

RUMBIDZAI HAMANDISHE
versus
FREDERICK MANYANGARIRWA N. O.
and
MR. KUNAKA
and
MRS KUNAKA
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 6 June 2017 and 8 March 2018

Opposed application

F. Siyakurima, for applicant
T. Ngova, for 1st respondent
J. Mutonono, for 2nd and 3rd respondents

CHITAKUNYE J: This is a court application in which the applicant sought an order that:

1. The sale of a certain piece of land situate in the district of Salisbury called Stand 5603 Budiro Township of stand 3068 Budiro Township (herein after referred to as the property) from Estate late Maruta Jawona to 2nd and 3rd Respondents be set aside.
2. Applicant be and is hereby given 60 days to pay to 1st Respondent payment in the sum of US40 000.00 for stand 5603 Budiro Township of stand 3068 Budiro Township referred to in paragraph 1 above failing which the property shall be sold on the open market for its open market value.
3. 1st respondent pays costs of suit de *bonis propriis*.

The basic facts leading to this application were that:

The applicant is one of two surviving spouses of the late Maruta Jawona who died intestate at Harare on 17 February 2013.

The first respondent was appointed Executor Dative of the estate late Maruta Jawona on 13 October 2013.

The late Maruta Jawona owned a number of properties. The applicant lodged a claim for a 50% share in one of such properties namely Stand 5603 Budiro Township of Stand 3068 Budiro Township (hereinafter referred to as the property) with the first respondent. The first respondent accepted applicant's claim as lodged in terms of s 47 of the Administration of Estates Act [*Chapter 6:01*].

During the administration of the estate it was agreed that the property be sold in order to raise funds to meet some of the estate's liabilities. The first respondent duly obtained the Master's consent to sell the property.

The applicant offered to buy out the estate's other 50% share in the property and the offer was duly accepted. In terms of a valuation report dated 13 October 2013, the property was valued at \$160 000.00. The applicant was therefore required to pay half that value being a sum of \$80 000.00.

An agreement of sale was duly executed between the first respondent as executor dative and the applicant on 18 February 2014. In terms of the agreement of sale the applicant was required to raise a bank guarantee for payment of the purchase price within 30 days of the date of signature of the agreement. She, however, failed to do so despite an extension of time within which to raise the purchase price. She was also given the option to pay in monthly instalments but she still failed to raise the instalments. The applicant was thus in breach of the agreement by failing to pay the purchase price. As a consequence on 11 July 2014, the first respondent sent a letter to the applicant requiring her to rectify the breach within seven days in terms of clause 6 of the agreement of sale failing which the property would be sold to the general public.

When the applicant failed to rectify the breach, on 15 September 2014 the first respondent, through his legal practitioners, advised the applicant's legal practitioners that due to applicant's breach the agreement of sale was terminated and that the property would be sold to the general public.

After the termination of the agreement of sale to the applicant, the property was subsequently sold to the second and third respondents on about the 10th June 2015 for the sum of \$80 000.00.

The sale was apparently done without the involvement of the applicant though she was aware that upon her failure to pay the purchase price the property would be offered for sale to the general public.

When the applicant learnt that the property had been sold she, through her legal practitioners, requested for her 50% share with no success. She was not favoured with any response in that regard; she was not even told the price at which the property had been sold at. It was in this scenario that when she eventually got to know that the property had been sold for \$80 000.00 she was livid as, to her knowledge, the property had been valued at \$160 000.00 on 25 October 2013 when it was initially offered to her and she could not understand how a property valued at such a value could be sold for \$80 000.00 in June 2015.

The applicant thus regarded the price at which the property was sold at as grossly unfair and unjust to the estate and to herself as a holder of a 50% claim in the property. It is as a result of the dissatisfaction with the selling price that applicant launched this application. She deemed that the sale was fraudulent and so it must be set aside.

