

NELSON NKOSANA MWERENGA
versus
CITY OF HARARE DAPARTMENT OF HOUSING REGISTRAR OF DEEDS NO.

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 November 2020 & 26 May 2021

Opposed application

A. T. Mutema, for the applicant
Ms K. Kaseke, for the respondent

MANGOTA J: Purchase and sale is a synalgmatic contract. It creates rights and obligations as between the parties. It allows the parties to enforce their respective rights one as against the other.

The seller's right in a contract of sale, for instance, is to insist that the purchaser pays for the thing which he sells to him. His concomitant obligation is to deliver to the purchaser the thing which he has sold to him. He cannot insist on payment when he has not delivered or is not ready to deliver the purchased thing to the purchaser.

The purchaser's right in the contract is to receive delivery of what he purchased. His concomitant obligation is to pay the purchase price for the thing which the seller sells to him. He cannot insist on delivery when he has not paid, or is not ready to tender payment of, the purchase price.

A party who has performed his own side of the contract has every right to claim specific performance from the other. A purchaser who has paid full purchase price for the property which he purchased does not waste his time. He, for instance, does not move the court to declare him the owner of what he purchased and paid for. He knows that declaring him the owner when the circumstances show otherwise will not weigh in his favour. He sues and moves the court to compel the defendant or the respondent, as the case may be, to deliver to him the thing which he purchased. His suit will, however, be subject to the qualification that he pays the purchase price in full for the property. Where he alleges and proves, on a balance of probabilities, that he discharged his obligation in an unqualified manner, his day in court will not be regarded as a wasted one. It will be a well rewarded one. He, under the

stated circumstances, will not beat about the bush. He will not, in other words, waste my precious time moving me, as the applicant *in casu* is doing, to declare him to be the owner of the thing which he purchased. He would simply allege and prove that:

- (i) he purchased the thing from the defendant, or the respondent; and
- (ii) he paid full purchase price for the thing; and
- (iii) the defendant or the respondent is refusing to deliver the thing to him- and
- (iv) he moves that the thing be delivered to him by way of a court order

He would support each of the abovementioned four allegations by way of documentary evidence. He would, for instance, attach to his application for specific performance such respective documents as (i) the contract of sale; (ii) receipts showing the payments which he made; (iii) his letter (s) of demand which went unanswered and (iv) court process which constitutes his suit against the defendant or the respondent.

The remarks which I made in the foregoing part of this judgement are apposite to this application. I heard it on 19 November, 2020. I delivered an *ex tempore* judgment in which I dismissed it with costs.

On 2 March, 2021 the registrar of this court wrote a minute to me. The minute advised that the applicant appealed my decision of 19 November, 2020 and that he required reasons for purposes of the appeal. My reasons are these:

The application falls under section 14 of the High Court Act [*Chapter 7:06*] (“the Act”). It is one for a declaratur. The declaratory order which is sought by the applicant is premised on the contract of sale which the first respondent concluded with him on 11 December, 1979. He purchased from it stand number 8763, Glenview area, Harare (“the property”) for the total sum of \$582 which was to be paid off during the period which extended from 1 January 1980 to 31 December, 2010 at a monthly instalment of \$4.65.

He alleges that he paid full purchase price for the property. He, therefore, moves me to declare him to be the owner of the property which is the subject of his application. His draft order reads in the following terms:

“IT IS ORDERED THAT:

1. The application for a declaratory order be and is hereby granted.
2. The applicant be and is hereby declared the owner of stand number 8763, Glenview, Harare.
3. It is hereby declared that there is no encroachment of any structure build (sic) on stand number 8763 by the applicant into any other stand as such construction is

- within the boundaries as indicated by both the cite (sic) plan and the building plan and was consequently approved by the first respondent.
4. The first respondent be and is hereby ordered to tender and facilitate transfer of rights, title and interest in stand number 8763, Glenview, Harare within 7 days of this order.
 5. Failing to comply with clause 4 of this order, the sheriff be and is hereby authorised to sign all necessary document (sic) for purposes of lodging title deed application with the second respondent.
 6. The second respondent be and is hereby ordered to accept documents lodged with him in compliance with either part 4 or 5 of this order for purposes of transfer of rights, title and interests (sic) in stand number 8763, Glenview, Harare.”

