ELIZABETH MUSAVENGANA
and
KUDAKWASHE CHIKWARA
(In his capacity as the Executor Dative of the Estate Late Rebecca Derera)
versus
SHEPHARD MUFUDZI CHIRISA
and
AUDREY MUFUDZA
and
BEVERLEY BUILDING SOCIETY
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 1 and 2 December 2005 and 22 March 2006

Civil Trial

Mr *I E G Musimbe,* for the plaintiffs
Mr *A. A.Debwe,* for the 2nd respondent

KUDYA J: The first plaintiff's name is Elizabeth Musavengana and not Rebecca Musavengana as was wrongly perpetuated in the pleadings in this matter, while the deceased who was represented by *Kudakwashe Chikwara* (the 2nd plaintiff) was during her life time called Rebecca Derera and not Elizabeth Derera as was also wrongly perpetuated in the pleadings. The two women were married to the same man in a polygamous union. I have *mero motu* corrected the errors in question as I conceive of no possible prejudice that would visit any of the parties involved in these proceedings. In any event, when the first plaintiff gave evidence, she took the oath as Elizabeth and not Rebecca, and the agreement of sale the two women entered into with the 1st respondent correctly reflected their proper names as did all the documentary exhibits which were produced in which their respective names appear.

At the commencement of the trial, the 2nd plaintiff was not in attendance even though his legal practitioner, Mr *Musimbe,* was present. Mr *Debwe,* for the 2nd respondent applied for dismissal of his case. The application was opposed on the basis that 2nd plaintiff's case was to all intents and purposes indivisible from that of the 1st plaintiff such that it would not serve any practical purpose to grant the application sought. I was persuaded by this submission and declined to grant a default judgment against him dismissing his claim.

On 18 September 2003, the plaintiffs issued summons against the four respondents seeking that:

(a) the transfer of stand 2551 Chegutu Pfupajena Township of Stand 3155 Chegutu Pfupajena Township situate in the District of Hartley, held under Deed of Transfer 8176/2000 by the first defendant to the second defendant, on 26 September 2002, be and is hereby set aside.

(b) the first defendant upon service of this order upon him shall take all such steps and sign all such necessary documents required by the Fourth defendant to enable the transfer of stand 2551 Chegutu Township of Stand 3155 Chegutu Pfupajena Township, situate in the District of Hartley, to be transferred from the first defendant to the first and second plaintiffs, provided that the plaintiffs would have paid the balance of the purchase price due to the first defendant, in the sum of $12 300.00.

(c) in the event that the first defendant fails to carry out his obligations in terms of paragraph 2 above the Deputy Sheriff of Harare or his lawful Assistant be and is hereby authorised to take all such necessary steps and execute such transfer documents on behalf of the first defendant.

(d) Costs of suit.

Alternatively, as against the first defendant only

(a) Payment of the sum of $1 million in respect of damages for breach of the sale agreement by the first defendant in failing to transfer the property to the plaintiffs.

(b) Interest thereon *a tempore morae* at the prescribed rate and

(c) Costs of suit.

While all the defendants were served with the summons and its declaration only the 1st and 2nd defendants entered an appearance to defend, pleaded and counter-claimed against the plaintiffs' claim. The first defendant counter-claimed for a declaration that recognised the cancellation of the agreement of sale he entered into with the plaintiffs' and damages while the second defendant claimed for the plaintiffs' eviction and holding over damages (both counter-claimed for costs of suit.) All the pleadings were conducted between the plaintiffs and these two defendants up to the Pre-trial conference stage and beyond, that is even up to the request for a date of hearing.

