ELIJAH MADUNHA KASEZA
versus
LANGTON KASEZA
and
WINNIE MURAPE

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 3 February 2011 and 29 February 2012.

Opposed Application

S. Evans for the applicant
T. Hangazha for the second respondent
No appearance for the first respondent

MAVANGIRA J: This matter was initially set down for hearing on 11 June 2009 on which date it was postponed to 10 July 2009. It was again postponed a number of times and was finally heard on 3 February 2011 after which date the court called for supplementary heads of argument from both legal practitioners for reasons appearing later in this judgment. The applicant seeks the following order:

"IT IS ORDERED THAT

1. The second respondent be and is hereby compelled to uplift caveat she noted on stand7813 Fountainbleau Township of Fountainbleau Estate measuring 200 square metres. (sic)
2. The first respondent be and is hereby ordered to transfer stand 7813 Fountainbleau Township of Fountainbleau Estate measuring 200 square metres. (sic)
3. The first and second respondents and all those claiming possession through them be and are hereby ordered to vacate the above property within ten (10) days of this order failing which the Deputy Sheriff be and is hereby authorized to evict the respondent.

4. Or alternatively, the first respondent be and is hereby authorized to pay the applicant the current market value of the property within (10) ten days of this order.
5. The first and second respondents be and are hereby ordered to pay costs of suit"

The applicant's case is as follows. On 19/09/07 and through Amazon Real Estate Agents, applicant entered into an agreement of sale with the first respondent. In terms of the agreement the applicant purchased from the respondent an immovable property namely stand No 7813 Fountainbleau Township or Fountainbleau Estate, also known as House No 7813 Kuwadzana 4, Harare.

The purchase price for the property was $5 billion ($5 000 000 000- 00). In terms of clause 2 of the agreement of sale, payment for the property was to be made through the estate agents. It was also a term of the agreement that Mushuma Law Chambers, legal practitioners were to transfer the property into the applicant's name. The applicant alleges that despite the fact that he has paid the purchase price in full, the first respondent has not transferred the property into his name.

The applicant avers that sometime in January 2008 he approached Mushuma Law Chambers with a view to ascertaining the cause for the delay in effecting transfer of the property into his name. He avers that it was at that stage that he then learnt that 1st and 2nd respondent were formerly husband and wife and that their divorce order had awarded 30% of the market value of the immovable property to the second respondent. He avers that he was also surprised to learn that Mushuma Law Chambers had also acted as the first respondent's legal practitioners in the divorce proceedings. He avers that Mushuma Law Chambers had not disclosed to him the circumstances in which the house was being sold to him. The applicant also avers that before buying the property he had done or conducted a deeds search and had verified that the first respondent was the registered owner of the property. Mushuma Law Chambers then assured him that everything was under control and that the property would be transferred into his name within a short period of time. Thereafter, Mushuma Law Chambers made an application to the Magistrates Court and obtained an order which *inter alia* barred the second respondent from denying him the right of occupation to four rooms of the house. The second

respondent appealed against the order. The applicant however managed to occupy part of the house after applying for and obtaining leave to execute pending appeal.

The applicant contends that at the time of the sale he had no knowledge of the dispute between first and second respondent. He further contends that the second respondent's recourse lies in a claim of personal rights against the first respondent and that this cannot take precedence over his rights as a *bona fide* purchaser. He further contends that the 1st respondent's appeal against the order obtained by the applicant in the Magistrate's Court and referred to above was filed after he had already purchased the property.

The first respondent has not filed any opposing papers in this matter.

The second respondent has opposed this application on the following grounds. She avers that the house in question forms part of the matrimonial property of the former marriage between her and the first respondent. She avers that the property was fraudulently sold behind her back and that she was not party to the agreement of sale yet she has a substantial interest in the property as she contributed directly and indirectly in the purchase of the stand and its construction or development. Furthermore she never received any payment. She further avers that the applicant was aware of the dispute over this property when he purchased it. She avers that the property was never evaluated. She further avers that at the time that he became aware that there was a dispute, the applicant should have cancelled his agreement with the first respondent.