The first respondent opposes the application. It raises three *in limine* matters the first two of which are, in my considered view, of an inconsequential nature and do not, therefore, deserve my full attention. The last preliminary matter, which has some merit, will be considered in the body of this judgment. It states, on the merits, that the applicant encroached on to the land which it did not sell to him. It denies that the dimensions of the site plan of the applicant tallied with those of the durawall which he was constructing on the property. It insists that he should remain within the confines of the dimensions of the site plan and the surveyor-general’s map. It denies that the applicant paid full purchase price for the property. It alleges that he made an effort to use the court to vary the terms of its contract with him. It moves me to dismiss the application with punitive costs.

The first respondent’s preliminary point which is to the effect that the application is fatally defective on account of the fact that it was filed at this court and not at the court of the magistrate for the district of Salisbury cannot hold. It cannot hold because, whilst there was, as at the time of the conclusion of the contract, the court of the magistrate for the district of Salisbury, that court no longer exists in independent Zimbabwe. There is sufficient knowledge for the stated proposition judicial notice of which is also taken of the same.

The applicant could not, on the strength of the reasoning in *Macfoy v United Africa Ltd* [1961] ALL ER 1169 approach a non-existent court of Salisbury. He was, therefore, within his rights to file his application with this court upon which the Constitution of Zimbabwe confers inherent jurisdiction which no parties’ submission clause can oust. Clause 22 of the agreement of the applicant and the first respondent is, therefore, of no moment and the preliminary matter which is premised upon it is without merit.

Whether or not the applicant had to, or did actually, comply with the requirements which are set out in clause 14 of the parties’ contract remains an issue for debate. The clause

allows the applicant who is the purchaser *in casu* to apply to the first respondent which is the seller to transfer the stand/property to him.

The success, or otherwise, of his application does, in terms of the mentioned clause, depend on the applicant satisfying the first respondent on the fact that:

- “i) he has constructed a house on the property within three years of the existence of his contract with it – and
- ii) he has paid full purchase price for the property which price includes interest and such charges as are referred to in clause 4 of the contract.” (emphasis is added).

Because the first respondent raised the above mentioned *in limine* matter in its opposing papers, it was within the applicant’s right to deal with the issue of his compliance with clause 14 of the contract in his answering affidavit. He, in my considered opinion, had no choice but to do justice to his own side of the case. He had to do so, notwithstanding the fact that he had not substantively referred to the clause in his founding affidavit. The first respondent’s preliminary matter which touches upon the applicant’s compliance with clause 14 of the parties’ contract is without merit.

The branch of the law under which the application was filed has already been identified. Section 14 of the Act upon which the application rests enjoins me, at my pleasure, to inquire into and determine the applicant’s existing, future or contingent right or obligation. For me to do so, however, the applicant must allege and show, on a balance of probabilities, that he has a direct and substantial interest in the matter which is the subject of my inquiry.

The full text of the section of the Act which relates to the application is relevant. The text places the application which is before me into context. The section, therefore, reads as follows:

“The High Court may in its discretion at the instance of any interested person, inquire into and determine any existing, future, contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination”. (emphasis added)

The above-cited section of the Act is divided into two very important segments. The first relates to my power as well as discretion to inquire into and determine the applicant’s right or obligation. The second relates to the applicant’s inability to claim any relief which is of a consequential nature following the inquiry and/or determination which may have been made in his favour by the court. The emphasis which I made in the cited portion of the quoted section of the Act relates to the second segment of the same.

It is evident, from a reading of the underlined words which begin with “notwithstanding” and end with “determination” ..., that the applicant’s ability to the apply for relief which is of a consequential nature is so curtailed that it cannot be countenanced.

Section 14 of the Act, it is apparent, gives with one hand and takes with the other. It confers a discretion on me to inquire into, determine and declare the applicant’s existing, future or contingent right. It, in the same vein, takes away from the applicant the right to claim any relief which results from the declaration which I make in his favour unless and until he combines his section 14 of the Act application with some such other application as compels the first respondent to transfer title in the property to the applicant.

Because this application is a purely s 14 of the Act one which is not combined with any other application as should have been the case where the applicant wants title in the property to be transferred from the first respondent to him, paras 4, 5 and 6 of the draft order cannot stand. They cannot stand because they owe their existence to the declaratur which he is moving me to grant to him. They are of a consequential nature. The applicant cannot, therefore, claim any relief which is premised on what the law prohibits him from doing.

That the applicant purchased stand number 8763, Glenview, Harare from the first respondent requires little, if any, debate. That he paid instalments towards his purchasing of the property is a matter which is of a common cause nature as indeed is the fact that he constructed/is constructing a durawall which constitutes the perimeter of the property upon which he has built/ is building a structure which will serve/is serving as his home.

