GEORGE ROBERT PARKIN

Versus

ELVIN NCUBE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 3, 4 FEBRUARY & 28 APRIL 2022

Civil trial

T. Dube for the plaintiff
J. Ndubiwa for the defendant

DUBE-BANDA J:

Introduction

1. The plaintiff seeks an eviction order against defendant and all those claiming through him from stand Lot 1 of subdivision B of subdivision B of Deneys situate in the district of Gwanda (property). The order is sought on the basis of an alleged unlawful occupation of the property by the defendant.

2. At the trial the plaintiff testified, and also called one Mr Richard Moyo-Majwabu to corroborate his evidence. The defendant testified in support of his defence to the plaintiff's claim and his counter-claim.

3. Cut to the borne the Plaintiff's case is that he is the registered owner of the property and the defendant is in unlawful occupation of the property. Defendant's defence is that plaintiff's title to the property is tainted with illegality and is a nullity. He contends that he has a valid written contract of sale with the late Gladys Marjorie Parkin (seller). Such contract of sale has not been validly cancelled and the deposit he paid had not been refunded. Defendant contends it was a material term of the contract that the balance of the purchase price would be paid upon production of a certificate of no present interests from the Ministry of Lands. He avers that his occupation of the property is lawful.

4. In his claim in reconvention defendant contends that he entered into an agreement of sale with the seller in respect of the property, and paid a deposit of US$40 000.00. It is said the balance of the purchase price was payable upon the fulfilment of the suspensive condition, being the acquisition of a certificate of no present interests from the Ministry of Lands. He prays for an order declaring null and void deed of transfer in favour of the plaintiff, and that the agreement of sale between him and the seller be declared binding. In his plea in reconvention plaintiff disputes that he had knowledge of the agreement of sale between defendant and the seller. He says he was an innocent third party who purchased the property for value from the executor of the estate of the seller.

5. On the 19 January 2022, plaintiff filed a notice of amendment to his plea in reconvention. In the notice he raised two issues, the first being that in the event there was valid agreement between the defendant and the seller such agreement fails for lack of fulfilment of the condition precedent i.e. in that there was no certificate of no present interests. The second being that the claim in reconvention had prescribed. The notice of amendment was opposed. At the commencement of the trial the notice was withdrawn.

6. Before dealing with the merits of this trial, I have to put a few issues off the way. Evidence was adduced and the parties closed their respective cases. Counsel requested to file written submissions. I agreed. In his written submissions plaintiff now contends that the defendant's claim in reconvention has prescribed, that the estate of the seller must have been joined in these proceedings, and that defendant lacks *locus standi* to make a claim on behalf of the estate of his late wife.

7. Regarding the issue of prescription rule 42(1) (a) of the High Court Rules, 2021 defines the purpose of a plea in bar or in abatement, it provides thus:

> As an alternative to pleadings to the merits, a party may within the period allowed for filing any subsequent pleadings take a plea in bar or in abatement where the matter is one of substance which does not involve going into the merits of the case and which, if allowed, will dispose of the case.

8. Prescription is a special plea which must be filed and determined before the merits of the matter. It must be specifically pleaded. After being served with the special plea of prescription defendant had a procedural right to file a replication. See: *Van Brooker v Mudhanda & Another AND Pierce v Mudhanda & Another* SC 5/18. In *casu* plaintiff did not file a special plea of prescription, he cannot be permitted to raise this defence in his closing written submissions.

9. Further plaintiff did not lead evidence regarding his defence of prescription. There was an attempt in the cross examination of the defendant to canvass this issue, which is in adequate. A litigant pleading prescription must adduce evidence to show that the claim has indeed prescribed. In *Van Brooker v Mudhanda & Another AND Pierce v Mudhanda & Another (supra)* the court held thus:

> It can therefore be accepted as settled that evidence is necessary when disposing of a matter in which a special plea of prescription is raised. The rationale behind this is that where a party raises a special plea as a defence, new facts arise and because of the introduction of fresh facts which did not appear in the declaration, there is need for a court to hear the evidence of the parties where facts are disputed before making a ruling on the plea.

10. This is a case which required evidence to show that the claim in reconvention has prescribed. No such evidence was led. In the result the defence of prescription was irregularly taken and must fail.

