TENDAI MUZA
versus
CHRISTINA MUWIRIMI
and
FATIMA MURWISI
and
MUNICIPALITY OF CHITUNGWIZA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 24 September 2008, 13 October 2008 and 17 & 27 November 2008 and
18 February 2009

Mr *Mushonga*, for the plaintiff
Mrs *Muchemwa*, for the first defendant
Mr *Machinga*, for the second defendant

MTSHIYA J: On 17 April 2007 the plaintiff issued summons against the defendants claiming the following:

"(a) An order that the plaintiff be declared the owner of stand number 14826 Unit 'O' Seke, Chitungwiza;

(b) an order that the third defendant be ordered to cede rights, title and interests in house number 14826 Unit 'O', Seke, Chitungwiza to the plaintiff; and

(c) costs of suit".

In these proceedings the first defendant, who is late, is represented by Herbert Muwirimi, the executor of her estate.

The brief facts leading to the above claim are these:

On 18 July 2005 the plaintiff and the first defendant entered into an agreement of sale whereby the plaintiff purchased from the first defendant stand number 14826 Unit 'O' Seke, Chitungwiza ("the property") for $80 000 000-00 (Eighty million dollars). The amount was paid in instalments and as at 27 November 2005 the full amount had been paid. Transfer of property, however, remained outstanding.

Notwithstanding the above agreement of sale between the plaintiff and first defendant, on 16 March 2006 the first defendant, through another agreement of sale, sold the same property to

the second defendant for $500 000 000-00 (five hundred million). The property was then immediately transferred to the second defendant without the plaintiff's knowledge.

The above facts are common cause.

The plaintiff gave evidence in support of his claim. He confirmed the agreement of sale between him and the first defendant and stated that following full payment of the purchase price he took vacant possession of the property on 1 February 2006. He remains in possession. The plaintiff said apart from requesting the first defendant on three occasions to attend to the transfer of the property, he had actually visited her at her rural home where upon she had promised to come to Chitungwiza to attend to the transfer. It was the plaintiff's evidence that when the first defendant finally came to Chitungwiza during the first week of March 2006, she indicated that she was no longer willing to proceed with the sale of the property. This was so because her family members had objected to the sale of the property for the reason that it was a 'family house'.

The plaintiff's reaction was that he could only move out of the property if the first defendant bought him a similar property. He said he never agreed to the cancellation of the agreement. He also said there was never any suggestion of a top up. The first defendant, he testified, never advised him of the second sale of the property to the second defendant. He only discovered that the property had been transferred into the name of the second defendant through water bills which bore her name.

The plaintiff said the first defendant, in the company of the second defendant and her husband, visited him at the property during the second week of March 2006. It was then that the second defendant had disclosed that she had bought the property and therefore wanted him to move out. He refused to move out.

The plaintiff denied that he ever agreed to pay rent to the second defendant. He had paid the full purchase price and the property was now his. All what remained was transfer of the property to him. He denied ever receiving any reimbursement.

After his testimony, the plaintiff closed his case.

Herbert Muwirimi, the executor of the first defendant's estate, gave evidence, which, in the main, was based on hearsay. He said that the late first defendant was his aunt and was the owner of the property in dispute. He, however, only became aware of the contract between the plaintiff and the first defendant when he came to court. He was not aware of the second sale to the second defendant. All what her aunt had told him was that the plaintiff had not paid the

'top up'. He trusted that his brother, Onismus Muwirimi (Onismus), had accounted for all the money that had been paid by the plaintiff through him. The money was for the first defendant (i.e payments towards the agreed purchase price of $80 million).

Onismus, who was called as the last witness for the first defendant, testified that he was involved in the negotiations that led to the purchase of the property by the plaintiff. He said the first defendant was his aunt. He confirmed that an agreement of sale was signed between the plaintiff and the first defendant. The full purchase price of $80 million, including a top up of $2.5 million, was paid by the plaintiff. He said the 'top up' had arisen as a result of complaints from the first defendant's brothers who felt the price of $80 million was low.

