

SITHEMBILE SIBANDA

Versus

PUMULO MULEMBA SAYELA

And

ESTATE LATE MFAKAZI DENNIS NDLOVU

And

PLUMTREE TOWN COUNCIL

And

ASSISTANT MASTER OF THE HIGH COURT, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 21, 22 JULY, 7,8,9 & 12 OCTOBER 2009 & 21 JANUARY 2010

G Nyathi, for plaintiff

S S Mazibisa for 1st defendant

No opposing papers from 2nd, 3rd and 4th defendants

Civil Trial

KAMOCHA J: On 20 May 2004 plaintiff issued summons claiming the following against the defendants:-

- “1. An order that, the agreement of sale entered into by and between plaintiff and first and second defendants on 6 April 1999 be and is hereby declared valid and binding on first and second defendants;
2. An order setting aside the cession of stand number 1401 Dingumuzi Extension, Plumtree to first defendant;
3. An order that the first defendant as the sole beneficiary and surviving spouse of the second defendant takes all necessary steps in the 3rd defendant's offices to transfer the right, title and interest in stand number 1401 Dingumuzi Extension, Plumtree to the plaintiff's names within 7 days of the granting of this order

failing which the Deputy Sheriff, Bulawayo be and is hereby authorized to act in her stead;

4. An order that the first and second defendants, jointly and severally, the one paying the other to be absolved, pay the costs of suit on an attorney and client scale.”

When the parties attended a pre-trial conference formulated by agreement the following issues to be determined by the trial court:-

- “(a) Whether the agreement of sale entered into by and between plaintiff and first and second defendant is valid;
- (b) Whether the cession of stand number 1401 Dingumuzi Township, Plumtree should be set aside;
- (c) Whether the first defendant should be compelled to transfer stand number 1401 Dingumuzi Township, Plumtree, to the plaintiff;
- (d) Whether the affidavit and “the letter for construction” both dated the 6th of April were written and signed by the late Mr Ndlovu on the same day; and
- (e) Whether first defendant should pay plaintiff’s costs on an attorney-client scale.”

The first defendant, hereinafter referred to as “defendant” since she was the only one before the court, was married to one Mfakazi Dennis Ndlovu who died at Plumtree on 4 October 2001. She was the surviving spouse of Mfakazi Dennis Ndlovu and sole beneficiary of his estate. By virtue of being married to the deceased in his life time she is also known as Pumulo Mulemba Ndlovu.

In his life time, the deceased owned a residential stand known as stand number 1401 Dingumuzi Extension, Plumtree as reflected in a letter by the Rural District Council dated 28 August 2002 which was filed of record by the defendant and reads thus:

Judgment No. HB 3/10
Case No. HC 1858/04
X Ref HC 1875/05

“To Whom It May Concern

Dear Sir/Madam

Confirmation of stand number 1401: Dingumuzi Extension, Plumtree

Bulilimamangwe Rural District Council confirms that residential stand number 1401 Extension, Plumtree is being owned by Mfakazi Dennis Ndlovu identity number 08-305325 B 39.

Thank you

A S Khumalo
For: Chief Executive Officer”

The defendant was seeking confirmation of ownership of the said stand since she had been appointed executrix dative to the estate of her late husband on 15 July 2002 which she was going to administer.

In the distribution account dated 10 April 2003, as the sole beneficiary, she was awarded all the assets of the estate including the said stand. The estate was accordingly wound all the property which it had belonged to the defendant.

That being the case she took steps to have the residential stand registered into her name. Armed with the award in the distribution account she approached the Plumtree Town Council seeking registration of the said property into her name. A determination was made at a full Council meeting on 31 August 2003. The defendant was informed by the following letter.

“15 October 2003

Pumulo M Ndlovu
Phakamani Secondary School
P O Box 156
Plumtree

Re: Confirmation of change of ownership to stand 1401 Matiwaza Township

I am glad to advise you that this Council has approved change of ownership from Mfakazi Dennis Ndlovu I.D 08-305325 B 39 to Pumulo Mulemba Ndlovu I D No. 79-023193 Z 39.

Reference is made to Full Council Meeting Number 6 resolution F115 dated 31/8/08 at 1700 hours.

Thank you

D D Luthe
Town Secretary”

What comes out clearly from all the documents filed of record is that by the time summons was issued out of this court the estate had long been wound up. The defendant who was the sole beneficiary to the estate had taken ownership of the estate property and had the immovable property registered in her name. There was no property left in the estate. Consequently there was no need to cite the estate in these proceedings after it had been wound up and had nothing left in it.

The documents also reveal that the said stand belonged to Mfakazi Dennis Ndlovu and was not jointly owned with the defendant. That being the case the late Mfakazi Dennis Ndlovu was at liberty to sell the property if he had so wished without having to seek the consent of the defendant.

