

DISTRIBUTABLE

PAUL ZISENGWE
versus
LUKA MOYANA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 6 September 2018 & 23 January 2019

Opposed Application

K. Kachambwa, for applicant

Respondent in Person

MUSAKWA J: In this application the applicant is seeking an order nullifying the agreement of sale in respect of stand number 2485 Glen Lorne, Folyjon, that the respondent be ordered to pay \$112 500.00 plus costs of suit.

The background is that on 1st November 2006 the applicant entered into an agreement of sale with the respondent in respect of stand number 2485 Glen Lorne, Folyjon. The applicant paid ZW\$28 000 000.00 upon signing of the agreement. According to the applicant he was of the impression that the respondent held rights which would be ceded by the City of Harare in terms of clause 3 of the agreement. In pursuit of the cession the applicant's legal practitioners addressed a letter to the City of Harare's Director of Housing and Community Services on 31 March 2016. In that letter they sought cession. They also sought to know whether the respondent held rights to the property. A reply dated 11th May 2016 by the Acting Director of Housing and Community Services was to the effect that their records did not reflect that records did not disclose that the respondent had rights to the property. The letter further suggested that confirmation be sought with the Surveyor General whether the stand existed on the general plan.

Because he has never been able to have the property registered in his name, the applicant prays that the agreement be declared null and void. According to the applicant advice was sought from the Reserve Bank of Harare regarding the rate of exchange applicable in 2006. The rate of exchange was put at US\$1 to ZWD250. This translates to US\$112 500.00. The applicant further contends that the respondent has been unjustly enriched to that extent.

In his opposing affidavit the respondent avers that he purchased six residential stands from Sally Mugabe Heights Housing Co-operative. Land development was undertaken by

DISTRIBUTABLE

three successive developers. As a result the land layout was altered. This means the numbering was also altered. For example, the third developer introduced a three digit numbering as opposed to four. What did not change was the database.

It was also a requirement that those who purchased land from Co-operatives should be vetted by the local authority. Since the respondent already owned another stand he was disqualified and directed to cede the stands to other people. In the transaction relating to the present matter, the applicant was represented by his brother. Payments were made to the Co-operative. The developer also wrote to the applicant. Since the stand in question is available the issue is between the applicant and the developer.

The respondent also trips in his opposition. In one instance he claims that he holds rights in the stand. Then in another instance he claims that he no longer holds rights in the stand as he signed off everything. As such, he claims that delivery of the stand should be sought from the Co-operative and the developer.

The respondent also raised three points *in limine*. The first point is that the applicant should have joined other parties who have something to do with the stand. These are City of Harare, Arosume, Sally Mugabe Housing Co-operative, Fingold Real Estate and Israel Zisengwe.

On the second point, the respondent claims that there are material disputes of fact. There is no elaboration on the issue.

The third point *in limine* is that the present application should not be entertained until the applicant pays costs in HC 14 388/12. Apparently the applicant instituted proceedings which were subsequently withdrawn. The respondent takes issue with the non-payment of the attendant costs.

In his submissions Mr *Kachambwa* attacked the points *in limine* as being ill-taken. He submitted that the property that was described in the agreement does not exist. On that basis the sale is null and void. On the issue of non-joinder of other parties, he submitted that joinder would only be relevant if a party has direct and substantial interest. In light of the fact that this is simply an agreement involving a seller and a purchaser which was not fulfilled, the relief sought does not require anyone else to comply with it. The applicant is not seeking transfer of the property.

On the issue of material dispute, Mr *Kachambwa* submitted that such dispute must be real. The dispute between the parties relate to a non-existent property as confirmed by the

DISTRIBUTABLE

City of Harare. Whilst the property in dispute is supposed to be situated in Folyjohn the respondent is offering the applicant an alternative stand in Carrick Creagh.

Concerning the issue of costs that the applicant is said not to have paid, Mr *Kachambwa* submitted that the issue is well settled. He cited the case of *Sibusisiwe Bango v A. H. S. Madlela* HB-136-15.

Mr *Kachambwa* further submitted that the requirements for the relief sought are met as the applicant's interest is based on him being a purchaser. The cause of action arises from an agreement of sale. An essential requirement in an agreement of sale is identification of the subject matter of the sale. Since the respondent does not dispute these averments the sale is null and void. He prayed that the declaratory order be granted together with consequential relief.

The respondent insisted that the agent who represented the applicant should be joined. Failing that, it was his submission that the court would be hamstrung in making a proper decision. This is because, as further submitted by the respondent, the urgent is in a better position to explain the status of the stand. On this aspect, the respondent is way off the mark. He forgets that it is for him to proffer a valid defence. He made similar submissions about the developer and Sally Mugabe Housing having acknowledged the existence of the property. Again, this counts for nothing. If he wanted their evidence he should have secured their supporting affidavits.

On costs, the respondent submitted that the applicant has in the past initiated litigation and subsequently withdrawn the cases. No costs have been paid in those matters. He then submitted that in order for those cases to be satisfactorily concluded other parties must be joined. This submission has nothing to do with costs.

The respondent insisted that the dispute cannot be resolved on the papers. He was of the conviction that if evidence is led it would paint a totally different picture.

Quite clearly the respondent is a victim of being a litigant and his own lawyer. His submissions were largely pedestrian on account of being a self-actor. As pointed out by TAKUVA J in *Sibusisiwe Bango v A. H. S. Madlela supra* the claim by the respondent that the applicant should first tender costs in the withdrawn matters applies to actions and not court applications. There is nothing to prevent the respondent from preparing his bill of costs, having it taxed and then enforcing it against the applicant.

DISTRIBUTABLE

The issue of non-joinder of other would be interested parties is a red herring. As submitted by Mr *Kachambwa*, the applicant is not seeking transfer or cession of rights. The legal dispute is really between the present parties.

The nub of the matter is that the parties entered into an agreement of sale in respect of a property described as ‘certain piece of land situate in the District of Salisbury called stand 2485 Glen Lorne Folyjon measuring 8270 square metres.’ The City of Harare could not confirm the existence of such a stand. For some inexplicable reason the respondent countered by attaching to his opposing papers a note headed Carrick Creagh Development Borrowdale East/ Sally Mugabe Development in which is stated that the final allocation to the applicant is stand 238. This is a radical departure from the agreement. The respondent did not avail a diagram which depicts the stand and its location. I note though that that there is reference to some diagram that is not before the court. In his answering affidavit the applicant avers that the diagram in question relates to stand 2485 Carrick Creagh Township measuring 8 720 square metres. In the absence of the particular diagram depicting stand 2485 Glen Lorne Folyjon measuring 8270 square metres, the inescapable conclusion is that the stand does not exist.

It is difficult to ascertain whether stand number 2485 Glen Lorne Folyjon existed at the time the parties concluded the contract. As of the present moment there is no proof of the existence of the stand. It follows that the applicant is entitled to the declaratory order and consequential relief.

Accordingly, it is ordered as follows-

1. The sale agreement that was concluded between the applicant and the respondent in respect of stand 2485 Glen Lorne Folyjon on 1st November 2006, is declared null and void.
2. The respondent shall pay the applicant \$112 500.00.
3. The respondent shall pay the applicant’s costs.

Kanokanga & Partners, applicant’s legal practitioners