Onismus, who was a close friend of the plaintiff, testified that her aunt's first legal practitioners, Messrs C Mutsahuni, Chikore & Partners had paid a refund of $82.5 million to the plaintiff. A receipt (exhibit 5) was produced. He, however, said the plaintiff had refused to accept the refund. The witness said he had told the plaintiff that because of his failure to pay the top up price, of $50 million, his aunt, the first defendant, was considering selling the property to someone else. Furthermore, his aunt's brothers were accusing him of conniving with him (the plaintiff) in order for the plaintiff to purchase the property at a cheaper price. He said when the property was finally sold to the second defendant, he did not disclose the first sale to her (the second defendant).

The second defendant gave evidence in support of the second sale of the property to her and was supported by two other witnesses. She confirmed that through a Mr Chihota, she had, in terms of an agreement of sale dated 16 March 2006, purchased the property from the plaintiff for $500 million. She said upon checking on ownership details with the council, she had, within five days, proceeded to have he property transferred into her name before paying the purchase price. She also said she had not viewed the property since she had a general knowledge of the types of houses in the area. She had to move fast because she had been advised that there was also a soldier who was keen to pay more money for the property. She said she only discovered that the property had also been sold to the plaintiff after she had already transferred ownership to herself. The first defendant had only told her that a relative of hers was staying at the property.

The second defendant said one of her main aims in buying the property was to build a bigger house. She said that upon proving her ownership of the property to the plaintiff, he had

initially agreed to pay $10 million per month as rental pending his final departure from the property. She said the plaintiff had, however, reneged on the rental arrangement.

Mr Livingstone Chituriro Chihota testified that he had indeed facilitated the purchase of the property by the second defendant. He said all negotiations leading to the purchase of the property by the second defendant had been conducted at his house, which was about 300 metres away from the property in issue. He said it was, however, not his duty to show the second defendant the property that the first defendant was selling. He said that his only duty was to find a buyer for the first defendant. Once he had found a buyer he sent Onismus for the first defendant, with the second defendant paying for Onismus's transport to the rural area to fetch the first defendant.

Clement Nhau was called as the last witness for the second defendant. He said the second defendant was his wife and that he had been present at Chihota's house when the purchase of the property was discussed and concluded. Like the second defendant, he also confirmed that they had not seen or viewed the property. He and the second defendant had been told that there was a soldier who was also interested in buying the property. He said as a result moving with speed became necessary in order not to lose the property. In the main his evidence corroborated that of the second defendant.

In order to put all the evidence and submissions from the parties' legal practitioners in proper prospective, I think, in the face of the evidence now before me, it is necessary to restate the issues identified for trial at the pre-trial conference. The agreed issues were:

> "1. Whether or not plaintiff was in breach of the contract between him and first defendant
>
> 2. Whether or not the agreement of sale between the plaintiff and the first defendant was ever cancelled.
>
> 3. Whether or not second defendant is an innocent third party"

Upon restating and evaluating the evidence of the plaintiff, Mr *Mushonga* for the plaintiff, submitted that the double sale situation had arisen as a result of greed on the part of the first defendant. He submitted that the plaintiff had paid the full purchase price in terms of the agreement. There was no dispute that the sum of $80 million had been paid.

Relying on *Chimponda v Rodgriques and Others* 1997(2) ZLR 63, Mr *Mushonga* correctly submitted that it is the primary right of a wronged first buyer to have the remedy of

specific performance unless there is some equitable reason disqualifying him/her from obtaining such a relief. He said, *in casu* there were no special reasons/circumstances militating against the plaintiff's right to specific performance.

Mr *Mushonga* submitted that the second defendant had conducted herself in a suspicious and questionable manner and hence leaving room for one to conclude that she was aware of the first sale i.e the sale of the property to the plaintiff. That being the case, Mr *Mushonga* argued, the second defendant's remedy was in an action for damages against the estate of the first defendant i.e the seller of the property. All in all, Mr *Mushonga's* position was that the plaintiff's rights under the contract entered into between him and the first defendant should be enforced by this court.

Mrs *Muchemwa*, for the first defendant, also cited the case of Chimpondah (supra) and submitted that in a double sale situation the basic rule is that, in the absence of special circumstances, the first purchaser should succeed. Also relying on *Guga v Moyo and Others* ZLR 2000(2) 458(s), she went on to state that the special circumstances to be looked at are:-

"(i) who has paid more money than the other

(ii) who has taken possession of the property and expended considerable sums on the house

(iii) whether first purchaser took any action to protect his interest when he became aware that the seller was behaving dishonestly".