The crux of the dispute *in casu* is whether or not the late Mfakazi Dennis Ndlovu in the presence of the defendant sold the said vacant stand to the plaintiff and her husband. While the plaintiff and her husband on the one hand alleged that that was the position the defendant on the other hand vehemently put that in issue.

The plaintiff gave evidence in an effort to prove her case and called her husband to support her story.

Their story is as follows. The plaintiff Sithembile Sibanda and Nhlanhla Dube are married to each other. The husband used to work in Botswana but the couple has got a rural home in Bhambadzi in the Plumtree area. The couple was looking for a vacant stand in Plumtree town. They sent word through relatives and friends to that effect.

A friend called Moyo who used to work for Agritex in Plumtree contacted the husband about a colleague of his who was selling a stand in Plumtree. The husband came from Botswana and proceeded to his rural home in Bhambadzi to fetch his wife. The two then proceeded to Plumtree town to see the friend Moyo who, unfortunately is now late.

The late Mr Moyo took them to the late Mfakazi Dennis Ndlovu's house. They found the late Mfakazi Dennis Ndlovu with his wife who is the present defendant. The parties discussed

the sale of the stand and concluded its sale agreement. The late Mfakazi later made an affidavit to that effect which reads thus:-

"AFFIDAVIT

I Mfakazi Dennis Ndlovu 08-305325 B 39 residing at GP 2231 Park Rd Plumtree do hereby solemnly and sincerely swear/declare the following:-

That I sell stand number 1401 Dingumuzi Extension pending processing lease agreement which will be transferred to Sithembile Sibanda I D No. 56-050824 H 56 of Bhambadzi Secondary School P O Box 118 Plumtree. ..."

The above document was signed by Mfakazi Dennis Ndlovu on 6 April 1991 before a Commissioner of Oaths and bears the District Administrator's stamp.

The purchase price for the stand was \$29 000,00. But before payment for the stand was made the parties agreed to go and verify at the Council offices if indeed the said stand belonged to Mfakazi Dennis Ndlovu. The defendant did not go to the Council offices but both plaintiff and her husband averred that she had not objected to the sale of the stand by her husband. Instead she gave the impression that she was quite happy with the sale of the stand.

On arrival at the Council offices the officials of the Council confirmed that the stand belonged to Mfakazi Dennis Ndlovu and was registered in his name. That being the case the plaintiff and her husband then paid the full purchase price of \$29 000,00 to Mfakazi Dennis Ndlovu in his office at Agritex where he was employed.

After the purchase price had been paid the parties discussed the issue of constructing a dwelling house on the vacant stand. An agreement was reached to the effect that the plaintiff could go ahead with construction pending changing of ownership. The late Mfakazi Dennis Ndlovu reduced the agreement to writing thus:-

"This is to certify that I Mfakazi Dennis Ndlovu of Agritex, Box 87, Plumtree, GP 2231, Park Rd have allowed Sithembile Sibanda to proceed and carry out construction of stand 1401 ZBS known as Dingumuzi Extension for \$29 000 ..."

The document bore the signature of the author as M D Ndlovu and was signed by two witnesses one Ncube and one P Moyo and was dated 6 April 1999. The deceased also wrote his telephone number at the foot of the document and signed M D Ndhlovu at the foot of it. This time he spelt his Ndhlovu with an "h".

After he had executed the above document he gave them an approved plan of the building to be constructed on the stand. The plaintiff and her husband started construction of a dwelling house on the stand using the said approved plan in 2000 and completed it in mid 2003.

It was the plaintiff's evidence and that of her husband that the defendant was aware that there was construction going on at the said stand right from the beginning up to the end. They based their assertion on the ground that she knew that the stand had been sold to the plaintiff. Moreover the stand was about 2 kilometres, from where defendant lived, and was therefore not far and was also on the way to town. She therefore saw construction going on for more than three years but she did not report to the local authority that someone was unlawfully building on her stand. She even could have reported to the police if she did not get any joy from the local authority.

The witnesses told the court that they had agreed with the late Mfakazi Dennis Ndlovu that the stand would be registered in the name of the plaintiff and her husband but he unfortunately passed away before that could be done. They, however, learnt of his death after sometime and went to pay their condolences to the defendant at the loss of her husband and to also discuss the issue of the transfer of the stand. When the subject was raised with her she advised them that she was in the process of winding up the estate of her late husband. She assured them that she would contact them as soon as she completed processing the estate. She had promised to phone them but never did. She led them to believe that she had no problem with facilitating the transfer of the said property into their names.

