

KASERE SIMOKO NCUBE

Versus

DICKSON MILANZI

And

DEBRA MILANZI

And

LEVISON GUNDUMURE

And

ASSISTANT MASTER OF THE HIGH COURT

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 23, 24 AND 25 JULY, 1 AUGUST 2014 AND 23 JULY 2015

Civil Action

C.N. Dube for the plaintiff

H. Shenje for the 3rd defendant

No appearance for 1st, 2nd, 4th and 5th defendants

TAKUVA J: The plaintiff instituted proceedings against the defendants on 5 January 2010 seeking the following relief:

- “(a) An order that the 1st and 2nd defendants effect transfer of stand number N 9 Mzilikazi, Bulawayo into plaintiff’s name at 5th defendant’s offices within 5 days of service of this order following an agreement of sale entered into by and between the plaintiff and the late Che Detanes Gross Milanzi. The late seller died in Malawi before the transfer could be effected.
- (b) Failure (a) above, the Deputy Sheriff, Bulawayo be empowered to sign all transfer papers in the 1st and 2nd defendants’ place and stead at 5th defendant’s offices.

- (c) An order that the 1st, 2nd and 3rd defendants together with those acting through them be interdicted from disturbing plaintiff's peaceful occupation of the dwelling property, N 9 Mzilikazi, Bulawayo.
- (d) An order for payment of costs of suit on an attorney – client scale by a defendant who opposed this order ...”.

The background facts are as follows:

Plaintiff purchased house number N 9 Mzilikazi, Bulawayo from the late Gross Milanzi (Gross) a Malawian national in 1985. Before transfer could be effected into his name the late Gross Milanzi relocated to Malawi where he passed on. The plaintiff has lived in that house to date. The plaintiff's case is that Gross' son one Dickson Milanzi who is the 1st defendant fraudulently sold the house to Levison Gundumure illegally without his knowledge and knowing fully well that he had purchased the property. As a result of the sale to the 3rd defendant, the property was transferred to the 3rd defendant. Despite the 1st and 3rd defendants being aware of his rights, title and interest in house number N 9 Mzilikazi, Bulawayo the 1st and 3rd defendants have refused to transfer the property into plaintiff's name, necessitating this action.

Plaintiff withdrew his case against the 2nd defendant. The 1st defendant entered appearance to defend but failed to file a plea and was barred. The 3rd defendant filed his plea in which he stated that he bought the property innocently and in good faith during the winding up of the Estate Late Dennis Meleka Golosi. He then registered the property in his name. He filed a counter claim for an order directing the plaintiff to vacate the premises called N 9 Mzilikazi within 7 days of the granting of the order failing which the Deputy Sheriff Bulawayo be authorized to forcibly evict the plaintiff from the premises and an order of costs on a higher scale. Fourth and fifth defendants did not file opposing papers and did not appear at the trial.

The issues as agreed in the pre-trial conference memorandum are as follows:

- “1) Whether plaintiff has any lawful right to claim cession of the property in dispute.

- 2) Whether the defendant has any lawful right to claim and/or remain in occupation of the premises in issue.”

The plaintiff opened his case with the plaintiff testifying to the effect that he lives at house number N 9 Mzilikazi Bulawayo. He said he bought the house on 11 November 1985 from Meleka for \$50 000,00 since it was old and damaged. The seller had told him that he wanted money to travel to Malawi to visit his sister who was ill and admitted in hospital. They then signed an agreement in the housing superintendent’s office and he paid a deposit in the sum of \$4 500,00. Plaintiff produced exhibit ‘A’ which however shows that the plaintiff bought the house from Dennis Gross on 11 November 1985 for \$20 000,00 and a deposit of \$10 000,00 was paid. At the time plaintiff testified, he was 84 years old and partially blind. He said witnesses to this transaction were deceased. The witness resisted the 3rd defendant’s previous efforts to have him evicted from this house. While he could remember dates well, he had problems with figures. He said the balance of the purchase price was paid to Ngulube on the seller’s instructions. When the balance was paid one Dube acted as a witness. The witness denied signing exhibit G which states that he was a temporary tenant at N 9 Mzilikazi. According to him, this document surfaced later and he did not know the circumstances under which it was written, although he said Meleka went back claiming his identification number had been forged.