The context in which the dispute of the applicant and the first respondent must be understood is not only important. It is also pertinent. The dispute is not as the applicant asserts. It is not that he constructed a durawall on the property which he purchased from the first respondent. Nor is it that the house which he is constructing on the property is without the approval of the first respondent.

The dispute is that, in constructing the durawall which marks the boundary of the land which the first respondent sold to him, the applicant allegedly exceeded the dimensions of the land which he purchased from the first respondent. The dispute, in other words, centres on the size or area of the land which he purchased. The first respondent defines the dispute in a clear and unequivocal manner. It does so in para 8 of its opposing papers. It states, in the same, that the dimensions of the site plan do not tally with the dimensions which relate to the durawall which the applicant has constructed/is constructing on the property.

The applicant's statement on the issue which relates to the first respondent's abovementioned assertion is to the contrary. He states that the durawall which he has constructed /is constructing on the property does not, as the first respondent alleges, encroach into the site plan of the surveyor-general. He, in short, denies that there is an illegal extension of the boundary of his property into an adjacent stand. He insists that the dimensions of his property are in *sync* with the site plan of the surveyor –general.

The surveyor-general's plan which the applicant attached to the application and marked annexure C does not, on its own, assist his case at all. The applicant cannot speak to it in any meaningful way. He cannot, from its mere sight, tell the area of the property which the first respondent sold to him. Nor can the court do so from its reading of the same.

The case of the applicant is exacerbated by the fact that the size of the land which he purchased from the first respondent remains unstated in the agreement of sale which the parties concluded on 11 December, 1979. Because annexure C as read with the agreement of sale does not resolve the dispute of the parties, the first respondent's allegation which is to the effect that he encroached onto the land/property which it did not sell to him cannot be said to be a far- fetched matter. It, if anything, is a material dispute of fact which cannot be resolved on the papers. It cannot because, whilst he states that he did not encroach, the first respondent continues to assert, as it is doing, that he encroached onto land which it did not sell to him.

What is created out of the above stated set of circumstances is a situation where the word of the applicant cancels that of the first respondent and *vice versa*. That cannot be resolved on the papers which the parties have placed before the court. There is need for what is called evidence *aliunde* which would unlock the parties' dispute.

It is for the abovementioned reason , if for no other, that I am persuaded to subscribe to the view of the first respondent which is to the effect that the application contains material disputes of fact which go to the root of the case. Where such exist, as they do in *casu*, those can only be resolved through action, as opposed to application, proceedings. They are resolved through the procedure which, in other words, allows the hearing of *viva voce* evidence which clears the air for the benefit of the case of the parties.

The law which relates to an application which suffers the defect of material disputes of facts is clear. It states that, where such material disputes of fact exist, as is the case in *casu*, the court has a discretion which it must exercise in a judicious manner. It can dismiss the application as a whole: *Magurenje v Maphosa & Ors* 2005 (2) ZLR 44 (H), or, it can allow

the application to go to evidence with a view to resolving the observed dispute of facts: *Masakusa v National Foods Ltd & Anor*, 1983 (1) ZLR 232. The choice remains that of the court.

It is evident, from a reading of the foregoing, that where the applicant's attention has been, or is, drawn to the possibility, or as in *casu*, the probability of the existence of material disputes of fact, its best course of action would be to withdraw the application and adopt the course which better suits the achievement of its intention. Where it persists with its application when its attention has been drawn to the existence of material disputes of facts, the applicant cannot be heard to be crying foul when the court refuses to show any sympathy to it. It has, in such a case, no one to blame but itself for its unwholesome conduct.

Not only did the word of the applicant cancel that of the first respondent and *vice versa* on the issue which relates to the applicant's alleged encroachment on land which the first respondent says it did not sell to him. The issues of whether or not the applicant paid full purchase price for the property is a matter which also remains in the balance. He alleges that he did and it asserts to the contrary on the same matter. It states that he did not pay full purchase price for the property.

The law of procedure places the *onus* on the applicant to prove, on a balance of probabilities, that he paid full purchase price for the property. He alleged. He, however, did not prove that he paid full purchase price. He did not rebut the assertion of the first respondent which says he did not pay full purchase price for the property. He, in other words, produced no evidence which supports the allegation that he paid full purchase price for the property.

The above-stated matter creates another challenge for the applicant. It draws him into one other material dispute of fact from which he must emerge in a clear and unambiguous manner. He would simply have discharged the *onus* which the law places upon him by producing receipts of the payments which he made to the first respondent towards purchasing of the property. The fact that he did not produce even one single receipt of his alleged payment of the instalments which the first respondent and him agreed upon shows nothing other than that he did not pay full purchase price for the property.

