

HENRY MUTANDWA MUSHAMBI  
versus  
THE EXECUTOR, ESTATE LATE MIRIAM EVERNESS MUNEMO (nee MADENGA)  
and  
THE EXECUTOR, ESTATE LATE FAINA MUNEMO (nee MARUMURE)  
and  
ELIZABETH NZIRAMASANGA  
and  
THE DIRECTOR OF HOUSING AND COMMUNITY SERVICES, CITY OF HARARE

HIGH COURT OF ZIMBABWE  
HUNGWE J  
HARARE, 3 & 4 July 2006 & 19 April 2012

**Civil Trial**

*Ms L Mkhuhlani*, for the plaintiff  
*S Deme*, for the 3<sup>rd</sup> defendant

HUNGWE J: The plaintiff issued summons against the first, second, third and fourth defendants claiming the following relief:

1. An order that the fourth defendant takes all the necessary steps to pass possession of stand number 9314, Budiro Township, Harare, within 48 hours of the order of court.
2. An order that if the fourth defendant fails within 48 hours of the court's order to take the necessary steps, the Deputy Sheriff be authorized to take such steps on the fourth defendant's behalf.
3. The first, second and third defendant's pay the costs of suit on the legal practitioner and client scale jointly and severally, the one paying the others to be absolved.

The background to this action is as follows. Miriam MUNEMO and Faina MUNEMO were both married to Thomas Munemo. He held a lease-to-buy agreement with the City of Harare over stand 9314 Budiro Township, Harare. They assumed his rights, title and interest over the said stand upon his death. In September 2002, the two wives “sold” their rights, title and interest in the stand to the third defendant through the agency of one Davison Shonhiwa of Southern Life Executors. A month later, in October, they “sold” their rights, title and interest to the plaintiff. All formalities were observed regarding obtaining the consent of the fourth respondent and a memorandum of agreement of assignment was executed. Prior to the signature of the memorandum of agreement of assignment of rights, title and interest, it was brought to the fourth respondent’s notice that there existed a prior agreement of assignment between the two wives and the third defendant. The assignment was not proceeded with. The plaintiff sued in HC 10708/02. The two wives both died soon thereafter. This action was withdrawn pending the appointment of the executors to their estates.

It is common cause that in HC 10708/02 the two wives had claimed that the earlier “sale” had been cancelled for breach (Exh 3). It is also common cause that one Davison Shonhiwa had facilitated the “sale” to the third respondent but had not passed on the proceeds of the “sale” to the two wives.

After the appointment of the executors to the late two wives’ estates, the third defendant counter-claimed seeing the same relief as that which the plaintiff is presently seeking on the basis that a prior sale takes precedence over a subsequent sale.

At the pre-trial conference the parties agreed that the issues for determination

- (a) were which agreement, between the two, should be upheld;
- (b) whether the third defendant’s agreement with the two wives was cancelled for breach;
- (c) whether the plaintiff is a *bona fide* purchaser; and
- (e) what an appropriate order should be.

At the trial the plaintiff was able to show that indeed he had entered into an “agreement of sale” with the two wives. Pursuant to that agreement, the parties had attended at the fourth defendant’s sub-office in Budiro and were referred to the Remembrance Drive offices where the final documents formalising the cession of rights, title and interests in favour of the plaintiff would be concluded. It was admitted by the third defendant, that the purchase price paid to

Shonhiwa was not passed on to the two wives. The plaintiff's witness confirmed that the only "sale" which the last dying wife, Faina acknowledged to him as executor of her estate, was that of the subsequent sale to the plaintiff.

The witnesses for the plaintiff were both credible and honest. The plaintiff even admitted that he could not recall the exact amount of money he had paid over to his legal practitioners as the purchase price. Had he rehearsed his evidence he could simply have given the figure.

In my assessment of the evidence, although the third defendant may have signed an "agreement of sale" with the two wives at the behest of a shadowy figure called Shonhiwa, the difficulty her case faces is that Shonhiwa was an incredibly unreliable character even in court. He claimed he acted as agent of both the sellers and the buyer in the transaction. He could not produce any proof that he had been lawfully appointed to deal with the estate of the late Thomas Munemo and the estate of the late Miriam and Faina Munemo in the manner he did. He failed to explain why, for example, his firm of executors demanded payment from Miriam if they held any funds in the form of proceeds of sale from the third defendant in 2002. The evidence shows that on 22 and 23 October 2002 Miriam Munemo paid a total of \$125 375, 00 to Southern Life Executor Services. To my mind this put Shonhiwa's credibility into serious doubt and cast him as a shameless liar. Even the document his firm admittedly drew regarding the sale, there is nothing to suggest that his firm was behind it. Why was he hiding his firm's role? Whose agent was he? The sellers dispute that he acted for them and claim that he coerced them into signing exh 6 against their will. From the manner he conducted himself in this case, I cannot put it beyond him.

