

FENG DE JIN
and
LIU BIN
and
XIA QUN
and
JAN MIRZA ZAKARIAN
and
KANUKAI SUSAN MUKUZE
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 18 March & 13 May 2022 & 2 November 2023

Judgement-Trial

A Mugiya, for the plaintiff
P Ranchold, for the 1st defendant

KATIYO J: The Plaintiff petitioned this court for a prayer in the following terms:

- a) An order setting aside the registration of transfer from the Plaintiff to the first Defendant under Deed Number 3541/2017 for a certain piece of land situate in the District of Salisbury called stand number 346 Northwood Township 2 of Sumben measuring 4 047 square meters.
- b) Cancellation of Deed of Transfer Number 2144/2018 made in favor of the third Defendant for the above immovable property.
- c) The fourth Defendant be ordered and authorized to effect transfer into the name of the Plaintiff and Li Wei Yong for the above property.
- d) Costs of Suit on a Legal Practitioner Client Scale.

Brief background

The Plaintiff's claim in his pleadings in HC 7113/20 is summarised as follows:

Plaintiff acquired Stand 106 Northwood Township of Sumben (called Number 47 during the trial) jointly with Liu Wei Yong, Dong Qiming and Li Tianping in 2011 purportedly for the sum of US\$ 280 000.00;

Plaintiff purportedly entered into an Acknowledgment of Debt with Kudzai Chakukira in January 2014 alleging that he owed the sum of US\$ 250 000.00 and proffered the immovable property as security without the consent or knowledge of the other owners.

Plaintiff was arrested at the instance of first Defendant sometime in December 2013 and was deported from Zimbabwe in January 2014. He was subsequently arrested in China on 20 May 2014 following criminal complaints made against him by, among others, Liu Wei Yong, Dong Oiming and Li Tianping. He was incarcerated until 24 July 2018 in China.

In June 2015 Kudzai Chakukira obtained a default judgment against Plaintiff and Liu Wei Yong in Case No. H 4963/15 and sought to attach two properties in execution (Number 47 and Number 12) for a debt purportedly due from Plaintiff. None of the other co-owners of the property were cited in the default judgment proceedings. Without Plaintiff's knowledge, the first Defendant filed proceedings against Kudzai Chakukira in HC 9313/15 to stay the attachment and sale in execution of the immovable property at Number 47. First Defendant allegedly filed false affidavits in HC 4963/15, HC 9313/15, HC 4321/16 and HC 3620/17 without Plaintiff's authority and caused the default judgment to be rescinded by the High Court and the claim of Kudzai Chakukira to be subsequently dismissed by the High Court, Harare.

First Defendant had, after the conclusion of the High Court proceedings against Kudzai Chakukira sold Number 47 to Second Defendant in 2017, while Plaintiff was still in custody in China and he did not give Plaintiff a share of the

proceeds. Second Defendant thereafter sold the property to the third and fourth Defendants in 2018.

First Defendant in his Plea denied the claim of the Plaintiff and averred that: He was only acting as an agent for the other owners of the property and he had been authorized in March 2014 in writing by Plaintiff and the other owners to sell the property. Plaintiff had originally misrepresented the true price of the property as he deliberately inflated the purchase price to US\$ 449 600.00 to induce the other purchasers to pay more than the properties were actually purchased for. Number 47 was purchased from the seller for US\$ 280 000.00 only. Plaintiff therefore did not pay any share for the properties but used the contributions from the other buyers to acquire the property and kept the amount in excess of the true purchase price. The total prejudice caused by Plaintiff's fraudulent misrepresentation to the other buyers amounted to US\$ 282 000.00 (the contribution for his share of the purchase price that Plaintiff never paid of US\$ 112 400.00 and US\$ 169 600.00 extra received from the other buyers above the actual value of the property) which amount Plaintiff has never accounted for.

