

ROBERT MADZAMBA  
versus  
CATHERINE MERCY CHIDEMO  
and  
MRS. E. GEZI  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 1 October 2007

*F M Katsande*, for the plaintiff  
*Ms R G Maunganidze*, for 1<sup>st</sup> defendant  
*S Kampira*, for 2<sup>nd</sup> defendant

HUNGWE J: Plaintiff in this matter seeks an order directing the first defendant to transfer all rights, title and interest in the subdivided piece of land being portion of stand 132 of Prospect measuring 2350 square metres and an order interdicting first defendant from alienating her rights, title and interest in the said property to any other person than the plaintiff till this matter is determined and costs.

Plaintiff's claim arose from the following broad facts. Sometime in July 2004 plaintiff negotiated with second defendant for the sale of a subdivision of stand 132 of Prospect. To the contracting parties' knowledge the property belonged to first defendant. Second defendant was negotiating on behalf of the first defendant. An agreement of sale was concluded between the parties for the sale of the said property for the sum of \$50 000 000.00. Second defendant signed on behalf of the first defendant. Plaintiff duly paid the purchase price. There is a dispute as to whether second defendant undertook to effect transfer on first defendant's behalf but it is common cause that first defendant was approached over the issue of transfer. At that time she expressed her unwillingness to go through with the sale.

First defendant disputes that second defendant was duly authorised to enter into an agreement of sale on her behalf. She has counter-claimed for the eviction of the plaintiff. She states that plaintiff and second defendant acted without her knowledge in entering into the agreement of sale. As such she is not bound by the agreement. Plaintiff therefore has no basis to remain on her property. He should be evicted.

If I find that the agreement entered into by plaintiff and second defendant to be binding upon the first defendant, then it must follow that plaintiff would be entitled to the order compelling first defendant to perform specifically. The question to be answered in order to resolve this issue is whether second defendant, as agent of first defendant, had authority to bind her principal.

It is trite that the authority of an agent may be express or implied. If express it may be created by formal writing, informal writing or verbally. Authorisation may also be given *ex post facto* by ratification. The liability of the principal to a third party upon transactions concluded by an agent, or the transfer of his interest by an agent may be based on the fact that;

- a) The agent was expressly authorised,
- b) The agent was apparently authorised; or,
- c) The agent had a power arising from the agency relationship and not dependant upon express authority or apparent authority. (See generally *Tucker's and Development Corporation (Pvt) Ltd v Perperllief* 1978 (2) SA 11(T).

In order to succeed therefore plaintiff had to show that second defendant had the authority to bind first defendant.

Plaintiff gave evidence for his case. The effect of his evidence was that second defendant approached him over the sale of the subdivision property. She was specific as to who the seller was, as to terms of the sale and the rest of the conditions attaching to the sale. To use his own words second defendant described herself as the loudspeaker for the first defendant, her daughter. The reason for the sale was to raise funds to give her house a fresh coat of paint such that should she pass on, her friends would give her a send-off from a palatial residence. The sale was concluded on the understanding that the first respondent would, according to him, effect transfer upon her return from the USA. She kept plaintiff informed of every wish by the first

defendant on the sale. She similarly kept first defendant informed of the developments as they unfolded. He took occupation of the stand in March 2005. He has been in such occupation to date. When first plaintiff arrived from the US a meeting was arranged between him and first defendant. During that meeting he learnt with utter surprise that first defendant no longer wished to be bound. She claimed she had not given her mother instructions to sell on her behalf. He refused the offer to refund upon cancellation of the agreement. He held first defendant to the sale. Eh remained adamant that first defendant was kept informed about the sale of this property to him by her mother.

On the other hand first defendant's case was that she learnt, with shock and surprise, upon her arrival from her overseas trip that her mother had sold her immovable property without any reference to her. She had kept in touch with her mother over the phone but her mother had not used the opportunity to raise the subject. She had mandated her, as her agent, to finalise the application for the sub-division of the property in terms of an application she had lodged prior to her departure. She had not authorised her to sell the property. She had tried to negotiate for the cancellation of the agreement of sale and possible refund of the purchase price to the plaintiff unsuccessfully. She contented that as there was no basis for the continued stay on the property by plaintiff, she was entitled to evict him.

