

KUDAKWASHE BLESSING SHAMUYARIRA
versus
DAVISON MUNODAWAFA GOREDEMA
and
SPIWE EMMA MONGO
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 14 & 20 March 2017 and 31 May 2017

Opposed application

Adv Chinwadzimba, for the applicant
DC Kufaruwenga, for the second respondent

CHIWESHE JP: This is an application for summary judgment in terms of Rule 64 of the High Court Rules, 1971.

The background facts to this application are as follows. In December 2013 the first respondent sold stand 4379 Norton Township of Knowe to the applicant for the sum of \$20 000.00. The sale was made in terms of a written agreement between the parties. When the first respondent attempted to resile out of the agreement, the applicant approached this court under case number HC 4412/14. By judgment of Makoni J, given under reference HH 783/15 on 30 September 2015, the parties' agreement of sale was recognised as valid and the first respondent was ordered to sign all necessary documents to pass transfer to the applicant, failing which, the Sheriff was authorised to sign all such documents on behalf of the first respondent.

Contrary to his obligations in terms of that court order, the first respondent then entered into another agreement of sale with the second respondent in terms of which the first respondent sold the same property to the second respondent for the sum of \$34 000.00. This agreement was entered into on 7 October 2015. The first respondent then effected transfer to the second respondent who now holds title deeds to the property.

Aggrieved by this turn of events the applicant issued summons under case HC 263/16 wherein he seeks an order setting aside the deed of transfer made in favour of the second respondent and the immediate transfer of the property to the applicant. Summons was issued on 14 Mach 2016. The second respondent entered appearance to defend and filed her plea. Being of the belief that second respondent had no bona fide defence to his claim and that appearance to defend and the plea had been entered only for purposes of delay, the applicant launched the present application for summary judgment to be entered against the second respondent. The application is opposed.

Summary judgment may be granted when the plaintiff proves that it has a clear and unassailable case against the defendant and that the defence raised, if any, is without substance in law and in fact. See *Pitchford Investments Pvt Ltd v Muzariri* 2005 (1) ZLR (H). On the other hand in *Jena v Nechipate* 1986 (1) ZLR 29 (S) it was stated thus:

“All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that “there is a mere possibility of his success”, “he has a plausible case”, “there is a triable issue”, or “there is a reasonable possibility that an injustice may be done if summary judgment is granted”

A look at the defences raised by the second respondent clearly shows that there are triable issues and for that reason an injustice is likely to arise if the matter were summarily disposed of. Chief among these defences is the fact that the second respondent is an innocent purchaser. He had no knowledge of the earlier agreement of sale between the first respondent and the applicant. Nor was he aware that the property had been the subject of litigation before Makoni J and that the court had ordered that the property be transferred to the applicant.

The facts of this matter puts this case into that category of cases often referred to as “double sales”, where A sells the same property to B and then to C. The law regarding double sales has been aptly captured by the second respondent in its heads of arguments. Para 3.1 thereof reads:

“Eminent authors Professor McKerron and Professor Burchell laid down the law in double sales as follows:

- “Where A sells a piece of land to B and then to C,..... the rights of the parties are as follows:
- (1)
 - (2) Where transfer has been passed to C, C acquires an indefeasible right, if he had no knowledge, either at the time of the sale or at the time he took transfer, of the prior sale to B, and B’s only remedy is an action for damages

against A. If however, C had knowledge at either of these dates, B, in the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event C's only remedy is an action for damages against A."

It is apparent that the second respondent, whose position as an innocent purchaser is thus protected, has raised a *bona fide* defence which if proved would entitle her to succeed at the trial.

In any event the second respondent would have an arguable case as the balance of equities appear to lie in her favour – she has taken transfer and she is in occupation. No caveat had been registered against the property. She bought the property for \$34 000.00 compared to the \$20 000.00 paid by the applicant.

In its heads of argument, the applicant concedes that the law with regards the position of innocent third parties is as enunciated by the second respondent. Having made that concession the plaintiff argues that the present case should be distinguished from this general rule because *in casu* there was, at the time of the second sale, a judgment of this court precluding the first respondent from alienating the property otherwise than by transfer to the plaintiff. The property was thus *res litigiosa* and as a result the agreement of sale of the *res litigiosa* between the litigating party and a third party is valid *inter partes* and the third purchaser is bound by the prior judgment in the action and the successful party can recover it from the new possessor by execution and without fresh proceedings. See *Supa Plant Investments Pvt Ltd v Chidavaenzi* 2009 (2) ZLR 132 and *Gardner v Dampier Development and Ors* 2010 ZLR 306 (H).

Based on that legal principle therefore, argues the plaintiff, the second respondent, notwithstanding her position as an innocent third party, is bound by Makoni J's judgment. The applicant can thus recover the property from the second respondent by operation of law.

The second respondent has not advanced any meaningful argument on the issue of *res litigiosa* other than to assert in general terms and from the bar that this is a complex legal concept which cannot be determined summarily. The applicant's argument is simple and straight forward. It is to the effect that ordinarily, as an innocent purchaser, the second respondent's position would have been impregnable but for the fact that the property is, in this particular case, deemed to be *res litigiosa* and therefore capable of vindication by the first purchaser, the applicant, by operation of law. That is the crux of the applicant's case to which no meaningful response has been advanced by the second respondent. Further, in such

cases it matters not whether the registrar has placed a caveat on the property (as he is required to do) for it has been held in *Mwayipaida Family Trust v Madoroba and ors* SC 22/04 that the plaintiff cannot be penalised for the registrar's neglect of duty.

Is the applicant's case unanswerable? Whilst the applicant appears to have a strong case, I am unable to grant the relief sought because in the main the defendant does have a bona fide defence. The applicant is an innocent purchaser – ordinarily that alone would entitle her to succeed if so proved in the trial. The applicant agrees with that position save that the “status of the property”, *res litigiosa*, changes this equation in its favour. The cases cited *supra* would support the applicant's contention. However, I do not read the authorities as laying down a hard and fast rule as to how cases involving property *res litigiosa* must always be dealt with. Rather considerations of public policy and the balance of convenience do come to play and one can never predict with certainty how a particular set of facts will be determined. Thus in *BP Southern Africa Pty Ltd v Desden Properties Pvt Ltd and anor* it was stated as follows:-

“In my view, the policy of the law to uphold the sanctity of contracts 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 claims for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with Professor Mckerron, that save in special circumstances, the first purchaser should be preferred.”

In my view therefore the defendant has an arguable case. It would not be in the interests of justice to shut her up at this nascent stage of the case. Summary judgment by its nature is a drastic remedy which should not be granted save in cases where the defendant is clearly without a *bona fide* defence and for that reason engages in dilatory tactics. That does not seem to be the case here. No basis has been established to deny the second respondent the right to be heard.

For these reasons the application must be dismissed with costs. It is so dismissed.

Mushangwe & Company, applicant's legal practitioners
Dzimba Jaravaza & Associates, 2nd respondent's legal practitioners