

JANE CONSTANCE MARUMAHOKO
and
CLIFFORD DANIEL GOREMUSANDU
and
GRACE CHUMA SANDE

HIGH COURT OF ZIMBABWE
KARWI J
HARARE, 21 October 2011

Civil Trial

Ms *Njerere*, for plaintiff
Mrs *Mukwachari*, for 2nd defendant

KARWI J: This civil trial involved the double sale of an immovable property. It would appear that the two ladies, the plaintiff and the second defendant, were victims of the fraudulent activities of the first respondent (hereinafter called Goremusandu). To make things worse, Goremusandu died in 2003, before the trial commenced and did not give evidence.

Summons in this matter were issued in January 2002 and both defendants entered appearance to defend. Second defendant counterclaimed against the plaintiff for transfer and for the eviction of the plaintiff.

The facts of the matter are heavily contested. It was the plaintiff's evidence that she entered into an agreement of sale with Goremusandu on 12 September, 2000. The agreement, which was signed by both parties provided for the sale by the first defendant to the plaintiff of Lot 96 Athlone Township situate in the District of Salisbury measuring 2239 square meters for the price of \$1000 000 (one million dollars) payable in instalments. In pursuance of the agreement, the plaintiff paid a deposit of \$500 000. She told the court that she went on paying by instalments up to 2000 when she finished paying the whole of the purchase price. She would pay Goremusandu in person or she would deposit the money into his account. She took occupation on 1 October 2000 and

has been residing there ever since. She has also been paying all the rates, insurance and other charges over the property.

Plaintiff further testified that when she entered into the agreement with the deceased she did not know of the second respondent's interest in the property. She said she met the second defendant for the first time when the second defendant visited the property on 2 October 2000, a day after she had moved into the property. Second defendant then informed her that she had purchased the property, but had resiled from the agreement because the house was dilapidated. This was the first time the plaintiff came to know that the second defendant had also purchased the property. She said she later came to know that the agreement between the second respondent and Goremusandu had been cancelled. She produced a court application filed by the second respondent in terms of which she was seeking an order confirming the cancellation of their contract and the return of the money she had paid. Plaintiff insisted during her evidence that the agreement between her and Goremusandu was never cancelled.

Plaintiff explained that as soon as she had been visited by the second defendant on 2 October, 2000 and learning of her interests in the house, she asked Goremusandu about it. She said he confirmed the sale but said the second defendant had refused to go ahead with the sale saying the house was old and dilapidated. She said she requested a refund of the purchase price so she could move out of the house but Goremusandu refused saying he had no money and was building somewhere. She said she eventually agreed with Goremusandu that if he got the refund she would move out of the house. She continued paying for the house. She also said at some stage during 2000 or 2001 she received a letter from Goremusandu saying that the house belonged to the second defendant. She told the court that the said letter was not correct. As a result she continued staying at the house and also continued paying for the house after that letter. Plaintiff denied under cross examination that she had tampered with the agreement of sale between herself and Goremusandu. She said the transfer of the property to her was not done due to the continued deterioration of Goremusandu's health which eventually led to his death in 2003.

Defendant gave evidence. She told the court that she got to know of the property through her relative, one Mr Kumire, who is an estate agent. She viewed the house in the presence of Mr Kumire, which she liked. She was impressed most by the huge size of the yard, which she assumed to be around two hectares. She signed an agreement with Goremusandu to purchase the property on 4 September 2000. She paid a deposit of \$500 000 on the same day. The purchase price was \$900 000. The two parties agreed that the balance would be paid in instalments of \$50 000 per month at the interest rate of 35% per annum. A commission of \$45 000 was also required. Defendant was to occupy the property on 1 October 2000.