First Defendant averred that he did not derive any benefit from the sale of the property in 2017 and his only function was to carry out the tasks assigned to him by the owners of the property. He denied that he participated in the conduct alleged of in the High Court proceedings filed by and against Kudzai Chakukira in HC 4963/15, HC 9313/15, HC 4321/16 and HC 3620/17: he did not depose to any affidavits in any of those Court proceedings; he was not involved at all in the conducting of the proceedings and he was not cited as a party to those proceedings.

He averred that he sold Number 47 in terms of a written authority given to him by Plaintiff, Liu Wei Yong, Dong Qiming and Li Tianping dated March 2014. He was not aware of the Plaintiff's circumstances between May 2014 and July 2018 as he was not based in China.

Second, third and fourth Defendants denied that they had any knowledge of

any facts or information relating to the disputes between Plaintiff, the other previous owners of the property and first Defendant.

In relation to HC 7112/20, the material allegations of the Plaintiff's claim are substantially similar to those made by him in HC 7113/20, except that the property in this claim, being Stand 346 Northwood Township 2 of Sumben (known as Number 12 during the trial), was acquired in the names of Plaintiff and Liu Wei Yong only, and was purportedly purchased for US\$ 90 000.00 in February 2010.

Plaintiff alleged that he used this property as security for the purported debt due from him to Kudzai Chakukira in January 2014 and that the first Defendant, acting without Plaintiff's authority, secured a rescission of the default judgment and stay of execution of this property against Kudzai Chakukira in Case No. HC 9313/15. In subsequent proceedings before this Honourable Court in HC 4321/16 and HC 3620/17 the High Court dismissed Kudzai Chakukira's claim.

Plaintiff further alleged that while he was in prison in China between 20 May 2014 and 24 July 2018, first Defendant sold Number 12 without his authority and did not give him a share of the proceeds.

First Defendant denied the claim in his Plea and averred that: Plaintiff had fraudulently misrepresented to Liu Wei Yong that Number 12 was to be purchased for US\$ 170 000.00, when it was actually only purchased for US\$ 90 000.00. On the basis of the fraudulent misrepresentation, Li Wei Yong paid the Plaintiff US\$ 85 000.00 believing this amount to be his half-share of the purchase price due. Plaintiff used the funds from Liu Wei Yong to purchase Number 12 without contributing anything to the purchase price himself .

First Defendant did not know Kudzai Chakukira and averred that the Acknowledgement of Debt allegedly signed by Plaintiff on 11 January 2014 was fraudulent and that the document was forged by Plaintiff in connivance with Kudzai Chakukira to illegally sell the property.

Plaintiff had been deported from Zimbabwe on 13 December 2013 after being

convicted of criminal offences committed in Zimbabwe, thus the Acknowledgement of Debt could not have been signed by Plaintiff on 11 January 2014. First Defendant did not depose to any affidavits nor did he participate in the High Court proceedings in HC 9313/15, HC 4321/16 and HC 3620/17 in any manner, and he was not aware of any facts relating to the dispute in those proceedings.

First Defendant was only acting as a representative in terms of a written authority and he was not aware of the Plaintiff's circumstances in China between May 2014 and July 2018. He sold the property in 2017 in terms of a written authority sent to him from China signed by Liu Wei Yong and Plaintiff.

Second and third Defendants averred that they were not aware of any dispute in relation to the property prior to their acquiring the property.

Evidence by Parties

Case No. 7113/20

The Plaintiff opened his case and testified in his examination in chief. He confirmed that he jointly purchased the property in question with Liu Wei Yong, Dong Qiming and Li Tianping. He also confirmed that the property was valued at USD 280 000.00. The Plaintiff's Legal Practitioner asked the Plaintiff to comment on the assertion made by the first Defendant that he gave power of attorney to the first Defendant to sell the property.

Plaintiff advised the court that he did not sign any documents authorizing the first Defendant to sell stand number 106 Northwood Township to the second Defendant. In support of his averment, he told the court that the power of attorney which the first Defendant used to execute the sale was dated third day of April 2014 which period he was incarceration in China.

In particular he told the court that towards the end of January 2014 he travelled to the People's Republic of China and was subsequently arrested on 12 April 2014 and he was detained in prison up until 20 May 2014.

