

**CLADIUS CHENGA v (1) VIRGINIA CHIKADAYA (2) ZAKEYO
CHIKADAYA (3) BEAUTY MPOFU (4) THE REGISTRAR OF
DEEDS**

**SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & OMERJEE AJA
HARARE, NOVEMBER 20, 2012 & FEBRUARY 25, 2013**

J Dondo, for the appellant

T Hove & A Mhene, for the first respondent

OMERJEE AJA: This appeal concerns a protracted legal dispute involving the rights, title and interest in an immovable property namely Stand No. 6058 Glen View 3 Township, Harare (hereinafter referred to as “the property”).

In 1980 the first respondent’s husband purchased the rights, title and interest in the property from Kufa Oswin Danda. At the time of purchase, the first respondent’s husband had acquired another property within the municipal jurisdiction of the City of Harare (“the City Council”). It was the policy of the City Council at the time not to permit any person to acquire and register in his name more than one property within the municipal area. The first respondent’s husband agreed with the second respondent (his young brother) that the property would be registered in the latter’s name. They also agreed that in due course it would be transferred and registered in the name of the first respondent’s children.

On 26 January 1982 the City Council approved the cession of Danda's rights in the property to the second respondent. On 19 May 1998, the first respondent's husband requested the second respondent to cede his rights in the property to his son, Lydman Chikadaya. The second respondent refused to do so. On 25 September 1998, the first respondent's husband then instituted proceedings in the High Court in Case No. HC 11678/98 against the second respondent and the City Council for the cession of rights in the property. The second respondent contested the action.

On 1 March 2001, SMITH J, non-suited the first respondent's husband on the basis of the "dirty hands" principle and dismissed his claim without a hearing as to the merits. The first respondent's husband noted an appeal to the Supreme Court on 29 March 2001. In Judgment No SC 58/2001 delivered on 14 June 2001, the Supreme Court, upheld the appeal, set aside the order of the High Court and remitted the matter to the lower court for the continuation of the trial on the merits. The subsequent trial was held on 3 and 4 September 2001.

On 20 February 2002, SMITH J granted the relief sought by the first respondent's husband in Judgment No. HH-1-2002. In that judgment the court ordered the second respondent to cede his rights, title and interest in the property to the first respondent's husband failing which, the Deputy Sheriff was authorised to act in his stead. The second respondent noted an appeal to this Court in Case No. SC 85/02 against that decision. The appeal was dismissed by this Court on 15 November 2004.

When the first respondent's husband sought to execute the judgement of 20 February 2002, he discovered that, while the matter was still pending before the courts, the council had already, under Deed of Transfer 1284/2001, transferred the property to the second and third respondents. The second and third respondents had in turn sold the property to the appellant on 6 December 2000 and effected transfer of the property to the appellant on 14 February 2001.

When the first respondent's husband discovered that the property had been sold to the appellant, he filed a court application under Case No HC 12434/04 against the appellant, the second, third and fourth respondents respectively, seeking *inter alia* the cancellation of the sale, cancellation of transfer of the property to the appellant, transfer of the property to him, eviction of all parties claiming occupation through the appellant and costs of suit on the scale of legal practitioner and client. Only the appellant opposed the application in the papers filed. The other parties cited did not file any opposing papers in this matter.

On 24 March 2009 the first respondent's husband died before the trial of the matter. The first respondent in her capacity as the executrix was substituted as the plaintiff in the matter. The court *a quo* granted the relief sought by the first respondent. It is against that decision that the present appeal has been noted.

The appellant now appeals to this Court on the grounds that:

- “1. The learned Judge *a quo* erred and misdirected himself on the evidence presented to make a finding that the appellant was a mala fide purchaser. In particular the learned Judge ignored evidence which proved that the appellant was an innocent third party at the time he purchased the property and took transfer of the same.
2. The learned judge failed to appreciate that the first respondent was not entitled to the relief of *rei vindicatio* as against second respondent. In particular, the learned Judge ignored the fact that second respondent being the registered owner of the property had proper title and dominium thereof.
3. The learned Judge erred and misdirected himself in granting an order setting aside the sale and transfer of the property to the appellant when the facts of the case disclosed special circumstances in favour of non-cancellation of Deed of transfer in favour of the appellant.
4. The Learned Judge ought to have made a finding that the first respondent was estopped from vindicating the property since the respondent did not take appropriate steps to protect her interests in the property which situation resulted in appellant purchasing and taking transfer of the same in good faith.
5. The learned Judge failed to appreciate that at the time of the trial herein , the property had passed from second respondent to appellant and hence the principle of *res litigiosa* had no application to the extent warranting the cancellation of appellant’s title to the property under circumstances shown by the facts of the case.
6. The learned Judge erred and misdirected himself in awarding costs against the appellant on a Legal Practitioner and client scale.”

