

REPORTABLE ZLR(22)

EDWARD COLLIN GARDNER v (1) DAMPIER DEVELOPMENT
(PRIVATE) LIMITED (2) V MHANGAMI (3) KDS MHANGAMI (4)
EXPORT CREDIT GUARANTEE CORPORATION PRIVATE LIMITED
(5) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & GARWE JA
HARARE, MAY 21, 2012

Advocate L Uriri, for the appellant

Advocate R M Fitches, for the first respondent

Advocate T Mpofu, for the fourth respondent

MALABA DCJ: The unanimous view of the Court is that the appeal has no merit. The appellant went to the High Court seeking the enforcement of a personal right namely to take transfer of certain immovable property against payment of the purchase price in terms of the agreement of sale.

The High Court granted the order sought by the appellant. The order granted the appellant personal rights which were conditional upon payment for the property within three days. To date there has been no payment. Having been granted a personal right, the principle of *res litigiosa* could not be the basis for a vindicatory action for the recovery of the immovable property purchased by the fourth respondent at a time he was unaware of the rights of the appellant. The fourth respondent paid for the property and had it registered in its name.

In the court *a quo* the appellant sought a declaration to the effect that the first respondent had lost *dominium* in the property by virtue of it having become *res litigiosa* at the closure of pleadings on 24 March 2006.

It was conceded before the court *a quo* and before this Court that the first respondent had not lost *dominium* in the property. The effect of the concession is that the court *a quo* could not have granted the declaration sought. Mr *Uriri*, however, argued that the Court ought to have granted an order which was consistent with the law.

The Court found that the order sought to be enforced granted personal rights which could not be enforced on the basis of the principle of *res litigiosa*. As such the court *a quo* could not have granted the alternative relief suggested by Mr *Uriri* in argument. The appellant had not complied with the order granted in his favour whilst the fourth respondent was not only a bona fide purchaser without notice of the appellant's personal right but had paid for the property and taken transfer.

Paragraph 1 of the draft order having fallen away the court *a quo* correctly found that the consequential orders seeking specific performance also fell away.

The Court finds that there was no misdirection on the part of the court *a quo*.

I would accordingly dismiss the appeal with costs.

It is agreed by the parties that the costs of 24 January 2012 which had been reserved are to be met by the fourth respondent.

Accordingly it is ordered as follows:

- “1. The appeal is dismissed with costs.
2. The wasted costs of 24 January 2012 are to be met by the fourth respondent.”

ZIYAMBI JA: I agree

GARWE JA: I agree

Messrs Kantor & Immerman, applicant’s legal practitioners

Messrs Costa Madzonga, first respondent’s legal practitioners

Messrs Mawere & Sibanda, fourth respondent’s legal practitioners