

TAMUONA LUXTON KUDYA
and
ABIGAIL KUDYA
versus
AGSON MAFUTA CHIOZA
and
ELLIOT CHIOZA
and
STANELY CHIOZA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; June 24, July & 14 January 2025

Civil Trial

D Diza & V Pfumvuti, for plaintiffs
1st defendant in person
No appearance by 2nd and 3rd defendants

TSANGA J:

In this action matter, the plaintiffs (the Kudyas) seek transfer of property known as Stand 2994 Prospect Township of Stand 322 of Prospect measuring 4026 square metres purchased in 2004 from the first defendant, Agson Afuta Chioza in 2004. The evidence, on behalf of the plaintiffs, was given by his wife Abigail Kudya. This was under a power of attorney given by her husband Tamuona Luxton Kudya. She is also the second plaintiff.

The second and third defendants, Elliot Chioza and Stanely Chioza are Agson's sons. The two sons did not attend this trial so their father Agson was the only witness for the defendants. He told the court that his sons are in Bangladesh and will abide by the court's decision.

There were common cause facts in the background of this trial. Tamuona Luxton Kudya and his wife Abigail Kudya entered into a written agreement of sale of the stand in question with Agson Afuta Kudya in 2004. It was an undeveloped and unoccupied stand at the time. It is not disputed that the purchase price of ninety five million in Zimbabwean dollars at the time was paid as per agreed terms and was acknowledged. A house plan was approved by the City of Harare in 2007. The Kudyas proceeded to construct and complete a dwelling on the said

stand and to take occupation. They have been in occupation since then but alas, without the security of transfer.

What has brought the parties to court is that since the purchase of the stand in 2004, which is, twenty years ago, Agson has simply not effected transfer to them. Using one excuse after another, he has played the artful dodger ultimately being caught in his own web of lies about unending litigation. To the Kudyas, he attributed the long delay to date to subdivision disputes with a Mr Kapumha, being the person who sold him the stand in the initial instance. Mr Kapumha had in turn bought them from the deceased estate of Jean Schultz. Whilst informing them that he is obligated to transfer, Agson has consistently over the years hidden under the umbrella that there is on-going litigation concerning the sale of the original stand to him.

However, unbeknown to the Kudyas, whatever impediment may have legitimately stalled transfer, Agson Chioza in fact had long since entered into an order by consent with the relevant parties on the 4th of May 2017 under case number HC1253/2014 wherein the issue of the subdivision of the two stands he had acquired from Mr Kapumha had been regularised.

In that order by consent, Agson surreptitiously proceeded to cause sub divisional transfers of the property forming the subject of litigation, being stand 2994 Prospect Township of Stand 322 of Prospect measuring 4026 square metres to be transferred to his sons Elliot and Stanely Chioza instead of himself. The Kudyas do not have an agreement with his sons but with him hence the quest to regularise that paragraph so as to compel transfer from Agson.

Well knowing what he had done, he had continued the charade that he was not in a legal position to pass transfer because of disputes. In her evidence, Abigail Kudya told the court that the only time that he ever mentioned his sons was when asked what would happen if he died without transfer. He had assured them that his sons were fully aware of the circumstances and would effect transfer should the legal impediments be resolved by the courts.

Abigail Kudya also told the court that sometime in 2023, in continuation of his charade, Agson had in fact tried to persuade them to buy more land under the pretext that this would help rationalise the portion that was to be awarded to them. They had exercised caution and had not done so.

They had then learnt from the purchaser of the other subdivided stand being a Mr Zhangare who had bought stand 2293 that he had resorted to taking legal action to obtain transfer from Mr Chioza and had indeed obtained a court order from the court. She was adamant in cross examination by Agson that as full purchasers of stand 2294 they do not want a

substitute property from him but that he must simply transfer that which he sold and was paid for as per their agreement. At the start of the trial, Mr *Diza* told the court that there is currently no pending matter in any court on the alleged disputes.

It is against the backdrop of these facts that the Kudyas seek that the names of Elliot Chioza and Stanely Chioza the second and third defendants be expunged from the order under HC 1253/2014 as they were never part of the agreement. Their names should be substituted with that of their father Agson Chioza. Thereafter they seek an order compelling the first defendant to transfer the property to them and failing which they seek an order that the Sheriff proceeds to do so. Costs of suit are also sought.

In his plea, Agson Chioza pleaded that the Kudya's agreement of sale was with the second and third defendants as the real owners of the stand and that therefore transfer had to be sequential. This had been denied by the plaintiffs that their agreement was ever with his sons. The agreement speaks for itself that it is an agreement between Tamuona Luxton Kudya and Agson Afuta Chioza.

Agson Chioza's evidence-in-chief can be summarised as follows: he bought stands 2993 and 2994 through an estate agent that was representing Mr Kapumha who sold him the stands. This was on September 28th 2000. Each of the stands measured 4026 square metres. He said that Mr Kapumha, who then worked for the City of Harare, had only purchased one half share of stand 322 of Prospect from the estate of Jean Schultz yet Mr Kapumha had then subdivided the whole land being 1,3641 hectares into three stands. According to him the problem then arose from the fact that although in reality Mr Kapumha bought only half of stand 322, he sold stands on the basis of having acquired the entire property instead of confining himself to the half share he bought. He submitted that Mr Kapumha having purchased a half share, could therefore not have sold stands measuring 4026 square metres each as that was more land than he had purchased. He therefore claims that his agreement with Mr Kapumha is illegal. He said that he had reported the matter to the police in 2022.

