Judgment No. 21/07
Case No. 1681/05

MICHAEL MOYO

Versus

SANELISIWE NTULIKI

And

MUSAKANYANA DUBE

And

THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 29 JANUARY, 1 & 2 FEBRUARY 2007

G Nyathi, for applicant
S Sibanda, for 1st and 2nd respondents
No appearance from 3rd respondent

Opposed Application

KAMOCHA J: On 1 May,1995 the applicant Michael Moyo and Musakanyana Dube the 2nd respondent signed an agreement of sale of stand number 14559 Nkulumane. Musakanyana Dube was the seller while Michael Moyo was the buyer. The purchase price was $40 000 (forty thousand dollars) which the seller acknowledge had been paid in full.

Applicant has been living in the said house since May 1995 and erected a durawall.

Sometime in July, 2005 the 1st respondent in the company of three other people approached the applicant and informed him that she had bought the property from the 2nd respondent in March 2005.

Applicant alleged that 1st respondent knew in July 2005 before the house was transferred to her that it had been bought by applicant. She was therefore not an innocent purchaser.

Transfer was passed to the 1st respondent on 22 August 2005. Having got transfer 1st respondent allegedly continuously phoned the applicant telling him to vacate the property.

The applicant told the 1st respondent that the property was his in July 2005 and that he had bought it from 2nd respondent but she went ahead and had the property transferred into her

name. Not only was 1st respondent told by applicant that the house was his but she was also told by applicant's legal practitioners that the property belonged to applicant who bought it in 1995 and was not for sell. She turned down an invitation by the legal practitioners to attend at their offices so that she could inspect the applicant's file. She was allegedly abusive and arrogant over the phone necessitating the lawyers to write to the Registrar of Deeds on 19 August 2005 requesting that a caveat be placed on the property. Because of the intervening week end the letter only arrived after transfer of the property had been effected into 1st respondent's name.

The Registrar of Deeds responded to the lawyers' letter on 24 August 2005 advising that stand 14559 Nkulumane had already been transferred to Sanelisiwe Ntuliki on 22 August 2005 under title deed number 2318/2005.

Mr Musakanyana Dube the seller denied that a sell took place. He alleged that the applicant was a mere tenant. He, however, asserted that it was only in 2004 that through his erstwhile legal practitioners (the ones now representing applicant) that he offered his house for sale to the applicant for $100 million. The applicant accepted the offer and deposited $10 million with the said legal practitioner. The buyer was unable to make any further payment despite several letters from the lawyers asking

him to meet his obligations in full. This failure by the purchaser to pay the balance of $90 million led the 2nd respondent to cancel the verbal agreement.

There was only one letter written by the 2nd respondent's erstwhile legal practitioners dated 24 March 2004. Its import was thus:-

"We have been approached by Mr Dube who instructs us that he sold his rights, title and interest in his house number 14559 Nkulumane 12, Bulawayo to yourself in terms of a written agreement entered into by yourself and him sometime in January, 1994. In terms of that agreement of sale you were supposed to take over all the mortgage payments from Mr Dube and pay them yourself. In breach of the said agreement of sale you did not do so; resulting in our client having to foot all the mortgage payments on your behalf. It is like our client bought the above house for yourself when in fact he sold it to yourself. My underlining

Our client demands payment of all his mortgage payments inclusive of interest and insurance. Our client instructs that he has suffered damages as a result of your breach of the contract. In order to put everything to rest and transfer the house to yourself, our client demands that you pay him $16 000 000,00 being inclusive of mortgage payments, interest, insurance and damages for breach of contract. We therefore call you to come to our offices at 8am on Monday 29 March, 2004 for arrangements to pay the above amount and discuss this issue with our client. If you do not come, we shall presume that you do not want to settle this matter and we shall issue summons for cancellation of the agreement of sale and forfeiture of all monies you paid as rentals for occupation of the house…"

This letter from the 2nd respondent's erstwhile legal practitioners belies his story that he at no time sold the house to the applicant in either 1994 or 1995. His story that the two did not enter into a written agreement is clearly false and so is his assertion that the signature on annexure "A" – the agreement of sale was not his but a forged one. It is also clear from a comparison of the signatures on annexure "A" the agreement of sale between himself and applicant and that on annexure "A1" the agreement of sale between him and the 1st respondent Sanelisiwe Ntuliki signed on 11 March 2005 reveals that the signature was appended by the some person on both documents. He was just being untruthful when he suggested that the one on annexure

"A" was not his. He was further untruthful when he alleged that the applicant occupied the house since May 1995 as a tenant not as a buyer. Consequently I have no difficulty in making specific a finding that the 2nd respondent sold the house to the applicant in terms of the agreement of sale signed on 1 may 1995 and the purchase price was paid in full. The applicant further paid an amount of $10 000 000 in order to put everything to rest which amount was inclusive of mortgage payments, insurance and damages for breach of contract. I also find that the contract between applicant and 2nd respondent was not cancelled at all.

