BERNARD GWARADA
versus
JIM KADZIYA
and
HAAGAI TOGAREPI KADZIYA
and
MUNICIPALITY OF KARIBA
and
NEIL PADMORE
and
SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
Harare, 6 March 2025

Opposed Court Application

T J Muhonde, for applicant
D Dakwena, for the first and second respondent
C W Gumiro for the third respondent
T Mpofu for the fourth and fifth respondent

CHITAPI J: This Application concerns a double sale of an immovable property called Stand 1015 Heights Kariba (the property). The parties to the application are set out in the heading. I do not therefore restate them. The background facts are not in serious dispute.

At the commencement of the hearing the first and the second respondents opposing papers and heads of argument were time barred. The bar was uplifted by consent. The first and the second respondents then formally withdrew case No HC 5015/22 and tendered costs on the legal practitioner and client scale. Case No HC 5015/22 was an application to uplift the bar which was uplifted by consent.

The applicant in short seeks a declaratur that he is declared to be the lawful owner of the property in dispute and consequential relief. In the alternative the applicant sought against first and second respondent an order of damages which equate to the value of the property. The draft order to the application is a long one numbering ten (10) paragraphs. The draft order was presented as follows:

"DRAFT ORDER

IT IS ORDERED THAT

1. The application for declaratur and ancillary reliefs be and is hereby granted.
2. The Applicant's personal rights in Stand 1015 Kariba Heights Kariba Township arising from an Agreement of Sale dated 12 March 2009 with the first respondent be and hereby declared valid and confirmed.
3. The Agreement of sale subsequently entered into by and between the first Respondent and fourth and fifth respondents in respect of Stand 1015 KARIBA HEIGHTS, KARIBA TOWNSHIP be and is hereby declared void, invalid, of no force and effect on account of fraud and is hereby set aside.
4. The Cession Agreement and transfer of personal rights in respect of Stand 1015 KARIBA HEIGHTS, KARIBA Township concluded by and between the third respondent and the fourth and fifth respondents be and is hereby declared void, invalid, of no force and effect on account of fraud and is hereby declared void, invalid, of no force and effect on account of fraud and is hereby set aside.
5. The third respondent be and is hereby ordered to cancel the said Cession Agreement and restore the name of the first respondent as the owner of stand number 1015 KARIBA HEIGHTS, KARIBA TOWNSHIP on its records.
6. The first, second and third respondent be and is hereby ordered to process the cession transfer of personal rights in the said Stand 1015 KARIBA HEIGTS, KARIBA TOWNSHIP into the first respondent's name.
7. In the event of first, second and third respondents failing, neglecting and or refusing to comply with the provisions of paragraph 4,5 and 6 above, the Sheriff for Zimbabwe shall be empowered and mandated to sign all relevant documents to effect the cession of Stand 1015 KARIBA HEIGHTS, KARIBA TOWNSHIP.
8. Alternatively, (in the alternative to Paragraphs 2-7), the first and second and third respondents, jointly and severally, the one paying the other/s to be absolved, be and are hereby ordered to pay to the Applicant a sum in local currency equivalent to the USD market the value of the said Stand 1015 KARIBA HEIGHTS TOWNSHIP.
9. The USD market value of the said Stand 1015 KARIBA HEIGHTS, KARIBA TOWNSHIP shall be determined by any registered reputable Estate Agent and Valuer

in Zimbabwe appointed by the Registrar of High Court of Zimbabwe (High Court, Harare).

10. The first, second, third, fourth and fifth respondents shall, jointly and severally, the one paying the other to be absolved, pay costs of suit on a legal practitioner and client scale only if they oppose the Application.

The applicants counsel applied to amend the draft order by the deletion of paragraphs 8 and 9. Effectively the applicant abandoned the alternative claim for damages. The applicants counsel also amended paragraph 10 of the draft order by removing the third, fourth and fifth respondents from liability for costs. Thus costs remained claimed against the first and second respondents only.

The factual matrix informing the dispute in this application is as follows. The property in question was municipal land. It belonged to the third respondent. On 16 May 2008 and by letter of that date the third respondent offered the property to the first respondent for value. An agreement of sale was subsequently executed between the first and third respondents on 20 October 2008. Clause 7 and 8 of the sale agreement provided as follows:

> "7 the stand is sold as it stands and without any warranty whether expressed or implied. It is further especially agreed that the seller gives no warranty that the stand is suitable for building or any other purposes
> 8 vacant possession of the stand shall be given by the seller to the purchaser on the date of the signature hereto, from which date the risk and benefit in respect of the stand shall pass from the seller to the purchaser.
> Significantly clause 19 (iv) provided that:
> " 9 (iv) the said piece of land shall not be transferred without prior written consent of the Municipality of Kariba, provided that this condition shall be removed upon its written consent to such removal."