Under cross-examination he was asked about the thumbprints on a document on page 124 of the record, in fact first Defendant was questioned if the thumbprints were his, he denied this and said the document was fake. The Defendant did not to prove that the document they produced indeed beared the thump print of the Plaintiff. During the Defence case the first Defendant claimed that he was present when the Plaintiff signed the document and affixed his signature.

However, it must be noted that under cross examination the Plaintiff was never asked about this or challenged that the first Defendant was present in China when the document was signed and the thump prints affixed. He maintained that first Defendant sold the property in question without his consent and authority. Plaintiff further denied the authenticity of the other documents which were filed by the Defendants inclusive of the notary certificates which were used by the first Defendant to facilitate the sale.

Case No. HC 7112/20

The Plaintiff opened its case and testified in its examination in chief. He told the court that he did not sign any documents authorizing the first Defendant to sell stand number 346 Northwood Township. He also advised the court that towards the end of January 2014 he travelled to the People's Republic of China and was released on 24 July 2018. He produced documents showing that he was indeed incarcerated in China.

The Plaintiff also told the court that the Deed of transfer registered under Number 2541/17 showed that the property had been transferred to the second Defendant but he did not know anything about it because at the time the sale was executed, he was in prison in China. He further advised the court that during the period of his incarceration he was not permitted to see any visitors and as such it was impossible for him to have signed the document in China.

Plaintiff stated that the first Defendant had sold his properties while he was in China and first Defendant did not give him any money from the sales. He stated that

he travelled to China in January 2014 and was arrested at Harare International Airport after someone placed ivory in his luggage. He however also stated that he was arrested in December 201 after ivory was found in his luggage. He was then arrested in China on 18 March 2014 for selling fake mining claims in Zimbabwe. He stated that the first Defendant set a trap for him in China. He was in prison from 2014 to 2018 and during that time the first Defendant sold the two properties (Number 12 and Number 47) without his knowledge or authority. He denied that he met first Defendant during that period. He confirmed that Number 47 was jointly purchased in the names of 4 persons, including himself and that the property was purchased in 2012. He confirmed that Number 12 was jointly purchased in the name of Liu Wie Yong and himself in 2010.

In response to questions from his Legal Practitioner, and referring to page 6 of the Consolidated Bundle (Compensation Report), Plaintiff confirmed that he was arrested in China on 20 May 2014 and released on 24 July 2018. Plaintiff could not recognize the properties on the title deeds shown to him but denied that he gave first Defendant authority to sell the properties. He denied that he signed the Notarial certificates authorising the sale of the properties. He denied further that he signed the supporting Affidavit in the High Court proceedings to stay the execution and sale of the properties by Kudzai Chakukira. He however confirmed that he signed the Acknowledgement of Debt in favour of Kudzai Chakukira in January 2014 and further confirmed that the two properties, Number 12 and Number 47, were used as security for the alleged debt, even though he was not the sole owner of those properties.

In response to a question from the Honourable Court, Plaintiff repeatedly confirmed that he signed the Acknowledgement of Debt in January 2014. In relation to the Power of Attorney dated 9 April 2014 which was used to transfer Number 47 and which was signed by Plaintiff, he alleged that he could not recall signing that Power of Attorney. He stated that according to the Compensation Report (page 76 of

the record) he was only initially arrested on 12 April 2014, that is, 9 days after signing the Power of Attorney. He stated that he returned to Zimbabwe in 2019 and discovered that the two properties had been sold. He stated that the written authority to sell the properties was fake.

Under cross-examination the Plaintiff admitted that the two properties were jointly acquired with the other parties (Liu Wei Yong, Dong Qiming and Li Tianping) and that he did not speak for them in the trial, but that he was only representing his own interests in both cases. He stated that Number 12 was purchased for US\$ 90 000.00, not US\$ 180 000.00 as signed for by him in the Joint Venture Agreement with Liu Wei Yong. He denied that the Joint Venture agreement bore his signature notwithstanding that the original was produced to him in evidence.