The defendant did not mean what she had assured the plaintiffs she would do. Instead, when she was awarded the stand as the sole beneficiary of the estate on 10 April 2003, she proceeded to have ownership of the property changed from her late husband's name into hers on 15 October 2003.

The plaintiff only discovered what had happened when she went to pay her water bill. The plaintiff and her husband then went to confront the defendant who, to their surprise and dismay, pretended not to know what they were talking about and professed ignorance of the sale of the said property.

Plaintiff and her husband stated that they found the defendant busy writing at a table which was full of papers. As the defendant was denying any knowledge of the sale of the stand the husband of the plaintiff noticed the affidavit of sale on the table and immediately pointed it out to her and she read it. The affidavit quoted in extension at page 5 supra belied her story but she persisted that she had done nothing wrong.

The parties then agreed to go to the magistrates' court to seek legal advice. An officer there advised the defendant that she was wrong and should transfer ownership of the property into the plaintiff's name. She did not accept the opinion and advice of the officer. She suggested that the parties go to seek a second opinion from the police. The parties proceeded to the police station where she was told once more that she had done wrong and was advised to transfer the property into the plaintiff's name. She still did not accept that she had done any wrong and handed the matter to her lawyers.

Plaintiff and her husband were subjected to lengthy cross examination which in each case appeared to be designed to get the witness tell the court about the exact dates, times when things were done and places where they were done and who did what. For instance a lot of time was spent on what date were documents quoted above in this judgment were written and where they were authenticated. The witnesses were also asked about who had done the introductions when they were at the house of the defendant.

It was suggested to the witnesses that the signatures appearing on the two documents allegedly written by the late Mfakazi Dennis Ndlovu were forgeries. It was even put to them that Mfakazi Dennis Ndlovu did not spell his Ndlovu with an "h". The reply from both witnesses was that that was his choice to write it as either Ndlovu or Ndhlovu. They were emphatic that that was his signature and he even wrote his telephone number.

The court observed that the defendant was being untruthful when she made these suggestions. That is so because when the defendant appeared before the Master of this court she told him that Mfakazi Dennis Ndlovu was also known as Mfakazi Dennis Ndhlovu. Quite clearly the suggestion was designed to mislead the court.

The witnesses emphasized under cross-examination that the defendant agreed to the sale of the stand to them and she even told them that she had received the proceeds of the sale from her late husband. She said it was a lot of money which she banked. They further revealed that the construction was at window level when Mfakazi Dennis Ndlovu died. They were therefore emphatic that both defendant and her late husband were fully aware of the construction taking place at the stand. The witnesses knew only one wife of Mfakazi Dennis Ndlovu and that is the defendant. She is the one who was in agreement with her husband to sell the stand.

The witnesses repeated under cross-examination that when they went to see her after the death of her husband she pretended not to know them and secondly she professed ignorance of the sale of the stand but the fortuitous discovery of the affidavit of sale belied her innocence. She thereafter changed her attitude and promised to contact them to sign certain

documents after sorting out the estate. She was clearly being untruthful as she never meant what she was saying.

The two witnesses gave their evidence well. Their evidence flows well and is easy to follow. They corroborated each other on all material points and are worth to be believed.

The same cannot be said about the defendant. Her story is full of improbabilities and untruths. For instance it is highly improbable that someone could have started building on the stand which is about two kilometers from where she lived without her knowledge for a period of two years. Plumtree is a small town. The suggestion is not only improbable but is also false. She was untruthful when she suggested in court that Mfakazi never used to write Ndlovu as Ndhlovu. She was a bad witness who was not worth to be believed. Where her story conflicts with that of the plaintiff and her husband I prefer that of plaintiff and her husband.

The court has no difficulty in finding that the defendant in fact was in agreement with her husband when selling the stand. She even received the proceeds of the sale. Even if the court had found that she had not consented to the sale that would not have changed anything as the property belonged to her late husband and was not jointly owned. Her consent was not necessary.

This court finds that the defendant was actuated by greed that is why she transferred the stand into her name instead of the names of the plaintiff. The defendant deserves to be visited with an award of punitive costs. She led the plaintiff to believe that she was sorting out the estate of her late husband and thereafter would contact her inviting her to go and sign the necessary papers relating to the change of ownership. She instead had the property registered into her own name. The plaintiff was forced to institute these proceedings to assert her rights. It is only fair that she recovers her full costs.

The estate was wound. The defendant had been appointed executrix dative before it was wound up and she was the sole beneficiary. The responsibility of bearing the costs is hers and hers alone.

In the result I would grant the order in terms of the draft with a rider that the costs on an attorney and client scale be borne by the first defendant alone.

Sansole and Senda, plaintiff's legal practitioners
Cheda and Partners, 1st defendant's legal practitioners