It is common cause that the first respondent then sold the property to the applicant through the agency of his son the second respondent whom he granted a power of attorney which was in the form of an affidavit. The affidavit reads as follows:

> "I Jim Kadaya ID No 29-007785A-70 reaing at 3740 Cold Stream Chinhoyi do hereby solemnly and sincerely swear or declare the following:
> I own a residential stand No 1015 Kariba Heights which I bought fully from Kariba Municipality Council. I have authorized my son Haggi Kadziya ID No 70-116132L-70 to sell my stand on my behalf. I can only change ownership when the buyer has built up to window level as a requirement by Urban Councils Act.
> I can be contacted on the following numbers Bus 067-23259. Res 067-26382 after work and weekends Mobile 011434207
> NB the stand shall be sold to an interested buyer
> I make the above statement consciously believing the same to be done

Signed

……..

Signed before the me at Chinhoyi this 11th day of March 2009

Commissioner of oaths.

From the power of attorney change of ownership with the third respondent was to be made after the development of a structure built to window level at the least. The applicant and the first respondent represented by the second respondent executed a sale agreement for the property dated 12 March 2009. The purchase price was agreed to be US$5 500. The suspensive condition on transfer as expressed in the power of attorney was carried into the agreement as clause 1 of general conditions. The conditions were stated as:

> "1. Transfer of the property shall be done when the purchaser erects a building up to the window level as required by the Urban Council Act."

Significantly clause 4 of the general conditions provided as follows:

> "4. The seller shall tender transfer of the property within twenty one (21) days of the date upon which the purchases fulfils his obligation in terms of this agreement."

Other significant clauses were as follows:

> "5. That risk and profit in the property shall pass from the seller to the purchaser upon signing this agreement
> 6. The purchaser shall be entitled to take occupation upon signing of this agreement."

The breach clause 13 needs restating. It reads as follows

> "13 SHOULD either party commit a breach of this Agreement and fail to remedy the same within seven days of a written notice to do so then-:
> (a) If it is the purchaser who is in default, the seller shall have the right to cancel Agreement and claim damages
> (b) If it is the seller who is in default, the purchaser shall have the right either to cancel this Agreement or alternatively to enforce it and in either case, to claim damages;
> (c) If either party should have to engage the services of a legal practitioner for the collection of any money due, in terms of this agreement, the defaulting party shall be liable for costs and charges incurred in such collection."

The applicant in consequence of the agreement paid to the second respondent in cash the sum of US$ 4500. 00 on 17 March, 2009. There is a dispute in relation to payment of the balance of US$1 00.00. The applicant produced as proof of payment a copy of what it says was an acknowledgement of payment of cash USD$700.00 on 22 April, 2009 and cash USD$300.00 on 5 May 2009. The acknowledgement bears the picture of second respondent's driving license, a

Houghton Park Harare address, 11 Selcox Avenue and phone numbers 0913 268 665 and 0912 994 873. The first and second respondents denied that the payment was made and described the acknowledgement as having been fabricated. They averred that on account *inter alia* of the failure by the applicant to pay the balance of the purchase price the first and second respondents exercised their rights to cancel the agreement as provided in clause 13 of the Sale Agreement.

The first and second respondents averred that the sale was a cash sale and that the applicant breached the agreement by paying US$ 4 500.00. The first and second respondents did not explain why they accepted the payment of US$4500.00 and did not return nor have they made a tender to refund the money even in the opposition to this application.

The first and second respondents also averred that the applicant had breached the agreement by failing to comply with general conditions clause 1 which required that the applicant would get change of ownership upon constructing a dwelling to window level. The first respondent averred that the applicant was placed in mora to rectify the breach of non payment but refused, failed and neglected to remedy the breach."

The sale agreement provided for an elaborate manner of dealing with breach. Specifically the party alleging the breach was required to communicate details of the breach in writing by first calling upon the party in default to remedy the specified breach within seven days and thereafter and in the event of the breach not being remedied to cancel the agreement. The process was a simple paper trail issue which the first and second respondents needed to lay out but did not do so. It cannot be held under the circumstances that the first and second respondents cancelled the agreement at all in terms of how cancellation should be made. None of the alleged applicants' breache's were properly dealt with. Even if it is held that these were breaches committed by the applicant, no proof of notice to remedy breach was produced by the first and second defendants nor did they give details thereof.

It is common cause that the first respondent purported to enter into another agreement for the disposal of his rights, title and interest in the same property with the fourth and fifth respondents on 19 October, 2021. He executed a cession agreement on that date earning himself a princely sum of US$35 150. 00 before deductions. The first respondent lied in his warranties given to the fourth and fifth respondents. In clauses 4.2 and 4.3 the first respondent stated:

> "4.2 The cedent warrants that the property has not been pledged, hypothecated or otherwise encumbered to any creditors or third parties

> 4.3 The Cedent hereby represents and warrants that he has not entered into any agreement of a similar nature with any third parties in respect of the property."