Mrs *Muchemwa* submitted that *in casu* the second defendant had paid more money than the plaintiff i.e. $500 million as compared to $82,5 million paid by the plaintiff. She said the plaintiff had, in any case, failed to protect his interest after being told in February 2006 by his wife that the second defendant was inquiring about whether or not the house was still on sale. She went on to say the plaintiff had also not reacted swiftly when told by officers at Chitungwiza Municipality that the file had been taken to the Head Office. She argued that such information should have indicated to the plaintiff that something was happening to the house. The plaintiff, she argued, did not, however, take prompt action to protect his interest. She concluded her submissions by urging the court to regard the second defendant as an innocent purchaser in whose favour the special circumstances should lie so as for her to be awarded the property.

Mr *Machinga*, for the second defendant, submitted that the important factor to consider in a double sale was whether or not the second purchaser was aware of the first purchase of the

same house. He submitted that at the time of the agreement to purchase the property and also at cession of rights, title and interest in the property, the second defendant was not aware or had no knowledge of the first sale. He said that the fact that the second defendant went on to purchase the property without seeing or viewing it could not be construed as conduct confirming that she had known of the first sale. In any case, he argued, the second defendant had given adequate explanation for her conduct. He said whereas the second defendant had protected her interests by quickly seeking transfer of property, the plaintiff had done nothing to protect his interests despite the fact that he had become aware of the first defendant's reluctance to proceed with the sale (i.e. through asking for a 'top-up'.) Furthermore, Mr *Machinga* argued, the second defendant had paid more money than the plaintiff. He therefore submitted that the second defendant's case should succeed. The plaintiff, he suggested, could seek damages from the estate of the first defendant.

The facts *in casu*, in my view, clearly establish the existence of a double sale. The first sale was completed on 27 November 2005 when the last instalment towards the purchase price of $80 million was paid by the plaintiff to the first defendant. The payment was in terms of the agreement of sale dated 18 July 2005. The issue of a top up only came some three months after the plaintiff had fulfilled his obligation under the contract. What remained to be done under that agreement was cession of rights, title and interest in the property to the plaintiff. The purported reversal of the agreement of sale in March 2006 does not, in my view, invalidate the first sale.

The second sale was concluded on or before 16 March 2006 when the second defendant paid $500 million to the first defendant in terms of the agreement signed between the first defendant and the second defendant on that date.

In concluding that the evidence confirms the existence of a double sale, I am in the same vein stating that the plaintiff complied with his obligations under the agreement of sale dated 18 July 2005. The plaintiff did not breach that agreement. There was therefore nothing on which the first defendant could anchor cancellation on and worse still without notice.

In her plea filed of record on 6 July 2007 and prepared during her life time, the first defendant said she had cancelled the agreement between herself and the plaintiff because:-

"(i) He had failed to pay the full purchase price.

(ii) He chased away first defendant's lodger without her permission and he imposed himself on the property in question.

(iii) He started cutting trees at the house without permission"

The above 'breaches' were never placed before the plaintiff.

The issue of a top-up amount is not mentioned anywhere in the pleadings. It was only raised during the hearing in court. The plaintiff, who, I must say, I found to be a credible witness, denied that he had paid an additional sum of $2,5 million as a top-up. He said the reason for the purported reversal of the agreement as given him by the first defendant was that the property "was a family house". The family had therefore decided not to have it sold. This does not tally with reasons given in the pleadings. The plaintiff had refused to accept a refund arguing that if anything, it was the first defendant's duty to get him a similar property.

Exhibit 5, showing the purported reimbursement of $82.5 million on 7 April 2006, through Messrs C Mutsahuni Chikore & Partners throws mud in the first defendant's story. The said legal practitioners are not mentioned anywhere in the pleadings and if indeed they had handled the matter one would have expected them to proceed against the non-rent paying plaintiff who had allegedly imposed himself on the property on 1 February 2006. That piece of evidence is suspect. I have, however, already indicated that as at 27 November 2005 the plaintiff had complied with the agreement of sale. He had, in terms of the agreement of sale, paid the only agreed and known purchase price of $80 million. Accordingly, in the absence of a breach, any purported cancellation of the agreement was of no effect. This finding disposes of the first two tissues; namely whether or not the plaintiff breached the agreement and whether or not as a result of a breach the first defendant cancelled the agreement.