The appellant seeks the setting aside of the judgement of the court *a quo* and for it to be substituted by an order dismissing the claim by first respondent with costs.

Three issues arise for determination. I propose to deal with each of the issues in turn. These are:

- i. Whether the appellant *in casu* was a *bona fide* purchaser of the property in dispute.
- ii. Whether the first respondent (plaintiff in the court *a quo*) was entitled to the remedy of *rei vindicatio* under the circumstances.

iii. Whether the contested rights were *res litigiosa*.

On the first issue, it was the submission of Mr *Dondo* for the appellant that the court *a quo* misdirected itself in finding on the evidence adduced that the appellant was a *mala fide* purchaser. This was a finding of fact.

It is trite that an appellate court will not interfere with a decision of a trial court based on findings of fact, unless there is a clear misdirection or the decision reached is irrational. In the case of *Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S) at 670C-E KORSAH JA* stated the following:

“The general rule of the law, as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person D who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcon v Rosenberg 1936 AD 380 at 395-7*; *Secretary of State for Education & Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 (CA) at 671E-H*; *CCSU v Min for the Civil Service supra at 951A-B*; *PF-ZAPU v Min of Justice (2) 1985 (1) ZLR 305 (S) at 326E-G.*”

The onus to prove that the appellant was a *mala fide* purchaser rested upon first respondent in the court *a quo*. A careful analysis of the evidence of Virginia Chikadaya the first respondent in her capacity as executrix in the estate of the late Cyril Chikadaya, reveals that this witness failed to discharge the onus upon her. She was unable to give reasons for claiming that the appellant was aware of the legal wrangle between her husband and the second respondent over the said property. The trial Judge correctly found that the first respondent had failed to prove that the appellant had been a tenant at the property prior to the purchase of the same.

The court *a quo* however found that the probabilities confirmed that the appellant must have been aware of the claims by the first respondent's husband to the property. There was no evidence whether direct or circumstantial to establish that the appellant knew or should have known of the legal dispute between the first respondent's late husband and his brother over the property. There was a mere suspicion that he could have known about it but nothing more. Furthermore the appellant's assertion that he was not aware of the legal wrangle over the property was supported by the evidence of Chiedza Chimere who was a tenant at the property at the time. She testified that she never brought this issue to the appellant's attention at any time, but confirmed seeing the appellant inspecting the property.

The first respondent failed to prove that the appellant was a *mala fide* purchaser. She only relied on what she had been told by her husband and this was regarded as first hand hearsay by the court *a quo*. That court admitted such evidence despite the fact that the late Chikadaya was an interested party and had an interest in this matter. The appellant's evidence that he was unaware of the legal dispute as to the rights in the property was supported and corroborated by two tenants who were residing at the property at the relevant time.

Having regard to the evidence adduced on record, it is clear that the first respondent failed to discharge the onus to prove that the appellant was a *mala fide* purchaser. The court *a quo* erred and misdirected itself in coming to such conclusion on the evidence led. The appellant on the evidence on record was a *bona fide* purchaser. However the

resolution of this issue does not determine the fate of this appeal. It is necessary to determine the two other remaining issues.

I turn to deal with the second issue that is, whether the first respondent was entitled to the remedy of *rei vindicatio*.

The *rei vindicatio* is a common law remedy that is available to the owner of property for its recovery from the possession of any other person. In such an action there are two essential elements of the remedy that require to be proved. These are firstly, proof of ownership and secondly, possession of the property by another person. Once the two requirements are met, the onus shifts to the respondent to justify his occupation.

Mr *Dondo* for the appellant submitted that the remedy was not available to the first respondent because her late husband had never become the owner of the property. Prior to the transfer of the property to the appellant, second respondent held rights, title and interest therein.

The judgment of SMITH J in *Chikadaya v Chikadaya & Ors* HH-1-2002, established that the first respondent's husband was the owner of the rights, title and interest in the property which his young brother the second respondent purported to dispose of to the appellant. The second respondent purported to be the owner and disposed of the property in the full knowledge that the property did not belong to him. He did so in order to cheat and defeat the true owner of his rights in the property. In other words he fraudulently sold the

property to the appellant. The second respondent disposed of the property before the merits of the matter had been determined by SMITH J. When the trial commenced, he did not disclose the fact that transfer had already been effected to the appellant. He deliberately concealed this information from the court and proceeded to appeal to the Supreme Court against the decision of SMITH J, which had awarded the rights, interest and title to the first respondent's late husband.