The following text which appears in the first respondent's opposing papers as read with those of the applicant's answering affidavit brings to the fore the probabilities of the matter which relates to payment of the purchase price by him to the first respondent.

8. "It is denied that the applicant became entitled to transfer of ownership of 8763 Glen View Harare. The applicant has not furnished the court with evidence of his compliance with the requirement to make full payment to the 1st respondent. I am advised that the proper pleading regarding payments would have been a proven allegation that I did not fulfil my financial obligations. This could have been simply proven by the statement of what is outstanding and the *onus* would have shifted to me to prove otherwise." [emphasis added].
- 19 I am advised that the proper pleading regarding payments would have been a proven allegation that I did not fulfil my financial obligation. This could have been simply proven by the statement of what is outstanding and the *onus* would have shifted to me to prove otherwise" (emphasis added.)

Whatever the applicant meant to convey in stating as he did at paragraph 19 of his answering affidavit in response to what the first respondent stated in paragraph 8 of his opposing papers remains a matter for complete conjecture. It is a matter for anyone's guess. There is no obligation on the part of the first respondent to show what the applicant paid and what sum of money remains not paid to it by him. He states that he paid full purchase price for the property. The *onus*, therefore, lies upon him, and not upon the first respondent, to prove that what he asserts conforms with the reality of his case. He, in other words, cannot be allowed to put the cart before the horse and move that the cart should pull the horse. The contrary of the postulated position holds true.

The applicant's attempt to go by way of inductive, as opposed to deductive, logic is not only intriguing. It also exposes his situation in a very irredeemable manner. The defence of prescription which he raises in his answering affidavit constitutes sufficient evidence which supports the allegation that he did not pay full purchase price for the property. His statement, put in a paraphrased form, is that "I paid full purchase price....if the first respondent insists that I did not do so, the debt which relates to the unpaid sum has become extinct by operation of law...it has prescribed...."

Paragraph 21 of the answering affidavit is apposite in regard to the above-stated matter. It appears at p 30 of the record. It reads, in part, as follows;

".....the prescription act calls for a debt to be claimed within 3 years of any due date of such payments. If the last instalment was to be made by end of December 2010 then by December 2013 the claim for that debt ought to have been made. Failing which the debt, is also deemed prescribed by operation of law. None payment of outstanding debt apart from lack of proof can no longer be raised as an issue in defence of a claim to transfer title into my name." (emphasis added)

It is when the circumstances of the above-cited portion of the answering affidavit are placed into context that it becomes apparent that:

- (a) the applicant does not prove that he paid full purchase price for the property and/or
- (b) because of the stated matter, he cannot move me to compel the first respondent to transfer title in the property from it to him and /or
- (c) his best option was/is to move for a declaratur in which he had no choice but to pray for a relief which was/is for a consequential nature and cannot at law, therefore, be made.

That the applicant has a direct and substantial interest in the property which forms the subject of my inquiry requires little, if any, debate. The contract which the first respondent and him signed confers personal rights upon him from which flows his right to sue for a declaratur. However, as the first respondent correctly states, the issue is not whether or not the applicant:

- (i) purchased the property; or
- (ii) constructed a structure on the same, or
- (iii) constructed a durawall at the property.

The issue, in context, is whether or not the applicant, in constructing the durawall which demarcates the boundaries of his property from other properties or from the respondent's land encroached on to land which the first respondent did not sell to him. He alleges that he did not. He, however, produces no evidence which supports the allegation.

To the extent, therefore, that the allegation remains unrebutted, the applicant cannot claim to have a direct and substantial interest on a matter which relates to land which is not included in his contract of sale. He has no interest at all on such land. He, in short, does not have any existing, future or contingent right to the land which the respondent did not sell to him. That land falls outside his contract with the respondent. He has no relationship with it. He has neither personal nor real rights in respect of it.

It is on the strength of the above-stated matters that a declaration cannot be made in the applicant's favour. A declaratur, it is trite, cannot be made for a non-existent right or obligation. The applicant has neither a right nor an obligation to the first respondent in regard to the land which the latter refers to as an encroachment by him onto its land. There are no contractual rights and/or obligations which exist *inter partes vis-à-vis* the disputed portion of the property.

I considered all the circumstances of this case. I am satisfied that the applicant's motion for a declatur is ill-conceived. It stands on nothing. It has no merit at all. It is, in the result, dismissed with costs.

Kanokanga & Partners, respondent's legal practitioners
Stansilous & Associates, applicant's legal practitioners