There is no gainsaying that the first respondents sold the property for the second time to the fourth and fifth respondents before he properly cancelled the first agreement he had executed for same property with the applicant.

Dealing with the position of the fourth and fifth respondents, they averred that they lawfully acquired the property by cession agreement which was approved by the third respondent. They averred that they made all ground checks including confirming with the third respondent that the first respondent was the registered owner of the property. They averred that they sought an extension of the time granted for erecting building plans given in the agreements between the first third respondents and an extension was granted on 8 October 2021. They attached a capital gains clearance certificate dated 21 October, 2021 showing the transferor as the first respondent, the fourth and the fifth respondents the transferees. The transfer of the property has not yet been registered. The fourth and the fifth respondents averred that they only learnt of the applicants' interest on 1 May 2022 when the care takers reported that unknown persons had entered the property and were cutting trees. They averred that they did not know about the applicants claim because the property was not ceded to him and his agreement with the first and second respondents was therefore a nullity at law. The fourth and fifth respondent averred that the agreement between the applicant and the first respondent was a nullity because it was in the form of a sale agreement instead of a cession of rights in the property. They averred that only the owner then, the third respondent to be precise could sell the property yet it was not party to the agreement in question. The fourth and fifth respondents also impugned the sale between the applicant and the first respondent on the basis that it breached clause 19 of the agreement between the first and third respondents. Clause 19 reads as follows:

> "19. That the purchaser shall not cede or assign his rights or obligations under this agreement nor past with possession of the said property or part with possession thereof without the Sellers Consent in waiting on the conditions stipulated therein. The fourth and fifth respondents averred that for their part they assumed ownership or cession rights in compliance with the requirements of the conditions set out in clause 19. The applicant on the other hand averred that he took possession of the property and placed some property on the site. He averred that the submitted building plans were approved by the third respondent and thus to him the sale of the property to him was valid."

The third respondents position in relation to the sale of the property by the first respondent was that it was not aware of the transaction and did not grant its consent to the sale or alienation of the property contrary to the conditions of the sale in the event that the first respondent was

inclined to dispose of his rights in the property. The third respondent also averred that the plans which the applicant submitted for approval were not properly settled because the purported plan related to hospitality and accommodation yet the property was to be used for residential purposes only unless there was of an authorized change of use. The third respondent averred that it recognized the agreement of cession entered into between the first respondent and fourth and fifth respondents.

In his submissions the applicant's counsel submitted that he was the first purchaser of the property and the third and fourth respondents' second purchasers. He argued that the scenario was in fact a double sale because it is a fact that the first respondent concluded two separate agreements of the alienation of the property to the applicant and subsequently to the third and fourth respondents. There is no gain saying that the first respondents' sold the same property twice and received two separate payments which he pocketed.

The applicant also submitted that the first respondents committed a fraud in misrepresenting to the third and fourth respondents that he had not entered into any other transaction alienating his rights. The first respondent acted with greed and although he recognizes the validity of the agreement unlike the third, fourth and fifth respondents he argues that the applicant breached it by nor complying with the terms of the agreement. He also submitted that no agreement came into force because the applicant did not pay the full purchase price yet the sale was for cash.

The first issue to address therefore is whether or not there was a valid sale agreement of the property between the applicant and the first respondent. In other words does the applicant enjoy any rights in the property to be declared so and to be protected. The position of the first respondent is that he admits that a sale came into being but avoids the sale on the basis of an alleged breach by the applicant as already canvased. The first respondents defence in that regard does not hold water. This is so because the first respondent did not cancel the agreement for breach let alone doing so in terms of the provisions of the agreement. The agreement as against him is therefore extant.

The applicant has argued contrary to the assertions by the third, fourth and fifth respondents that this agreement is invalid for want of prior consent by the third respondent that such consent is not necessary and that its absence does not invalidate the agreement. The said respondents all took the position that the agreement of sale was invalid because as the first respondent had not become

the registered owner of the property he could not sell it. It was argued that the first respondent had only acquired personal rights in the property but could not dispose of the property without the consent of the owner because apart from the provisions of clause 19 in the Sale agreement as aforesaid, only an owns could sell the property in the case the respondent.

The dispute in this application is clear and arises from the dishonest and unscrupulous conduct of the first respondent who was greedy and sold the same property to innocent purchasers twice. Such cases flood the courts daily. Reverting to the facts, it is not correct to hold that the property in issue belonged to or was owned by the third respondent. The third respondent sold it to the first respondent for value. Its books reflected after the sale to the first respondents that the property had been sold to the first respondent and been paid for. In terms of clause 7 and 8 of the agreement between the first and third respondents, risk and profit in the property as well as possession all passed to the first respondent on signature of the sale agreement. (clause 9 iv) provided that: "property shall not be transferred without the prior written consent of the Municipality of Kariba provided that this condition shall be removed upon its written consent to such removal." There is no suggestion that the first respondent took any steps to transfer the property to the first purchaser who is the applicant without the consent of the third respondent.

