

TENDAI MUSARARA
versus
MAXWELL CHIDUKU & ANOTHER

HIGH COURT OF ZIMBABWE
HUNGWE J:
HARARE, 12,13 March 2007, 24 September 2007 & 3 September 2008

Mr *K. Gama*, for the plaintiff
Mr *C. Warara*, for 1st defendant
No appearance for the Master

HUNGWE J: This dispute concerns immovable deceased estate property. Plaintiff is the executor in the estate of her late father Isaac Musarara. Isaac Musarara died on 20 January 1993 at Mazowe. He is survived by his wife and five children. He owned immovable property situated at number 1, 39th Crescent, Warren Part 1, Harare. At the time of his death he leased out this property as he resided in the communal lands. The deceased's brothers agreed that Lovemore Musarara, deceased's younger brother supervised this immovable property and generally the deceased's affairs. In the course of this supervision Lovemore Musarara obtained letters of administration and sold the immovable property to first defendant in 1996. The deceased's wife all along was under the impression that the rentals from the tenants were being used to pay off the mortgage bond in favour of a building society. She only learnt in 2001 by sheer luck that Lovemore Musarara had sold the immovable property from the legal practitioner who was involved in that sale.

Upon gaining this knowledge, plaintiff's mother sought and obtained an order setting aside the sale and transfer under case HC 3364/08. First defendant did not move out of the property notwithstanding the setting aside of the sale and transfer He appealed the judgment of the court but later abandoned that appeal.

In the meantime plaintiff who was a minor at her father's death became a major and was duly appointed executrix in the estate of her late father's estate. She now seeks an order for the eviction of the first defendant.

First defendant raised a special plea in bar but after evidence was led, abandoned it. His defence on the merits was that since the seller was a registered estate agent, he had acquired real right in the property. Further since the transfer into his name was done on the basis of a report by the Master's office which report was defective and over looked several issues, he cannot be evicted from the property. He binds the executor to deliver on the sale.

As appears from the first defendant's plea, his defence is that the sale was proper. It was not his duty to seek the Master's consent to the sale and transfer of the property but that of the executor. He feebly counter claims for the re-transfer of the property into his name.

In his summary of evidence first defendant says that he bought the property through a firm of estate agents from an executor of a deceased estate. He avers that he is entitled to the re-transfer of the property.

It is important from the outset that the issues in this case be restated. I make the remark out of abundance of caution because the defendant appears to have confused the issues at stake in this case. The court should always during trial remain focused on what the dispute is about, the legal issues to be resolved and assess the evidence led towards the resolution of that dispute in order to make a determination. There should be a clear identification of these issues. Such identification will then lead to proper resolution of the dispute before it. In this case the pre-trial conference identified the issues as follows:-

- (a) Whether plaintiff's claim has prescribed;
- (b) Whether the plaintiff is entitled to evict the first defendant without first resolving case HC 2715/05 and the Supreme Court appeal in which first defendant seeks an order for re-transfer of the property.
- (c) Whether plaintiff is entitled to holding over damages and the quantum thereof.
- (d) Whether or not plaintiff is entitled to execute the eviction order despite any appeal to the Supreme Court; and
- (e) Whether plaintiff is entitled to costs on a higher scale.

The following facts are common cause.

The immovable property at the centre of the dispute is registered in the name of Isaac Musarara. At some point the executor of the estate of the late Isaac Musarara sold the immovable property to first defendant. This sale was reversed. Lovemore Musarara was removed from the office of executor of the estate of the late Isaac Musarara. The deceased's wife and children were unaware of the sale to first defendant. When they became aware they sought and obtained an order for the setting aside of the sale successfully.

I will first deal with the legal issues raised in this case before discussing the evidence. I find this approach both proper and appropriate.

With regard to the issue of prescription Mr *Gama* submitted that among other factors, the running of prescription is interrupted by the issuance of summons or by notice of motion.

In the present case prescription began to run against the plaintiff as well as the estate on the date upon which the order setting aside the title held by first defendant was granted. KARWI J granted an order to this effect on 26 May 2004. Summons in the present action were issued and served on 22 February 2006. In the event prescription had not run its full course. Mr *Warara*, for the first defendant conceded that this was the correct exposition of the facts. In the event he did not press his argument on prescription. That concession in my view was proper.

As for the second issue, Mr *Gama* pointed out that in HC 2715/05 first defendant sought an order confirming the sale of the property to him and another order interdicting plaintiff from disposing the immovable property pending the finalisation of the present proceedings. HC 2715/05 was delayed pending the final determination of the present proceedings. First defendant appealed the judgment of KARWI J in HC 3364/01 where the sale to first defendant was set aside. The appeal was however withdrawn by first defendant. In the event therefore there is no appeal pending in the Supreme Court. The matter HC 2715/05 is stayed awaiting the final determination of the present proceedings. Thus it is in these proceedings that a determination will have to be made whether plaintiff is entitled to evict first defendant. Depending upon what this court orders, that judgment will decide whether there would be any issues outstanding and open for resolution in favour of first defendant in HC 2715/05 now stayed. Plaintiff clearly is entitled to have her rights determined before the other matter is finally decided as it is stayed pending the present case.

