

Judgment No. HB 145/10

Case No. HC 103/10

Xref No. HC 138/09

**JANE NYIKA**

**PLAINTIFF**

**AND**

**THEMBANI MOYO**

**1<sup>ST</sup> DEFENDANT**

**AND**

**ALPHEUS NCUBE**

**2<sup>ND</sup> DEFENDANT**

**AND**

**REGISTRAR OF DEEDS**

**3<sup>RD</sup> DEFENDANT**

**AND**

**CITY OF BULAWAYO**

**4<sup>TH</sup> DEFENDANT**

IN THE HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 28, 29 OCTOBER 2010 AND 4 NOVEMBER 2010

*Mrs N. Tachiona* for applicant

*Mr T. Muganyi* for 1<sup>st</sup> respondent

CIVIL TRIAL

**MATHONSI J:** The plaintiff instituted proceedings against the four Defendants seeking an order, inter alia, nullifying the transfer from herself to the first Defendant of stand 6638 Nketa 9 Bulawayo.

In her declaration filed with the summons, the Plaintiff averred that some time in 2007, the second Defendant had called a meeting of widows in the township of Nketa in Bulawayo which she attended, during which he told them that he was assisting widows with money and

food, but as security for such assistance their houses were required. Title Deeds for the houses would have to be surrendered.

The Plaintiff further averred in the declaration that she later held a meeting with first and second Defendants during which she was made to sign a document she did not know which later turned out to be an agreement of sale of stand 6638 Nketa 9 Bulawayo to the first Defendant. She went on to aver that she received money but that the second Defendant had told her the money was the widows' assistance referred to at the initial meeting.

She went on to allege in the declaration that her house was fraudulently transferred from her to the first Defendant through the use of a power of attorney she had no knowledge of and never signed. She therefore prayed for the reversal of that transfer and the nullification of the power of attorney given to *Munyaradzi Nzarayapenga* and *Simbarashe Chivaura* of the law firm of *Dube-Banda, Nzarayapenga and partners*.

Surprisingly the summons was never served upon the second Defendant although *Mrs Tachiona* who represented the Plaintiff acknowledged before commencement of trial that the dispute evolved around the second Defendant. The latter was said to be in prison.

The action was strongly contested by the first Defendant who also filed a counter claim seeking an order for the eviction of the Plaintiff and those claiming through her from the premises. The first Defendant averred that he had lawfully entered into a sale agreement involving the said premises with the Plaintiff in October 2007. The Plaintiff was being assisted by the second Defendant who acted as her agent and the full purchase price was paid to the Plaintiff in the presence of witnesses. The first Defendant further alleged that he was given

receipts for the three instalments he paid and, in addition to that, the Plaintiff signed at the back of the agreement in acknowledgement that the full purchase price had been paid.

The first Defendant further averred in his plea and counter claim that immediately after payment of the last instalment he took the Plaintiff to his legal practitioners *Messrs Dube-Banda, Nzarayapenga and partners* where she signed the power of attorney to pass transfer and the declaration by the seller to facilitate the conveyancing process. It is this power of attorney which the Plaintiff is disputing. In her replication to the first Defendant's plea the Plaintiff alleged that she is illiterate which exposed her to the trickery of the first and second Defendants.

At the trial, the Plaintiff gave evidence in person and called two other witnesses, widows from her township, who claim to have been swindled in similar fashion. The Plaintiff's evidence is at variance with the averments made in the pleadings. While in her pleadings she claims that the second Defendant called a meeting of widows in Nketa Township to invite them to join the association of widows he had formed, her evidence in court was to the effect that she was walking about in the township when she saw a poster tied to a pole advertising this widows association. She read the advert and took down the details which led her to a house where she found a lady called Lindiwe Khumalo who took down her details and promised that a follow up would be made. She said when this happened she was alone and after a while the second Defendant arrived at her house driving a white minibus and explained to her how he would assist her. She was then advised by second Defendant to bring the required documents to the office at Hunicot Building in town.

While in her pleadings the Plaintiff alleges that she had a meeting with the first and second Defendants during which she was made to sign a document she did not know, in her testimony the Plaintiff told a different story. She maintained that she never met the first Defendant and that when she signed the “document” she was only with the second Defendant who was sitting across the table and hiding the contents of the document with his hand.