He was shown the original agreement dated 23 March 2014 in terms of which the owners had agreed to sell the properties and they appointed first Defendant to represent them in Zimbabwe to undertake the sale of the land. That document had the fingerprints, name, passport numbers and signatures of Plaintiff, Liu Wei Yong, Li Tianping and Dong Qiming. Plaintiff became agitated and claimed that he could not remember signing that document, but even if he had signed it, he did not receive any proceeds from the sale of the properties. When Plaintiff was shown his passport copy on which the Zimbabwe Immigration Department had endorsed an exit stamp dated 3 December 2013 and China Immigration had endorsed with an entry stamp into China dated 4 December 2013, Plaintiff became evasive again and stated that the copy of the passport and Immigration stamps were fake.

In response to the question that Liu Wei Yong, had purportedly witnessed the Acknowledgement of Debt, had left Zimbabwe in August 2012 and that his name was mis-spelt by the alleged signatory on the Acknowledgement of Debt Plaintiff refused to answer these questions under cross-examination.

The Questioned Document Examiner's Report was presented to Plaintiff, in terms of which it was determined that the signatures on the Acknowledgement of

Debt were all signed by the same person, Plaintiff re-stated again that he had signed the Acknowledgement of Debt. The Honourable Court questioned the Plaintiff and advised him that the findings of the Report were that the same person had signed all three signatures on the Acknowledgment of Debt. Notwithstanding the explanation of the findings of the Report by the Honourable Court to the Plaintiff, the Plaintiff insisted that he had signed the Acknowledgement of Debt.

When asked to compare his signatures on the Acknowledgement of Debt with those appearing on his two issued Chinese passports and his affidavit signed on 17 December 2018 (page 72 of the record), Plaintiff answered that the difference in signatures was attributable to his haste in signing his passport signatures and the police affidavit. When asked to explain how the Plaintiff's passport number on the Acknowledgement of Debt differed from the passport used by him when he was deported from Zimbabwe on 3 December 2013, Plaintiff did not respond to that question. He confirmed that a new Chinese passport was issued to him in Shandong, China on 7 January 2014 and he was asked how he could have obtained a Zimbabwe re-entry visa and travel back to Zimbabwe before 11 January 2014 (within 3 days) to purportedly sign the Acknowledgement of Debt with Kudzai Chakukira.

He asserted that he owed Kudzai Chakukira US\$ 250 000.00 and he used the two properties as security for the purported debt notwithstanding that the other owners were not indebted to Kudzai Chakukira. He admitted that Kudzai Chakukira obtained default judgment against him in 2015 and there was no judgment against Dong Qiming, Li Tiamping or first Defendant in those proceedings. How he came to know about the default judgment order granted to Kudzai Chakukira in 2015 was not explained by him. Plaintiff was shown the original "Property Disposal" agreement and "A Power of attorney for the Sale of the House" signed by himself, Liu Wei Yong, Li Tianping and Dong Qiming (pages 119 to 129 of the record dated 26 March 2014) which both pre-dated his arrest in May 2014. Plaintiff denied knowledge of those documents. When asked by the Honourable Court if the document empowered anyone

to act for the signatories, Plaintiff merely denied knowledge of the documents.

Plaintiff admitted that he knew Dong Qiming and Li Tainping but denied that the amounts recorded at in the Chinese language agreement at pages 139,140 and 141 of the record were the correct figures for the purchase price for Number 47. He claimed that the amount should have been US\$ 280 000.00 and therefore the agreement signed on 10 February 2011 was fake. He denied signing the Letter of Entrustment of 3 April 2014, stating instead that he was in custody at the time.

When asked to confirm that the High Court had in Case No HC 9313/15 rescinded the default judgment granted to Kudzai Chakukira in HC 4963/15 and dismissed Kudzai's claim and that such judgment was still extant, Plaintiff stated that he knew nothing about the case.

First Defendant

FIRST DEFENDANT'S EVIDENCE IN CHIEF.

Liu Bin gave evidence in his defence and stated that:

He knew the Plaintiff from 2009 when they were initially planned to open a restaurant in Harare. First Defendant was not an employee of the Plaintiff. He also knew Liu Wei Yong, Dong Olming and Li Tianping at that time.