In HC 2715/05 first defendant seeks an order confirming the Agreement of Sale of the property to himself. But having withdrawn his appeal against the judgment of KARWI J in HC 3364/01 I am unable to see how he can succeed in HC 2715/05. These present proceeding are founded on the order of KARWI J setting aside the sale and transfer of the property to him.

The evidence of plaintiff's mother is quite pertinent on the point. I need to recite her evidence in this regard and any assessment which I may make of it..

Esnath Musarara is plaintiff's mother and the late Isaac Musarara's widow. According to her the house had been bought through a mortgage bond. They lived in it. When her husband retired from work, he was thereafter appointed headman. Without regular income and with the duties of headman calling, they decided to move to their rural home and lease out their house to the Malinga family. The proceeds from the lease would be applied to servicing the mortgage bond with Beverly Building Society. As fate would have it her husband was involved in a tragic road traffic accident in late 1992. The family of the deceased called her to

attend at Concession Community Court. She was not called to participate in the proceedings inside the court room as only her husband's brothers and sisters were involved. She was later advised that Lovemore Musarara would help her look after the deceased's family.

Nyangulu and Associates legal practitioners, administered the deceased estate of her late husband. During their administration she knew Mr *Warara* then of the said law firm handled the estate. He advised her of the various steps his firm took in respect of the estate. In that regard she was advised that the engine of their Peugeot 404 motor vehicle had been sold for \$6000-00. Mr *Warara* had bought the engine. She was paid \$2000-00 on the first occasion then \$3000-00 and finally \$1000-00. She used the proceeds of the sale of the salvage of the wreckage to pay school fees for one of her daughters.

She describes her encounter on the day she received the final instalment of \$1000-00 as follows. Mr *Warara* had given her \$1000-00 cash. As she was leaving his office he called her back. She sat down. Mr *Warara* asked her if she knew that Lovemore Musarara had sold their Warren Park 1 house which they were leasing to Mrs Malinga. She told him she did not. He said to her that he was Lovemore Musarara's lawyer and had felt pity over her predicament. He advised her to go and report the sale of the house to the High Court. She told him that she did not know how to go about it. He told her that he was the one who had sold the house. He had agreed with Lovemore Musarara that he would get a share of the proceeds of the sale but Lovemore Musarara had not kept his side of the bargain. He will give her the High Court file number in respect of her late husband's estate to facilitate the setting aside of the sale. He gave her a DR number and advised her that should anyone ask her why it took her so long to report this sale she should explain that she was not educated and had been led to make the report by her children. She told the Court under cross examination by Mr *Warara* that *Warara* had told her that sale was illegal as the master of the High Court's consent to sale was never sought or obtained.

Mr *Warara* persistently cross-examined this witness on this claim. She steadfastly remained adamant that this is how the application to set aside the sale was initiated culminating in the order by KARWI J.

Mrs Musarara did not strike the Court as a sophisticated lady. Indeed she is a plain rural housewife. She is of average intelligence. She impressed the court as a forthright witness. She was not an overzealous witness bent on making sure the court believes her. She admitted that due to time she had forgotten certain details especially dates, but was adamant as

to the facts she deposed to. She maintained her version of the events leading to the setting aside of the sale.

Indeed that her version is correct is corroborated by the defence's failure to prove that the consent of the Master of the High Court was obtained prior to the sale of the house comprising part of the estate of the late Isaac Musarara. For the Master's part it is revealing that the Master never, in any of the reports filed in connection with the several matters, attached the document authorising the sale. The master in his report gave the court his opinion of the effect of ED 16 which is the Consent to Transfer Immovable Property. Consent to Transfer immovable property may well have been given by the Master but that is not the same as the Consent to sell immovable estate property. What this means is that there never was consent granted by second defendant's office for the sale of the immovable property in favour of first defendant. Thus when Mrs Musarara says that Mr *Warara* told her as far back as she says, when matters on the file were still fresh in both the legal practitioner and her memory, it must be the truth. She says *Charles Warara* told her that this legal requirement was never complied with. Indeed when she made her application for the setting aside of the sale on that basis she succeeded before KARWI J.

I find therefore that Mrs Esnath Musarara's evidence to be truthful on the point and in respect of the circumstances surrounding how she got the information regarding the fraudulent sale of estate property. It was engineered with the connivance of a legal practitioner of this court. In this regard, I find that *Charles Warara*'s conduct highly reprehensible and unethical if not criminal. A widow would have lost her property as a result of his collusion with an executor.

In an effort to suppress this fact *Charles Warara* has taken personal interest in the matter. He has personally appeared in a case in which he ought to have been a witness for his client, the first defendant. The result was that his better judgment was clouded by the dust of the conflict. In the end the plaintiff's witnesses gave a torrid of embarrassing answers to those questions Mr *Warara* put during cross-examination.

For example Mr *Warara* for first defendant would ask:-

"When did you know of the sale of the houses?"

She would respond.