That leaves clause 19 of the sale agreement between the first and third respondent. The clause is worded ad follows:

> "19 that the purchaser shall not cede or assign his rights or obligations under this agreement nor part with possession of the said property or without the sellers consent in writing and on the condition stipulated therein."

The first and second respondents did not seek to rely on this clause but on breach of agreement between him and applicant.

In the opposing affidavit the first and second respondents set out their opposition clearly in paragraph 4 and 5 of the opposing affidavit which reads:

> **"Ad para 10-1-10-2**
>
> "4 this is disputed. Applicant waivered *(sic)* his present and future rights to the property in question when he reneged from his contractual obligations by refusing and failing pay (sic) the purchase price in full. The agreement of sale being relied upon herein to enforce non existing rights is no longer extant.
> 5. The purchase price was supposed to be paid in full upon signing of the Agreement of Sale in as (sic) stated in the permeable, hence it was not an installment agreement"
> **6. Ad para 103**

> This is also vehemently disputed. First respondent lawfully disposed of the property in question since he was the lawful owner of the property in question. Therefore the Agreement of sale between the first, third and fourth respondents is valid at law. See Annexure B, being a copy of the agreement of sale between first, fourth and fifth respondents."

The first and second respondents further cemented their positions as they stated in paragraph 8 of their opposing affidavit as follows

> "8 Applicant has no legal basis to claim and or demand the 5th Respondent to reverse the transfer of the property. He forfeited his legal rights to the property when he refused, failed and neglected to pay the full purchase price despite demand to do so, thus breaching the agreement of sale"

I must note that there is confusion in the citation of the parties in the opposing affidavit of the first and second respondents. The reference to fifth respondent is in fact a reference to the third respondent (Municipality of Kariba). In relation to the position taken by the first and second respondents, it is observed that they did not provide any evidence of cancellation of their agreement with the applicant prior to entering into the second sale with the fourth and fifth respondents. The agreement between the first respondent and the applicant contains clause 13 which provides for elaborate steps to be followed when one party seeks to cancel the agreement. Significantly the aggrieved party should give a seven day notice to the other party to remedy the breach complained of before rights of cancellation and consequential relief can arise. The contention by the first and second respondents that the applicant was in breach of the agreement of sale by not paying the purchase price is a red-herring because on 17 March 2009 the second respondent as agent for the first respondent accepted payment of US$4 500 from the applicant and signed for it under the cause that it was "payment of residential stand in Kariba." The agreement had been signed on 12 March 2009. It cannot be open to first and second respondent to plead a breach of the agreement and its cancellation in consequence thereof if they failed to follow cancellation steps as given in the same agreement. There can be no doubt therefore that the first and second respondents did not lawfully cancel the agreement between the first respondent and the applicant.

The third respondent averred that it did not commit any wrong and that at all times it acted in terms of the agreement it had with the first respondent. It averred that clause 19 of the agreement did not allow for cession of rights in the property by the first respondent without first obtaining the third respondents' consent in writing. It was averred that no consent was sought nor obtained by the first respondent before transacting with the applicant. The applicant in the answering

affidavit averred that the third respondent was not a law unto itself to choose which agreement of sale to accept and which to trash. The applicant also averred that the approval or consent of the third respondent was not necessary in relation to the validity of the sale of rights in the property as between the applicant and first and second respondents. The applicant deposed that clause 19 of the agreement which purported to prohibit the sale of the property without the respondents' approval was of no force or effect.

The fourth and fifth respondents in their opposing affidavit did not deny the existence of the first sale of property to the applicant by the first and second respondents as I have already noted. Their position was that the first sale agreement should not be recognized because it was made in breach of clause 19 of the agreement and that it was also headed and described as a sale agreement as opposed to it being a cession agreement. It was averred that a sale agreement was untenable because the first and the second respondents could not sell what they did not own since the first respondent had not obtained transfer of the property. The fourth and fifth respondents averred that they were innocent purchasers who complied with the process of cession of the property. They averred that the first sale agreement between the applicant and the first respondent was invalid and hence there could be no double sale. The fourth and fifth respondents averred that a nullity could not be enforced. They also averred that if clause 19 of the first sale agreement is given effect, the court will in effect be forcing the third respondent to accede to the cession thus fettering its discretion to refuse to consent to the cession.

In counsels submissions, the applicants counsel impugned clause 19 of the agreement between the first and third respondents. Counsel submitted on the authority of the case of David *Tabaiwa* v *Clemence Kaseke* and *Beath Kaseke* and the *Director of Housing* and *Community Services* HH 74/2006 that the consent of the third respondent was not necessary for the validity of the alienation by the first respondent of his rights in the first sale agreement between him and the first and third respondent.