He testified that he was not involved in the agreements between Plaintiff and the other 3 buyers to purchase the two properties. However, he was in contact with Liu Wei Yong, Dong Qiming and Li Tiamping who had been informed by Plaintiff that the total price for Number 47 was US\$ 449 600.00 and for Number 12 it was to be a total of USS 170 000.00 (inclusive of lawyer's fees and a charge for Christopher Mapondera, the local person). He did not cause the arrest of Plaintiff in January 2014 as he had no contact with him at that time. First Defendant was only called back to China in March 2014 by Liu Wei Yong, Li Tianping and Dong Qiming. He confirmed that he was present when the Agreement to sell was signed by Plaintiff, Liu Wei Yong, Dong Qiming and Li Tianping in China on 26 March 2014 (pages 123-128 of the

record). He confirmed that the Agreement was signed by each of the owners and Plaintiff in his presence and he also signed the document and applied his fingerprints to the pages of the Agreement. He pointed out exactly on pages 124 and 125 where he had signed and applied his own fingerprints. He confirmed that Plaintiff also signed and put his fingerprints on the same document in the presence of Liu Wei Yong, LinTianping and Dong Oiming, who each signed the document and applied their fingerprints. The Letter of Entrustment of 3 April 2014 was based on the signed agreement ("Property Disposal" Agreement) and "A Power of attorney to sell the House" at pages 123-128 of the record) and authorized him to act for the parties to sell the property. First Defendant confirmed that Plaintiff was there in person when the Letter of Entrustment was signed by him and Plaintiff was not in custody at that time.

First Defendant further stated that Liu Wei Yong then handed the original title deeds for both properties to him, with the Letters of Entrustment and instructed him to return to Zimbabwe. First Defendant had no further contact with Plaintiff as he returned to Zimbabwe to continue with his own business endeavors. First Defendant requested an estate agent to find buyers for the properties sometime after he returned to Zimbabwe. The estate agents did background checks and informed first Defendant that both properties had been attached in terms of a Court order obtained by Kudzai Chakukira. First Defendant had no knowledge of who Kudzai was, nor was he aware of the facts of the case. He has not been informed that there were any debts due on the properties when he was in China in March 2014. He reported the matter of the Court order and attachment to Liu Wei Yong, who instructed him to find a lawyer to represent them to stay the attachment. First Defendant confirmed that in terms of the default judgment in HC 4963/15 both properties (Number 47 and Number 12) were attached. He further confirmed that in HC 9313/15 the default judgment was rescinded and execution was stayed at the instance of the joint owners of the two properties in terms of an Order of the High Court dated 11 July 2016. First Defendant

stated that his role was only to find the lawyers to represent Liu WeinYong and the other owners and that he did not take part in any of the Court proceedings.

He was advised later by Liu Wei Yong that they had succeeded in rescinding the default judgment and dismissing the claim of Kudzai Chakukira. He further stated that the properties were then sold and transferred in terms of the Letters of Entrustment that he received in March 2014 and February 2017. He received the second Letter of Entrustment (page 60 of the record) for the property registered to LiumWei Yong and Plaintiff while he was in Zimbabwe. He was not an employee of Liu Wei Yong, Dog Qiming or Li Tianping and only carried the tasks assigned to him in writing as he had his own business in Zimbabwe. The properties were sold through estate agents to the other Defendants and title transferred by lawyers appointed for this purpose. He stated that pages 139, 140 and 143 of the record confirmed that he was merely appointed as a representative to attend to the sale and transfer of the properties and Plaintiff was not authorised by the other owners to represent them in the Court proceedings in HC 7112/20 and HC 7113/20 and Plaintiff did not have their authority to reverse the sale of the properties. He confirmed that the lawyers who transferred Number 12 and Number 47 verified that the properties were only acquired for US\$ 90 000.00 and US\$ 280 000.00 respectively and not at the inflated prices that Plaintiff had claimed the properties were not originally purchased for, being US\$ 170 000.00 and US\$ 449 600.00.