Defendant further testified that she later learnt that the stand had been subdivided, effectively making it smaller in extent, about a quarter of what she had seen. She indicated that she wanted to resile from the agreement and demanded her refund. She said she was disappointed by the development. She no longer wanted the house as she had been originally attracted by the big yard which had now been subdivided. She caused Mr. Kumire to write a letter on her behalf to Goremusandu to that effect. Goremusandu indicated that he had no money to refund her as he had passed it on to his principal, one a Mr Goodall Wright. Mr. Goremusandu then requested for a letter which he wanted to take to Mr White so the money would be released. She said when the refund was not forthcoming she eventually agreed with Goremusandu that the house was not to be sold to anybody else and also not to cancel the agreement of sale. The parties re-entered into a fresh agreement in terms of which defendant was to buy the property as subdivided on the same conditions as in the original agreement.

The defendant said that she was not aware of another agreement on the same property until she visited the property on 1 September 2000. She learnt for the first time that plaintiff was in occupation on the strength that she had also bought the same property. She said she reported to the police. She could not remember what happened after making the police report. She had briefed a lawyer who was pursuing the matter. Defendant also told the court that she went to court on 6 October 2000 seeking an order confirming the cancellation of her agreement with Goremusandu and the refund of the purchase price. She said the court application was Goremusandu's idea as she no longer

wanted cancellation of the agreement of sale. She said that they agreed that the agreement would only be cancelled after her money had been refunded. She told the court that the said court application had not been withdrawn. She said she revisited the house in September 2000.

In assessing the evidence of both parties, it is clear that the plaintiff appeared credible and consistent. She appeared convincing in her evidence. She was truthful. She did not appear to be hiding any information. She also fared very well in cross examination. Her evidence was simple and straightforward. Save for lapse of memory in some cases because of lapse of time, her evidence cannot be found wanting in anyway.

Second defendant was a poor witness. She narrated her side of her story in a very comprehensible manner. In answer to questions in cross examination she fell short. She started to prevaricate and became evasive. She also would fail to acknowledge and accept clear facts which were indisputable. For example, her efforts to distance herself from her founding affidavit in her application to court for cancellation were contradictory. In her evidence in chief she said she had seen the caretaker at the property and he had informed her of the subdivision of the property. Under cross examination she changed her story to say that the caretaker, who happened to be someone she knew before, came to see her at her butchery. The fact that it was coincidental that the caretaker happened to be someone she knew before and that he happened to be residing at the house which she had bought is difficult to believe. She also insisted in her evidence in chief that the first time she visited the house and saw the plaintiff was on 1 September, 2001. Under cross examination she admitted that she saw the plaintiff on 2 October 2000. Furthermore, it is striking that the second defendant would not know what had happened to her court application seeking confirmation of cancellation and also what had become of the police report she had made against Goremusandu. The truth of the matter is that the court application had not been withdrawn, and is still extant today. Defendant deliberately withheld that vital information from court because she did not want the court to know that the agreement was cancelled. She knew that if she told the court that the application before the court was not withdrawn, it would have obviously meant that the agreement was cancelled. I also find it difficult to believe that after initially agreeing to pay \$900 000 for a house on

two acres of land she would later agree to pay the same amount of money for a quarter of the size as she did. Besides she failed to tell the court exactly when she entered into a fresh agreement with Goremusandu or when she revived the initial agreement.

At the pretrial of this matter four issues were referred to trial. These are;

1. Whether or not the first defendant duly cancelled the Deed of Sale between him and the plaintiff.
2. Whether the plaintiff tampered with the terms of the Deed of Sale, and if so, whether the alleged tampering invalidated the agreement.
3. Whether the first defendant contracted a fresh agreement of sale with the second defendant
4. Whether there is an equitable basis upon which the second defendant is entitled to receive transfer of the property.