This matter was initially set down for hearing on 21 March 2005. It was postponed *sine die,* by consent with no order as to costs at the instance of Mr *Debwe*. It was reset for

23 May 2005 and again postponed *sine die* by consent but at the request of Mr *Debwe* who was finding it difficult to contact his other client the 1st defendant. On 11 October 2005 Mr *Debwe* wrote to the Registrar of this court seeking set down of the matter for trial. The matter was accordingly on 14 November 2005 set down for hearing on 28 November 2005. The notice of hearing was served on Mr *Debwe* on 15 November 2005. On 16 November 2005, Mr *Debwe* filed a notice of renunciation of agency for the 1st defendant and provided the 1st defendant's last known address. Until the date of renunciation, Mr *Debwe* had represented the 1st defendant from at least 12 November 2002 when he entered an appearance to defend on his behalf.

At the hearing Mr *Debwe* conceded that proper service of the notice of hearing had been served on him for the 1st defendant before he renounced agency. He explained that he had failed to contact the 1st defendant since May 2005 and that all correspondence that he dispatched to him had not been responded to, hence the renunciation of agency. Be that as it may, the first defendant was found to be in default. Mr *Musimbe*, however, did not move for default judgment and the dismissal of the 1st defendant's counter-claim. (He did not have to do so).

THE PRE-TRIAL CONFERENCE ISSUES

At the Pre-trial conference held on 22 September 2004 five issues were referred for determination at the trial. These are:

1. Whether or not 1st defendant validly and effectively cancelled the agreement of sale.
2. If not, whether or not 2nd defendant was aware of the prior sale between 1st defendant and plaintiff.
3. Whether the plaintiffs are entitled to the relief sought.
4. If the 1st defendant had validly cancelled the agreement of sale whether he is entitled to damages.
5. If the 1st defendant had validly cancelled the agreement of sale, whether the 2nd defendant is entitled to damages.

At the commencement of the hearing on 1 December 2005 the 1st plaintiff and the 2nd defendant, who were the only parties before me agreed on the following issues:

1. Whether or not the second defendant on signing her agreement of sale with the first defendant had prior notice of the sale between the plaintiffs and the first defendant.

2. Whether the second defendant had prior notice of the sale agreement between the plaintiffs and the first defendant prior to the transfer of the immovable property into her name.

The answer to these issues will resolve the dispute between the parties. However most of the evidence led at the trial was common cause. It is necessary that I highlight the agreed testimony before I analyse the areas of conflict.

The first plaintiff (Elizabeth) aged 49 gave evidence and called her son Tinawo Chikara (born 1 June 1988 as shown on page 2 of Exhibits 3) aged 17, years to support her claim. She produced Exhibit '1' a bundle of documents consisting of 28 pages and Exhibit 3, a three-paged document. On the other hand the 2nd defendant (Audrey) was the sole witness to lead evidence to counter the 1st plaintiff and to prove her counter-claim. She produced Exhibit 2, a bundle of documents consisting of 18 pages.

The following course of events was common cause:

1. Elizabeth and the deceased Rebecca Derera (Rebecca) were married to one husband in a polygamous union.

2. The husband in question died in 1990 and the two widows utilised his pension benefits to purchase the rights, title and interest of the 1st respondent (Chirisa) in the immovable property in question.

3. The widows then entered into an agreement of sale with Chirisa on 10 August 1993. The total purchase price was $30 000 but they paid a deposit of $20 000 and took occupation with their children in December 1993 after giving three months notice to some tenants who were then in occupation.

4. They were to pay the balance at the rate of $1 109 during the first 11 months and the last instalment of $1 101 by 10 July 1994 plus interest on the balances at the rate of 33% per annum. The total purchase price and interest amounted to $33 300.00.

5. On 14 June 1996 Chirisa wrote to them threatening to terminate the agreement of sale by 30 June 1996 and refund them what they had paid less what he termed loss of business profit. He purported to be acting in terms of condition 4 of the agreement. Chirisa must have abandoned the threat of cancellation as on 18 February 2000 he wrote another letter in which he purported to cancel the agreement and enclosed a

statement of account as at that date which indicated that the widows owed him $21 104.35.

