

STUPENDIS ENTERPRISES (PRIVATE) LIMITED
versus
ADMIRE KASI
and
SARAH KASI
and
THE REGISTRAR OF DEEDS
and
COMMISSIONER-GENERAL,
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 22 February, 2012

Opposed Application

Advocate *ET Matinenga*, for the applicant
Advocate *H Zhou*, for the 1st and 2nd respondent
No appearance for 3rd & 4th respondents

HUNGWE J: The applicant seeks an order for specific performance of a contract of sale of an immovable property called Lot 1 of Subdivision 2 of Lot 382A Highlands Estate measuring 4043 square metres held under Title Deed No. 13635/2001, registered in the names of the first and second respondents, husband and wife respectively. Third respondent is the Registrar of Deeds. No papers were filed on behalf of the third respondent so I take it that that office will abide the Court's decision. Fourth respondent is the Commissioner-General of the Zimbabwe Revenue Authority. He indicates that he is not opposed to the order sought by the applicant. He has not filed any papers.

Second respondent is opposed to the order sought by the applicant. She counter-applies for an order declaring the agreement of sale relied upon by the applicant null and void *ab initio*. She avers that as joint owner of the property in question, she never consented to the sale of the property. She states that the signature appended to the Power

of Attorney executed in favour of the first respondent granting him power to transfer her half-share is a forgery.

Applicant makes the following averments regarding the circumstances leading to this application:

On 15 February 2005, the first and second respondents sold the property to one Wonderful Chizema. On 1 July 2005, the first and second respondents sold the same property to the applicant. At the time of the sale the applicant was unaware of the prior sale to Chizema.

On 20 July 2005, the first and second respondents sought to cancel the sale of the property to Chizema. Chizema did not accept the cancellation. He obtained a provisional order on 23 August 2005 in this court interdicting the first and second respondent from alienating the property in any way. The provisional order was never confirmed. Applicant states that Chizema has since fallen out of the picture.

On 2 August 2005, the first respondent sought to cancel the sale of the property to the applicant. Applicant did not accept the cancellation. It obtained a provisional order in this court on 2 September 2005 interdicting the first and second respondent from alienating the property in any way, pending the determination of an application compelling transfer of the property to it.

On 5 October 2005, the applicant obtained default judgment against respondents in terms of the order in the present application. Consequently, the property was transferred to it. On 10 October 2005, a writ of eviction was issued out in favour of the applicant for the eviction of both the first and second respondents from the property. First and second respondent obtained an order staying eviction pending the filing of an application for rescission of judgment.

On 20 December 2006, the second respondent applied for and obtained rescission of the judgment granted on 5 October 2005.

This application deals with the merits of the main application. The issue is whether the applicant is entitled to the order sought in the application for specific performance. First respondent has not opposed the order sought.

Second respondent states that her marriage to the first respondent, around 24 February 2004, the dated the Power of Attorney in favour of the first respondent was signed, was on the rocks due to the first respondent's association with one Ivy Kombo. As such she could not possibly have executed the power of attorney as alleged. In any event she had already executed such power of attorney in favour of her sister.

Mr *Matinenga*, for the applicant urged this court to find for the applicant on the following grounds: Firstly he contended that as the second respondent was fully aware of the sale of the joint matrimonial property to the applicant, she must be ordered to pass transfer to applicant. Secondly, if this court held that she was unaware of the sale to applicant and therefore found that her signature consenting to the sale is a forgery, the court must still order specific performance as she will not suffer any prejudice since she can still call upon first respondent to account for the sale of the proceeds of the sale of the matrimonial assets in the pending divorce action. Thirdly, since at common law 2nd respondent is regarded as co-owner of the asset in issue, she will be entitled to a share on the property proportionate to her shareholding. See *Runciman v Schultz* 1923 TPD 45 where at p 45 the following appears;

“The principle of our law on this point seems to me to be contained in the first paragraph of Digest (10.3.6.2), where Ulpton says ‘ A joint owner (socius), will be bound by the actio communi dividundo to account for whatever he has acquired from the common property, whether by letting the common property or by cultivating it himself.”

Applicant argues that the first respondent need not have obtained the second respondent's consent before disposing of his half-share. As such the sale of the first respondent's half share to applicant cannot be impugned. If applicant does not obtain transfer, the result will be that applicant, a company, and the second respondent will become co-owners of a residential property which, for strangers, is absurd. Applicant urged the court to exercise its wide discretion to make such an order as the justice of the case may require. *Estate Rother v Estate Sandig* 1943 AD 47.

In *Bennett N.O. v Le Roux* 1983 ZLR 301 (H) the relevant authorities are discussed and set out as follows;

“The task of the court is to decide how the property should be sold, and in doing that it is being guided by the following passage in Oosthuizen’s **The Law of Property** on p 63:

“If the joint owners are unable to agree upon the manner in which the property is to be divided, anyone of them may approach the court for relief by instituting the *actio communi dividundo*. The court has a wide discretion in regard to the partition and may make such order as appears to be fair and equitable in the circumstances. It may, for example, order one joint owner to pay a certain sum to each of the others in order to equalise the division; the court may award it to one of the joint owners subject to the payment of compensation to the other; or it may order that the property be sold by public auction and the proceeds to be divided among the joint owners in accordance with their shares. ”

Second respondent is vehemently opposed to the grant of the order sought and, as I said, makes a counter-application for an order declaring the agreement of sale null and void *ab initio*. She raised a point *in limine* that as there is dispute of fact incapable of resolution on the papers, the matter must be referred to trial. It seems to me that there are sufficient facts which are common cause on the papers upon which this court can, adopting a robust approach to the whole matter, rely upon to resolve the dispute.