In her declaration, the Plaintiff stated clearly that she was given some money after signing the document although she was made to believe it was the widow’s assistance she had been promised by the second Defendant. She did not give the exact amount she received. Throughout her testimony she categorically denied having received any money or even seeing any money at all. She reluctantly admitted under cross examination having seen Minlot Moyo, the first Defendant’s father, passing something to the second Defendant. Now, money is something a person cannot forget having received except if that person wishes to mislead. It must be accepted therefore that the Plaintiff did receive some money and when she admits having seen something being passed on to second Defendant, it is safe to conclude that the money she received came from the first Defendant or his father.

In her pleadings the Plaintiff claims to be illiterate and that first and second Defendants took advantage of this factor to hoodwink her into signing the sale agreement without knowing it. She tried to develop this point further in her evidence in chief by alleging that she cannot read and write and that “even a grade one child can write better than (her)”. Having declared her illiteracy that way, she found her fingers burning on being asked how, if she had been alone as she claimed, she was able to read the poster that had been put up by the second Defendant

and also how she was able to record the details on it which helped her locate the second Defendant's house. She equally had difficulties explaining how she was able to read the list of names on the document she alleges second Defendant got her to sign before the latter blocked her view with the palm of his hand.

The Plaintiff's testimony regarding her literacy levels is so improbable that no one can take it seriously. Indeed she ended up giving the absurd explanation that while she can read some less important documents, she cannot read "serious documents". This, coupled with her incredible story that the second Defendant got her to sign the sale agreement even though he was hiding the contents with the palm of his hand to obstruct her view, means that the Plaintiff not only exaggerated her poor literacy levels, but was also out rightly untruthful. I therefore make a finding that when she signed the agreement of sale, it had been read to her as alleged by the first Defendant and she knew exactly what the contents were. She knew that she was selling her house and this whole story about the widows association and what it stood for is a figment of her imagination. Not that it would change the outcome of her contractual relationship with the first Defendant.

The Plaintiff challenged the legality of the power of attorney used to pass transfer to the first Defendant. Other than her bare denial, there is nothing that has been put forward to question the authenticity of her signature on that document or indeed on the declaration by the seller. When the agreement of sale between herself and the first Defendant was put to her, the Plaintiff confirmed that her signature is appended on that document. She did not even deny signing at the back of that document in acknowledgment of receipt of the full purchase

price. Of course she sought to say that she signed without reading and that she recalls signing only once.

The significance of her verification of that signature is that there is a striking resemblance between the Plaintiff's signature or writing on the agreement and on the power of attorney and the declaration by the seller. Both documents were produced by consent in the bundle of exhibits for trial. Without the aid of expert evidence to the contrary, which the Plaintiff did not bother to elicit, I have no reason to believe that the Plaintiff did not sign the power of attorney and the declaration. According to my value judgment, it is the Plaintiff who signed those documents.

Overall, the Plaintiff was not a credible witness. She appeared extremely shaken even when presenting her evidence in chief and was worse under cross examination. Her story was also incredible especially as she does not pass out as an unsophisticated woman who would be fooled to sign away her house without even reading the document. She admitted that no undue influence was brought to bear upon her before she signed the documents now before me.

The Plaintiff's two witnesses, Florence Chawira and Ngonidzashe Mlauzi did not take her case anywhere. Clearly they appeared over-coached and desperately wanted to present themselves as victims of the machinations of the second Defendant. They tried to give an impression that they fortuitously met the Plaintiff and learnt of her plight which is similar to their own.

It turns out that the two are not independent witnesses at all because, as much as they tried to conceal it, they are Plaintiff's neighbours. In addition to that they have a direct interest in the outcome of this case given that they both have matters pending in this court where they are also resisting transfer of their own houses.

