

Judgment No. SC 64/06
Civil Appeal No. 332/05

SOLOMON ZONDO

v

(1) LUCIA NHONGO (2) JUSTINE BANDA (3) CHARLES
TAMIREPI (4) LAZARUS TIMBAYI

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, OCTOBER 17, 2006 & JANUARY 25, 2007

The appellant in person

The respondents in person

ZIYAMBI JA: This is an appeal from a judgment of the High Court. The subject of the appeal is house number 30 Zuze Street, Rimuka, Kadoma.

On 18 September 2002, Justine Banda in case number 719/2002 (Magistrates' Court, Kadoma) obtained the following order against third and fourth respondents:

“It is hereby ordered that:

1. The respondents be and are hereby ordered each to refrain from collecting rentals from tenants resident at 30 Zuze Street, Rimuka upon their sight of this order.
2. The respondents be and are hereby ordered to facilitate the transfer of 30 Zuze Street, Rimuka from the late Moses Tamirepi's name into the name of the late Rosewitter Banda within two weeks upon their sight of this order failure of which the Director of Housing and Community Services Kadoma is hereby ordered and authorised to register 30 Zuze Street, Rimuka in the name of Rosewitter Banda within seven days upon his sight of this order.
3. The respondents (jointly and severally, the one paying the other to be absolved) meet the costs of this application.”

On 19 September 2002, Lucia Nhongo obtained a Certificate of Authority to administer and distribute the estate of the late Moses Tamirepi and in particular to “transfer title, rights and interests in house number 30 Rimuka, Kadoma to yourself”. On the same date, Lucia Nhongo ceded her rights, title and interest in the house to the appellant.

The next development was that on 18 December 2002, the appellant made an application in the magistrates court (case number 964/2002) for an order setting aside the order granted on 18 September 2002 and directing that the cession to him be approved. In his founding affidavit the appellant alleged that the order, issued by the magistrate in favour of Justine Banda, first came to his notice when he went to the offices of the director of housing with the first respondent to effect the cession. On 10 January 2003, the magistrate gave his judgment. He stated therein that in making a ruling he had “considered documents filed in case 719/2002 and 964/2002.” He went on to say that:

“... from the documents filed of record in 1981 Rosewitter Banda bought House No. 30 Zuze Street Rimuka from Moses Tamirepi for \$1700. No cession agreement was executed before a legal practitioner until both lost their lives and since 1981 Rosewitter Banda has been enjoying undisturbed occupation of this property. Moses Tamirepi died first and Rosewitter Banda died sometime in 1998...”

And determined the matter as follows:-

“On 19 February 2002, the applicant in case number 964/02 entered into an agreement with the executor of the estate of the late Moses Tamirepi for the cession of the rights and interests in the same property. This agreement was not proper as the house no longer belonged to Moses Tamirepi and did not form part of his estate. It appears that the executor took advantage of the fact that the house had not been changed into the name of Rosewitter Banda. The application made in case number 964/2002 should therefore not succeed and the application made in case number 719/2002 is confirmed.”

The appellant appealed to the High Court. He took issue with the finding by the magistrate that there was evidence that the house had been purchased by Rosewitter Banda. He maintained that the lawfully appointed executor had the authority to dispose of the property to him.

The High Court in dismissing the appeal said as follows:

“The record of proceedings in case No. 719/02 should have been attached to this appeal record as it contains documents filed therein which according to the trial magistrate show that in 1981 Rosewitter Banda bought house No. 30 Zuze St Rimuka Kadoma from Moses Tamirepi for \$1700.00. *If that is found to be true* it was then not proper for the Executrix of the estate of the late Moses Tamireyi to have sought the certificate of authority empowering her to transfer title, rights and interests in house number 30 Zuze Street Rimuka Kadoma.

Using the certificate of authority obtained in her favour on 19 September 2002 the Executrix Lucia Nhongo sold the property to appellant Solomon Zondo. But no cession was effected in favour of Zondo neither was cession effected in favour of the first purchaser the late Rosewitter Banda whose husband Justine Banda now seeks to have cession to be effected into the name of the estate of his late wife in order for him to inherit it as a surviving spouse.

This is a double sale wherein transfer has not yet been effected. The second purchaser should look to the seller for refund of his money and damages, if any. Transfer should be effected into the name of the estate of the late Rosewitter Banda.

In the result, the appeal should fail with costs.” (The italics is mine).

There was no evidence before the court *a quo* that there was a double sale. The use of the words “if that is found to be true” bears this out. The court could not have made a finding in favour of either party without having sight of the papers which were considered by the magistrate. The conclusion arrived at by the court, that there was a double sale, being unsupported by evidence was therefore flawed. The court should have adjourned the proceedings in order that the papers considered by the magistrate might be placed before it.

This Court is in no better position to resolve the matter without the complete record.

Accordingly, the order of the High Court is set aside and the matter is remitted to that Court so that the appeal may be determined afresh after proper consideration of the complete record inclusive of the proceedings in case number 719/02.

The costs of this appeal shall be costs in the cause.

SANDURA JA: I agree.

CHEDA JA: I agree.