In this regard the reasons she outlined for seeking the setting aside of the sale included that:-

- a. The immovable property was sold for half the amount it had been offered to her;
- b. she was not given an opportunity to exercise her right of first refusal at the reduced price of US\$ 80 000.00. In essence she was only obliged to raise US\$40 000.00 because her claim for the other 50% share had already been accepted by 1st respondent.
- c. 1st respondent must have extended the right of 1st refusal to her on the reduced amount of US\$ 40 000.00 and he did not do so.
- d. 1st respondent without just cause acted unlawfully to her prejudice by completely disregarding her pre-emptive right and sold the immovable property in question to 2nd and 3rd respondents for an unreasonably low price.”

She thus concluded that the first respondent abdicated his fiduciary duty towards the estate and herself in breach of his duties and responsibilities as executor. Consequently the sale must be set aside.

The first respondent on the other hand contended that the sale to the second and third respondents was done above board and not fraudulent. He contended that when the property was initially offered to the applicant in February 2014 it had been valued at US\$ 160 000.00 as per valuation report dated 25 October 2013 tendered. However when the property was sold to the second and third respondents its value had gone down due to dilapidation. The first respondent further contended that the applicant had retained occupation of the property and had run down the property such that when a second valuation was done on 26 March 2015 it was valued at US\$ 75 000.00 as the open market price with a forced sale price of US\$50 000.00. He also attached the valuation report.

The first respondent maintained that the market forces coupled with the dilapidated state of the building led to a lower value being realised. He thus contended that in the face of the second valuation, the price of US\$ 80 000.00 was a fair market price for the property at the time it was sold to the second and third respondents.

He also alluded to the fact that the property has in fact already been transferred to the second and third respondents.

Regarding the issue of right of first refusal the first respondent contended that he never granted applicant any right of first refusal.

The second and third respondents on their part denied any wrong doing. They denied being part to any fraudulent activity *vis- a- vis* the sale of the property in question.

The second respondent contended that they are innocent purchasers who bought the property for its fair value at the time of purchase. He alluded to the fact that he has since taken transfer.

As regards the manner of purchase the second respondent stated that the property was advertised in a local newspaper as a result of which he responded and bought the property. There was therefore no collusion between the purchasers and the first respondent to defraud or prejudice the applicant as the purchasers were not even aware of the alleged prior agreement of sale between the first respondent and the applicant.

He maintained that in the circumstances the balance of convenience favoured that the purchasers retain the property and if applicant has any financial claim she can always lay that against the estate.

The fourth respondent's response to the application was to the effect that the applicant was given the first option to buy the property and upon her failure to do so the property was sold to the second and third respondents and there was nothing amiss in that.

From the papers filed of record and submissions made the main issues may be stated as follows:

1. Whether the applicant had a right of first refusal
2. Whether the first respondent's sale of the property to second and third respondent was fraudulent and
3. Whether the sale to second and third respondents should be cancelled.

The issues will be dealt with in seriatim.

1. Whether the applicant had a right of first refusal.

The applicant averred that she had a right of first refusal. The applicant's argument is premised on the failure by the first respondent to offer her another opportunity to buy the property at the reduced price of US\$80 00.00.

That right is apparently derived from the fact that the first respondent had accepted her claim of a 50% share in the property in question and had also accepted her offer to buy the estate's other half share in the property. It is that option given to her when she made her offer that she apparently viewed as a right of first refusal. She thus opined that when the price was reduced she ought to have been given another opportunity to buy the property at the reduced price of \$ 80 000.00 as this would have required her to raise only \$40 000.00.

It is pertinent to appreciate a right of pre-emption or first refusal and how it arises.

In *Business Law in Zimbabwe 2nd Ed*, Juta & Co. by R H Christie at p 146 the learned author stated that:-

“A right of pre-emption or first refusal differs from an option by giving the holder the right to buy in priority to other prospective buyers if and when the seller decides to sell.”

In *Central African Processed Exports (Pvt) Ltd & Ors v Macdonald & Ors* 2002 (1) ZLR 399 (S) at 403 C – H, MALABA JA (as he then was) quoted with approval NICHOLAS JA in *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 932 B – G, where the learned judge stated that:

“A right of first refusal is well known in our law. In the context of sale, it is usually called a right of pre-emption. The grantor of such a right cannot be compelled to sell the property concerned. But if he does sell, he is obliged to give the grantee the preference of purchasing and consequently he is prevented from selling to a third person without giving the first refusal----- . So, a right of pre-emption involves a negative contract not to sell the property to a third party without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies -----.”