11. The issue of non-joinder of the estate of the Gladys Marjorie Parkin is not fatal to the defendant's counter claim. This court is able determine the issues or questions in this dispute in so far as they affect the rights and interests of the persons who are parties to this case. See: Rule 32(11) of the High Court Rules, 2021. The issue of non-joinder was ill taken and must fail.

12. In the claim in reconvention defendant is not making a claim on behalf of the estate of his late wife. He is seeking to protect his interest, not that of his late wife. He has *locus standi* to approach this court in seeking to protect his own interest. The issue of *locus stand* has been ill-taken and must also fail.

13. At a pre-trial conference held before a judge in chambers the issues for determination were set-out as the following:
    i. Whether there was a valid agreement of sale in respect of the property between the late Gladys Marjorie Parkin and the defendant.
    ii. Whether the transfer of the property into plaintiff's name was done fraudulently and unlawful.
    iii. Whether the plaintiff is entitled to the relief he seeks.

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    Issues (i) and (ii) on the defendant, and (iii) on the plaintiff.

Plaintiff's case

14. I recount in brief the evidence led at the trial. Plaintiff testified in support of his case. His evidence is that he is the registered owner of the property. The property was previously owned by his aunt the late Gladys Marjorie Parkin, who died in 2013. His uncle George Parkin told him that the property was for sale. In 2016 he contacted the executor of the estate of the seller to enquire about the sale of the property. The executor of the estate was one Mr Moyo-Majwabu. The executor confirmed that the property was for sale, and he then purchased the property for US$50 000.00.

15. At the time of the sale defendant was staying at the property. The plaintiff testified that he is the owner of the property and defendant has no right to be at the property. He gave him notice to vacate the property. When he did not vacate he sued out a summons for his eviction. He does not know that defendant bought the property from the previous owner. He has no knowledge of the agreement of sale between defendant and the previous owner.

16. In cross examination the plaintiff testified that he purchased the property in 2016. Defendant is in occupation of the property without his consent. He could not dispute that defendant had been in occupation of the property since 2010. Executor did not inform him that the property was subject of an instalment sale between defendant and

the late Gladys Marjorie Parkin. When it was put to him that in 2010, defendant and Gladys Marjorie Parkin entered into an agreement in respect of the property, he said he could not dispute that assertion. When it was put to him that the agreement between defendant and the previous owner was an instalment sale, his answer was he (plaintiff) bought the property from the executor. It was put to him that defendant paid a deposit of US$40 000. 00 as a deposit for the property, his answer was he could not dispute that.

17. The plaintiff was a very good witness, never stating more than he knew or believed and choosing his words with care. He was cross-examined and made several concessions. At the end of the day I find that he is a credible and truthful witness. I accept his evidence without reservation.

18. The 2nd witness to testify was Mr Richard Moyo-Majwabu (executor). He is a legal practitioner at James, Moyo-Majwabu and Nyoni, and the executor of the estate of the seller. He testified that the seller approached him and said in 2010 she entered into an agreement of sale with defendant and his wife in respect of the property. The property was sold for USD90 000.00. The purchase price was to be paid by November 2010. Payment was not made as agreed between the parties.

19. This witness in his capacity as a legal practitioner assisted the seller to draft a letter to the defendant. The letter is dated 27 February 2013 (Exh. A2). Exh. A2 was read into the record. It reads thus:

> Mr. Elvin Ncube
> Lot 1. Sub division B
> Gwanda
>
> On the 8th September 2010, you and your wife entered into an agreement of sale with me in terms of which I sold to you and your wife the above mentioned piece of land.
> The price we agreed to for the piece of land was $90 000.00 and you were supposed to pay the purchase price by the 9th November 2010.
> Because of your undertaking to pay the full purchase price by the 9th November 2010, I and my husband agreed to allow you to effect renovations to the existing structures on the property.