In cross-examination, he however admitted key facts that are pertinent to this matter: he was indeed the one who entered into an agreement of sale with the plaintiffs. He also accepted that he had been paid the full purchase price. He accepted that he had an obligation to transfer but had not yet tendered transfer. Materially, in 2017 he had entered into an order by consent which among other things regularised the creation of stand 2294 and stand 2293. He admitted that he had caused stand 2294 to be allocated to his sons who were not party to those proceedings. He admitted that the stand had already been sold to the Kudyas in 2005 at

the time he entered the order by consent in 2017. He further admitted that the agreement of sale had not been cancelled. He admitted to entering a plea to the summons in which he said the agreement was not valid on the basis that it was not him as the first defendant who had entered into an agreement with the plaintiffs. He equally admitted that the names of his sons do not appear in the agreement. He further admitted that contrary to his evidence to the court, there had been absolutely no mention of Mr Kapumha as having been the impediment to him transferring the stands to the plaintiffs following the order of 2017. His summary of evidence was different from his plea. He further agreed that the consent order was still extant and that the same property mentioned in that order is the one he had sold to the plaintiffs.

Analysis of evidence

Referred to trial were two issues:

1. Whether or not there is a valid agreement of sale between the first defendant and the plaintiffs.
2. Whether or not the plaintiffs are entitled to the transfer by the first defendant of property known as stand 2994 Prospect Township measuring 4026 square metres at the exclusion of the second and third defendants

The issues raised in the plaintiffs' evidence and which then also arose in the cross examination of the first defendant's own evidence in chief are the pertinent facts of relevance to the dispute that was placed before me. There is absolutely no doubt that the agreement between the plaintiffs and the first defendant is valid and was freely and voluntarily entered into. The issue of the legality or otherwise of the subdivisions was not the subject matter of the dispute between the parties before me and it was not what was referred to trial. It therefore does not at all impede my making a decision on whether the first defendant has an obligation to transfer the stand he sold to the plaintiffs as per the terms of their agreement.

Mr *Diza* on behalf of the plaintiffs drew the court's attention that the first defendant had been brought to court under HC 1253/2014 *Zhangare v Chioza & Anor* by Mr Zhangare to whom he had sold the other stand mentioned in the order by consent. The same order by consent had therefore been central to that matter. Mr Zhangare who was seeking specific performance had proven that there was an agreement of sale which had been complied with and that the relevant stand should rightly have been passed to him. The purported fraud allegations on the part of Mr Kapumha had also been dealt with and the court had concluded that these had not been proven. There was no reason for the court to depart from that finding in this matter before

me. The plaintiffs had proven that they entered into a valid agreement and had paid the purchase price and were entitled to transfer. He therefore submitted that the court should be slow to depart from the position of MANONGWA J in that related matter. He also emphasised that the parties are bound by their agreement. Lastly, the defendant was said not to have been a credible witness, for example pleading one set of facts yet arguing another at the trial.

In his closing submissions the first defendant sought to rehash the arguments about the illegality of the subdivisions. That, as already stated, was not the issue before me.

I am inclined to agree with the plaintiff on the applicability of the principle of *stare decisis* in this matter. The court in *Zhangare v Chioza* ordered that Zhangare be transferred his stand on the basis of the same order by consent as in this matter. Moreover, it has been proven absolutely by the plaintiffs that they did enter into an agreement with the first defendant I agree too that the first defendant was absolutely not a credible witness. He sought to confuse issues by raising the legality of the Kapumha sale only because he seeks to resile from the agreement with the plaintiffs. Whatever disputes he had with Mr Kapumha had been resolved. The fact that he hid the order by consent he obtained from the court smacks of a man who is given to dishonesty and fraudulent tendencies in his dealings. He knew he had had the property transferred to his sons instead of to himself. He knew at the time that he agreed to the order by consent that the property had already been sold to the plaintiffs by him. There is absolutely no reason why the first defendant should make an offer in cross examination to find them another property. The property which they bought from him is the one that must be transferred as its creation was regularised. There was an agreement and the full purchase price was paid. Transfer has not taken place and has to take place. The first defendant cannot purport to have bought the property for his two sons. The order by consent must therefore be corrected to reflect in the relevant paragraph that the property must be transferred to him so that he can simultaneously effect transfer to the plaintiffs.

In the result it is hereby ordered that:

- 1 The names of the second and third defendants in paragraph 3.1 of the order of this honourable court dated 4th March 2017 under cover of case number HC 1253/2014 are deleted and replaced with that of the first defendant.
- 2 The first defendant is hereby compelled to transfer to the plaintiffs' property known as Stand 2994 Prospect Township of Stand 322 of Prospect measuring 4026 square metres within 7 days of the granting of the order.

- 3 The Sheriff of Zimbabwe shall sign all transfer documents if the first defendant does not comply with the order in (2) above.
- 4 The first defendant shall pay costs of suit.

TSANGA J:

Diza Attorneys, plaintiffs' legal practitioners