The first Defendant's case is simply that his father wanted to buy him a house and played an active part in hunting for such house, negotiating the sale and paying the purchase price. His role was limited to signing the requisite documents. The first Defendant's father Minlot Moyo testified that after discovering that the Plaintiff's house was on sale, he and his wife went to view it. They met the Plaintiff who readily confirmed the house was on sale and showed them around. After they had agreed on the purchase price the Plaintiff insisted that they should go and conclude the sale at the offices of her agent, the second Defendant. Minlot Moyo and his group met the Plaintiff at the offices of the second Defendant the following day, the 11<sup>th</sup> October 2007. They concluded the sale even though the Plaintiff had increased the price alleging that this was to take care of the agent's commission.

In the presence of witnesses the parties signed the agreement of sale after it had been read out. He then paid the first instalment of \$2, 7 billion (Zimbabwean currency) which money was handed over to the Plaintiff and counted in the presence of all concerned. On that day he also paid the costs of preparation of the agreement. He was given the Deed of Transfer by which the Plaintiff held the house.

The same formula was employed when the second and third instalments were paid on the 26<sup>th</sup> October 2007 and 9<sup>th</sup> November 2007. Minlot Moyo confirmed that he was issued with

receipts in first Defendant's name by Plaintiff's agent in the name of Defiant Hardware and Construction. Each time payment was made money was handed over to the Plaintiff who counted it before passing it on to his agent.

On the 9<sup>th</sup> November 2007 when the last instalment was paid the Plaintiff was made to sign behind the agreement acknowledging that payment had been made in full. All the receipts have been produced as exhibits. The same day, Minlot Moyo says he insisted on taking the Plaintiff to *Messrs Dube-Banda, Nzarayapenga and partners*, legal practitioners he had consulted earlier for her to sign documents to pass transfer and this was done.

Minlot Moyo was a credible witness whose evidence was given with confidence and an air of honesty. It was also backed by documentation which made it impossible for anyone to cheat him and his son even if they wanted to. I have no reason to doubt it.

There is no doubt in my mind that when the Plaintiff met the first Defendant she had already established a relationship with the second Defendant which enabled her to insist on transacting with the first Defendant in the presence or with the assistance of the second Defendant who was clearly her advisor, if not her agent. I have already concluded that not only did the Plaintiff sign the agreement of sale, the power of attorney and the declaration by the seller, she also received money in consideration of the sale of her house.

Accordingly, the Plaintiff's signature brings into operation the caveat subscriptor rule. That rule was expressed by R. H. Christie in Business Law in Zimbabwe at page 67 as follows:

"The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme. The general rule, sometimes known as the caveat subscriptor rule is therefore that a party to a



contract is bound by his signature, whether or not he has read or understood the contract----. And this will be so even if he signed in blank--- or it is obvious to the other party that he did not read the document.”

Having come to the conclusion that the Plaintiff knew she was signing an agreement of sale, there was no misrepresentation as would entitle the Plaintiff to a defence. I also consider it unnecessary to discuss the issue of whether or not the second Defendant was an agent of the Plaintiff or whether he had a mandate to sell the house. This is because the evidence shows that at all material times the first Defendant dealt with the Plaintiff. She is the one who showed them the house and negotiated the price, she led them to the second defendant where the agreement was signed in her presence and she is the one who received the purchase price and proceeded to sign the documents to pass transfer.

I have no doubt in mind that the second Defendant is a crook who may have specialised in the business of swindling people of their properties. It may well be that after the transaction he swindled the Plaintiff of her money hence decision to go back on her promises. This however has nothing to do with the first Defendant who was an innocent purchaser who paid his money to the Plaintiff. In her wisdom the Plaintiff elected to pass on the money to a trickster and must therefore live with the consequences of her choice.

In the result, I find in favour of the first defendant and make the following order, to wit,

- (1) The Plaintiff's claim be and is hereby dismissed.
- (2) Judgment be and is hereby entered in favour of the first Defendant to the effect that he is the lawful owner of stand 6638 Nketa 9, Bulawayo.

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- (3) The Plaintiff and those claiming through her should vacate the said premises within 21 days from the date of this order failing which the first defendant is entitled to evict them.
- (4) The Plaintiff shall bear the costs of suit.

*Bulawayo legal project centre, plaintiff's legal practitioners*

*Dube-Banda, Nzarayapenga and partners, 1<sup>st</sup> defendant's legal practitioners*