> Since the time of our agreement referred to above, we have asked you many times for payment of the purchase price and you have made numerous promises to pay but you have always failed to honour those promises.
> We now want you to state, in writing, as to when you will be paying the purchase price. We need to finalise this issue soon. Let me hear from you by the 8th March 2013.
>
> Yours faithfully
> Gladys Marjorie Parkin

20. This witness testified that the letter was delivered to the defendant. Defendant did not reply the letter. The seller died on the 29 May 2013. This witness was appointed executor dative of the estate of the seller. He was issued with Letters of Administration (Exh. A3). On the 22 November 2013, he placed an advertisement in the Chronicle Newspaper (Exh. A4) calling for all persons having claims against the estate and those persons having in their custody or possession property of the estate to contact him and notify him of their claims or estate property in their possessions.

21. On the 3rd December 2013, he addressed a letter (Exh. A5) to the defendant. In this letter defendant was advised that Gladys Marjorie Parkin had died. He was further advised that before she died the deceased had instructed this witness to draft a letter (Exh.A2) to him wherein a demand of the purchase price of $90 000.00 was made. No payment was received and as a result defendant was being given notice to vacate the property by no later than the 31st January 2014, failing which an eviction summons would be sued out without further notice.

22. The executor testified that he received a letter (Exh. A6) from *Mashayamombe & Co. Attorneys* defendant's legal practitioners. In the letter it was averred that in terms of the agreement the property was sold for USD90 000.00 and a deposit of USD40 000.00 was paid on the 5th October 2011. The balance had not been paid. The point was made that defendant will vacate the property on being refunded the USD40 000.00 deposit he paid and compensated for the repairs and improvements to the property valued USD8 000.00.

23. Mr Moyo-Majwabu testified that in terms of Exh. A2 defendant was given the 9th November 2010 as the deadline to pay the purchase price. He did not pay. No cent was paid towards the purchase price. By failing to pay he breached the agreement entitling the seller to cancel the agreement. Exh. A5 terminated the agreement and defendant was put on notice to vacate the property.

24. By letter dated 12 February 2014 (Exh. A7) this witness informed the defendant's legal practitioners that defendant did not pay a cent towards the purchase price. That it is a falsehood that he paid a deposit of USD40 000.00. Defendant was challenged to produce proof of payment. In fact the legal practitioners were advised that defendant had personally visited this witness office and said he tried to pay USD28 000.00, which was declined.

25. Mr Moyo-Majwabu testified that in their letter dated 2nd September 2014 (Exh. A9), defendant's legal practitioners attached a copy of a receipt dated 5 October 2011. The receipt was issued to Lucia Midzi, defendant's late wife. This witness said he was shocked to see what was alleged to be a receipt. He said if the receipt was available in when Exh. A2 was received, defendant was expected to reply and make such receipt available. Again he would have shown this receipt to this witness in reply to Exh. A5.

26. The executor testified that after receiving Exh. A5 defendant and his wife visited his office on separate occasions. This was in the beginning of 2014. The wife visited twice pleading for more time to pay the purchase price. At no time did she say she paid a deposit of USD40 000.00 nor produced a receipt. Defendant visited the office once and neither said he paid the USD40 000.00 nor produced a receipt as proof of payment.

27. He testified that the original of the receipt was never shown to him. In the letter (Exh. A10) this witness said the receipt is a falsehood. A fake and an attempted fraud. Defendant's legal practitioners were told that the contention that defendant paid a deposit of USD40 000.00 was rejected. Defendant was told to take whatever action he would deem appropriate to protect his interests.

28. Defendant did not challenge the rejection of his claim.

29. This witness testified that as the executor he had to finalise the administration of the estate. He decided to sell the property to raise money to pay the creditors. He made an application for authority to sell the property by private treaty in terms of section 120 of the Administration of Estates Act [Chapter 6:01]. The Master of the High Court granted the section 120 authority. Plaintiff offered to buy the property.

30. This witness and the plaintiff entered into an agreement of sale in respect of the property. The price was based on an evaluation report furnished to the Master of the High Court. The plaintiff paid the purchase price and the property was transferred to him. A copy of the deed of transfer in favour of the plaintiff is before court and marked Exh. A1.

31. The Final Distribution Account of the estate late Gladys Marjorie Parkin was advertised in terms of the requirements of the law. No objections were received and the Account was confirmed by the Master and the estate was closed.