See also *Nerger Properties (Pvt) Ltd v R. Chitrin & Ors (Pvt) Ltd* 2006 (2) ZLR 287 (S).

In *Eastview Gardens Residents Association v Zimbabwe Reinsurance Corporation (Ltd) & Ors* 2002 (2) ZLR 543 (S) at 548 G – H, MALABA JA (as he then was) explained a right of first refusal in these terms:

“A right of first refusal or pre-emption is created when, in an agreement, one party(the grantor) undertakes that when he decides to sell his property he will give the other party(the grantee) the opportunity of refusing or buying of the property at a price equal to that offered by another person. The grantor is then said to be under an obligation to do, at the time he sells the property, what he voluntarily bound himself to do, that is, offer the property to the grantee

first at a price equal to that offered by a third party or which he is prepared to accept from any other would be buyer. The grantee is said to have acquired the correlative right to have the property offered to him first so that he can match the price offered by the third party or refuse the offer.”

After citing a number of case authorities on the subject the learned Judge proceeded to state at p 549B-C that:-

“It is clear from all these decided cases that a right of pre-emption can only be created by contract or agreement between the grantor and the grantee. Where breach of the right is alleged as a cause of action and its existence is denied, the onus is on the plaintiff to show that there was an agreement between the parties in terms of which the defendant undertook to offer to him the property at a price equal to that offered by another.”

It is axiomatic that for a right of first refusal to exist there must be a contract or agreement between the grantor and the grantee. In *casu*, it is common cause that the agreement of sale between the applicant and the first respondent did not contain any right of first refusal. In any case that agreement was duly terminated and had no residue right of first refusal. As at the time the property was sold to the second and third respondents there was no subsisting contract or agreement between applicant and the first respondent, let alone one from which a right of first refusal could be deduced.

It may in fact be noted that in most of her founding affidavit the applicant did not allude to any agreement on a right of first refusal. For instance, in the founding affidavit after narrating how her claim for a 50% share was accepted and the fact that she had then offered to buy the property which agreement of sale fell through as she could not raise the purchase price, the applicant proceeded to explain her misgivings about how that property had been sold to the second and third respondents at half the price the property had been offered to her. It is apparent from the affidavit that her claim for a right of first refusal is based on her assertion that when first respondent decided to sell at a lower price he ought to have made her that offer first. This claim is not based on an agreement of first refusal. Nowhere in paragraphs 1 to 19 of her founding affidavit did applicant allude to any agreement she entered into with the first respondent granting her a right of first refusal.

It is only in paragraph 20 that the mention of a right of first refusal is made for the first time wherein she states, *inter alia*, that:

“I was not given an opportunity to exercise my right of first refusal at the reduced price of US\$ 80 000.00. In essence I was only obliged to raise US\$ 40 000.00 because my claim for the other fifty percent share had already been accepted by 1st respondent.

The first respondent must have extended the right of first refusal to me on the reduced amount of US\$ 40 000.00. He did not do so.

The first respondent, without just cause acted unlawfully to my prejudice by completely disregarding my pre-emptive right and sold the immovable property in question to the second and third respondents for an unreasonably low price.”

The applicant did not state how that right of first refusal referred to in paragraph 20 arose.

In her answering affidavit the applicant did not refute the first respondent’s contention that there was in fact no agreement granting her a right of first refusal. The agreement of sale which she had entered into did not offer her a right of first refusal should the property be offered to anyone else at a lower price. It is clear from the answering affidavit that her grievance from which she believed that she ought to have been given a right of first refusal pertained to the price at which the property was sold. It had nothing to do with a standing contract or agreement between the parties granting her such right. The only agreement that the parties had entered into had been lawfully terminated and, as already alluded to above; it had no clause on right of first refusal.

The plaintiff also sought to argue that the right of pre-emption or first refusal arose from having been allowed to buy the estates’ other 50% share in the property in question. I am of the firm view that the acceptance of a creditors’ claim under the Administration of Estates Act [*Chapter 6:01*] does not translate to a grant of a right of first refusal.