Wille and Millin's in their book "*Mercantile Law in South Africa*" by Phillip Millin and George Wille, 18th edition at p 182 states that:

"If, however a vendor knowing himself not to be the true owner of the thing, represents himself to be the owner of ascertained goods, and sells them to a person ignorant of the truth so as to wilfully to expose the latter to the danger of having the possession taken away from him by the true owner, the law regards such conduct on the part of the vendor as fraudulent; and the buyer is entitled to repudiate the contract and sue the seller for damages even before he is evicted. This reflects the view of De Villiers JA in *Kleynhans Bros v Wessels's Trustee* 1927 AD 271, and is submitted to be preferable to the contrary view of Wessels JA in that case – at least as regards the sale of a specific *merx*."

These sentiments are pertinent to the present matter. The agreement of sale between the appellant and the second respondent was null and void for lack of authority. The second respondent was not authorised by the owner of the property to dispose of it on his behalf. He purported to dispose of rights in the property which rights he did not have. As was pointed out by LORD DENNING in *Macfoy v United Africa Company limited* (1961) 3 All ER 1169 (PC) at 1172:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without

more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The same sentiments were also echoed by MAKARAU JP, as she then was, in *Katirawu v Katirawu & Ors* HH-58-07 at p 5 of the cyclostyled judgement when she said:

“... Nothing legal can flow from a fraud. His appointment was null and void *ab initio* on account of fraud. It is as if it was never made. It is a nothing and upon which nothing of consequence can hang.”

The first respondent has a right of vindication against the appellant, despite the fact that the appellant had become the registered owner of the property. The first respondent’s right is derived from the common law principle *memo dat quod non habet* which means no one can transfer more rights to another than he himself has. In the present case the second respondent who purported to sell the property to the appellant was not the legitimate owner of the property and hence could not transfer the right of ownership which he did not possess.

The court *a quo* correctly concluded that the first respondent as the rightful owner of the property was entitled to recover it from any person, who had possession of it without his consent. The first respondent is entitled to the remedy of vindication as against the appellant.

The last issue that falls for determination is whether or the principle of *res litigiosa* applies in the present case. In *Waikiki Shipping Company Limited v Thomas Barlaw and Sons (Natal) Ltd and Anor* 1978 (1) SA 671 at 676 H the court defined “*res litigiosa*” as objects that are the subject matter of litigation.

In *Zimbabwe Banking Corporation Ltd & Anor v Shiku Distributors (Pvt) Ltd and Ors* 2000 (2) ZLR 11 (H) at 18F the court held that:

“- - - a *res litigiosa* may not be sold after institution of action as there is no-one who can be enriched by the right as everyone has an equal right to prosecute it.”

It is trite that all personal actions have the effect of rendering their subject matter *res litigiosa* at the stage of *litis contestatio*. The relevant stage is not the time of commencement of action, but the time of *litis contestatio*. In the case of *Opera House (Grand Parade) Restaurant (Pvt) Ltd v Cape Town City Council* 1986 (2) SA 656 (C), it was held that in a real action (action in *rem*) the land becomes *res litigiosa* on the service of summons while in a personal action, that status was achieved at the closure of pleadings.

I am in agreement with the findings of the trial Judge that in the present matter, it was unnecessary to determine whether the rights in issue were real or personal rights as at the time of the alienation summons had been served and pleadings closed. It is common cause that the contested rights were *res litigiosa*.

It is now settled in our law that where an object is *res litigiosa* this does not preclude or prevent it from being alienated or similarly dealt with, as long as the rights of the non-alienating litigant in the *res* are protected. See the cyclostyled judgment of *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi* HH-92-09 at p 6-7. I conclude that the sale of the rights in the property after the closure of pleadings without protecting the first respondent's rights rendered the sale a nullity. The court *a quo*'s findings in this regard cannot be faulted.

Accordingly and for these reasons, it is ordered as follows:

The appeal be and is hereby dismissed with costs.

GARWE JA: I agree

GOWORA JA: I agree

Dondo & Partners, appellant's legal practitioners

Musunga & Associates, first respondent's legal practitioners