Plaintiff was later informed that Meleka’s wife and child had died in Malawi. This was before he returned to Zimbabwe. A message was sent to church elders that Meleka was seriously ill in Malawi. He learnt later that Meleka had died in Malawi where he was eventually buried. This was before he could have the property transferred to his name. Plaintiff also produced exhibit C a letter from D. Gross addressed to K Shuwayo. The letter in the English version states;

“10-08-87

Mr D. Gross
P.O. Box 64
LUNZU

Blantyre

Dear Father,

Mr K. Shuwayo, thank you very much I have received your letter I have heard everything you said. Firstly, I am happy that you advised me that my child from Kamativi came asking about my money (issues). But where did my child from Kamativi get the guts? That in itself is like stealing from me, he has no authority of asking for money from you, no! Once he/she comes tell him/her that Father said I sold my house, I did not sell anyone's house, but mine, when he/she comes tell him/her we have sent your father's money to Malawi, please do not give him/her. (Don't give him). Tell Mr Ngulube we that when he/she comes, we must not give him any money. I have written Ngulube a letter telling him everything. If he gives you problems, go to the police, tell them he wants money left by his father, I did not tell him, then tell me, that he is being problematic, thank you sir, the house is mine, it is not for my child, not at all (please) I will come and collect the outstanding balance, greetings to you all, write me a letter concerning that.

I end here

D. Gross.” (emphasis added)

Reference to the child in Kamativi is to one Dickson Milanzi, Gross' son who is the 1st defendant in this matter. According to the plaintiff the addressee was also known as Ngulube Ndete. The 1st defendant had approached him intending to collect the balance of the purchase price. Also, plaintiff testified that 1st defendant was all along aware of the agreement of sale between him and his father. He referred to a letter he said was written by 1st defendant to one Julius Madziwa from an address in Kamativi in 1985.

The letter which was produced as exhibit B states:

“Dear Mr Madziwa

I am here today writing this letter to you. I will be very happy if you are well. I decided to write you this letter because father sold house and left all the property with me. As a result, I do not have money for transport and that of transporting the property, I therefore task you to tell the people concerned that I will collect it at the end of the month, I do not have much to say. I bid you farewell.

Yours

Dickson Milanzi.” (emphasis added)

Under cross-examination, the witness who said his level of education was standard six, mentioned different figures relating to the purchase price. He referred to \$500,00 and \$5 050,00 insisting that the house was damaged and he carried out extensive improvements such as replacing window panes, plastering, flooring and structural reinforcements on the walls. The witness remained steadfast in his averment that he had bought the property and that 1st defendant was aware of this fact. Therefore 1st defendant had no lawful right to sell the property that had been sold to him already. He maintained that 1st defendant’s mother and father died in Malawi and not in Bulawayo arguing that if indeed Gross Milanzi had died in Bulawayo he would certainly have known as he and the late Milanzi were members of the same church. Plaintiff gave his evidence well. Despite his advanced age and failing eye sight, he was able to narrate the events eloquently citing dates. He however exhibited an inability to appreciate currency denominations, that is the difference between “hundreds” and “thousands”. He was calm in the witness stand and answered questions promptly and honestly. The witness did not exaggerate his evidence. For example, he readily conceded that he did not pay the full purchase price at the time the agreement was entered into. Had he wanted to embellish his testimony he would have said he paid the full purchase price to Gross Milanzi before he left for Malawi. The court accepts his entire evidence.

The plaintiff’s 2nd witness was Julias Mudziwa who stated that he lives at house number N 8 Mzilikazi. He started living there in 1960 and he knows the plaintiff as his neighbour in Mzilikazi. He knew Gross Milanzi as the owner of N 9 Mzilikazi. The witness who was 74 years old at the time he testified said he grew up with 1st defendant and the two families were close to each other. He further said 1st defendant’s father Gross Milanzi emigrated to Malawi where he died. Sometime in 1985 he received exhibit B from 1st defendant advising him that N 9

Mzilikazi had been sold by Gross Milanzi and requesting the witness to advise the then occupants that he would come to collect the property. When it was put to him in cross-examination that the plaintiff was left at the house as a caretaker, he denied arguing that if this had happened 1st defendant would not have written a letter saying his father (Gross Milanzi) had sold the house.

This witness was not shaken in cross-examination. He told a short and simple story which is supported by documentary evidence and the fact that he has lived at N 8, a semi-detached house to N 9 placed him in an advantageous position vis-à-vis what transpired involving N 9 Mzilikazi. In my view, the witness did not exhibit any bias at all. He told the court that he did not know about the sale of the house to plaintiff until 1st defendant wrote exhibit B to him. It was only after he told plaintiff about the contents of exhibit B that plaintiff told him that he was the buyer of N 9 Mzilikazi. For these reasons, I fully accept the evidence of this witness.

Plaintiff's 3rd and last witness was Mr C. Dube also known as Mr Dickson Chidangure an 80 year old blind man. He lost sight in 2010 due to diabetes. The witness has been living at number 33 Mhlophe flats Mzilikazi since 1972. The plaintiff is known to him through marriage in that plaintiff's older brother married his relative. He knew both Gross and Dickson Milanzi as father and son respectively. The witness knew Mr Ngulube as Gross Milanzi's relative through marriage in that the former was married to a woman related to the latter. As regards the name Zhoya, he told the court that there are people in Zvimba where plaintiff comes from who use that name.