In *casu*, the acceptance of applicant’s claim to a 50% claim to the property and the acceptance of her offer to buy the other 50% share did not create a right of first refusal. The applicant had in fact been informed that as she had failed to buy the property the property would be offered to the general public.

The applicant’s Counsel whilst raising questions of lack of probity on the part of the first respondent was still not able to point at any agreement wherein applicant was granted a right of first refusal. He in fact conceded that there was no such written or even unwritten agreement of first refusal. Counsel, however, argued that such agreement is implied from the fact that applicant as one of the surviving spouses had her 50% claim accepted by the first respondent, so she ought to have been given the opportunity to buy the property at the reduced price. Her initial failure to purchase the property was due to its price hence when its price was now reduced to half its original price applicant should have been offered the property. That, in my view, would still not be an agreement on a right of first refusal.

Applicant had simply been given an opportunity to buy the property as she had offered to do so at the price that had been set by the first valuation.

Further, the question of lack of probity raised over the first respondent's conduct was disputed. The first respondent clearly contended that there was never any agreement granting applicant a right of first refusal. In any case when the agreement to sale the property to applicant was cancelled the applicant was advised that the property would now be offered to the general public and so the applicant was all along aware that the property was being offered for sale to third parties.

I am of the firm view that the applicant lamentably failed to establish that there was any agreement granting her a right of first refusal.

2. Whether or not the first respondent fraudulently sold the property to the second and third respondents

The applicant's allegations in this regard were to the effect that the whole transaction whereby the first respondent sold the property at half its original value, without giving her the right of first refusal and without informing her of the reduced value, smacked of dishonesty of the highest order and was outright fraudulent. She also alleged that the second valuation report was not properly done and that the first respondent was not a qualified estate agent for him to have sold the property. The tone of the applicant's stance showed clearly her displeasure at the manner in which the first respondent handled the sale to the second and third respondents. It was from that displeasure that she opined that the transaction was fraudulent.

For instance, in paragraph 17 of her answering affidavit, applicant made this clear when she stated that:-

“2nd and 3rd Respondents are not putting this honourable Court into their confidence. They did not state who actually advertised this property and where did they find the advert. It is not in dispute that the property was being sold and that the 4th respondent's consent had been obtained. What is fraudulent is the manner and the price at which the property was sold to 2nd and 3rd Respondents. It was sold for a song, which is prejudicial to the estate and to myself. The property cannot have deteriorated from its value of US\$ 160 000.00 to US\$ 80 000.00 within such a short period of time.”

The 'short space of time' referred to is the period of October 2013 when the 1st valuation was done and March 2015 when the second valuation was done; a period of at least 16 months.

It is however pertinent to note that applicant did not clearly outline the role, if any, played by the second and third respondents other than that they bought the property at a low price.

The first respondent on his part denied acting in any fraudulent manner. Regarding what led to the second valuation and reduction in value he stated in paragraph 11.3 of his opposing affidavit that:

“The reasons for the reduction in purchase price were that during the material time relevant hereto, and whilst Applicant was in occupation of the building, the same was run down by her by failing to maintain it from the time of the initial valuation in the following manner:

11.3.1 The ceiling had fallen down in some parts of the shop.

11.3.2. The toilets were no longer functional in that waste pipes had broken down.

11.3.3 The entrance doors are now broken and safety locks removed and or burglarized.

11.3.4 The gate leading to the backyard was also broken.

11.3.5. Shop counters, shop trolleys and baskets were also broken.

11.3.6. In the Butchery, the Coldroom was no longer functional together with the Scale and other weighing appliances.”

These were some of the aspects that he said necessitated a second valuation as prospective buyers were complaining about the price he was asking for. The second valuation valued the property at US\$ 75 000.00 as market price and US\$50 000.00 as forced sale price.

Though the applicant in her answer to the above denied that she had run down the property, it was not disputed that she had remained in occupation and use of the property during the period in question. In the circumstances, whatever depreciation in value to the property would be blamed on her.

What emerged from the above is a dispute of fact on the state of the property at the time of the sale. Though applicant seemed to challenge the second valuation as not having been certified and so should not be considered, I did not hear her to deny that the evaluator, Stephen Taurayi, is a registered evaluator with the Estates Council of Zimbabwe and that he is on the Master’s list of valuers. In fact applicant did not expressly allege any collusion between applicant and the evaluator. No specific allegations of malpractice were made against the evaluator serve for the lack of certification alleged.