First Defendant stated that he did not act for any benefit from the sale of the properties and that the Regional Court had acquitted him of criminal conduct in relation to the sale of the two properties. The Honourable Court asked first Defendant whether he knew of the status of Plaintiff in February 2017. First Defendant replied that he did not know where the Plaintiff was as he had ceased contact with him for several years and he only remained in contact with Liu Wei Yong, Li Tianping and Dong Qiming.

Arguments

People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which caused them to seek relief from the court. It is called, in time-honoured legal parlance, the need to have clean hands. It is a basic principle that litigants should not come to court with "dirty hands". If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions, see *Chikadya v Chikadya* 2000 (1) ZLR 343 (HC) *Gilbert Nyasha v Chiredzi Wildlife Inv. Minister of Lands & Rural Resettlement* HH 68-18.

First Defendant respectfully submits that Plaintiff has sought relief in this Honourable Court despite being dishonest in relation to the original acquisition of the properties at Number 47 and Number 12. Plaintiff in evidence was shown original documents signed by him in China in terms of which he misrepresented to Liu Wei Yong, Li Tianping and Dong Qiming that the purchase price for the properties was higher than the actual purchase price. He lied to them that Number 47 was to be purchased for US\$ 446 900.00 and Number 12 for US 170 000.00, when the real prices for each were US\$ 280 000.00 and US\$ 90 000.00 only. Further, Plaintiff profited directly by inflating the price of both properties as he kept the excess amounts and did not account to the other buyers for that excess. Consequently, the very basis for his acquiring any right in and to Number 47 and Number 12 was premised on his fraudulent conduct on Lu Wei Yong, Li Tianping and Dong Oiming and this Honourable Court cannot therefore permit such conduct to found a cause of action in the proceedings in HC 7113/20 and 7112/20. Further, Plaintiff stated in his evidence, under cross-examination and in direct response to questions from the Honourable Court that he signed the Acknowledgement of Debt in favour of Kudzai Chakukira on 11 January 2014 purporting to owe him US\$ 250 000.00 and using Number 47 and Number 12 as security for the alleged debt. The Acknowledgement of Debt was used by Kudzai Chakukira in HC 4963/15 to obtain default judgment against Plaintiff and to attach the two properties in execution.

That document was shown to have been a fraudulent document as: It was allegedly signed on 11 January 2014 when Plaintiff was deported from Zimbabwe on 3 December 2013 and Liu Wei Yong had left Zimbabwe in August 2012.

The High Court in HC 9313/15 rescinded the default judgment granted in favour of Kudzai Chalukira and subsequently in HC 4321/16 and HC 3620/17 dismissed the claim of Kudzai Chakukira on the grounds that the Acknowledgement of Debt was a suspicious document. Those judgments of the High Court against Kudzai Chakukira remain extant and have not been set aside.

In terms of **Section 18 of the Civil Evidence Act**, first Defendant was entitled to draw a comparison of the handwriting on those documents to prove the authenticity of the handwriting.

Plaintiff he cited the case of *Simuka v Montana Carswell Meats (Private) Limited* (51 of 51) ZWSC (24 May 2022) it was held that;

"It is trite that he who alleges must prove his allegations. The Respondent failed to discharge that onus. In effort to buttress its case against the appellant, the Respondent sought to rely on an

"Acknowledgement of debt" in which the appellant allegedly admitted to the theft of the monies entrusted to him. The appellant vehemently denied authoring that document. The Respondent ought to have taken it a handwriting expert."

Also in the case of *Zavaza & Anor v Tendere & Ors* (HH 740 of 2015) it was held that;

"The papers before me clearly demonstrate that the applicants did not sell their property to the third respondent. They did not transfer it either. That was done by someone else without their knowledge and consent. The Position of the law in that regard is aptly stated by the learned author R.H. Christie, *Business Law in Zimbabwe*, 2nd Ed, Juta & Co Lt p 149-150;

"An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership of what is not his."

