

FRED DUBE

Versus

LEVI MPALA

And

MORA NYATHI

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF BULAWAYO
CHEDA J
BULAWAYO 27 OCTOBER 2005

J Dlamini for applicant
Ndlovu for respondent

Judgment

CHEDA J: Applicant seeks an order declaring the agreement of sale of an immovable property between 1st respondent and 2nd respondent invalid while his and 1st respondent valid.

The facts of this case which are largely common case are that 1st respondent sold to applicant stand number 20142 Pumula South, Bulawayo for \$300 000 which purchase price was paid in full. The agreement was made and signed by both parties on 11 May 2002. The sale was through 1st respondent's agents Mimosa Properties.

At the time of the sale, the stand had been developed up to slab level. After making payment of the full purchase price, applicant took over payment of all the owners' rates, supplementary and water charges.

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Unbeknown to him though 1st respondent subsequently sold the same stand to 2nd respondent who had then put up a superstructure on the same property to window height level.

It is 2nd respondent's argument that he did not give the estate agents authority to sell his property but merely to mandate it. This is a case of a double sale. I find that when 1st respondent sold the stand to applicant, no other agreement existed. First respondent did not only grant his estate agents a mandate to advertise but also to sell as such is the common practice in sales of immovable property. There was no evidence presented before the court to show either that the mandate was for sale only or that it was withdrawn.

Second respondent purchased the said stand innocently from the 1st respondent. The correct legal position in double sales is that the first in time is the stronger in law. This was the legal principle as stated in *Guga v Moyo & Others* 2000(2) ZLR 458(S) where McNALLY JA at 459E-F had this to say;

“The basic rule in double sales where transfer has not been passed to either party is that first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages against the seller, which is usually small comfort. But that rule applies only “in the absence of special circumstances affecting the balance of equities.” See also *Barros & Another v Chimponda* 1999(1) ZLR 58 (SC).

The balance of equities must weigh heavily in favour of the second purchaser before the court can favour her over the first purchaser. The question of special circumstances referred to by McNALLY JA, (*supra*) largely depends on a particular case as

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they are inexhaustive. In this case, second purchaser has the following in her favour:

1. She purchased the property without knowledge that first purchaser had already sold it to applicant.
2. The property has not yet been transferred to either purchaser.
3. Has already expended a lot of money on it.
4. Applicant having been purchased the property as far back as May 2002 at slab level did nothing towards either its development and/or improvement.

However, second respondent though can be described as a “Johnny come lately” into the scene has shown great zeal and enthusiasm in the development and improvement of the said stand, a policy which is favoured by 3rd respondent.

These factors cumulatively form special circumstances which tilt the balance of equities in favour of second respondent.

Applicant’s only recourse is against 1st respondent who acted dishonestly.

In light of the above, the application is dismissed. The following order is made:-

1. That the agreement of sale between 1st and 2nd respondent be and is hereby declared valid.
2. That 3rd respondent be and is hereby authorised to approve and sign cession of 1st respondent's right, title and interest in stand 20142 Pumula South, Bulawayo to 2nd respondent.

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3. That 1st respondent pay the costs at an attorney and client scale.

Lazarus & Sarif applicant's legal practitioners
Coghlan & Welsh respondent's legal practitioners