REPORTABLE ZLR (20)

Judgment No. SC 22/04

Civil Application No. 274/02

MWAYIPAIDA FAMILY TRUST v (1) MICHAEL MADOROBA (2) CATHLEEN MADOROBA (3) THE REGISTRAR OF DEEDS (4) PANDIRE MARY PARIRENYATWA

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, JANUARY 27 & MAY 13, 2004

R M Fitches, for appellant

No appearance for respondent

GWAUNZA JA: This appeal was determined without benefit of argument from the respondents, who were all in default.

The appellant appeals against an order of the High Court, in terms of which the transfer of certain immovable property in Bluff Hill, Harare, to the appellant, was set aside. The court also ordered the Registrar of Deeds to cancel the Deed of Transfer in question and the appellant to pay the respondents' costs.

The facts of the matter are as follows:-

On 11 January 2000 the first and second respondents ("the respondents") concluded an agreement of sale in terms of which they bought the immovable property in question, from the fourth respondent ("Parirenyatwa"). On 8 March 2000 the respondents obtained a provisional order in the form of an interim interdict against Parirenyatwa, whose effect was to restrain her from transferring the property in question to any other people except themselves. A copy of the interdict was served on the Registrar of Deeds, who was supposed to then endorse a caveat on the title deeds of the property in question. The caveat would have served as a further barrier to any attempt to transfer the property from the name of Parirenyatwa to any person other than the respondents.

In defiance of the interim interdict against her, Parirenyatwa

proceeded, on 22 March, 2000 to enter into another written agreement of sale with the appellant *in casu*, for the same property. Consequent upon this second sale, and notwithstanding the copy of the provisional order that had been served on the Registrar of Deeds, the property was transferred to and registered in the name of the appellant.

Despite the respondents' claims to the contrary, there is no evidence before the court to conclusively establish that a caveat had indeed been endorsed against the Title Deeds of the property, nor that such caveat had then been mysteriously uplifted, to enable the transfer into the appellant's name to take place. No supporting affidavit by the Registrar of Deeds was filed in order to shed light on the matter. Be that as it may, the respondents then successfully applied for the order now being appealed against.

The appellant contends in the main that the court *a quo* ought not have granted the relief sought by the respondent especially considering;

(a) that the appellant was an innocent purchaser, having bought and taken transfer of the property in good faith;

(b) that even if the appellant had or ought to have, known of the prior sale of the property to the respondents, that did not entitle them to the relief sought; and

(c) that in any case the transfer of the property to the appellant constituted special circumstances.

The facts of the case clearly reveal a situation where a *mala fide* seller sold the same property to a second purchaser well knowing she was not supposed to do so. While noting initially in her judgment that the appellant may not have been 'entirely ignorant' of the respondents' prior claim to the property, the learned trial judge later concluded as follows at page three of her judgment:

"… In the matter before me, it is not in dispute that the applicants

> sought to give notice to the first respondent and to the world at large of their prior rights over the property. This they did by obtaining any interim restraining order from this court. The order was duly served upon second respondent, the Registrar of Deeds who was thereby restrained from transferring the property other than to the applicants, pending determination of certain proceedings. Thus, notice was served upon the first respondent but due to an error on the part of the public official, was not received.
>
> We thus have a situation where we have an innocent second purchaser but whose innocence is as a result of the mistake of a public official tasked with bringing the notice to the attention of the first respondent and the world at large." (my emphasis)

The appellant denied it had any knowledge of the first sale, either before its own purchase of the same property, or at the time the property was registered in its name.

I have found no basis for the learned judge's finding that the appellant was not 'entirely ignorant' of the respondents' claim, or that notice of the respondents' claims was served on the appellant. The first 'notice' could only have been that pertaining to the interdict that the respondents obtained against Parirenyatwa. The provisional order in question was prompted by the latter's attempt to cancel the agreement of sale, and not by any known (to the respondents) attempt by her to sell the same property to a third party. If at the time the provisional order was granted, Parirenyatwa and the appellant had started negotiations over the sale of the property, there is no indication that the respondents had knowledge of any such negotiations. The appellant would therefore not have received any notice of the application for an interdict against Parirenyatwa.

The other 'notice' related to proceedings that took place after the transfer of the property to the appellant had taken place. The appellant did receive notice of the proceedings since it was cited as a party, and the order applied for sought to interdict Parirenyatwa and the appellant, respectively, from disposing of the property in question or carrying out any construction thereon. The appellant thus only had formal notice of the respondents' prior claim to the property after the transfer to it had already been effected. The respondents' averments that because a caveat had been endorsed against the title deed, and then been mysteriously uplifted, it followed that the appellant had gained prior knowledge of the sale of the property to the respondents, have not been substantiated. There is a strong indication from the evidence before the Court, that the caveat in question was never registered. This in my view lends credence to the appellant's assertion that a Deeds Office search conducted before the transfer into its name took place, had "picked up" no caveats or mortgage bonds registered against the title deeds of the property in question.

