

SAMUEL MANDIZVIDZA MUVUTI

Versus

JANSON MUTSAA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 28 MARCH 2003 & 1 APRIL 2004

N Mazibuko for applicant
S Mazibisa for respondent

Judgment

CHIWESHE J: On 15 May 2002 the applicant was granted a provisional order in the following terms:

Interim Relief

1. First respondent is interdicted from disposing of 4178 Kito Avenue, Northlea, Gweru to any other person other than the applicant pending the return day of this provisional order.
2. Second respondent is interdicted from transferring rights in stand 4178 Kito Avenue, Northlea, Gweru to any other person other than the applicant pending the return day of this provisional order.
3. This provisional order shall remain binding notwithstanding the notice of appeal.

Terms of the Final Order sought

That you show cause to this honourable court why a final order should not be made in the following terms:-

1. First respondent is compelled to transfer stand 4178 Kito Avenue, Northlea, Gweru to the applicant.
2. That 1st respondent pay the costs of this application.
3. That the order shall remain binding notwithstanding the notice of any appeal.”

The applicant now seeks confirmation of that provisional order.

The facts according to the applicant’s founding affidavit are as follows:

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In June 2001 the applicant and his wife who were looking for a property to buy went to see a Mr Bernard Mufunda of Bernin Properties, a firm of estate agents. Mr Mufunda advised the couple that he had a property they could be interested in. This property was 4178 Kite Ave, Northlea, Gweru. Its asking price was \$530 000,00. The couple went to view the property. They liked it. An agreement of sale was then drawn up by Mr Mafunda. It was signed on 30 July 2001 against payment of the sum of \$320 000,00. A further \$100 000,00 was paid on 1 September 2001 and the last payment was made on 4 March 2002 in the sum of \$100 000,00. On 3 September 2001 Mr Mafunda attested an affidavit in which he confirmed he had sold the house to the applicant on behalf of 1st respondent. The applicant took occupation of the property in February 2002. Since then the applicant has been paying all charges relating to the property.

After paying the last instalment in March 2002, the applicant inquired from Mr Mafunda when transfer would be effected. Mr Mafunda indicated that his principal was away in the United Kingdom and that transfer would be arranged as soon as he returned. Mr Mafunda later advised the applicant that a Mr Naison Chikeya, a brother to the 1st respondent had informed him that the 1st respondent was no longer interested in selling the house to the applicant.

The applicant avers that he complied with the terms of the agreement having paid to Mr Mafunda a total of \$520 000,00 towards the purchase price. He is willing to pay the balance of \$10 000,00. He insists on transfer on the basis that Mr Mafunda acted as an agent of the 1st respondent. The 1st respondent on the contrary wishes the applicant to vacate the property and he contemplates selling the same to a third party.

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Mr Mafunda has filed an affidavit in support of the applicant's case. He states that he had been mandated by the applicant to find a buyer for the applicant's house. He negotiated with the applicant and his wife who agreed to buy the house. Thereafter an agreement of sale was entered into between the applicant and the 1st respondent. A total of \$520 000,00 was paid to him by the applicant towards the purchase price, leaving a balance of \$10 000,00. He states that he still holds the \$520 000,00 on behalf of the 1st respondent. Sometime in 2002 1st respondent's brother advised him that the property was no longer being sold to the applicant. The 1st respondent later confirmed that position.

In his opposing affidavit the 1st respondent states that he never signed an agreement with the applicant and that he only met the applicant in 2002. He says that his instructions to Mr Mafunda were that he finds him a buyer for his house. He in turn would then enter into an agreement of sale with the prospective buyer. He had intended it to be a cash sale and not one based on payment by way of instalments.

His version of events is that in June 2001 he had been summoned to Gweru by Mr Mafunda who said he had found a buyer for the house. Mr Mafunda had advised him that the buyer was his nephew based in London. Mafunda then asked him to sign the agreement in the hope that his nephew would find the purchase price. After waiting in Gweru for three days Mafunda told him that the nephew had failed to raise the purchase price and consequently it was no longer possible to conclude the agreement. He says Mafunda then gave him \$1 700,00 for transport to his rural home. He says that all this happened in the presence of Chideya, his Gweru based brother who was also the caretaker of the property in question. The 1st respondent

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categorically denies ever receiving the purchase price. In any event he would not have received it if it had been tendered as he had insisted on a cash sale. Around 15 and 16 July 2001 1st respondent advised Mafunda that the house was no longer on sale as he the 1st respondent had now sold it to one Havire.

The 1st respondent insists that he did not sign any agreement on 30 July 2001 as alleged and as indicated on the agreement of sale. He says he only signed a copy which was meant for Mufunda's nephew who failed to raise the purchase price. On 30 July 2001 he was never at Mafunda's office. He says he never signed the agreement with the applicant and the witnesses indicated thereon because he was not there. He only returned to Gweru in May 2002.

The 1st respondent has denied literally every factual averment made by the applicant and in my view the arising disputes of fact are not capable of resolution on the papers without hearing *viva voce* evidence.

The issue to be resolved in this matter is whether a valid agreement of sale exists between the applicant and the 1st respondent through the agency of Mr Mafunda. Once that is determined in favour of the applicant, then the second purchaser cannot have a claim for specific performance but a mere claim for damages as against the 1st respondent. If the determination is in favour of the 1st respondent then the applicant cannot be granted the order he seeks. Such determination is not possible on the papers as the facts in support of either option are in serious dispute.

For these reasons it is ordered as follows:

1. The matter be and is hereby referred to trial. The present papers shall stand as pleadings.

2. Costs be costs in the cause.

Calderwood, Bryce & Hendrie, applicant's legal practitioners
Cheda & Partners, respondent's legal practitioners