DAVID TOBAIWA
versus
CLEMENCE KASEKE
and
BEATA KASEKE
and
THE DIRECTOR OF HOUSING AND COMMUNITY SERVICES

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 16 May and 5 July 2006

OPPOSED APPLICATION

Applicant in person
1st respondent in default
Mr *T Biti* for 2nd respondent
3rd respondent in default

MAKARAU J: On 24 September 2002, the applicant purchased certain rights, title and interest that the 1st respondent had in respect of certain immovable property in Norton. He paid the asking price in full in the sum of $1,9 million. The agreement of sale was reduced to writing. After paying the purchase price, he demanded that the seller cede to him the rights, title and interest that he had purchased. He was informed that the Norton Town Council was refusing to accede to the cession as it required the consent of the 2nd respondent, estranged wife of the 1st respondent.

Desirous of taking cession of the 1st respondent's rights in the property, the applicant approached this court for an order compelling the 2nd respondent to give her consent to the cession failing which the 3rd respondent be compelled to give effect to the cession without such consent.

The 1st respondent did not oppose the application. The 2nd respondent did. In her opposing affidavit, she denied knowledge of the sale to the applicant and that the purchase price was paid in full or at

all. She further alleged that she was married to the 1st respondent in terms of the Marriages Act [*Chapter 5.11*] and that the parties are currently before this court in divorce proceedings wherein she has made a claim against the property.

In his answering affidavit, the applicant made the point that the 1st respondent, as the sole registered purchaser of the property from the local authority under a suspensive agreement of sale, had every right to sell his rights under the suspensive agreement of sale without the consent of the 2nd respondent. He makes the further point that since the sale to him was concluded before the divorce proceedings were initiated, such proceedings cannot vitiate the sale.

It appears to me that two legal issues arise from this matter. The first one would at first glance appear idle. It is whether the applicant has an enforceable agreement of sale. The second one is in my view more complex. It is whether, assuming the applicant has an enforceable agreement of sale, the absence of the 2nd respondent's consent can stop the cession of rights as between applicant and 1st respondent.

I return to the first issue.

It is trite that in dealing with rights in immovable properties owned by local authorities, the principles that apply in a sale of property out rightly owned by the seller are of no application. I am here reminded of the remarks by McNALLY J A in *Gomba v Makwarimba* 1992 (2) ZLR 26 at page 27 H where he had this to say:

> "As so often happens, the parties have used the word 'sale' to describe what is in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council. Compare *Majuru v Maposa* SC 172/91 (not reported)."

The learned judge then went on to lament that legal practitioners persist in ignoring the distinction between sale and

cession of rights in cases where the property is owned by a local authority when there are many distinctions between the two legal transactions.

The transaction between the applicant and the 1st respondent was thus not a sale where the applicant can compel delivery of the merx sold.

In *Chikonyora v Pedzisa* 1992 (2) ZLR 445 (S), the Supreme Court held that a cession between the registered tenant and a prospective purchaser of rights in respect of a municipal property is invalid if the prior written consent of the municipality concerned is not obtained as such a cession fails to comply with a contractual formality. This rather distressing decision formed the basis of the Supreme Court's decision in the year that followed in *Hundah v Murauro* 1993 (2) ZLR 401 (S) where McNally J A found it distressing that he and the concurring judges were reaching the conclusion that they did.

EBRAHIM JA came with a refreshingly less distressing opinion on similar transactions in *Magwenzi v Chamunorwa & Anor* 1995 (2) ZLR 332 (S). It is noteworthy that GUBBAY CJ who penned the decision in *Chikonyora and Pedzisa*, concurred with EBRAHIM JA's opinion that the rights that the 1st respondent (Chamunorwa) had in the property were capable of being sold without the prior consent of the local and that such a sale would bring a binding agreement between the parties which though unenforceable at the time of conclusion, could be enforced once the seller had full title to the property. In sidestepping the decision in *Chikonyora v Pedzisa*, the learned judge had this to say at page 335G:

> "The agreement in Pedzisa's case supra was described as 'invalid', because it had failed to comply with a contractual formality. Kelly v Wright 1948 (3) SA 552 (A) was cited as authority for that statement. With respect, Kelly's case supra appears to relate to a situation where as a matter of statutory

> law the consent of an official was required before a certain property could be leased. Without that consent, the lease was illegal. I would respectfully agree with the position that the present situation was not one where purported sale was invalid because of failure to comply with the requirement to get the Municipality's consent it was in my view, a sale that was unenforceable. The plaintiff could not have obtained title from the first defendant, who did not have title to transfer. The Municipality could have decided to cancel the agreement between themselves and the first defendant and obtained the ejectment of the plaintiff. But none of those events occurred. The first defendant allowed the plaintiff to remain in occupation until a time when the sale became enforceable."

