

WILLIAM NGWENYA

Versus

STELLA MATONGO

And

VAINA MOYO

And

MAQHAWE MATHE

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 9 AND 17 FEBRUARY 2011

L Mcijo for applicant
Mrs N. Tachiona for first respondent

Opposed Court Application

KAMOCHA J: The applicant brought two applications to this court which the court consolidated and heard at one sitting. The first application was for joinder and condonation for the late filing of an application for rescission. The terms of the order being sought were these:

“It is ordered that:-

1. Applicant be and is hereby joined as the 5th respondent under case no. HC 1527/09;
2. Applicant be and is hereby authorized to apply for rescission of judgment under case number HC 1527/09 out of time; and
3. The first respondent shall pay the costs of this suit only if she opposes this action.”

In the second application the order he sought was thus:-

“It is ordered that:-

1. The judgment granted in first respondent's favour under case number HC 1527/09 be and is hereby set aside;
2. Applicant be and is hereby joined as the 5th respondent therein and is hereby given leave to file his notice of opposition; and
3. Each party shall bear his or her own costs."

As far as the application relating to joinder is concerned the applicant did not state in terms of what rule he wanted to be joined to a matter which has already been finalized. He sought the rescission of a judgment to which he was not a party. The only way he could have done so was in terms of the provisions of order 49 rule 449(1)(a) which provides:-

"(1) The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order –

- (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) ...
- (c) ..."

The applicant has an interest in the matter as will be seen from the details below. The applicant paid R24 000 for stand number 6107 Emganwini Township, Bulawayo and had started construction up to slab level. He therefore had a substantial interest in the matter. He should have been cited. In the result I would *mero motu* entertain his application for rescission to ascertain whether or not it has any merit.

The facts giving rise to these proceedings are briefly these. On 2 July 2009 the third respondent Maqhawe Mathe, who was being represented by Miss Vaina Moyo entered into a memorandum of agreement of sale of stand number 263 Emganwini Township in Bulawayo with Stella Matongo. The property was developed. Its purchase price was R25 000 which was paid on signing the agreement.

The property, however, did not belong to Maqhawe Mathe – "Maqhawe". It belonged to one of his workmates. Stella Matongo – "Stella" discovered that the property did not belong to Maqhawe three weeks after she had paid for it. That was during the same month that Maqhawe had purported to sell the property.

The following month *id est* August 2009 Maqhawe decided to offer her his own undeveloped stand number 6107 Emganwini Township, Bulawayo for the price he had received in relation to the stand which belonged to his workmate.

Stella accepted the offer thereby completing the verbal agreement to purchase stand number 6107 Emganwini Township, Bulawayo. Trouble started when she sought to have the property transferred into her name as Maqhawe would not co-operate. He refused to sign relevant documents to effect transfer into Stella's names.

While that was happening Maqhawe was busy looking for another buyer for the same property. On 25 September 2009 the applicant fell victim to Maqhawe's fraudulent activities. He entered into an agreement of sale of the same stand number 6107 for R24 000 paid in cash. He was given vacant possession of the stand on the next day 26 September 2009.

The applicant started developing the property. He had started constructing a dwelling house up to slab level. Stella, on the other hand has had the stand transferred into her names. She purchased the stand in August 2009 while applicant did so the following month - September 2009. She is the first purchaser in a double sale. She is a holder of a real right.

The applicant should look to Maqhawe for damages.

Applicant contended that since he had effected some improvement to the property the balance of convenience was tilted in his favour. He has started construction up to slab level. He, however, is not without a remedy. Stella has indicated her willingness to refund him for the slab that he has put up.

In as far as the application for rescission is concerned the applicant has no bona fide defence. He was a second buyer in double sale of a property which has since been transferred into the names of the first buyer. His prospects of success on the merits are non-existent. In the result, his application for rescission fails. Consequently, I would issue the following order.

It is hereby ordered that the application for rescission, which this court allowed him to prosecute, be and is hereby dismissed with costs.

Lazarus & Sarif, applicant's legal practitioners
Bulawayo Legal Project Centre, first respondent's legal practitioners