The last issue to be determined is whether or not the second defendant is an innocent purchaser. I am unable to accept Mr *Machinga's* submission that the second defendant's conduct should not be construed as to mean that she had knowledge of the first sale. Admittedly there is no direct evidence of knowledge. However, the following factors lead me into believing that the second defendant had knowledge of the first sale and that all she needed to do before parting with $500 million, was to establish that transfer of property to the plaintiff had not yet taken place. That, as per her own evidence, she proceeded to do with speed.

The factors that confirm my belief that the second defendant knew of the first sale are these:-

1. The negotiations of the second sale were hurried and confined to Chihota's house despite the fact that the first defendant knew the plaintiff very well. The plaintiff had even helped her (first defendant) in registering the estate of her late

husband, Mr White. That fact was not disputed. I find no good reason as to why the hurried negotiations were not held at her house which was only 300 metres away from Mr Chihota's house. The first defendant had no long association with Mr Chihota

2. The second defendant did not bother to view the property which was only 300 metres from where the negotiations were taking place. The mere fact of buying the property, at a high price of $500 million, without inspecting/viewing it is strange. The only reasonable conclusion I can make is that the first and second defendants colluded to deprive the plaintiff of the property. This plan was enhanced by the fact that transfer of property had not yet been effected. The second defendant was even prepared to go out of her way to pay Onismus's transport costs in order for him (Onismus) to fetch the first defendant from her rural home.

3. The speed at which the transaction was concluded is quite unusual. Once the second defendant had established that transfer had not yet occurred she made sure that everything got sealed within five days. This was so in order to ensure that the plaintiff would remain in the dark until the transaction particularly transfer of property, was through; and

4. The plaintiff only issued summons in this case on 17 April 2007. That is one year after the sale of the property to the second defendant on 16 March 2006. I believe that, were it not of the second defendant's knowledge of the dirty deal she had entered into with the first defendant, she would have, with the same speed she had employed in the transaction, caused the eviction of the plaintiff, who worse still, according to her evidence had refused to pay rent

On the basis of the above factors, my conclusion is that there was connivance between the first defendant and the second defendant. They were assisted in the execution of their plan by Onismus and Chihota. All ensured that the plaintiff would only be told after transfer of property to the second defendant had been effected. That, as shown by evidence, is exactly what happened. That is the only reasonable way to

explain the reason for confining the negotiations to Chihota's house and the failure to view the property which was only 300 metres away. The four knew they were doing something wrong, something whose results the plaintiff would only know when it was too late.

Accordingly, my finding, on a balance of probabilities, is that the second defendant was fully aware of the first sale.

In view of the foregoing, and given the authorities cited by Mr *Mushonga*, I fully agree that in the absence of special circumstances militating against the plaintiff, there is every reason for me to rule in his favour. The plaintiff is therefore entitled to his primary right of specific performance. The fact that he paid less that than the second defendant cannot be used against him in a situation where it has been established that through her conduct, the second defendant displayed her knowledge of the first sale. The court cannot ignore the manner in which both defendants conducted themselves. I am also not persuaded by the argument that the plaintiff did nothing to protect his rights. Having fulfilled his obligation under the agreement, the plaintiff quickly took possession and is still in possession. Evidence shows that even before and after 16 March 2006, the plaintiff was pestering the first defendant with his demand for the transfer of the property to his name. The subsequent intentions of the first defendant only became clear after the second sale had been fully executed. Clearly, the plaintiff was duped and the second defendant was a big player in the clandestine transaction.

All in all, the equities *in casu* favour the plaintiff. The second defendant, if she so wishes, can proceed to claim damages from the estate of the first defendant (See both Chimpondah and Gutsa - supra).

The plaintiff's claim succeeds and it is therefore order as follows:-

1. That the plaintiff be and is hereby declared the lawful owner of stand number 14826 Unit 'O' Seke, Chitungwiza
2. That the third defendant be and is hereby ordered to cancel the cession of rights title and interest in stand number 14826 Unit 'O' Seke Chitungwiza, made in favour of the second defendant.
3. That the third defendant be and is hereby ordered to cede rights, title and interest in Stand number 14826 Unit 'O' Seke Chitungwiza to the plaintiff; and
4. That first and second defendants shall pay costs of suit jointly and severally

Mushonga Mutsvairo & Associates, plaintiff's legal practitioners
Harare Legal Protects Central, 1st defendant's legal practitioners
Machinga & Associates, 2nd defendant's legal practitioners