Counsel for both the plaintiff and the third defendant argued this case as if it involved an agreement of sale of immovable property. That approach is misplaced because it in effect ignores the fact that what is being claimed is not the transfer of right, title and interest by the plaintiff from the first, second and fourth defendants but a cession of the rights enshrined in the "lease-to-buy" agreement between the fourth defendant who is the owner of the land, and the "sellers" who signed off their rights to two different parties.

Where a seller fraudulently sells immovable property to two purchasers the court has to decide between two innocent buyers. Where transfer has not been passed to either party the basic rule in cases of double sales is that the first purchaser should succeed, in the absence of special

circumstances. The first purchaser is treated as having the stronger claim and the second purchaser is left with a claim for damages against the seller. (*Guga Moyo & Ors* 2000 (2) ZLR 458 (SC)) But that rule applies only "in the absence of special circumstances affecting the balance of equities". See **McKerron** (1935) 4 SA Law Times 178, **Burchell** (1974) 91 SALJ 40. Burchell was of the view that "the balance of equities must weigh heavily in favour of the second purchaser" before the court could favour her over the first purchaser (p 41 in fine and note 31).

In *BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd* 1964 RLR 7 (G), MACDONALD J (as he then was) said:

"In my view, the policy of the law will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view expressed by Professor McKerron that save in 'special circumstances' the first purchaser is to be preferred."

The broad principle as set out above was acknowledged to be our law in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) although that case turned on the fact that the second purchaser had knowledge of the first purchase. (See also *Lindsay v Mathews & Anor* 1972 (1) SA RLR 186 (G) @ 195F.

In *Jangara v Nyakuyamba & Ors* 1998 (2) ZLR 475, the Head note of which reads:

"The cession of the rights in breach of the non-cession clause creates rights between the lessee-purchaser and the third party, but it cannot bind the lessor-seller. This agreement is not illegal and invalid, but is only unenforceable against the lessor-seller. At the instance of the third party, the court may enforce the contract as against the lessee-purchaser but it cannot make an order, such as an order of transfer, that can bind the lessor-seller. The court has the discretion to order the lessee-purchaser to make transfer if he is in a position to do so or to take transfer of the property in order to give transfer to the third party. Where the lessor-seller is joined in the action and does not oppose the transfer, the court can exercise a discretion to order specific performance of a contract which, had the lessor-seller objected to transfer, would only have been enforceable by way of damages."

That case is authority for the proposition that the court may confine the third party lessee-buyer to a claim for damages even if his claim may have been earlier in time, depending in the circumstances of the particular case. In the present case I consider the fact that the lessor-seller had virtually approved of the cession to be of overriding importance. This is a special

circumstance because the lessee-buyer had signed the relevant documentation together with the City of Harare virtually assigning their rights, title and interest to third party thereby placing that third party in a position to enforce the right to claim transfer upon fulfilment of whatever obligations are set out in the lease-to-buy agreement. Payment of the full purchase price to the lessee-buyer by third party puts his claim on a stronger footing compared to the other party whose payment is held by the executor.

The third defendant has a claim in damages against her agent, the said Shonhiwa. Her “agreement” cannot be held to have earned the approval of the fourth defendant who had already considered and approved the plaintiff’s of agreement of sale (exh 1), memorandum of agreement of assignment dated 30 October 2002 (p 14 of bundle of documents) and the parties “Application For Cession” (exh(s) 2) taken together. I am satisfied that the plaintiff has succeeded in making a case for the order he claims.

As for costs, normally costs follow the event but this is an unusual situation where from the evidence, it appears that the third defendant was a victim of unscrupulous executors. I will not grant the order prayed for but on party and party scale.

In the result therefore, I make the following order:

1. The fourth defendant be and is hereby ordered to finalise the process initiated on 22 October 2002 by taking all the necessary steps to pass cession of all rights title and interest in favour of the plaintiff within fourteen days of the date of this order.
2. In the event that the fourth defendant fails or neglects to comply with para (1) above, then in that event, the Deputy Sheriff be and is hereby authorised to take such steps on the fourth defendant’s behalf.
3. The third defendant’s counter-claim be and is hereby dismissed with costs.
4. The first, second and third defendants to pay the plaintiff’s costs.

*Mkuhlani Chiperesa*, plaintiff’s legal practitioners

*Legal Aid Directorate*, defendants' 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> legal practitioners