As I understood it, the contention by Mr *Zhou*, for the second respondent, is that despite the fact that a divorce is pending, at law she is still married to the first respondent. By virtue of her marriage she is a joint owner of equal and undivided share in the property. She was never party to the agreement of sale which applicant seeks to enforce. The power of attorney used to effect the agreement of sale was forged in favour of the first respondent. As such she is not bound by the agreement.

It is true that a co-owner may not purport to alienate the property which is jointly co-owned without the consent of the other owners; and that alienation of jointly owned property can only be effected by the joint action of all the owners. *Masubey v Masubey* 1993 (2) ZLR 36. There may, however be circumstances in which a court may be called upon to consider whether or not to recognise an alienation which violates this principle of our law. A common occurrence of such a circumstance occurs in matrimonial property.

In *Ncube v Ncube* 1993 (1) ZLR 39 (S) the court was called upon to do exactly that. At p 46 the Supreme Court expressed itself thus:

“It is true that joint owners of property own each and every part of the property equally and, therefore, own equal shares in the value of the property. But when property comes to be apportioned or divided under s 7 of the Act, even though the spouses may be joint owners of the property, the Act confers on a court of law, in the interest of justice and fair play, power to take part of a spouse’s share in property jointly owned to give it to the other spouse if, by doing so, it could place the spouses in the position they would have been had a normal marriage relationship continued between them.”

In the present case it is my finding that the first respondent misrepresented to the applicant that he had the power of attorney to enter into the agreement of sale in respect of the 2nd respondent’s half share in the immovable property. I also find that applicant had no reason to suspect that there was a misrepresentation of fact in respect of the authority to pass transfer by the first respondent. The papers do not suggest that it was in the public domain that the first and second respondent’s marriage was on the verge of collapse in 2005. It therefore cannot be argued that applicant was not an innocent purchaser for value when it bought the property. Indeed that is not the second respondent’s contention. She relies on her lack of knowledge and consent to the sale of her half-share by her husband only.

Having come to that conclusion I must decide whether or not I should order specific performance. Our law is clear that a plaintiff is always entitled to specific performance and, if he or she makes out a case, his or her claim will be granted, only subject to the court’s discretion. The *locus classicus* for this view is the judgment of INNES J in *Farmers Co-operative Society (reg) v Beny* 1912 AD 343 where at p 350 he says:

“*Prima facie* every party to binding agreement who is prepared to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson v Pullinger* (1894) 1 OR at p 301,

‘the right of s plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond doubt.’

It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has an option to purge his default by the payment of money. For, in the words of **Storey (Equity in Jurisprudence, sec 717 (a))**,

‘it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it.’

The election is rather with the injured party, subject to the discretion of the court.”

In exercising the court’s discretion I am aware that “(t)he discretion which a court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances.” (per DE VILLIERS AJA in *Heynes v Kingwilliamstown Municipality* 1951 (2) SA 371 @ p 378G).

In this case what I find to weigh heavily in favour of the granting of the order sought is the fact that applicant entered into the agreement of sale without any suspicion that the first defendant may have forged his wife’s signature to the agreement. Secondly, applicant has made full payment for value to the first respondent. It is for the first respondent to disgorge his ill-gotten gains in favour of his estranged wife. Thirdly, in view of the pending divorce proceedings, the second respondent will not suffer any prejudice by making a claim for her share in those proceedings taking into account the findings against her husband made in this judgment. Further a balance of convenience favour the making of an order in favour of the applicant in the terms sought.

In the premises therefore the second respondent’s counter-claim is dismissed with costs.

In the premises I make the following order:

1. The third respondent be and is hereby ordered to transfer a certain piece of land situate in the district of Salisbury known as Lot 1 of Subdivision 2 of Lot 382 A Highlands Estate measuring 4043 square metres held under Deed of Transfer No. 13635/2001 to the applicant.
2. The Sheriff of the High Court of Zimbabwe or his lawful Deputy be and is hereby authorised to sign all papers necessary to transfer title in favour of applicant in terms of para 1 above.
3. Fourth respondent be and is hereby ordered to issue a duplicate Capital Gains Tax Clearance Certificate to Matipano and Musimwa legal practitioners of the Certificate he issued to Musunga and Associates upon application and in fulfilment of his requirements for him to issue such certificate.
4. Matipano and Musimwa legal practitioners be and are hereby authorized to process the conveyancing of the property referred to in para 1 above to the applicant.
5. The Deputy Sheriff be and are hereby ordered to evict the first and second respondents and all those claiming through them from a certain piece of land situate in the district of Salisbury known as Lot 1 of Subdivision 2 of Lot 382 A Highlands Estate measuring 4043 square metres held under Deed of Transfer No. 13635/2001 otherwise known as 4 Knightsbridge Crescent, Highlands, Harare with the assistance of the members of the Zimbabwe Republic Police, if necessary, upon giving five days notice.
6. First and second respondent jointly and severally, the one paying the other to be absolved, be and are hereby ordered to pay costs of suit.

Matipano and Musimwa, applicant's legal practitioners
Debwe and Partners, 2nd respondent's legal practitioners