It is my view that if applicant intended to seriously challenge the value of the property as at the time of the sale to the second and third respondents she could easily have sought her

own evaluator to value the property as the onus was on her to show that the property had not lost value to that extent. This she did not do.

As regards allegations of fraudulent intent against the second and third respondents, the second respondent categorically denied any collusion or fraudulent intent when in paragraph 8 of his opposing affidavit he stated that:

“I specifically deny that I fraudulently purchased the property in question. The property was advertised in a local daily newspaper and I responded to same. I also made sure that the requisite consent from 4th respondent was availed. Apart from paying the purchase price, I paid all statutory obligations in this matter. I did not at any time collude with the 1st respondent or with anyone for that matter in this transaction. Applicant should thus not make insinuations of fraud against me.”

The onus was on the applicant to prove that the respondents were guilty of fraudulent intent, in that they were aware of her claim at the time of purchase of the property and intended to defeat her rights therein. See *Violet Tewe v Anderson Hanoki and Ors* SC 55/03, *Muzanenhano & Anor v Katanga & Ors* 1991(1) ZLR 182 and *Chenga v Chikadaya & Ors* SC 7/13.

In this case, the applicant did not establish that the second and third respondents were aware of her interests in the property and that despite such awareness colluded with the first respondent to act fraudulently to her detriment.

It was common cause that the second and third respondents were not privy to the earlier agreement of sale between applicant and the first respondent. They were also not aware that applicant had lodged a claim that had been accepted. In a nutshell, the second and third respondents were not privy to the goings on between applicant and the first respondent. It is in this light that they contended that they were innocent purchasers who bought the property for its fair value. They, in fact, bought it at a price slightly above what had been given as its open market price. It was thus upon the applicant to show that they were not innocent purchasers but that they had colluded with first respondent to prejudice her. This she could not do from the affidavits filed of record.

The mere allegation that the property was sold for an unreasonably low price was not adequate on its own to prove collusion or fraudulent intent. The applicant did not provide evidence of what could have been a reasonable price at the time of the sale to the respondents. This is an aspect that required her to place before court evidence of what would have been a reasonable price at the time of the sale to the second and third respondents and not just at the time she offered to buy the property which was a time lapse of over 16 months.

It was upon the applicant to rebut the contention that the property had in fact dilapidated. This, in my view, could only be done by placing credible evidence before court of a contrary value as at the time the property was sold. As the applicant was content with her founding affidavit and answering affidavit, these were insufficient for purposes of proving her case in view of the contentious factual issues.

I thus conclude that the second and third respondents were innocent purchasers for value of the property in question.

In the circumstances I am of the view that applicant has failed to prove fraudulent intent on the part of the respondents.

3. Whether the sale to the second and third respondents should be cancelled.

In the light of my findings regarding issues (1) and (2) above, it corollary follows that there is no valid basis for the cancellation of the sale of the property to the second and third respondents. The applicant lamentably failed to prove that she had a right of pre-emption or first refusal. She also failed to prove that the respondents had fraudulently connived to defeat her rights in the property.

Accordingly, the second and third respondents being innocent purchasers should retain the property. If the applicant has any complaint pertaining to her claim that was accepted by the first respondent, she should look to the estates late Maruta Jawona for the realisation of her claim as the first respondent administers the estate.

Costs

The applicant asked for costs *de bonis propriis* against the first respondent in the event of the application succeeding whilst the first respondent asked for costs on the higher scale in the event that the application is dismissed. The second and third respondents asked for costs on the general scale. Upon considering the arguments on costs and taking into account the nature of the dispute I am of the view that though applicant has not been successful, the justice of the case would better be served by an order that each party should bear their own costs,

Accordingly, the application is hereby dismissed with each party to bear their own costs.

Sawyer and Mkushi, applicant's legal practitioners
M S Musemburi Legal Practice, 1st respondent's legal practitioners
Chadyiwa & Associates, 2nd and 3rd respondents' legal practitioners