Analysis

As submitted by both parties the cases were heard together being case no HC

7112 and 7113/20 because the circumstances are more or less similar to each other. Most of the facts are common cause. The real issue faced by this court is whether the first Defendant had authority from the plaintiff and secondly whether plaintiff is entitled to cancellation of the title deeds. The second and third Defendants have distanced themselves from the dispute as innocent third parties. The plaintiff denied ever authorizing the first Defendant to sell the two properties. He however confirmed signing an acknowledgement of debt in favour of Kudzanai Chakurira in January 2014 making number 12 and 47 security for the alleged debt. It was also submitted that the first Defendant was prosecuted for fraud involving these properties but was cleared of any wrongdoing. The plaintiff also agrees that both properties were jointly owned by himself and other colleagues but he had surrendered them as security without the knowledge or consent of others. Also, he misrepresented that the property number 12 was bought for US\$90 000.00 and not for US\$180 000.00 as was signed for in the joint venture agreement. The plaintiff was shown an agreement between himself, Liu Wei Young, Dong Qiming and Tianping in relation to property number 47 for an agreed sum of US\$449 600.00 but denied any knowledge of it. He was also shown another document dated 23 March 2014 in terms of which the owners had agreed to sell the properties where the first Defendant was appointed to represent them to undertake the sale of the property. The document had fingerprints, names and passport numbers of the parties involved which include the plaintiff.

The plaintiff denied any knowledge of a passport copy bearing an exit stamp dated 3 December 2013 and Chinese Immigration had endorsed entry stamp into China dated 4 December 2013. He alleges that the stamps and the passports were fake. Asked about Kudzai's acknowledgement of debt, he said he did it sometime on the seventeenth of January 2014 and yet he was deported from Zimbabwe December 3 2013. The Questioned Document Examiner Report which determined that the signatures on the acknowledgement of debt were all signed by the same person, the plaintiff stuck to issue of having signed one document.

This court also sought clarification on that issue but he denied having signed the other two documents. When asked about the two different signatures he stated that the signature differed because he had done it hurriedly. This was in relation to his two issued Chinese passport and the acknowledgement of debt. Asked on how he could have been in China and back in Zimbabwe within a space of 3 days to sign the acknowledgement. Also put to him that it was on the basis of the letter of Entrustment of 3 April 2014 based on the Property Disposal Agreement and a Power Of Attorney to sell the House found at page 123-128 of the record. He denied it. The Defendant insisted that the Plaintiff was present when the letter of Entrustment was signed and it was given to him. He was not at all in custody in China.

What follows the pattern of arguments above is a situation where a boxers are pitted against each other but for whatever reasons the other mates refuse to take part. In the end it became a match of one vs one. The issue of credibility comes into play. The issue here is whether the first Defendant had the authority from the Plaintiff and his co- owners to dispose of the two properties. As given by the plaintiff in the cited case of Montana Carswell Meats (Pvt) Limited (51of 51) ZWSC(24May 2022) where it was held that:-“

"It is trite that he who alleges must prove his allegations. The Respondent failed to discharge that onus. In effort to buttress its case against the appellant, the Respondent sought to rely on an "acknowledgement of debt" in which the appellant allegedly admitted to the theft of the monies entrusted to him. The appellant vehemently denied authoring that document. The Respondent ought to have it a handwriting expert."

From this authority cited by the plaintiff's counsel it would appear that it is the plaintiff who is placing liability on the first Defendant and onus is on him to prove that first Defendant indeed had no authority to act in the manner he did. There is no reverse onus in this case. The disputed handwriting from either side doesn't seem to help in this case. There are no other witnesses from either side to corroborate what each one was testifying on. At one time the plaintiff gave away the two properties as security without the consent and knowledge of the co- owners. If at all it is true, how

different would it have been if the co- owners authorised the first Defendant to sell the properties. By securing a debt with the properties it is common knowledge that there was a real risk the property would have been disposed of.