In the quoted case, MAKARAU J (as then she was) dealt with both issues raised by the fourth and fifth respondents being firstly, the reference to the agreement between the first respondent and the applicant as a sale agreement and not a cession agreement and the issue also raised by the third respondent that there was no Municipality of Kariba consent to the transaction between the first respondent and the applicant. On the issue of the nature of the agreement, the learned judge noted

that parties loosely used the word sale even in circumstances where the transaction involved is a cession. The learned judge stated at page 2 of the cyclostyled judgment

> "It is trite that in dealing with rights in immovable properties owned by local authorities the principles that apply in a sale of property outrightly owned by seller are of no application. I am here reminded of the remarks by *MCNALLY* JA in *Gomba* v *Makwarimba* 1992 (2) ZLR 26 at page 27 H where he had this to say:
>
> "As so often happens, the parties have used the word sale to described what is in reality a cession of rights, since the house actually belongs to the C*hitungwiza* Town *Council Compar*e *Majuru* v *Maposa* SC 172/91(not reported)

The learned judge then went on to lament that legal practitioners persist in ignoring the distinction between sale and cession of rights in cases where the property is owned by a local authority there are many distinctions between the two legal transactions."

The above remarks were repeated by UCHENA JA in the case of *CBZ Bank* v *David Moyo* and *Deputy Sheriff SC*. 17/2018

It seems to that it is really not the form of the agreement which counts but its content and the intention of the parties. A consideration of the agreement between the first respondent and the applicant shows that the parties were aware of and incorporated in their agreement terms of the agreement between the first respondent and the third respondent. The parties recorded that transfer could not pass until conditions placed in the agreement between the first and the third respondent had been realized or met. Significantly, clause 10 of the agreement between the third respondent and the applicant provided as follows:

> "CONDITIONS AND ENCUMBERANCES"
>
> 10. The Purchaser accepts The Property, with any servitudes, lease or leases and rent orders to which it is subject, its nature extent boundaries, beacons and locality, the terms and conditions specified in the AGREEMENT OD SALE BETWEEN MUNICIPALITY OF KARIBA AND JIM KADZIYA, all restrictive conditions of use imposed by a Town Planning Authority or any other Board, Body, Authority or person whomsoever and its extent whether or not it contains roads vested in the Government or any other Authority Statutory or otherwise."

The purported sale was therefore not an outright sale but was subject to and incorporated the agreement between the third and first respondents. It is my view taking into account the circumstances and content of the agreement between the first respondent and the applicant that the agreement was not invalid for its presentation as a sale as opposed to a cession of rights agreement.

The agreement incorporated by refence the conditions to which the agreement between the first respondent and the applicant was subject.

The next issue also dealt with by MAKARAU J as aforesaid concerned the need to obtain the prior written consent of the municipality to sell a property between a registered tenant and a third party. After noting previous decisions which held such a sale to be invalid for want of consent see *Chikonyora* v *Pedzisa* 1992 (2) ZLR 445 *and Hundai* v *Murauro* 1993 (2) ZLR 401 (s). The learned judge then quoted the latter case of *Mukarati* v *Mkumbu* 1996(1) ZLR 212 at page 4 of the *David Tobaiwa* judgment (supra)

"The year, following EBRAHIM JA, had occasion to reinforce the remarks he had made in *Magwenzi* v *Chamunorwa* (supra), thereby putting the matter to rest and in a way reversing *Pedzisa* and Murauro. In *Mukarati* v *Mkumbu* 1996 ZLR 212 (S) at 214 HH: the learned judge had this to say: I think the real position with the arrangements is this:

In terms of her agreement with the council, the defendant cannot cede title to the property without the councils' consent. This means that she cannot without councils consent contract to pass title to the property because she has no title to pass. But this does not mean that she cannot contract to sell the property. It would think be legally possible to her. I enter into a contract of sale conditional on council granting its consent.

I would venture to suggest at this stage and following the remarks of EBRAHIM JA that it appears to be legally possible for a person in the position of the first respondent to enter into a contact of sale not only of the property itself as suggested by EBRAHIM JA, but of the rights, title and interest that he has under the suspensive agreement of sale and which rights will in due course mature into real rights in respect of the property. Thus it is my view that those personal rights that are conferred by the suspensive agreement of sale are capable of being sold and bought without the prior consent of the local authority concerned."

The learned judge then stated authoritatively as follows:

> "It would appear to me that the law is now settled that the agreement that the applicant and the 1st respondent had was valid and building as between the contracting parties. It is not null and void."

Thus the arguments by the fourth and fifth respondents suggesting that the agreement between the first respondent and the applicant was null and void for its reference as an agreement of sale as opposed to agreement of cession and for want of the consent or approval of the third respondent fails.

As against the third respondent and the applicant the position is different. There is no *vinculum juris* between the applicant and the third respondent. The learned judge also dealt with that aspect. The learned judge stated at page 5 of her judgment

> "The issue still to be determined in this matter is whether the agreement of sale between the applicant and the 1st respondent is enforceable against the local authority.