6. In June 1998 the second defendant (Audrey) was employed by Chibuku Breweries and was based in Kadoma. She was eligible for a company collateral mortgage loan and was entitled to the 3,25% loan subsidy that employees of Chibuku Breweries enjoyed for housing loans with the third respondent (Beverley Building Society).

7. Audrey saw an advertisement flighted in the newspaper by Laws Estate Agents of the sale of the immovable property in question. The Estate agents referred her to Chirisa.

8. Audrey and Chirisa met in Chegutu on Sunday 7 June 1998 and went to view the immovable property. They found occupants in the house.

9. She liked the immovable property. On Monday 8 June 1998 the Estate Agent facsimiled to her an Agreement to Buy and Sell Immovable Property (offer and unconditional acceptance)

10. On 9 June she made an offer to purchase the immovable property for $90 000 by signing on the form fascimiled to her. Chirisa accepted the offer on 10 June 1998 by signing on the requisite portion of acceptance on the same form.

11. On 12 June 1998 she signed the agreement of sale with Chirisa who appended his own signature to it on 15 June 1998 for the purchase of the immovable property for $90 000. She did not pay any deposit, as she was eligible for a mortgage loan facility from Beverley.

12. On 3 August 1998 Beverley Building Society offered her the mortgage loan of $90 000.00 which was conditional on the immovable property being the collateral security for the loan. The repayment dates for capital and interest of the loan would commence on the registration of the mortgage bond.

13. On 6 August 1998 the conveyancers of the building society Messrs *Mukadam and Associates* despatched to Audrey the fees and charges for the registration of the bond in the total sum $1 627.50.

14. Meanwhile Messrs *Mangwana and Partners* had been appointed to act *in forma pauperis* by the Registrar of this Court on 16 June 1998, as appears in Exhibit 3.

15. Messrs *Mangwana and Associates* had written to Chirisa on 25 August 1998 and had dispatched a cheque in the sum of $2 300.00 in full and final settlement of the capital amount in terms of the agreement of sale entered into on 10 August 1993.

16. Chirisa's legal practitioners *Messrs Mashonganyika and Associates* wrote to M*essrs Mangwana and Partners* on 29 September 1998. They threatened to cancel the agreement of sale unless payment of the amount of $25 534.74 as at 10 July 1998 was paid in full by 30 October 1998.

17. By 3 November 1998 when *Messrs Mashonganyika and Partners,* again returned the cheque for $2 300.00 to *Messrs Mangwana and Partners the* dispute over the total sum that the widows owed Chirisa was still raging. The letter was responded to on 26 November 1998 by *Mangwana and Partners* who were holding on to $12 300.00 for Chirisa's account pending cession of his rights to the widows. This amount was made up of the balance of the purchase price of $2 300.00 and $10 000 interest (calculated to the total of the capital of $10 000.00 which was outstanding on the date of agreement on 10 August 1993 in terms of the *in duplum doctrine) Mangwana and Partners* raised with Chirisa's legal advisers the provisions of the contractual Penalties Act [*Chapter 8:04*]

18. On 20 December 1999, without the knowledge of the widows or their then legal practitioners *Messrs Mangwana and Partners* Chirisa obtained registered title No.12861/99 from the Municipality of Chegutu over the immovable property.

19. On 11 May 2000 *Messrs Mangwana and Partners* responded to Chirisa's letter of 18 February 2000 to the widows in which he sought from them $21 104.35 and dispatched to him a cheque of $10 000.00 being the maximum interest accrued on the balance of $10 000.00 in line with the *in duplum* doctrine that interest cannot exceed the capital due.

20. On 26 September 2000 the immovable property in question was transferred to Audrey by the Registrar of Deeds by Deed Number 8716/2000 simultaneously with the registration of the mortgage bond in favour of Beverley, number 8001/2000.

21. On 18 October 2000 Audrey's legal advisers *Messrs H Mukonoweshuro and Partners* wrote to the widows attaching the title deed number 8716/00, giving them 1

month's notice to vacate the immovable property and seeking rentals for October and November 2000 in the sum of $2 500 per month. Messrs *Mangwana and Partners* responded to this letter on 24 October 2000 advising Audrey, through her legal advisers, that Chirisa was paid the last instalment in May 2000 and resisted vacation and payment of rentals.