32. In cross examination this witness testified that the late Gladys Marjorie Parkin did not show him a written agreement of sale. He had not seen Exh. B1. This is a handwritten letter allegedly written and signed by the late Gladys Marjorie Parkin. It is dated 8 September 2010. The letter reads as follows:

> To whom it may concern
>
> Elvin Ncube and Lucia Midzi have purchased Lot 1 of subdivision B of subdivision B of Deneys situate in the district of Gwanda, District. Transfer will be done after payment of the property is made. They are moving to the property immediately to start renovating it for ……

33. The witness disputed that Exh. B1 is an agreement. He said an agreement must indicate the purchase price, but Exh. B1 did not state the purchase price. It was put to this witness that all those who were involved in this agreement are deceased except the defendant. He agreed, Gladys Marjorie Parkin, Mr George Parkin and Lucia Midzi are all deceased. This witness accepted that defendant has been in occupation of the property from 2010. He testified that he wrote Exh. A2, and the late Gladys Marjorie

Parkin signed it. It was suggested to this witness that defendant and his late wife did not receive Exh. A2, his answer was when they visited his office they did not deny having received this letter. Again if Exh. A2 was not received Exh. A6 would have said so.

34. It was put to this witness that when defendant purchased this property it was occupied by artisanal miners. His answer was he had no comment. This witness disputed that the agreement between defendant and the late Gladys Marjorie Parkin was an instalment sale and he referred to Exh. A2. It was put to this witness that the seller had undertaken to obtain a certificate of no present interests from Government, he disagreed. It was put to this witness that the defendant paid a deposit of US$40 000.00, he disagreed. He said when defendant and his wife visited his office the receipt was not produced. He said defendant did not pay a cent towards the purchase price.

35. It was suggested to this witness that defendant showed him the receipt. He disagreed. He testified that he did not inform the plaintiff about the defendant. He did not inform plaintiff because the agreement with defendant had been cancelled. Asked what would happen to the deposit paid by the defendant, this witness answered that defendant paid no deposit.

36. In re-examination this witness was asked whether Exh. B1 was submitted to him as the executor, his answer was it was not produced. He said the late Gladys Marjorie Parkin said there was an agreement, she did not say whether it was written or not. Asked whether the late Gladys Marjorie Parkin was paid the US$40 000.00, he said after her death her husband said no payment was made by the defendant. He said when defendant and his wife visited his office on separate occasions there was no mention of the receipt nor the letter of no present interest from the Government.

37. Mr Moyo-Majwabu came across as a witness who had a clear recall of events and was more than a match for the intense cross-examination to which he was subjected. He was a very good witness, clear thinking and obviously very well trained and professional. I accept his evidence without qualification.

38. After the testimony of Mr Richard Moyo-Majwabu plaintiff closed his case.

Defendant's case

39. Coming to the defendant case I also propose to consider the evidence adduced in turn. Defendant testified in his defence.

40. Defendant testified that he resides at the property. The property has a main house and three cottages with six rooms each. When he bought the property it was deserted, only occupied by illegal gold miners and people who head cattle. He moved into the property in 2011. When he moved into the property the house had cracks and was dirty. It had no celling. No doors and window panes. There were scrap metals inside the house. He cleared the property, too the scrap to the scrap yard, and kept what he needed.

41. He entered into a sale agreement with the late Gladys Marjorie Parkin. He said Exh. B1 was the written agreement. The house was sold to him *voetstoots*. He was shown a copy of the deed of transfer. The agreement was reduced into writing and the purchase price was USD90 000.00. It was agreed that he would pay a deposit and the balance in instalments. He delayed paying a deposit, but it was eventually paid to the seller. It was paid on the 5th October 2011. He paid a deposit of US$40 000.00. He disputed that he told the executor that he offered to pay a deposit of US$28 000.00.

42. He testified that he was given a receipt as proof of payment. A copy of the receipt is before court and marked Exh. B2. He says payment was made by his late wife. He was present when such payment was made. George Parkin the husband to the late Gladys Marjorie Parkin was not present when payment was made and when he was given the receipt. He disputed that the receipt is a fake and a fraud.

43. He testified that the seller was supposed to collect a certificate of no present interests from the Ministry of Lands. It was agreed that after the collection of the certificate he would then pay instalments. He did not get the certificate.

44. He received a letter from the executor informing him that Gladys Marjorie Parkin had died and that he must move out of the property.