> The *dicta* in *Magwenu* appears to me to suggest that a transaction entered into between the seller and the purchaser without prior consent of the local authority is unenforceable against the local authority before the seller has full title in the property. The same view appears to have been impliedly expressed by ROBINSON J In *Nkomo* v *Mufuru* 1997 (1) ZLR 155(H) when he held that the agreement of sale/or assignment of right before him was binding as between the contracting parties only. In other words it could not be enforced against the local authority before the seller has full title in the property."
>
> The learned judge also referred to the case of *Jangar*a v Nyakuyamba 1998 (2) ZLR 475 where GILLESPIE J also expressed the same view.

It therefore follows and based on the authorities discussed above that the court cannot order the third respondent to process the cession of the property in favour of the applicant. The applicant at best is expected to follow due process. It is premature for the court even assuming that it upholds the agreement between the applicant and the first respondent to be valid, to order that the third respondent should register the cession from the second respondent to the applicants as there are requirements to be satisfied in processing a cession which the court is not privy to. The third respondent is however expected in such a scenario to perform its duties or obligations and only if it does not do so or the applicant has issues with the processing of the cession can the applicant seek appropriate orders from the court.

In relation to the circumstances of the sale or alienation of the first respondent's right in the property, it is clear from a reading of the case law that "the sale" agreement between the first respondent and the applicant was valid. The next consideration is to determine whether or not that agreement was still extant when the first respondent again sold his rights, title and interest in the property to fourth and fifth respondent. It is in my view on the evidence that the agreement between the first respondent and the applicant was still extant despite the spirited attempts of both the first, fourth and fifth respondents to argue that there was no valid agreement of sale between the first respondent and the applicant. The first respondent averred that the applicant was in breaach of the agreement for non payment of the full purchase price, an allegation disputed by the applicant. That is not the real issue. The issue is whether the cancellation so pleaded was done in accordance with the agreement. Clause 13 of the agreement provides for a seven (7) written notice to remedy an alleged breach to be given before cancellation can be invoked. The first defendant did not plead that he complied with the notice clause.

It was the applicant's contention that he reported the applicant to the police for fraud. Indeed, the first respondent purported to sell his rights, title and interest to the fourth and fifth

respondents at a time that the first agreement with the first respondent was still valid. The agreement with fourth and fifth respondents constituted a second and therefore a double sale. The first respondent lied to the fourth and fifth respondents that the property was not subject to a prior sale. The first respondent no longer held any rights, title or interest in the agreement because he had sold them. He therefore defrauded the fourth and fifth respondents of their money in a second sale.

The court must observe the sanctity of contracts. In the case of *Riogold (Pvt) Ltd* v *Falcon Gold Zimbabwe & Anor* Sc 7/23 MWAYERA JA stated at p 9 of the cyclostyled judgement.

"..... The doctrine of sanctity of contracts is a foundational principle in our jurisdiction. It provides that once a contract is entered into freely and voluntarily it becomes sacrosanct and courts should enforce it. In the case of *Kempen v Kempen* SC 14/16, this principle was aptly captured as being the freedom of parties to enter into a contract and the duty of the court to respect the agency that parties have in this regard.

It was noted as follows:

> " our legal system pays great honour to the doctrine of sanctity of contracts to the effect that lawful agreements are binding and enforceable by the courts. In *Book* v *Davison* 1988(1) ZLR at 369 F; the court held that it is in the public interest that agreements freely entered into must be honoured. To buttress this point, the court in *Magodora* v *Care International* 2014 (1) ZLR 397(S) held that|:
>
> "In principle it is not open to the court to rewrite a contract entered into between parties or to excuse any of them from the consequences of the contract that they have freely and voluntary accepted even if they are shown to be onerous or oppressive. This is so as a matter of public policy. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms."

From the above discourse it follows that once the decision is made that the sale agreement between the first respondent and the applicant's valid, it must be given effect to. The question then is what the court should do in view of the existence of two agreements entered into by the first respondent. It is a double sale situation. In this regard the applicants counsel submitted that as the first purchaser the court should give effect to its sale agreement and cancel the second sale agreement involving the first respondent and fourth and fifth respondents. It was submitted in the heads of argument that the first and second respondents had been convicted and sentenced on a charge of fraud arising from the double sale transactions at Kariba Magistrates court on 3 October, 2022. Even without taking into account the alleged criminal court conviction of the first and second fraud as submitted in the heads of argument, the facts of the matter amply demonstrate that the

first respondent misrepresented to the fourth and fifth respondents that the property was free for sale when it was not. The fourth and fifth respondents did not deny that they were victims of a fraud. They appeared to recognize the factual existence of the first agreement between the second respondent and the applicant but sought to trash it as invalid.