22. By 11 June 2004, Audrey had repaid the mortgage bond of $103 500.00.

23. Elizabeth and her children remained in occupation of the immovable property together with Rebecca's children after Rebecca passed away. They remain in physical occupation of the immovable property since December 1993. By May 2000 they had paid for the immovable property in full.

RESOLUTION OF THE ISSUES

WHETHER OR NOT THE SECOND DEFENDANT ON SIGNING HER AGREEMENT OF SALE WITH THE FIRST DEFENDANT HAD PRIOR NOTICE OF THE SALE BETWEEN THE PLAINTIFF AND THE FIRST RESPONDENT

Elizabeth testified on what transpired when Audrey in the company of Chirisa visited the immovable property on 7 June 1998. Rebecca was present. Chirisa knocked on the kitchen door and within Audrey's hearing advised the plaintiffs that the purpose of the visit was for Audrey to view the house. They asked him why he was selling the house when they had already bought it and refused him entry. He forcibly entered the house with Audrey in tow and viewed the kitchen and the dining room before proceeding to the passage from where they viewed the two bedrooms, bathroom and toilet. Audrey remarked that the house was beautiful. Elizabeth took the two back to their motor vehicle. On the way she asked Audrey who she was and was favoured with her name. She alleged that she warned Audrey that it would be safe for her to stay out of the matter but Audrey did not respond to her caution. She further alleged that she also advised Chirisa that she did not wish to have problems with him. That was the last she ever saw of Chirisa.

Audrey later called at the immovable property on her own on a date Elizabeth could not recall, but still in 1998. Elizabeth told her that the plaintiffs had purchased the property and requested her to let it be, but Audrey retorted that as they had breached their agreement they would be refunded their outlay as at that date. Her explanations that they had purchased

it to live in fell on deaf ears as Audrey insisted that as it was close to town and hospital she desired it and would execute her agreement of sale with Chirisa before her lawyers. She left.

She never saw Audrey again. She believed Audrey had taken heed of her advice. She was wrong. A Municipal Inspector of Chegutu; one Chekete visited the property between 1998 and 2000 on a date she could not recall. He came to inspect the immovable property. He left without doing so after he talked to Elizabeth. Later still some persons from Beverley visited the property. They too left without inspecting the house after talking to her and after she had referred them to Messrs *Mangwana and Partners.* Audrey was to visit the premises again in 2000 but in Elizabeth's absence.

It was her further testimony that as from 17 June 1998, Audrey never asserted her rights and did not seek rentals from her until 18 October 2000. She stated that she was no longer in a position to purchase another property as she was a single mother who eked out a living from selling vegetables. She and the late Rebecca had exhausted their late husband's pension in buying the immovable property in question.

Under cross-examination she stuck to her evidence in chief. She stated that after Chirisa and Audrey had left she visited Chegutu Community Court (Magistrates Court) seeking help and was referred to the High Court where on 16 June 1998 *Mangwana and Partners* were appointed in *forma pauperis* legal practitioners for the two widows. These legal practitioners handled the matter for them from then on until her present lawyers issued summons on her behalf. She was adamant that she advised Audrey when she first visited the immovable property in the company of Chirisa that they (she and Rebecca) had purchased it. She denied that she voluntarily permitted Chirisa and Audrey to inspect the house. She described the nature of her conversation with both Audrey and Chirisa as they went to their car as a quarrel. As a lay person she was not aware that *Mangwana and Partners* could have obtained an interdict against Chirisa barring her from selling the immovable property to Audrey. It was her testimony that Audrey was the only person who ever came to view the property. She was not aware it had been advertised.

