they did not until much later inform the respondent's legal practitioner of that fact nor did they alert the Assistant Registrar of the same. The respondent's legal practitioners believed (no doubt on the basis of previous conduct) that Cheda and Partners were the applicant's legal practitioners. That assumption was not immediately rebutted. Cheda and Partners ignored a clear duty to do so. It is common cause that in at least four applications (including the present) before this honourable court it was Cheda and Partners who filed papers on behalf of the applicant. The explanation proffered coupled with the absence of rebuttal is not worthy of belief. The probabilities are that at all relevant times they were the legal practitioners acting on behalf of the applicant.

I have already referred to two contradictory communications emanating from the office of the Registrar of Deeds. One is tempted in the circumstances of this case to infer collusion between that office and the applicant's legal practitioners to effect transfer of the property in violation of a court order clearly served upon both of them. In my view that transaction must be made the subject of investigation by the

appropriate authorities. The facts place the applicant in an insidious position, namely that her defence cannot be *bona fides*. Further there is the uncontroverted evidence that the applicant's agent knew of the respondent's interest in the property but nonetheless proceeded in disregard of the same to enter into the agreement of sale on behalf of the applicant.

The respondent in her opposing affidavit makes a number of averments which the applicant has not bothered to address by way of an answering affidavit. She states for example that the applicant's legal practitioners were present in court when the provisional order was confirmed. Instead of applying for an extension of the *rule nisi* they told the respondent's legal practitioners to proceed and obtain judgment which judgment according to them would be a *brutum fulmen*. There is merit in the assertion by the respondent that the applicant did not bother to file opposing papers because transfer of the property had been effected and not because she had not been aware of the papers filed against her. To that extent she must be deemed to have been in wilful default. She cannot therefore be heard to say her explanation for the default is reasonable in the circumstances.

Does the applicant have a bona fide defence against the claim for her interdiction from acquiring the property? Her defence seems to be that she bought the house from the respondent's husband in whose name the property was registered. She says she was an innocent purchaser and that the respondent's remedy if any lies in a suit against her customary union husband. On the other hand the respondent argues that she is a co-owner and that she contributed to the purchase of the property. It is not clear whether the customary union is registered. In my view that on its own is not the decisive factor. The respondent says she is married to the seller and on that basis

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she intends to prove her contribution to the purchase and development of the property. If she is unable to do so, she will lead evidence of co-ownership on the basis of actual contribution. There is no basis upon which it can be concluded at this stage (before trial) that simply because the seller had title, he is the exclusive owner of the property. In my view the respondent is entitled to be heard on that point before the property is disposed of. To rule otherwise would be unduly prejudicial to the respondent's interests. I would therefore hold that the applicant has no *bona fide* defence to the interdict.

In the premises I would order as follows:

1. The application for summary judgment be and is hereby dismissed with costs.
2. The application for rescission of judgment be and is hereby dismissed with costs.
3. The purported transfer of the property being certain piece of land situate in the district of Bulawayo called 4362 Bulawayo Township of Bulawayo Township Lands commonly known as number 67 Shetland Drive Queens Park East, Bulawayo held under deed of transfer number 3210/87 dated 21 September 1987 to Prisca Tagwireyi in terms of deed of transfer number 0594/2002 dated 6 March 2002 be and is hereby cancelled and declared to be of no legal force or effect.

T Hara & Partners applicant's legal practitioners
Messrs Majoko & Majoko respondents' legal practitioners