The approach of the court to resolving double sale situations was set out in the case of *Gaga v Moyo* case & Ors 2000 (2) ZLR 458 SC at 459 E-G Per MCNALLY JA where the learned judge stated:

> "The basic rule in double sales where transfer has not passed to either party is that the first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages against the seller, which is usually small comfort. But that rule applies only in the absence of special circumstances affecting the balance of equities." See Mckerron (1935) 4 SA Law Times 178, Burchell (1974) 91 SALJ 40. Burchell was of the view that the balance of equities must weigh heavily in favour of the second purchases" before the court could favour her over the first purchases "before the court could favour her over the first purchases. (p 41 in tine and note 31). And in BP *Southern Africa* (Pvt) Ltd v *Desden Properties*(Pvt) Ltd 1964 RLR 7 (G) MACANALD J(as he then was) said
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> "In my view, the policy of the law will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursive 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 expressed by Professor Micckerron that save in special circumstances, the first purchaser is to be preferred.
>
> His Lordship expressed the opinion that it should not be seen as a special circumstance that the second purchaser stood to lose more than the first purchaser; though in fact he was not convinced that was the true position. However, BECK J 1972 (1) RIR 186G at 195 F seemed prepared to consider that argument though he too found on the facts that it did not arise."

See *Benyamin Chamwaita and Anor* v *Mary Muchengeti* SC 78/22 wherein GARWE JA (as he was then) commenting on the dicta in the *Guga Moyo* as quoted (supra) stated at para 30

> "The above principle is derived from the policy of the law to uphold the sanctity of contracts- *Mwaypaida Family Trust* v *Madoroba & Ors* 2004 (1) ZLR 239(S) 443. A court 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 the hardship rather than with the result in a particular case. Select South African legal Problems Essays in Memory of RG Makerron by Ellison Kahn. It is clear therefore that the second purchaser must establish a preponderance of equites in his favour or circumstances which render it inequitable to apply the maxim *qui prior est tempore potior est*

juse before the court can favour him of her over the first purchaser- *Barros and Anor* v *Chimphonda* 1999 (1) ZLR 58(S).

Refreshingly the learned judge proceeded to define what constituted balance of equities and set out some factors without limit that the court may take into account to assist in the assessment of balance of equities. The learned judge stated as follows at paras 31-32 of the cyclostyled judgment.

"WHAT CONSTITUTES THE BALANCE OF EQUITIES"
[31] What constitutes the balance of equities is incapable of precise definition but what is clear from the application of the principles in various cases is that the totality of the proved facts must establish special circumstances which would render it inequitable to apply the qui prior est tempore potior est jure maxim. In simple terms the maxim means that he who is first in time is first in right or one who is prior in time has a superior right in law. In the absence of such equities the first purchaser would have a right to the remedy of specific performance. Whether the established facts constitute a balance of equities involves the exercise of discretion on the part of the trial court.
[32] Some of the considerations taken into account by the courts in this country include the following:

- That the second purchaser was an innocent purchaser.
- That the first purchases had failed to register a caveat against the property although she had become aware that the seller was exhibiting intentions to sell the property to another person.
- That the second purchaser had expended more money overally than the first purchases was already in lawful occupation and the first was not. *Guga* v *Moyo* supra at 460 C-E.
- That the second purchaser had demonstrated more zeal and enthusiasm towards developing the property as required by the local authorities. Whereas the purchaser had not done anything despite having purchased the property- *Dube* v *Mpala* and *Ors* HB 116/05.
- That one of the competing purchases had stayed at the property for a long time and had paid all the charges levied by council on the property – *Ndidzano* v *Gondora*& Ors HH 65/2011."

In casu both the applicant and the fourth and fifth respondents claim to have been attached to the property, the applicant said for longer. Starting with the applicant, he applicant averred that he was bound to comply with the requirement that a residential building is first erected on the property before transfer could be processed. He however intended to develop the stand and establish a hospitality and accommodation business. He produce as annexure G approved plans for soak away and inter alia payments which he made in the first respondent's name because he could not get cession until he had complied with the building clause on the agreement between the third and first respondent. The third respondent did not deny the allegation. The plans were approved in 2010. He averred that the plans approvals were renewed in 2013 with the building plans being approved on 7April, 2022. Also produced was a receipt issued by the third on 25 March, 2022 for payment of $ 225 512 ZIG for plan submission. The applicant claimed to have expended US $ 16

000.00 in consultancy fees. He annexed a copy of the invoice in that amount dated 25 April, 2022 from the consulting company called CITTADINNI Construction solutions (Pvt) Ltd.

The applicant averred that he only became aware of the fourth and fifth respondents claim on 29 April, 2022 when the Consulting Company commenced development operations on the property. Further developments were than halted. He averred that the lack of main developments was informed by the fact that he had awaited plan approvals by the third respondent. The applicant averred that the fourth and fifth respondents only commenced developments on 3 May, 2022 after the applicant had commenced his earlier and that the fourth and fifth respondents reacted to the applicants commencement of developments. The applicant attached no less than eight correspondences between his legal practitioners and the fourth and fifth respondents legal practitioners in which parties debated on who had superior rights to the property. From the correspondence it was noted that the applicant had erected a cabin on the property which the fourth and fifth respondent demanded that it be removed.