Her son Tinawo Chikwara was 10 years old when Chirisa and Audrey came to view the property. All he could remember was that the two had bulldozed their way into the house. His credibility was dented by his youthfulness; a factor he admitted in his evidence in chief tended to affect his powers of recall. Under cross-examination he compounded matters by his admission that he had discussed his evidence with his mother prior to coming to court. The fact that he made these admissions tend to portray him as a truthful witness. Indeed his testimony under cross-examination that Chirisa and Audrey first sat in the dining room with his mother and the late Rebecca before they inspected the bedrooms differed with

that of his mother. Indeed Audrey confirmed the mother's evidence on that score. He did not walk Chirisa and Audrey to their motor vehicle and so he did not hear the nature of the conversation they had with his mother.

Audrey in her evidence in chief, could not recall seeing Elizabeth on her very first visit. She stated that she saw the senior wife, Rebecca. In her testimony she used the pronoun 'they', clearly a reference to more than one responsible person. They did not sit in the dining room as Chirisa was in a hurry. She alleged that she was permitted to view the house freely and no force was used by Chirisa on them. She alleged that only the senior wife escorted her to the car. She never spoke to or quarrelled within Elizabeth. She alleged that she did not know that Elizabeth and Rebecca had executed an agreement of sale with Chirisa when she first visited the house.

She maintained her lack of knowledge on this aspect during cross-examination and denied that Elizabeth ever alerted her to the fact that they had purchased the immovable property. She averred that she was one of eleven prospective purchasers who came to view the house. That was new evidence which was not canvassed with Elizabeth.

In determining the first issue I have taken into account that the *onus* to establish it lies squarely on Elizabeth. I am satisfied that she has discharged that *onus* on a balance of probabilities. She gave very detailed testimony on what transpired on that visit of 7 June 1998. She clearly was present at the immovable property. The attempts by Audrey to deny that she was present are consistent only with her desire to deny as truthful the averment by Elizabeth that she advised Audrey that they had purchased the immovable property. It explains why Audrey failed to explain even in her evidence in chief whom she referred to under the term "they". Indeed the probabilities confirm Elizabeth's testimony of what transpired on Audrey's first visit. Elizabeth and Rebecca appear to have had a long and outstanding antagonistic relationship with Chirisa. Chirisa had run out of patience with the widows. He forced his way into the house. It is in my view unlikely that the two widows would acquiesce to the viewing of the house by a prospective purchaser when they had bought it. That tension must have been apparent to Audrey. In fact, in my view it explains why Chirisa was in hurry to leave the immovable property. Indeed the fact that soon thereafter the widows then sought *in forma pauperis* representation demonstrates the absence of acquiescence on their part. They were always desirous of resisting loss of the immovable property. Indeed their latter actions as typified by the resistance to the various attempts made by Audrey's legal practitioners show that the two widows did assert their rights even on the first visit.

A further point in support of Elizabeth's version that she warned Audrey on the first visit of their prior purchase is the open lie by Audrey that the widows told her that 11 other prospective buyers had visited the immovable property.

It is for these reasons that I hold that Audrey had prior notice of the sale between the plaintiff and the first defendant.

WHETHER THE SECOND DEFENDANT HAD PRIOR NOTICE OF THE SALE AGREEMENT BETWEEN THE PLAINTIFFS AND FIRST DEFENDANT PRIOR TO THE TRANSFER OF THE IMMOVABLE PROPERTY INTO HER NAME

I have already dealt with Elizabeth's evidence on what transpired on Audrey's second visit which took place in 1998 on a date she could not recall.

In her testimony Audrey placed the date of the visit as being either in September or October 1998. Audrey stated that one of the bedrooms of the immovable property had a big crack, she therefore phoned the Building Inspectorate of the Chegutu Town Council about the crack. She visited the immovable property on her own. She saw the two widows at the house. She stated that they told her to desist from buying the house as they were owed money by Chirisa. She alleged that she told them to deal with Chirisa as she too had bought the house.