In respect of the agreement of sale between plaintiff and Gross Milanzi he told the court that he was present when this happened. Mr Ngulube called him to witness the transaction in the municipal offices. According to him plaintiff paid half the purchase price and the rest was handed over to Ngulube since Gross had gone to Malawi. He witnessed the payment of the balance to Ngulube. The witness denied that Gross Milanzi died in Bulawayo. According to him, he died in Malawi and this was information received from Malawi by church elders. Asked

whether 1st defendant was aware of this agreement of sale, the witness said although he had no personal knowledge of this, he believed from what he was told by Mr Ngulube that 1st defendant was aware of this agreement.

When it was put to him under cross-examination that municipal documents showed that plaintiff was a tenant, his response was that “at that time houses were not sold publicly”. Between 1968 and 1996, the witness was employed as a printer by Garment and Rebels in Bulawayo.

In my view the court has no reason to disbelieve this witness. He was candid in revealing that he is related to the plaintiff. His evidence is clear and credible in that where he did not have personal knowledge, he readily conceded and explained himself. Certainly, this witness had nothing to gain from testifying favourably for the plaintiff. I find the witness to be credible. The plaintiff then closed his case.

The 3rd defendant opened his case by giving evidence to the effect that he purchased the property from Dickson Milanzi in 2008 for ZW\$70 billion. He did not take occupation of the house because the “old man” had been in occupation. The house was sold to him through three people namely Jackup, Nyoni who was supposed to be a police officer and Dickson Milanzi (1st defendant). He said after paying the full purchase price, he had the house registered in his name and he then viewed the house. Further, the witness said when he visited the house, the “old man” was not there but 1st defendant told him that there were “tenants” living in the house. He also said he was shown documents by a housing office showing that the house belonged to a “dead man”.

Under cross-examination, the witness conceded that 1st defendant initiated legal proceedings to evict the plaintiff but was unsuccessful. He then sued the plaintiff in the magistrates’ court again without fruitful results. The witness said he saw the house first before he paid the purchase price. Also, he said he believed 1st defendant had been given authority to sell the house as the deceased’s only son. When he discovered that there was a problem, he

opted to evict the old man instead of suing 1st defendant for a refund of the purchase price because he wanted the house and not the money.

The 3rd defendant's evidence is not disputed in most aspects. The only point of departure is whether or not he was aware of the sale between plaintiff and Dickson's father before he entered into an agreement of sale with Dickson. On this aspect, the witness' testimony is unclear. Initially, he said he visited the house before he purchased it and that on that visit he was in the company of one "Jack-up". He said they found a young boy and the "old man" was not present. However, he later changed and said he went to view the house after paying the full purchase price and on this visit he "discovered the old man". This prevarication shows that this witness is hiding the truth as regards the date he first visited the house. This position is made clear by Dickson who stated that he advised this witness before he entered into the contract that the house had "ownership problems" in that there was an old man who was claiming to have bought the house from his late father.

Further, the 3rd defendant was untruthful when he testified that before he entered into the contract he was shown all the documents depicting Dickson as the executor of the estate because it is common cause that the house was sold to him before the estate was registered.

Exhibit D which is the agreement of sale dated 12 March 2008 shows the seller as Dickson Milanzi in his personal capacity and not in his capacity as the Executor of the Estate Late Meleka Dennis Golosi. The letters of Administration exhibit I were issued on 12 December 2008 well after the agreement had been signed. Dickson Milanzi then issued process on 28 March 2008 against the plaintiff in the Magistrates' Court claiming plaintiff's eviction from house number N 9 Mzilikazi. The 3rd defendant was aware of these proceedings and their outcome for he said after Dickson failed to evict the old man, he also tried to have him evicted. In terms of exhibit F which is an agreement between 3rd defendant and the City of Bulawayo, cession or transfer of the piece of land known as N 9 Mzilikazi into the 3rd defendant's name was effected on 9 July 2009.

Further, according to the receipts issued to 3rd defendant upon payment, he had only paid \$50 billion when litigation commenced in the Magistrates' Court. Despite this knowledge, he paid 2 further instalments of \$10 billion on 9 and 24 April 2008.