The year following, EBRAHIM JA, had occasion to reinforce the remarks he had made in *Magwenzi v Chamunorwa* (*supra*), thereby putting the matter to rest and in a way reversing *Pedzisa* and *Murauro*.

In *Mukarati v Mkumbu* 1996 (1) ZLR 212 (S), at 214H ff, the learned judge had this to say:

> "I think the real position with these arrangements is this:
>
> In terms of her agreement with the Council, the defendant cannot cede title to the property without the Council's consent. This means that she cannot, without the council's consent contract to pass title to the property, because she has no title to pass. But this does not mean that she cannot contract to sell the property. It would, I think, be legally possible for her to enter into a contract of sale, conditional on the Council granting its consent."

I would venture to suggest at this stage and following the remarks of EBRAHIM JA that it appears to me legally possible for a person in the position of the 1st respondent to enter into a contract of sale not only of the property itself as suggested by EBRAHIM JA, but of the rights, title and interest that he has under the suspensive agreement of sale and which rights will in due course mature into real rights in respect of the property. Thus, it is my view that those personal rights that are conferred by the suspensive agreement of sale are capable of being sold and bought without the prior consent of the local authority concerned.

It would appear to me that the law is now settled that the agreement that the applicant and the 1st respondent had was valid and binding as between the contracting parties. It is not null and void. It is on this basis that I must reject the pressing by *Mr Biti* that I dismiss the application at this stage of the inquiry on the authority of the *Pedzisa* and *Murauro* decisions. These two decisions no longer represent the applicable position at law regarding the sale and purchase of rights in properties owned by local authorities and sold to sitting tenants under suspensive agreements of sale.

The issue still to be determined in this matter is whether the agreement of sale between the applicant and the 1st respondent is enforceable against the local authority.

The dicta in *Magwenzi* appears to me to suggest that a transaction entered into between the seller and the purchaser without the prior consent of the local authority is unenforceable against the local authority before the seller has full title in the property.

The same view appears to have been impliedly expressed by ROBINSON J in *Nkomo v Mujuru* 1997 (1) ZLR 155 (H) when he held that the agreement of sale/or assignment of rights before him was binding as between the contracting parties only. In other words, it could not be enforced against the local authority to compel transfer or cession of rights.

The point was succinctly made by GILLESPIE J in *Jangara v Nyakuyamba* 1998 (2) ZLR 475 (H) at page 480G- 481A-B A as follows:

> "I am therefore of the respectful view that the following statement of principle is to be gleaned from the Supreme Court decisions. A cession of a right, originally acquired subject to a *pactum de non cedendo*, but in breach of that reservation, creates rights as between the parties to that subsequent cession, which rights, however cannot bind the original holder of those rights. The court may, at the instance of the third party, enforce that contract as against the lessee-purchaser, no order however may be given which can bind the original holder of those rights. Thus, no order of transfer

> can be given against the original holder. An order of specific performance of transfer may, at the court's discretion, be given against the lessee purchaser, such an order has the effect of obliging that party to effect transfer if he is in a position to do so, or to take transfer of the property in order to give it, if such be necessary."

I respectfully associate myself with the remarks made by the learned judge which in my view are a correct rendition of the legal principle governing transactions of this nature. I am much aligned to the reasoning of the learned judge at page 480F as to the reason why the local authority cannot be bound to effect transfer of the rights in favour of the third party at the instance of the third party. There is simply no *vinculum juris* between these two parties and thus no cause of action can lie against the local authority at the instance of the third party. In my view, the logic why a third party cannot compel transfer from the local authority is so simple it nearly escapes notice.

Thus, it is my finding that while the applicant has a valid agreement of sale with the 1st respondent, he cannot obtain an order compelling the local authority to consent to the proposed cession in his favour. He has no contract with the local authority. He has no legal relationship with the local authority and thus, he has no cause of action against the local authority.

I would dismiss the application with costs on this basis alone.

Assuming however that I have erred in my perception of the principles emanating from the various decisions of the Supreme and this court on transactions similar to the one before me, I will proceed to consider the second issue arising from the papers.