If this so called Chakurira had succeeded in his cases these two properties could have been disposed of. As of the plaintiff's departure from Zimbabwe, it remains unclear as to when exactly he left Zimbabwe. He also failed to clearly explain the circumstances under which he was issued with two different passports, one at Chinese Embassy in Harare and other from China. He also failed to explain his two signatures other than saying it was done in haste. The witness, as much as it could have been an issue of the language barrier, did not impress this court as a credible witness. He chose to answer where it was convenient for him. It was quite clear that the whole deal was shrouded in mystery. The plaintiff had a lot to hide. Him and his colleagues are no longer welcome in this country no wonder why there were no witnesses from either side. The Defendant was adamant that he had nothing to do with this whole saga other than carrying out his mandate using the power of attorney. He was given a letter of entrustment by the plaintiff co-owners with the plaintiff's signature as well. He admitted though he was not in good books with the first Defendant and that he was in China at the time he was given the document. He also denied making an application of stay of execution on the securitised property and he simply assigned a lawyer to act. He was prosecuted and acquitted for fraud on the two properties for allegedly forging documents including deposing to affidavits.

He maintained that he had been duly instructed to do so. In the absence of any other evidence to rebut his plea how else would this court believe the plaintiff's testimony. The Defendant was very cool, calm and collected, unlike the plaintiff who was jittery in the way he responded. In my view the plaintiff performed badly as a witness as compared to the first Defendant. If the first Defendant did not have the mandate why would co-owners not be part of this litigation. There is nothing put forward to prove the first Defendant acted on his own will. Assuming he acted as

alleged how would this plaintiff deal with these two properties. In the case of *Zavaza & Anor v Tendere & Ors* (HH 740 of 2015) it was held that:-

"The papers before me clearly demonstrate that the applicants did not sell their property to the third respondent. They did not transfer it either. That was done by someone else without their knowledge and consent. The Position of the law in that regard is aptly stated by the learned author R.H. Christie, *Business Law in Zimbabwe*, 2nd Ed, Juta & Co Lt p 149-150; "An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership of what is not his"

Unlike the case before this court, in this case there were no papers to expressly show that these properties were not sold by consent. There are many gaps which were left unattended. Counsel for the plaintiff did everything a competent lawyer could have done, but could not resurrect a dead case back to life. Had there been some independent evidence maybe that could have assisted.

As reiterated above the plaintiff cannot be relied upon to tell the truth as he himself is a self-confessed breaker of law who found himself in jail. Still, he did not divulge why he got jailed. As case cited by the first Defendant legal practitioner *Chikadya v Chikadya* 2000(1) ZLR 243 (HC) the court had this to say: -

"People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honored legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions":

The plaintiff indeed has dirty hands before this court. He even inflated the price of one of the properties from US\$90 000.00 to US\$180 000.00 thereby prejudicing his co- owners in the transaction. An agent when given a mandate to act should only do so within the parameters of his mandate. Once he fulfills this mandate, that is the end of the matter. The plaintiff and his co-owners were not the cleanest of people. Up to now this court wonders what kind of transactions were these individuals involved in. Even the first Defendant himself is not a smart individual from the way he conducted himself in the whole transaction. He tried by all means to take himself away from the

scene. How would he be mandated with all these responsibilities without direct benefits? However, in the end the evidence adduced before this court falls far below the standard required in civil proceedings. Nothing was proved on a balance of probability to hold the first Defendant liable. The power of attorney acted upon is likely to be authentic, no wonder why the co-owners are not complaining. If there are any issues, it is would be between the plaintiff and the co-owners. As for the other Defendants, they had nothing to do with the dispute before the court.

Conclusion

Having gone through a full trial and with regard to the submissions placed before me I am not convinced by the Plaintiff evidence. His demeanor was very poor at most. There were a lot of gaps in his testimony leaving this court in doubt as to his credibility. I therefore find no liability on the part of the first Defendant's conduct. **It is therefore ordered that:-**

1. The consolidated prayers by the plaintiff in cases number HC 7112/20 and 7113/20 be and are hereby dismissed
2. The plaintiff to pay costs of the suit.

Mugiya and Muvhami Law Chambers, plaintiff's legal practitioners
Hussein, Ranchhod & Co, defendant's legal practitioners