After talking to the widows she contacted Chirisa's estate agents and Chirisa about the information she had received. Chirisa explained to her that the ladies wanted to buy the house, and had paid a deposit but had failed to pay the balance owed to him. Further he told her that he had met the two widows and they had amicably agreed that Chirisa resell the house to other prospective buyers. Chirisa expressed his surprise that they were raising this issue again and with her.

Audrey's evidence about events after this second visit in so far as the Building Inspector Chekete's visit and the Beverley visit confirmed Elizabeth and Tinawo's testimony that these persons visited the immovable property. Audrey however denied that these people were chased away and did not inspect it. She had talked to Chekete and he never told her about the message the two widows purportedly gave him for transmission to her. Beverley would not have granted her mortgage loan if the immovable property had been viewed in controvesional circumstances.

In her evidence in chief and under cross-examination Audrey often remarked that if she had known that the immovable property was mired in controversy as between Chirisa

and the plaintiffs she would not have purchased it. She blamed the plaintiffs for keeping quiet and not advising her of the prior agreement of sale.

She maintained her counter-claim in seeking eviction and holding over damages. She justified the quantum of holding over damages on the basis that, those were the rentals paid for similar properties in Chegutu at the time. She too claimed to be a widow who did not own any other property elsewhere.

Under cross-examination she admitted that she was aware of the prior agreement of sale between Chirisa and the plaintiffs by September/October 1998. That was only after she had executed her agreement with Chirisa on 15 June 1998.

The following unsatisfactory features emerged under cross-examination. She alleged that she commenced bond repayments in November 1998 notwithstanding condition '0' which predicated it to start running from date of registration of the bond which only took place almost 2 years later on 26 September 2000. Notwithstanding that Chirisa only accessed the $90 000 on or after 26 September 2000 yet he was paying her 5% of the purchase price as rentals from September 1998. She was to alter this evidence and limit the repayments by Chirisa to her to have been made during the period September to November 1998 only and only at the rate of just in excess of $2000 per month. She could not explain why Chirisa was paying her this money as this was not stipulated in the Agreement of Sale executed between them. In any event it did not make sense that he would pay her when he had not received any money from her.

It became clear that had she wanted, she could have terminated the agreement with Chirisa after she received knowledge of the plaintiff's prior sale. She however did not take this course of action because she did not wish to loose the golden opportunity presented to her by the mortgage loan facility. She agreed that she did not seek to verify further from the widows what was happening before she took transfer of the immovable property.

I agree with Mr *Musimbe* for the 1st plaintiff that the plaintiff has discharged the *onus* on her, to show that the second defendant knew of the sale agreement between the plaintiffs and the 1st respondent prior to the transfer of the immovable property into her name, not just on the required level of the preponderance of probabilities but even beyond a shadow of doubt. The second defendant admitted as much.

THE LAW

In the final analysis, Mr *Musimbe's s*ubmission that the court need not detain itself with making a finding on the first issue was properly made especially as the 2nd respondent

virtually admitted that she was aware of the plaintiff's prior agreement of sale before she took transfer of the immovable property on 26 September 2000.

The law on double sales was set out in *Crundall Brothers (Pvt) Limited vs Lazarus N.O. and Another* 1991 (2) ZLR 125 S.C. At page 131 F GUBBAY C J stated:

> "When the second purchaser is entirely ignorant of the claims of the first purchaser and takes transfer in good faith and for value, his real right cannot be disturbed. *Per contra* when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer his real right can and normally will be overturned subject to considerations of practicality."

At pages 132 G-133A, the learned Chief Justice set out our law on the point thus:

> "It is submitted that where A sells a piece of land first to B and then to C- and the position is the same *mutatis mutandis* in the case of a sale of a moveable of which the court would decree specific performance-the rights of the parties are as follows:
>
> 1. ……..
> 2. Where transfer has been passed to C, acquires an indefeasible right if he had no knowledge either at the time of the sale or at the time he took transfer of the prior sale to B, and Bs only remedy is an action for damages against A.
>
> If however, C had knowledge at either of these dates B, in the absence of special circumstances affecting the balance of equities can recover the land from him and in that event, Cs only remedy is an action for damages against 'A'"

At page 133C he pointed out that the doctrine of knowledge or notice requires nothing more than the knowledge or notice of the prior claim. It is not necessary to prove malafides or fraud.