45. He disputed that he saw Exh. A2. He did not know the persons listed in Exh. A2 as having received the letter on his behalf.

46. Defendant testified that he visited the office of the executor for two reasons. The first was that his wife went to the office of the executor with a receipt and it was misplaced in that office. The second was to tell the executor that his now late wife was seriously injured in a car accident.

47. He testified that he hired people to clean the property. The main house had to be painted. He had to seal the cracks in the main house. He did plumbing works. He constructed a perimeter fence around the property. He connected water to the property. It took him two and a half years to complete the renovations on the property.

48. In cross examination the defendant conceded that he did not hire a professional assessor to evaluate the improvements he allegedly made in the property. He was asked whether Exh. B1 is the agreement of sale with the late Gladys Marjorie Parkin, his answer was it was not the agreement. Asked whether he entered into a verbal agreement with the late, his answer was most of the agreement was verbal. Asked whether the agreement was verbal, written or both. His answer was part of the agreement was written down and the other part was not written down.

49. Again asked whether Exh. B1 was part of the agreement. His answer was it was part of what was agreed between him and the late Gladys Marjorie Parkin. Asked whether he paid the US$40 000.00, he agreed. Asked when he was supposed to pay the US$40 000.00, he said it was supposed to be paid after the seller had received the certificate of present interest from the Ministry of Lands, but they were delays with the certificate and he ended up paying before the certificate was obtained. Put to him that

in his evidence in chief he had testified that only the instalments were payable after the certificate, his answer was it is true he was supposed to pay the balance after the certificate had been obtained.

50. Asked the number of instalments he was supposed to pay after paying the deposit. His answer was there was no specific number of instalments. However the seller had indicated that instalments must be paid within a period of three months.

51. He testified in cross examination that he paid a deposit of US$40 000.00. It was paid in cash. Payment was made by him and his wife. Exh. B2 is the receipt confirming payment. He said the receipt has his wife's name only. His name was not written on the receipt.

52. Asked whether the certificate of no present interest was important in the agreement. His answer was it was very important. Asked whether the agreement would be legal without the certificate, his answer was since it was a requirement, the absence of a certificate would cause a problem. They were told by the provincial lands officer that a certificate of no present interest was a requirement in such an agreement. Asked whether he produced a certificate of no present interest, his answer was they did not get a certificate.

53. It was put to him that he received Exh. A2. He disagreed. Asked whether he had the original of Exh. B2, the receipt. His answer was that the original remained in the office of the executor. His late wife left it in the office of the executor. It was put to him that the Mr Moyo-Majwabu denies having seen the original receipt. His answer was that he did not hear him answer that question. When it was suggested to him that the copy of the receipt is fake, he disagreed. Asked whether he handed the original receipt to Mr Moyo-Majwabu, his answer was that it was not him who handed the original receipt. Asked whether he told his legal practitioners that the original receipt was with Mr Moyo-Majwabu, his answer was he told them. When it was suggested to him that he did not give the original receipt to Mr Moyo-Majwabu, his answer was "I gave him the receipt."

54. Asked whether plaintiff was present when he was negotiating with the late Gladys Marjorie Parkin, his answer plaintiff was not present. Asked whether plaintiff was present when he allegedly paid the US$40 000.00, his answer was he was not present. It was put to him that plaintiff was not aware of the agreement with the late Gladys Marjorie Parkin, his answer was "he is denying." When put to him that plaintiff had no knowledge of the agreement, his answer was plaintiff said "I acquired his grandmother's property."

55. Asked whether he filed a claim for his US$40 000.00 against the estate of the late Gladys Marjorie Parkin. His answer was "I did not see that." It was put to him that he was informed that she died. He agreed. When put to him that the executor invited him and his legal practitioners to file a claim, his answer was he was not sure of that. It was put to him that he and his legal practitioners failed to file a claim, he said that was not true. Asked whether a claim was made, he said he was not sure.

56. In re-examination defendant testified that he did not see the executor's advertisement for creditors and debtors, i.e. Exh. A4. Asked the reason he did not lodge a claim against the estate of the Gladys Marjorie Parkin, his answer was he resides 2km from Gwanda town.