The second respondent avers that she is pursuing her appeal against the order granted by the Magistrates Court in favour of the applicant and the appeal is still pending. Furthermore, that the applicant has not, contrary to his averment, taken occupation of part of the property. The second respondent contends that the applicant should wait until all appeals filed by the parties are heard and that he has no clear right until then, to justify the granting of the order that he seeks. The second respondent contends that the applicant's claim has no basis at law and that his only remedy is a claim for damages against the first respondent and his legal practitioner.

The applicant on the other hand denies that the sale was fraudulent and denies that he was aware that it was part of the respondents' matrimonial property. He avers that

when he inspected the title deed to the property, it reflected the first respondent's name only. Attached to the applicant's answering affidavit is an affidavit by Oliver Mushuma, a legal practitioner of Mushuma Law Chambers. He states that to his knowledge the first respondent is outside the country. He states that the first respondent obtained a default judgment in the Magistrate's Court on 24 August 2007 in terms of which he was awarded a 70% share in the immovable property and the second respondent was awarded a 30% share. Pursuant to this judgment, the first respondent sold the immovable property to the applicant through the estate agents, Amazon Real Estate Agents. The first respondent appointed Mushuma Law Chambers as his conveyancers. He states in his affidavit that as soon as the applicant and the first respondent signed the agreement of sale, the applicant paid the purchase price through the estate agents. Immediately thereafter the applicant and his sons reported at his office with the agreement of sale. At that stage the second respondent had filed an application for rescission of the default judgment referred to. He duly advised the applicant of this state of affairs so that the applicant could make a decision on the matter as he had already paid the purchase price and the values of properties were escalating on a daily basis. The applicant (and his sons) then decided to stand by the agreement. They also confirmed to him that at the time when they went to view the property they met the second respondent who denied them entry into the premises. He denies that he never mentioned to the applicant that Mushuma Law Chambers acted for the first respondent in the divorce matter.

Mushuma also states in his affidavit that the immovable property was evaluated at Z$5 000 000 000 and that the second respondent's share was only Z$1 117 826 373, 58 which amount the first respondent had confirmed to Mushuma that he had transferred into the second respondent's account in November 2007.

In her notice of opposition the second respondent contended, amongst other things, that besides having received no payment, she never consented to the sale of the matrimonial property which she states was done behind her back. She contends that the sale was fraudulently done and that the applicant was party to the fraud and that for that reason the applicant's only remedy is a claim for damages against the first respondent and his legal practitioners.

A perusal of the record shows that on 28 August 2007 a default judgment was granted in favour of the 1st respondent, in terms of which judgment, *inter alia*, the 1st respondent was awarded a 70% share in the immovable property in issue and the second respondent a 30% share. A perusal of the record also shows that on 2 November 2007 the second respondent's application for rescission of the default judgment was dismissed.

A perusal of the record further shows that payment was made to the first respondent by way of RTGS or electronic transfer on 8 November 2007 of an amount of Z$3 506 166 396, 14. It also reflects a reconciliation done by Mushuma Law Chambers which *inter alia*, shows that of the said amount paid into the first respondent's account, Z$1 117 826 373, 58 constitutes the second respondent's 30% share. The record bears no proof that any payment was made to the second respondent in respect of her award of a 30% share in the immovable property. The second respondent denies having received any payment. In such circumstances it would appear to me that the effect of granting the order sought by the applicant would be to deprive the second respondent of her 30% share in the property. For that reason, this application must in my view fail, with costs following the cause.