This principle of our law has been followed in *Chimponda v Rodriques and Others* 1997(2) ZLR 63(H) at 65D-66A which was upheld on appeal in *Barros and Another v Chimponda* 1999 (1) ZLR 58(S), *Charuma Blasting and Earthmoving Services (Pvt) Limited v Njainjai and Others* 2000 (1) ZLR 85(s) at 92A-D, *Guga v Moyo and Others 2000 (2) ZLR 458(S)* at 460B and *Muranda v Todzaniso and Others* 1998(2) ZLR 325H

The cases of *Menezes v Mc Gaili* 1971 (2) SA 12 CPD and *Chingwaru v Chirinda and 2 others* HH 152/91 referred to by Mr *Debwe*, to the extent that they lay down principles which are of a contrary view, are not part of our law. The former case was however predicated on the failure by the defendant to allege that transfer was taken malafide or with the knowledge of the order of court, hence the grant of the exception. In the *Chingwaru* case SMITH J was alive to the policy considerations of enforcing a prior agreement of sale and the equity considerations involved, which he applied. It does not support the contention advanced by Mr *Debwe*.

In *Chimponda's* in case, the High Court decision, ROBINSON J at page 65 D pointed out that fraud was not an essential element in the consideration of double sales matters. The submissions on that score by Mr *Debwe* were therefore misplaced. In the Supreme Court appeal of the same matter at 63A, GUBBAY CJ observed that the *onus* lay on the second purchaser. He stated:

> "One further point needs to be underscored. It is that the second appellant bore the burden of establishing a preponderance of equities in its favour. This is because a material equity attached to the respondent's claim to have his prior sale with a *bona fide* contracting party protected by law. It was for second appellant to prove the special circumstances which rendered it inequitable to apply the maximum "*qui prior est tempore est jure"* in favour of the respondent"

In other words, the plaintiffs have demonstrated that they are entitled to specific performance as against the second defendant unless the second defendant, shows that there are special circumstances affecting the balance of equities in her favour.

ARE THERE SPEICAL CIRCUMSTANCES AFFECTING THE BALANCE OF EQUITIES

Mr *Debwe* submitted that on the authority of *Menezes v McGaili supra* the 2nd respondent had an indefeasible right which the court cannot interfere with. This submission is not born out by the provisions of section 8(1) of the Deeds Registry Act [*Chapter 20:05*] which recognises the power of this court to cancel *inter alia* a registered deed of transfer. Indeed, this submission was found untenable in the Supreme Court appeal in *Chimponda's* case *supra.*

It was further submitted that the plaintiffs failed to file an interdict against the transfer to protect their prior agreement. The plaintiffs were not aware that the 1st defendant was scheming behind their back to have title registered in his name, which he wanted to transfer and did transfer to 2nd defendant. The second defendant was aware of the prior agreement of sale of the plaintiffs and shut her mouth about what was happening so that she would derive benefit and circumvent the plaintiffs prior rights. In any event if an interdict were possible after the plaintiffs became aware of the attempts to dispose of the property to the second defendant being unsophisticated persons they genuinely believed that their *in forma pauperis* legal practitioners were better placed to deal with the unfolding situation. The plaintiff's position was different from those of other litigants who consciously give agency to a firm of legal practitioners of their own choice. The plaintiffs were beggars and could not be choosers. I do not find that that factor favours the second defendant.

It was further submitted that *Guga v Moyo supra* favours the second defendant in that she has been the registered owner for 5 years who obtained a mortgage bond which she has discharged. This submission overlooks the point that the plaintiffs and their families have been residing continuously without interruption in the immovable property for 12 years. Further the second defendant took the mortgage bond when she was already aware of the prior agreement of sale between the 1st defendant and the plaintiffs. These factors defeat her contentions.