57. The defendant was untruthful. All in all he was totally unreliable and his testimony is not worthy of any belief. For example in his evidence in chief he testified that only the instalments were payable after the certificate had been obtained. In cross examination he made a turn and said he was supposed to be pay the deposit after the seller had received the certificate but they were delays with the certificate and he ended up paying before the certificate was obtained. He says the balance was supposed to be paid in instalments, but does not say the amounts of those instalment payments. His evidence was riddled with falsehoods.

58. At the conclusion of his testimony defendant closed his case.

59. I now turn to consider the issues for determination as set out in the pre-trial conference minute.

Whether there was a valid agreement of sale in respect of the property between the late Gladys Marjorie Parkin and the defendant

60. Plaintiff contends that the agreement of sale between the defendant and the late Gladys Marjorie Parkin is in conflict with section 3 of the Land Acquisition Disposal of Rural Land Regulation 1999 (S.I. 287/99). It is argued that the agreement is illegal, *null* and void. This contention is anchored on the submission that the property subject to the agreement of sale is rural land, and that such agreement was not preceded by the issuing of a certificate of no present interest by the Ministry of Lands.

61. In terms of section 2 of the Land Acquisition Act [Chapter 20:10] "rural land" means any land other than land which is (*a*) Communal Land; or (*b*) in a municipal area, town area or local government area; (*c*) in a town ward of a rural district council or an area declared to be a specified area in terms of the Rural District Councils Act [*Chapter 29:13*]; or (*d*) in the area of any township as defined in the Land Survey Act [*Chapter 20:12*]; or (*e*) State land the layout of which has been approved in terms of section 43 of the Regional, Town and Country Planning Act [*Chapter 29:12*]; or (*f*) State land specified in the Third Schedule to the Agricultural and Rural Development Authority Act [*Chapter 18:01*]; "specially Gazetted land" means agricultural land referred to in section 16B(1)(*a*)(i)(ii) or (iii) of the Constitution, and the term "specially Gazetted shall be construed accordingly; "structure" includes any wall, fence, dam, earthwork, well, borehole or other permanent improvement on or to land.

62. The property subject to the sale agreement is rural land. Defendant testified that it was agreed between the parties that the seller had to obtain a certificate of no present interest from the Ministry of Lands. In cross-examination defendant was asked as to when he was supposed to pay the deposit US$40 000.00, he said it was supposed to be paid after the seller had received the certificate of no present interest from the Ministry of Lands, but they were delays with the certificate and he ended up paying before the certificate was obtained. Even by his own version defendant accepts that the property is rural land.

63. Lot 1 of subdivision B of Deneys measuring 53, 9010 hectares is rural land. Its sale must comply with section 3 of the Land Acquisition Disposal of Rural land Regulations 1999 (S.I. 287/99). Section provides thus:

> ***3. Minister to be given right of first refusal on sale of rural land***
>
> (1) Subject to these regulations, the owner of any rural land, other than the State, a local authority or a statutory body, shall not sell the land unless he has offered to sell it to the Minister and—
> (*a*) the Minister has issued him with a certificate of no present interest; or
> (*b*) the Minister has not responded to the offer within the ninety-day period specified in subsection (1) of section 5.
> (2) An offer in terms of subsection (1) shall be in writing and shall—
> (*a*) specify the price which the owner is prepared to accept for the rural land concerned; and
> (*b*) describe the nature and extent of the rural land concerned and any buildings or other improvements on the land; and shall be accompanied by a copy of the title deed of the land. (My emphasis).

64. By operation of law a sale of rural land must comply with the section 3 of the S.I. 287/99.

65. Defendant in his claim in reconvention avers that it was a material term of the contract that the balance of the purchase price would be payable upon fulfilment of a suspensive condition, being the acquisition of a certificate of no present interest from the Ministry of Lands.

66. In his written submissions defendant contends that the agreement between defendant and the late Gladys Marjorie Parkin was subject to the seller acquiring a certificate of no present interest.

67. In not so many words defendant accepts that a certificate of no present was a prerequisite for the sale. In his written submissions plaintiff contends that the agreement of sale between defendant and the late Gladys Marjorie Parkin was invalid for want of a certificate of no present interest. It is argued that without a certificate there was no valid sale agreement at law.