It is my view that the second legal issue revealed by the facts of this matter is one aspect of the imprecise nature of the rights that spouses have in jointly acquired but not jointly owned matrimonial property during the subsistence of the marriage.[1] This is an issue that

[1] See Kazizi v Kazizi HH 71/06

eludes specific definition and resolution using the existing legal norms as it pits the law of property against the institution of marriage and how parties within the institution view their relationship to the assets of the matrimonial estate, jointly acquired. From the various suits brought before this court, it appears that spouses who contribute towards the acquisition of matrimonial assets directly or indirectly, mistakenly believe that they are joint owners with their spouses in whose sole name the property would have been registered. ordinarily and in most cases, they are not as their mere status as a spouse does not enter the realms of property law to clog or even cloud the rights of ownership that registration creates.

It is my further view that attempting to resolve the issue of the exact nature of the proprietary rights of spouses during the subsistence of a marriage using existing principles of property law has the potential of working injustices as between the spouses as during the subsistence of a marriage strict observance of the rules of property law as to the acquisition of ownership rights in respect of matrimonial assets may arguably lead to the destruction of that community of life that marriage automatically brings into being between the spouses.

For what it is worth, I will not pass this opportunity to once again express my view that unless sooner parliament intervenes and legislate on the position, the issue will continue to dog these courts.

The narrow legal issue brought out by the facts of this matter is whether the refusal by the Norton Town Council to accede to the proposed cession of rights between the applicant and first respondent on the grounds that the consent of the 2nd respondent as 1st respondent's wife, has any basis in law.

In my view, it is important that I at this stage set out in full the refusal by the Norton town Council. It was addressed to the first respondent and it reads as follows:

"PROPOSED CESSION OF K1341: C KASEKE TO D TOBAIWA

I refer to our telephone discussion on 4 December 2002 regarding the above issue.

Procedurally, I am required to have your wife's consent in writing that she does not object to the proposed cession. Now that you have failed to have this done you may proceed by way of court application to compel me to be ordered to entertain the cession in the absence of your wife's consent."

The letter is signed by the 3rd respondent.

It is not clear from a reading of the letter on what basis the consent of the 2nd respondent was considered binding on the town council. It was however strenuously argued by *Mr Biti* that the stance adopted by the town council in this matter is a noble policy on its part to protect the interests of those spouses, mainly women who find themselves dispossessed of jointly acquired property that is registered in the sole names of their husbands. I have thus been urged not only to positively acknowledge but to uphold the policy stance adopted by the local authority to deny the applicant the relief that he is seeking. The temptation to do *Mr Biti's* bidding in the name of judicial activism, I must confess is almost overwhelming especially when calls for legislative intervention to alleviate the plight of spouses in 2nd respondent's position appear not to be bearing any fruit. However I hesitate to do so on two scores.

Firstly, since the appellant was not represented before me, it is my view that the argument was not fully ventilated to allow one to form a definitive opinion on the issue despite the detailed and very useful arguments made by *Mr Biti* both in his heads and orally.

Secondly, it is my view that I can dispose of this application on another basis.

It is common cause that the agreement of lease and sale between the 1st respondent and the town council, in terms of which rights to the property were granted him, was not adduced in evidence before me. I have proceeded to consider this matter on the broad basis that the agreement between the parties was a lease-to-buy agreement in which the local authority reserved unto itself the right to consent to a cession on certain terms and conditions. I however do not know the precise terms and conditions upon which the 1st respondent was permitted to dispose of his rights under the agreement. If as suggested, it was an express or implied term of the agreement that procedurally, cession of his rights under the agreement would only be consented to if 1st respondent's wife gave her prior consent, then the applicant is out of court. If on the other hand, there was no such condition expressed or implied, the issue raised above as to whether the policy position of the local authority should be elevated to a rule of law then commands determination. At this stage, it is my view that this is not necessary.

Thus, on the basis of the foregoing, I would hold that the applicant has not discharged the onus on him to show that there was no requirement under the lease/ purchase agreement that the 1st respondent's wife would be required to give her prior consent to any cession of rights by her husband.

Further, the applicant seeks to have the 2nd respondent compelled to give her consent to the cession. He cannot. There is no nexus between him and the 2nd respondent that would give him a cause of action against her.

On the basis of the foregoing, I would hold that the applicant has failed to show that he is entitled to compel either the 2nd or the 3rd respondents to give their consent to the cession of 1st respondent's rights in relation to the property.

In the result, I make the following order:

1. The application is dismissed

2. The applicant shall pay the 2nd respondent's costs.

Honey & Blankernberg, 2nd respondent's legal practitioners.