I now turn to examine whether or not the 1st respondent was an innocent purchaser. In her opposing affidavit the 1st respondent admitted that she approached the applicant sometime in July 2005 in the company of some other people. She said it was correct that applicant informed her that he bought the house in 1995 from the 2nd respondent. He, however, did not produce the agreement of sale annexure "A" he instead produced the letter quoted *supra*

whose contents according to the 1st respondent, were to the effect that applicant had breached his contractual obligation to the 2nd respondent, who in the circumstances was cancelling the agreement of sale.

She then concluded that the sale agreement between 2nd respondent and herself was a clean one. She and the 2nd respondent had signed the agreement of sale on 11 March 2005. She alleged that she had gone to view the house before she bought it and was shown around by a boy she found there.

She repeatedly averred that she bought the house because applicant did not produce the agreement of sale between himself and the 2nd respondent but he instead produced the letter quoted above.

Quite clearly her assertions cannot be correct because she only approached the applicant when she was in the company of some people sometime in July 2005 which was long after the agreement of sale between herself and 2nd respondent was signed on 11 march 2005.

In his answering affidavit applicant stated that he showed her the agreement of sale between him and 2nd respondent and not the letter quoted above. In any event, the letter does not say the agreement of sale was cancelled but it stated that he should pay 2nd respondent mortgage payments and insurance for the house which he allegedly had to pay. Pursuant to that letter the parties agreed that applicant would pay $10 million to 2nd respondent and an acknowledgment of debt was signed by the parties and was filed of record as annexure "C1". The document reveals that the amount of $10 million was a payment of mortgage, interest and insurance of the house which 2nd respondent had paid on behalf of the applicant for the past 10 years. Applicant was to pay the $10 million as follows: $1 million on 30 April 2004 which was the day of signature; the balance of $9 million was to be paid in instalments of $500 000,00 every Friday commencing the 1st week of May 2004 till the amount was paid in full.

The applicant filed of record acknowledgments of receipts showing how he religiously paid the weekly payments of $500 000,00. The documents were signed by the 2nd respondent.

The 2nd respondent attempted to mislead the court by saying that the $10 million was a deposit in respect of a verbal agreement of sale which he had entered with applicant. That suggestion does not need any serious consideration as it is

palpably false. The 2nd respondent wanted the court to believe that he had offered the house to the applicant for $100 million in April 2004 and a year letter in March 2005
he sold it to 1st respondent for $80 million. That does not make economic sense in this hyper inflationary environment.

The applicant emphasised that when the 1st respondent approached him at the house he told her in no uncertain terms that he had bought the house in 1995 she but did not want to hear that and disregarded his claim.

The court has no difficulty in finding that the 1st respondent was shown the agreement of sale between applicant and 2nd respondent but she was not prepared, at her own peril , to accept that the house had been bought by applicant. It is also my finding that she only approached the applicant after she and the 2nd respondent had signed the agreement of sale. The court further makes a specific finding that despite her knowledge that the house was bought by applicant in 1995 she proceeded to have transfer effected into her name. She was clearly not an innocent third party.

Turning to the question of costs it seems to me that this is a proper case warranting punitive costs. Here is why. Starting with the 1st respondent. She was told that the house was bought by applicant in 1995 and was shown the agreement of sale but she nevertheless chose to disregard that. She did not want to verify that claim but decide to just go ahead with contemptuous disregard to effect the transfer of the property into her name.

The 2nd respondent faired no better He was completely untruthful. He attempted to deny that he had entered into the agreement of sale with the applicant and went on to deny his signature. He later, however, changed and suggested that he

had cancelled that agreement of sale and entered into a verbal agreement of sale with the applicant in terms of which the property was sold for $100 million.

The court should show its displeasure of people who behave in such a manner and visit them with an award of punitive costs.

In the result I would issue an order in terms of the draft as amended.

Sansole & Senda, applicant's legal practitioners