68. There is no evidence that a certificate of no present interest was applied for and obtained before the late Gladys Marjorie Parkin and defendant purported to enter into an agreement of sale in respect of the property. The *onus* is on the defendant to prove that there was a valid agreement of sale. Defendant has not adduced evidence to prove that there was valid agreement of sale between him and the late Gladys Marjorie Parkin. The agreement was invalid for want of a certificate of no present interest. The issue whether there was a valid agreement of sale in respect of the property between the late Gladys Marjorie Parkin and the defendant is answered in favour of the plaintiff.

Whether the transfer of the property into plaintiff's name was done fraudulently and unlawful

69. I have already found that the agreement between the defendant and the seller was invalid. Even if I am to assume at this stage, for present purposes only, that the agreement was valid, still it was lawfully cancelled. The following are the reasons for this finding.

70. Mr Moyo-Majwabu was the executor dative of the estate of the late Gladys Marjorie Parkin. He sought a section 120 of the Administration of Estates Act authority from the Master of the High Court to dispose of the property by private treaty, and such authority was granted. This evidence was not controverted. He entered into an agreement of sale with the plaintiff in respect of the property. Plaintiff purchased the property and it was then transferred to him. Plaintiff holds a deed of transfer No. 1804/2016 in respect of the property.

71. Cut to the borne defendant's contention is that he was the first purchaser and his agreement of sale with the late Gladys Marjorie Parkin was not terminated. Therefore, when plaintiff entered into an agreement of sale with the executor, the agreement with defendant was extant. Defendant contends that he paid a deposit of US$40 000.00. He produced a copy of a receipt (Exh. B2). He says the balance was due and payable upon the seller producing a certificate of no present interest. The question is did defendant pay the deposit of US440 000.00?

72. His argument is that Exh. A2 is inadmissible hearsay evidence. When Exh. A2 was produced and received by this court Mr *Ndubiwa* counsel for the defendant did not object to its admissibility. The issue of its inadmissibility was only raised in written submissions. It is important that when evidence that counsel considers inadmissible is adduced, counsel immediately stands up and objects and outline the grounds of objection. To sit and allow what counsel might be considering inadmissible evidence and then spring a surprise at closing submissions stage is not the best practice of running a trial.

73. Anywhere Mr Moyo-Majwabu testified that he received instructions from the seller, and on the basis of those instructions he drafted Exh. A2 and gave it to her to sign. This evidence was not challenged in cross examination. Mr Moyo-Majwabu saw, heard or otherwise perceived the statement being made by seller. It is on this ground that Exh. A2 is admissible in terms of section 27(3) (a) of the Civil Evidence Act [Chapter 8:01]. It remains a question of weight. It is important to distinguish issues of admissibility from issues of weight.

74. Defendant contends that the deposit was paid on the 5th October 2011. Exh. A2 was written on the 27 February 2013. It was received on the 28 February 2013. Exh. A2 is clear that no payment was made towards the purchase price. If defendant had paid the US$40 000.00 he surely could have approached the seller and produced his receipt. He received a letter dated 3rd December 2013 (Exh. A5) from *James, Moyo-Majwabu and Nyoni* advising him that he had not paid the purchase price and giving him notice to vacate. He instructs his legal practitioners to reply, but conspicuously does not attach the receipt (Exh. B2) to prove that he paid US$40 000. 00. He visits the executor's office, he does not tell him that he paid US$40 000.00. He tells the executor that he wanted to pay US$28 000.00, but it was refused. His wife twice visits the executor and does not say she paid a deposit of US$40 000.00. According to the executor she was merely pleading that they be given more time to raise the purchase price. These are not the actions of a person who had paid in cash a huge amount of US$40 000.00.

75. Defendant in an attempt to cover up his tracks he testified that he did not receive Exh. A2, and that his late wife left the original receipt in the executor's office. If he had not received the letter (Exh. A2) his legal practitioners would have said so in their letter dated 7 February 2014 (Exh. A6). Again if his wife had left the original receipt in the executor's office, his lawyers would have said so in the same letter. He does not even explain where he got the copy of the receipt (Exh. B2), who photocopied it and for what purpose. The copy was not certified a true and correct copy of the original. The receipt is just a fake. A façade. A false creation calculated to mislead.