If I am wrong in this respect, it seems to me that there is another dimension of this matter that needs to be addressed. This arises from the fact that it appears to be an undisputed fact that the first and second respondents were customarily married. According to Oliver Mushuma's affidavit, they were divorced on 20 July 2005. It also appears from a perusal of the record that the first respondent approached the magistrates' court in 2007 seeking an order for the "sharing of property" between him and the second respondent; the property to be shared including the immovable property the subject of this application. Thus, while the immovable property was allegedly registered in the name of the first respondent only, it was the first respondent himself who brought it before that court for distribution. In default of the second respondent he then obtained an order awarding him a 70% share and the second respondent a 30% share of the immovable property. Presumably those were the terms of the order that he sought from the magistrate. That in itself, in my view, is an acknowledgment by the first respondent that the second respondent has a 30% interest or is entitled to a 30% share in the

immovable property. Subsequent to obtaining the default judgment the second respondent then sold the immovable property to the applicant. Mushuma then dispatched to the first respondent a “reconciliation” in terms of which the second respondent’s share of the net proceeds of the sale was recorded. The impression created is that the second respondent dealt with the immovable property in terms of the distribution of it made by the magistrate. It was for these reasons that I requested the applicant’s and the second respondent’s legal practitioners to file supplementary heads of argument addressing the effect, if any, on this matter of the following cases: *Feremba v Matika* 2007 (1) ZLR 337 (H); *Mandava v Chasweka* 2008 (1) ZLR 300 and *Nyaradzai Kazuva v Gilbert Dube* HB 119/10. They both did.

It appears to me that whether or not the parties’ so called “divorce” was by an order of the magistrates court or was customarily done, the fact remains that the subsequent and apparently consequent claim by the first respondent before the magistrates court was for “sharing of property”; the property in issue being that of the joint estate of the first and second respondents. The principles enunciated in the *Feremba* and *Mandava* cases would thus be applicable. In the *Mandava* case MAKARAU JP, as she then was, stated at 303:

> “The issues that I have highlighted above are not new to this appeal court. I have had occasion to discuss the same issues in *Feremba v Matika* HH33-2007. I will take the risk of repeating myself again in this judgment and exhort all trial magistrates approached to distribute the joint estates of persons in an unregistered customary union to ensure that the parties before them have made the appropriate choice of law between customary and general law. Once a choice of law has been appropriately made, two further issues arise but only if general law is chosen. These are the cause of action and the monetary jurisdiction of the trial magistrate.
>
> In view of the fact that the trial magistrate failed to observe any of the above, his decision cannot stand.”

In the *Feremba* case MAKARAU JP stated at 342:

> “Finally, if the court is to entertain the matter on the basis of any of the above principles, then its general monetary jurisdiction limits apply. It therefore becomes imperative for the court to be aware of the value of the estate involved and to then ascertain whether it has the requisite jurisdiction in the matter.

At 342D-E she further stated:

> "Thirdly, as the trial magistrate was not applying customary law or proceeding in terms of section 11 (b) (iv) of the Magistrates Court Act, he had to be satisfied that the value of the estate that he was distributing fell within his monetary jurisdiction. This he did not do."

In *casu* there would appear to be no cause of action that was properly pleaded before the magistrate by the first respondent. Neither does the magistrate appear to have been alive to the issue of his monetary jurisdictional limits let alone the choice of law in terms made by the first respondent in those proceedings. The inevitable conclusion would thus be that the trial magistrate had no jurisdiction to deal with the first respondent's matter. If that be so, his order would be void. The applicant's legal practitioner submitted in her supplementary heads of argument that this aspect ought not to be a concern of this court as none of the parties have raised it. However, in *Muchakata v Netherburn* 1996 (1) ZLR 153 (SC) it was held:

> "If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it."

It appears therefore that insofar as the first respondent in selling the immovable property to the applicant, purported to act on the basis of the default judgment that he had obtained, the said sale cannot be valid as it purports to be founded on an invalid judgment on which nothing can depend. If I am correct on this, then the applicant's case ought therefore to fail on this basis too.

In the result the application is dismissed with costs.

Mabuye Zvarevashe, applicant's legal practitioners
Hangazha & Partners, first respondent's legal practitioners