The sum total of all this is to cast serious doubt on the submission that

the appellant did have knowledge, before the transfer into its name took place, that the

same property had already been sold to the respondents. The learned trial judge appears to have accepted this circumstance, as evidenced by her conclusion that the appellant was an "innocent' second purchaser. I am satisfied this was the correct conclusion.

What emerges from the evidence before the Court is a situation where the first purchasers (i.e. the respondents') took every precaution to protect their interest in the property in question. They were careful, in their petition for an interdict against Parirenyatwa, to include a prayer restraining the Registrar of Deeds from transferring the property to any other person but themselves. As the learned trial judge correctly noted, it was not the respondents' fault that the office of the Registrar of Deeds had then, for reasons not clear from the papers before the court, neglected to endorse the caveat against the relevant title deed.

To be balanced against this situation is that of the appellant, an innocent second purchaser which, on the evidence before the Court, was equally diligent in seeking to protect its interest. In addition to requesting sight of Parirenyatwa's copy of the title deed, (which showed no encumbrances registered against the property), the appellant instructed its lawyers to carry out a Deeds Office search, which was duly done. The search yielded no impediments against the intended transfer of the property to the appellant. Transfer thus proceeded.

The circumstances of this case establish a double sale of the property in question. In *Crundall Brothers (Private) Limited v Lazarus N O & Anor*[1], a case that the learned trial judge cited with approval, the Court referred to a "traditional approach"[2] to the matter. It summarised such approach as follows at p 131 E – F:

> "…When the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. *Per contra* when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, his real right can and normally will be overturned subject to considerations of practicality."

The court in *Crundall*'s case, however, found that cases of double sales do not always

fall neatly into one or the other of the two categories indicated above, since some cases, *Crundall*'s included, fall in between.

I am satisfied that *in casu,* the learned trial judge correctly found (*albeit* for different reasons) that the circumstances of the case placed it somewhere in between the two extremes noted above. This is because, even though the appellant was ignorant of the respondents' prior claim to the property at the time transfer into its name was effected, such ignorance was due solely to the oversight – if not

---

1. *1991 (2) ZLR 125 (SC) at 132*
2. *Set out by Professor McKerron in (1935) 4 SA Law Times 178 and repeated with approval by Professor Burchell in (1974) 91 SALJ 40*

incompetence – of a public official in the Deeds Office. The official failed to register the caveat in circumstances where such registration would have warned the appellant that the property in question was not available for transfer to it. It would not be fair and just, in my view, to rule that the failure by the Deeds Office to register the caveat in question had the effect of nullifying the respondents' prior claim to the property. Indeed the general approach of the courts is to give preference, except in special circumstances, to the first contract. The approach is derived from the policy of the law in upholding the sanctity of contracts. McDONALD J (as he then was) elaborated on this policy as follows in *BP Southern Africa (Pty) Limited v Desden Properties*[3] *(Pvt) Limited & Anor*:

> "… In my view, the policy of the law to uphold the sanctity of contracts will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view of

> Professor McKerron, that save in special circumstances, the first purchaser is to be preferred."

Earlier in the same judgement and in a passage cited with approval by the learned trial judge, McDonald J (as he then was) had this to say at 11 E – F:

> "It is the policy of the law to uphold, within reason, the sanctity of contracts. It follows that the courts of law should, as far as possible, in matters of this kind, adopt an approach which will discourage sellers from entering into contracts the performance of which will necessarily involve a breach of an earlier contract, and by adopting such an approach reduce a potential cause of hardship. The concern of the courts should primarily be with the removal of the cause of these cases of hardship rather than with the result in a particular case."

---

(3) *1964 RLR 7(G) at 11 H – I; 1964 (2) SA 21 at 25 G - H*

Both parties were in my view equally diligent in their efforts to protect their respective interests under the contracts they had signed with Parirenyatwa. They both fell victims to the neglect by the Deeds Office to register the caveat in question. Their prospects for success are in my view almost evenly balanced. However, what should and does tilt the scale in favour of the respondents is the fact that theirs was the first contract, and that but for the omission to register the caveat, it would have been the only contract. I am satisfied this is a proper case for the adoption of an approach which will discourage sellers from entering into contracts the performance of which will necessarily involve the breach of an earlier contract.

I am persuaded there are, thus, no special circumstances to warrant a supersession of the respondents' contract by that of the appellant. The appeal must therefore fail.

It is in the result ordered as follows:

1. The appeal is dismissed with costs.

SANDURA JA: I agree.

CHEDA JA: I agree.

Costa & Madzonga, appellant's legal practitioners