"A. You told me of it on the day you gave me \$1000-00

Q. Dispute that deceased sold the house to Mrs Malinga

A. I dispute that the sale was done by my husband. In fact you told me that Lovemore Musarara sold the house to Mrs Malinga.

Q. When was this?

A. Must have been in 1996.

Q. What action did you take?

A. You, Mr *Warara*, told me that you felt pity for my life and affairs. You then asked if I knew that Lovemore Musarara had sold my house to Mrs Malinga. You went on to say, that Lovemore and you had agreed that once he sells, you were to receive a share of the proceeds. Lovemore did not give you your share. This is why you were upset by Lovemore's action and would see to the reversal of the sale on the basis that the Master's consent to the sale was not sought or obtained. You urged me to go and lodge a complaint with the Master's office."

In my assessment a lay person such as this witness cannot make such a serious allegation against a legal professional unless it is the truth. In my view the fact that the consent had not been obtained was known to Mr *Warara* when he and Lovemore facilitated the sale of the house. That is the reason why the court set aside the sale. That is the reason why, too, the appeal was withdrawn. There could be other reasons for withdrawing the appeal but the stronger reason is its lacking in merit.

Having come to the conclusion that Mrs Musarara told the truth about Mr *Warara's* conduct, I must revert to the issues.

Could there be a reason why, in the event, an order for eviction and another for withholding damages should not be granted?

Mr *Warara* did not call first defendant to give evidence. So there is not a shred of evidence rebutting the evidence of damages before me. The first defendant has not placed his case before me. Only Lovemore Musarara gave evidence in respect of how he dealt with his late elder brother's property. That evidence did little to demonstrate the right which first defendant claimed on the property. The sale of the property by Lovemore Musarara to first defendant was set aside. It does not matter that the purchaser was an innocent purchaser. No real right passed to him because the sale was in *fraudum legis* in that the requisite statutory consent of the master had not been obtained. Without that first defendant could not have

acquired any rights in the property. He has a personal claim against Lovemore Musarara arising from this fraudulent sale. He cannot assert a right which he has not obtained.

The Master's interest stems, not so much from the agreement of sale, but from the Administration of Estates Act [*Cap 6:01*] which reads:-

“If after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction, he may if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.”

In the present matter the evidence suggests (and this was not contradicted) that no Liquidation and Distribution Account was placed before the Master and approved by him prior to the sale. The evidence suggests that both the seller and the estate agent were aware that the property belonged to the estate of the late Isaac Musarara. So did Mr *Warara*. They knew that consent by the Master was necessary for the sale. No such consent was sought or obtained.

In the absence of the Master's consent it cannot be argued that the sale was legal. If the sale was illegal it did not confer title upon first defendant. Without title first defendant cannot resist the present claim for eviction. In my view the plaintiff's claim ought to succeed.

It remains for me to decide what order of costs is appropriate in the case. As stated above, Mr *Warara* became emotionally involved in his client's case. This was evident in the manner in which he conducted himself during this trial. The court had to restrain and calm him when he became argumentative and confrontational towards witnesses and counsel. . Considering his role in this case, this is not surprising but it is to be deprecated. Not only did he involve himself in what is evidently a fraudulent sale of estate property for personal profit, his conduct compromised the profession of a legal practitioner. He did not only compromise himself in the sale to the first defendant Malinga but in that to all others without obtaining the Master's consent. The decision to personally act for the purchaser he further compromised his ability to dispassionately consider the issues at stake for the client. In the end he did not call the first defendant to give evidence whether by design or culpably, but his client's interests were clearly jeopardised by his continued role in the suit by the executors.

He resisted a claim when he clearly should have known better not to.

In the event this court will demonstrate its disgust of this conduct by an appropriate order of costs and drawing the Law Society's attention to this judgment for appropriate action.

I therefore make the following order;

- (1) It is ordered that first defendant and all those claiming occupation through him vacate premises situated at stand No. 2748 Warren Park Township, of Warren Park also known as 1 39th Crescent, Warren Park I, Harare within seven days of the date of this order failing which the Deputy Sheriff Harare, is authorised to eject first defendant and any person claiming occupation through first defendant from the premises aforesaid.
- (2) First defendant pays to plaintiff holding over damages as the following rate.
From 1 January 2006 to 31/3/2006 the sum of \$8 000-00 per month
From 1 April 2006 to 30 June 2006 the sum of \$15 000-00 per month.
From 1 July 2006 to 30/9/06 the sum of \$30 000-00 per month
From 1 October 2006 to 31 December 2006 the sum of \$50 000 per month
From 1 January 2007 to 31 January 2007 the sum of \$150 000 per month
From 1 April 2007 to 30 June 2007 the sum of \$250 000 per month
From 1 July 2007 to date of ejectment \$400 000 per month
- (3) Interest on the sums in the preceding paragraph at the rate of 30% p.a from date of summons to date of payment in full.
- (4) Mr *Charles Warara* of Warara & Associates is to pay plaintiff's costs
De bonis propriis
- (5) Notwithstanding any appeal which first defendant may note against this judgment plaintiff be and hereby given leave to execute the above order.