As regards the first issue, I am of the considered view that the agreement in question was never legally cancelled. In his plea Goremusandu stated that he had cancelled the agreement because the plaintiff failed to keep up with payments and that she had tampered with the written contract with a view to misrepresent the facts in as far as payment of the purchase price was concerned. When further particulars of her breach were requested, Goremusandu acknowledged that no payments were missed by the plaintiff. In any case the agreement itself speaks of the need to put the plaintiff on notice in the event of any breach by her before the agreement is cancelled. The notice require that the plaintiff rectify the alleged breach before any cancellation is contemplated. There was no evidence of any such notice given in that regard. One cannot therefore treat the agreement as cancelled in the absence of such important notice. This view is fortified by clear evidence as found in the bunch of correspondence between Plaintiff and Goremusandu indicating that Goremusandu was always painfully aware of the need for such notice in the event of a breach arising. This shows that if indeed there was any breach Goremusandu would have given the required notice as he was aware of its need. Even if one were to believe that there was any alleged tampering with the agreement of sale there would still be need to put the plaintiff in mora. In any case there was no evidence placed before the court to prove that the plaintiff ever tampered with the agreement of sale with a fraudulent intent. Once Goremusandu admitted that there was no lagging behind in payment, there would be no cause for the cancellation of the contract. It

is also important to note that Goremusandu continued to receive payments by Plaintiff in discharging her contractual obligations even after summons were issued. I totally agree with Plaintiff's legal practitioner's submission that there was absolutely no evidence that the agreement between Plaintiff and Goremusandu was cancelled. The letter in question which Goremusandu wrote indicating cancellation laid no other factual basis for cancellation other than the one considered above. It is therefore my finding that the agreement between the plaintiff and Goremusandu was not cancelled and that there is no evidence produced to show that the plaintiff tampered with the agreement let alone tampering with some fraudulent intent.

As regards the issue whether or not defendants entered a fresh contract, it would appear that this was not the case. It is clear that the defendants' so called agreement, if ever there was an agreement in the first place, was cancelled. This is confirmed by Goremusandu's plea which stated-

"4. Ad para 9

The agreement between the first defendant and the second defendant was resuscitated....."

It is a fact that Goremusandu confessed in his pleadings that he did not know when he resuscitated the agreement with the second defendant. Evidence in this case seems to show that on or before 12 September 2000 the agreement between the defendants was cancelled. Second defendant says she did so because she had been disappointed by the fact that the size of the stand she had bought had been reduced. This is why by October 2000 she had resorted to the courts to recover her money. As is shown by her affidavit, she had also realized that there was already a purchaser on the property. This made it difficult to believe that she entered into a fresh agreement with the same fellow whom she had discovered had cheated her. It is my considered view that it would be highly improbable for one to do so. Furthermore, as at that time there was already in existence an agreement between Goremusandu and the plaintiff. This means that if at all the defendants entered into a fresh agreement, it was at a time when the agreement between the plaintiff and Goremusandu was in subsistence. That fact would have prevented the two parties from entering into any legally binding contract.

The last issue to consider is whether the equities favour the second defendant. I think not. It is my view that the issue cannot arise as the plaintiff has established that she has a valid contract with Goremusandu and there has been a finding that the second defendant did not enter into a resuscitated contract with Goremusandu. It therefore follows that she does neither have any contract to enforce nor do issues of equity arise. In the result, It is therefore ordered:-

1. That the counterclaim by Second defendant be and is hereby dismissed with costs.
2. That the agreement of sale contracted by the defendants on 4 September 2000 was validly cancelled by the first defendant.
3. The first defendant's estate be and is hereby ordered to take all steps within two weeks of this order, to procure the registration in the plaintiff's name of certain piece of land called the Remainder of Lot 96 Athlone Township situate in the District of Salisbury held under Deed of Transfer 1055/99 dated 4 February 1999, measuring 2239 square meters, failing which the Sheriff of Zimbabwe be and is hereby authorized to take all such steps as are necessary to procure such registration.
4. That the second defendant pays the plaintiff's costs of suit.

Honey & Blanckenberg, plaintiff's legal practitioners
Scanlen & Holderness, 1st defendant's legal practitioners
T.H Chitapi & Associates, 2nd defendant's legal practitioners