Second defendant, on the other hand admitted that indeed a discussion for the sale of the sub-division portion of the property had taken place between herself and the first defendant. Proceeds of the sale would be applied to the repainting of her house. First defendant could not raise the cost of repainting the house as she was busy building another house. She gave the impression that she had not communicated with her daughter over such an issue as selling her stand although they are very close as mother and child. She claimed she only realised that first defendant was opposed to the sale when she arrived from USA. Under cross-examination she conceded that she had not anticipated a retraction of the sale from first defendant as this had been discussed and agreed to. First defendant had not withdrawn her instruction to sell so as to raise funds to repaint the house. According to her she had already used these funds and it was difficult for her to attempt to talk the plaintiff out of the sale.

The witnesses for the defendant's case were not convincing. To begin with the first defendant is a daughter who claims that her mother sold her immovable property, not a television set, without any reference to her. Without explanation for such an act of economic unilateralism bordering on outright theft, her mother sells off such an asset. But when one takes a closer look at the mother's evidence, there is a completely rational explanation to it. They had agreed that as their house on the remaining extent needed refurbishment, a sub-division and sale of such a resultant block could raise the required funds. She then mandates her mother to execute this plan which, by the time she left for USA, was already in motion. The mother says the only aspect they had not finalised was the purchase price.

Clearly there is a conflict in the defendant's case. It seems to me that such a conflict in the defendants' case only demonstrates the lie in their case. First defendant impressed the court as a professional person who is well capable of arranging her affairs. She quite clearly is not the type of person who would be content to leave a stranger on her property without taking the necessary action to protect her rights. She could not be the person who, upon arrival left her mother to sort out the messy situation on the property. I disbelieve her when she made this claim. The probabilities of this case favour the version given by the plaintiff. There was a valid agreement of sale executed by the second defendant duly authorised by first defendant. Plaintiff entered upon the portion sold to him with the knowledge and consent of the second defendant duly authorised by first defendant. This explains why no action was taken against plaintiff. A closer analysis of the effect of the evidence for the defendants reveals that for some obscure reason they felt unhappy with a two year old contract of sale. The reason for this displeasure remains obscure but the agreement remains valid against the first defendant as principal. I come to this conclusion for the following reasons.

The amount of detail given by plaintiff could only have been given by second defendant. As I hold plaintiff to have been truthful, it follows that I accept as fact that first defendant instructed second defendant to sell the sub-division of the property for her own benefit as the proceeds were to be applied to refurbishment of the main house. It may be true that mother and daughter did not agree as to the purchase price. It is not necessary for me to resolve that issue since the purchase price asked for on behalf of the seller was paid. It is not an issue.

The issue is whether the agent had the authority to bind the seller in the circumstances of this case. I am satisfied that indeed the second defendant had such authority to so bind first defendant. As such first defendant is bound by the contract of sale of the sub-division of stand 132 of Prospect, Harare. Plaintiff is therefore entitled to the order he seeks. Upon finding for the plaintiff, the counter-claim for eviction cannot succeed. It is therefore dismissed.

The following order therefore will issue.

It is ordered;

1. That the first defendant be and is hereby directed to, within 10 days of the service of this order upon her, to sign all papers necessary to pass all rights, title and interest in the subdivided portion of land measuring 2350 square metres of stand number 132 of Prospect to plaintiff.
2. In the event that first defendant fails to comply with para 1 above, then and in that event, the Deputy Sheriff be and is hereby authorised and directed to sign on behalf of first defendant, all papers necessary to pass transfer in favour of plaintiff aforesaid of all rights, title and interest in the sub-division of land measuring 2350 square metres of stand number 132 of Prospect, Harare.
3. First and second defendants shall bear the costs of suit.

*F M Katsande and Partners*, legal practitioners for the appellant  
*Chihambakwe, Mutizwa & Partners*, 1<sup>st</sup> defendant's legal practitioners  
*Chinamasa, Mudimu & Chinogwenya*, 2<sup>nd</sup> defendant's legal practitioners