76. It is clear that the denial that he received Exh. A2 and that the original of the receipt (Exh. B2) was left in the executor's office are just after-thoughts by the defendant. Exh. A2 shows that defendant did not pay any amount towards the purchase price. He breached a material term of the agreement and the agreement was terminated. He was given notice to vacate. He did not file a claim against the estate of the late Gladys Marjorie Parkin.

77. The executor was at large to sell the property to the plaintiff. The executor obtained a section 120 authority. Prepared a final distribution account. Defendant did not file an objection to the account. The Master confirmed the account. Without an objection there was no impediment to the sale of the property. There is no basis to allege that the transfer of the property to the plaintiff was done fraudulently and unlawfully.

78. I have made *supra* that there was no valid agreement of sale between the defendant and the late Gladys Marjorie Parkin. On this basis alone the transfer of the property to the plaintiff is beyond impeachment.

79. In his written submissions defendant contends that there was a double sale in this matter, and that the provisions of the Contractual Penalties Act [Chapter 8:04} are applicable. These issues do not arise. First, there was no double sale in this case. Second, there was no installment sale between defendant and the late Gladys Marjorie Parkin.

80. The *onus* is on the defendant to show that the transfer of the property to the plaintiff was fraudulent and unlawful. Defendant has failed to discharge such *onus* of proof. This issue is answered in favor of the plaintiff.

Whether the plaintiff is entitled to the relief he seeks

81. Plaintiff seeks the eviction of the defendant from the property in terms of the *rei vindicatio.*

82. The *rei vindicatio* is premised on the notion that an owner may not be deprived of his or her property against his or her will, and is entitled to recover property from any person who retains possession of it without his or her consent. Therefore, no other person may withhold property from the owner unless he or she is vested with some right enforceable against the owner such as a right of retention against the owner or a contractual right. It is trite law that possession should also be lawful in order to be a valid defence against the *rei vindicatio*. Our law calls for ruthless vindication and

protection of the right of ownership. See: *Nzara & Ors. v Kashumba N.O. & Ors.* SC 18/18; *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236.

83. Authorities show that an owner who institutes the *rei vindicatio* is required to allege and prove that-
    (i) he or she is the owner of the thing;
    (ii) the thing was in the possession of the defendant at the commencement of the action; and
    (iii) the thing which is vindicated is still in existence and clearly identifiable.
    (iv) The onus to establish any right to retain possession of the thing always rests on the defendant as long as the owner does not go beyond alleging his or her ownership and the fact that the thing is in the possession of the defendant.

84. In *casu* the property is registered in the name of the plaintiff. He has real right to the property. Exh. A1 is a copy of the deed of transfer. Defendant is in possession of the property. Defendant has not established any right of retention. He had no valid agreement with the late Gladys Marjorie Parkin. Even if the agreement was valid, it was lawfully cancelled.

85. In the circumstances plaintiff's claim against the defendant must succeed. Defendant's counter claim must fail.

86. The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the defendant.

87. In the summons costs are sought against on the scale as between legal practitioner and client. It is trite law that costs are in the discretion of the court to be exercised judicially upon a consideration of the relevant facts and must be fair to the parties. Defendant took advantage of the fact that of the four persons who had something to do with this matter, three have since died, the seller, her husband and defendant's wife. He is the only one who is alive. He then peddled falsehood that he and his wife

paid a deposit of US$40 000.00. Produced a fake receipt. Lied that his late wife left the original receipt in the office of the executor. He crafted a strategy to take advantage of the seller because she is late. This is reprehensible conduct. This is unworthy conduct. This is conduct that deserves of censure. Costs on a legal practitioner and client scale are warranted in this matter.

In the result, it is ordered that:

a. Plaintiff's claim succeeds with costs on a legal practitioner and client scale.

b. Defendant's claim in reconvention is dismissed with costs on a legal practitioner and client scale.

c. Defendant and all those claiming occupation through him vacate Lot 1 of subdivision B of Deneys measuring 53, 9010 hectares within 14 days of this order, failing which the Sheriff or his lawful deputy be and is hereby authorised to eject defendant from the property.

James, Moyo-Majwabu & Nyoni plaintiff's legal practitioners
Mashayamombe & Co. Attorneys defendant's legal practitioners