Per contra the fourth and fifth respondents averred that the fact that the applicant may have been advised by the third respondent that he could only get cession after building an approved structure to window level could have been the third respondents' position which in the case of the fourth and fifth respondent's case was not applied. It was not explained why the fourth and fifth respondent would have been excepted from a condition which was in the first agreement between the third and first respondent. They averred that from November 2021 until May, 2022 they did a lot of work on the land by cleaning it up and making it ready for a planned development. They averred that the stand had become a dump site which they cleared. As far as steps to take transfer is concerned the fourth and fifth respondents had after having their cession registered with the third respondent obtained a capital gains clearance on 26 October, 2021 as a step towards obtaining registered title. However registered title was yet to be registered. Until such registration the fourth and fifth respondents have held personal rights over the property.

The fourth and fifth respondents attached to their opposing affidavit copies of a contract of employment entered between them and an employee who was to look after the property as well as pictures of a lorry carrying rubbish said to have been removed from the property they planted trees.

From the analysis of facts and circumstances of the matter it cannot be said that either party lacked zeal in developing the property. The applicant showed that he took necessary steps to obtain regulatory approval first for the developments which he wanted to undertake. Such

regulatory approval in the form of final plans was obtained on 7 April, 2022. The dispute herein commenced. The evidence shows that the fourth and fifth respondents were fast movers but then their speed in taking charge of the ground, clearing it and obtaining a capital gains clearance all in a short space of time was dependant on the fact that there was a quick approval of their cession. There is however every reason to raise eye brows on the speed with which the paper trail transaction of the fourth and fifth respondents with the third respondent progressed. The sale or cession agreement between the first respondent and the fourth and fifth respondent was executed on 19 October, 2021. The third respondent approved the cession on November, 2021 being the date when the Town Clerk signed the cession on 4. The capital gains clearance was issued on 26 October, 2021 which date was before the cession was approved by the Town Clerk. It raises eyebrows and one can understand the applicants' comment that the fourth and fifth respondents' transactions were hurriedly done yet it took years for his transactions to be processed by the third respondent. I leave it at that. Some explanation would be required to shed light on how capital gains tax could have been assessed and paid for a property bought by a cession agreement which had not been signed for third respondent by the Town Clerk capital gains was assessed and paid before the sale agreement to which it relates had been signed by the Town Clerk .

The evidence shows that the applicant has approved plans for construction. The fourth and fifth respondents' submission that the plans and receipts are in the name of the first respondent and that the applicant cannot rely on them has no substance because without cession having been approved first, the applicant could not have plans approved in his name. In my view, it cannot be said that the fact that the fourth and fifth respondents had cession immediately approved by the third respondent grants them a leverage over the applicant. This is so because the applicant was himself not idle as he was awaiting regulatory approval to commence developments. The fourth and fifth respondents are also behind in this respect because whilst the applicant can immediately start construction on approved plans the third and fifth respondents cannot do so. I must also express my doubt on whether the approved cession gives an advantage to the fourth and fifth respondents when it arises from a fraud committed by the first respondent. It is my finding that there are no special circumstances to justify a departure from the general rule that the first purchasers must be first in right. The court must therefore protect the first agreement.

In relation to the draft order the prayer for an order declaring the agreement between the applicant and the first respondent to be valid is good to issue. The prayer to set aside the agreement

between the first respondent and fourth and fifth respondents is good to issue. The consequential relief setting aside the cession agreement between the first and fourth and fifth respondents is good to issue. The prayer that the court orders that the third respondent should affect cession of the property to the applicant is not good to issue because the third respondent may have other requirements which the court does not know about.

On the issue of costs, the dispute had to justifiably be resolved by the court. The culprit in the matter is the first respondent. His dishonest conduct has resulted in the parties incurring unnecessary expenses. Costs on the higher scale are also justified because parties have been put out of pocket by the first respondents' despicable conduct.

In the result the following order is issued

IT IS ORDERED THAT

1. The "agreement of sale of stand 1015 Heights Kariba acted 12 March, 2009 entered into between the applicant and the first respondent is declared to be valid and binding for all intents and purposes.
2. The agreement of cession of stand 1015 Heights Kariba dated 19 October, 2021 entered into between the first respondent and the fourth and fifth respondents including the subsequent cession approval by the third respondent dated 4 November, 2021 are set aside.
3. The third respondent shall consider the agreement in para 1 valid for cession consideration in the normal way.
4. The first respondent shall pay the costs incurred by the applicants and the third, fourth and fifth respondents on the scale of legal practitioner and client.

Muhonde Attorneys, applicant's legal practitioner
E Gjima, 1st & 2nd respondent legal practitioner
Moyo Chikomo& Gumuro, 3rd respondent legal practitioner
Mawere& Sibanda, 4th & 5th respondents