It was further submitted that the 2nd defendant paid the full purchase price while the plaintiffs are still to do so. The letter from *Messrs Mangwana and Partners* of 11 May 2000 demonstrates that when the 2nd defendant paid the full purchase price on 26 September 2000 the plaintiffs had tendered the balance outstanding of capital and interest. Indeed in the absence of the 1st defendant it cannot be said that they have not discharged that liability towards him. That letter demonstrates that the 1st defendant took delivery of the outstanding money.

It was submitted that the plaintiffs contributed to their predicament by failing to interdict 1st, 2nd and 3rd defendants. This submission presupposes that the 1st and 2nd defendants advised the plaintiffs that 1st defendant was seeking registered title and that they knew he had transferred it to 2nd defendant. The plaintiffs only knew of this on receipt of the letter of 18 October 2000. By then the house had bolted out of the stable door. Even after the 1st defendant obtained title, he misled the plaintiffs into believing that he considered their prior agreement valid as at 18 February 2000.

The fact that the plaintiffs sued the 1st defendant in the alternative is not a special circumstances which would bar them from getting specific performance especially in circumstances where the 2nd defendant and the 1st defendant were represented by one legal practitioner and where it is known or suspected that he is no longer within the court's jurisdiction.

It is clear to me from the manner that 2nd defendant obtained transfer that her conduct shows the absence of good faith in her dealings with the plaintiffs. She snatched at registration of title without being open and transparent to the plaintiffs about the actions she was about to take. I am left with the impression that she connived with the 1st defendant to defeat plaintiffs entitlement.

The plaintiffs in truth and fact actually had a prior right. The 2nd defendant with hindsight shed crocodile tears that had she known of the intractable and long standing dispute they had with the 1st defendant she would not have purchased the property. She was

not being open. She did not investigate further the plaintiffs' story but sought to take advantage of their simplicity.

There is nothing complex about this matter. It can be reversed without prejudice to other innocent parties, besides the 2nd defendant.

Lastly I find no basis for supposing that the plaintiffs could have stopped the transfer which was done without their knowledge.

In the exercise of my discretion, I am not satisfied therefore that the 2nd defendant has discharged the *onus* on her to show that she should become the preferred owner of the immovable property in question. There are no special circumstances affecting the balance of equities in her favour.

COUNTERCLAIM

It is clear to me that there is no basis for holding that the plaintiffs agreement of sale was ever cancelled. The 2nd defendant has not led such evidence. Her counter-claim cannot succeed in the circumstances.

COSTS

The plaintiff has succeeded. She is entitled to her costs.

DISPOSITION

IT IS ORDERED THAT:

1. The transfer of Stand 2551 Chegutu Pfupajena Township of Stand 3155 Chegutu Pfupajena Township situate in the District of Hartley, held under Deed of Transfer 8716/2000 by the first defendant, to the second defendant, on 26 September, 2002, be and is hereby set aside.

2. The first defendant shall within 10 days of the service of this order upon him take all such steps and sign all such necessary documents required by the fourth defendant to enable the transfer of Stand 2551 Chegutu Pfupajena Township of stand 3155 Chegutu Pfupajena Township situate in the District of Hartley from the first defendant to the first and second plaintiffs.

3. In the event that the first defendant fails to carry out his obligations in terms of paragraph 2 above, the Deputy Sheriff, Harare or his lawful Assistant be and is hereby authorised to take all such necessary steps and execute such transfer documents on behalf of the first defendant.

4. The 2nd defendant's counter-claim be and is hereby dismissed.

5. The 1st and 2nd defendants shall pay the plaintiffs' costs jointly and severally, the one paying the other to be absolved.

I E G Musimbe and Partners, plaintiff's legal practitioners.
Debwe and Partners, 2nd defendant's legal practitioners.