To strengthen his case, 3rd defendant called Dickson Milanzi as his witness. His evidence was to the effect that his father died and was buried in Bulawayo and any assertions that he died in Malawi are false. Dickson further stated that he decided to sell the house because the old man was refusing to vacate claiming to have bought that house. Effectively, he sold the house despite the fact that there was an ongoing ownership dispute between himself and plaintiff. He also admitted that he sold the property and received the full purchase price before he had registered the estate at the Master's office. Also, he denied writing a letter from TIN MINESTORE Kamativi, but could not explain why anyone could have forged that letter and how that person knew that he was in Kamativi at the time. Interestingly, he also denied that his late father wrote a letter to Mr K. Zhoya complaining about his conduct, although again he failed to explain why that letter was not only signed by his father, but why it originated from an address in Blantyre Malawi where his father was residing.

More importantly, Dickson confirmed that he told the 3rd defendant about the previous sale of the house to plaintiff before 3rd defendant purchased the house. He also confirmed that he unsuccessfully applied for the eviction of the plaintiff in the Magistrates' Court and that the 3rd defendant was aware of these proceedings.

In my view Dickson was not telling the truth when he denied knowledge of the agreement of sale between his late father and the plaintiff involving the house in question. On the evidence, Dickson knew as far back as 1985 that plaintiff had purchased this house. This is why he and his father were no longer staying at this house from 1985 to 1992 when his father died. It also explains why Dickson could not state how much plaintiff was paying towards rentals if at all plaintiff was a tenant as Dickson alleges he was. Not surprisingly, Dickson could not identify the recipient of the rentals. Surely, how could plaintiff have stayed for more than 23 years at this house without paying rent if at all he was a tenant? Why did the owner and Dickson

not enforce their ownership rights during this long period? In my view such conduct lays credence to the plaintiff's assertion that he bought the house from Dickson's late father with the former's knowledge.

As indicated above, there are only two issues to be considered. In order to resolve these issues, it is necessary to outline the applicable legal principles. In *Chimphonda v Rodrigues & Ors* 1997 (2) ZLR 63 (H), it was held that if in a double sale situation, the second buyer has knowledge of the first sale of the property, either at the time of the sale or at the time it took transfer of the property, then, unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the second buyer. In such an instance, the second buyer's only remedy is an action for damages against the seller. In deciding whether there are special circumstances affecting the balance of equities the court must bear in mind that the primary right of the wronged buyer is the remedy of specific performance which will be granted unless there is some equitable reason disqualifying him from obtaining such relief". See also *Crundall Bros (Pvt) Ltd v Lazarus NO and Anor* 1991 (2) ZLR 125 (S) and *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) at 25B – 28D.

Applying these principles to the facts in casu, I find as follows:

- (1) Plaintiff entered into a valid agreement of sale with one Gross Milanzi in 1985.
- (2) The agreement pertained to house number N 9 Mzilikazi, Bulawayo
- (3) Plaintiff paid the full purchase price for the house.
- (4) Dickson Milanzi, Gross Milanzi's son with full knowledge of the prior sale and transfer of rights to plaintiff sold the same house years later to the 3rd defendant.
- (5) The 3rd defendant with full knowledge of plaintiff's prior claim entered into an agreement of sale with Dickson Milanzi and paid the purchase price in full.
- (6) Notwithstanding his knowledge of plaintiff's prior claim in the property, 3rd defendant had the property transferred into his name.
- (7) Therefore, 3rd defendant cannot be described as an innocent purchaser in the circumstances.

- (8) The 3rd defendant failed to discharge the onus cast upon him of proving on a balance of probabilities that there are special circumstances affecting the balance of equities disqualifying the plaintiff from being granted his primary right of specific performance.
- (9) The plaintiff is entitled to specific performance. Plaintiff has been living in this house since 1985 and to “unscramble” matters would leave the plaintiff, a partially blind octogenarian homeless and destitute.
- (10) The 3rd defendant’s counter claim has no merit for reasons stated in this judgment.

I conclude therefore that on the balance of probabilities, the plaintiff has proved that he is entitled to the relief as prayed in the summons. Accordingly, I make the following order, that:-

- (1) The 1st and 3rd defendants effect transfer of stand number N 9 Mzilikazi, Bulawayo into plaintiff’s name at 5th defendant’s offices within 5 days of service of this order following an agreement of sale entered into by and between the plaintiff and the late Che Detanes Gross Milanzi.
- (2) Failing (1) above, the Deputy Sheriff, Bulawayo be empowered to sign all transfer papers in the 1st and 3rd defendants’ place and stead at 5th defendant’s offices.
- (3) The 1st and 3rd defendants together with those acting through them be interdicted from disturbing plaintiff’s peaceful occupation of the dwelling namely N 9 Mzilikazi Bulawayo.
- (4) The 3rd defendant’s counter-claim be and is hereby dismissed.
- (5) The 1st and 3rd defendants be and are hereby ordered to pay plaintiff costs of suit jointly and severally one paying the other to be absolved.

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HC 8-10