CLIFMORE CHIGUMIRA
and
CHIYEDZA BERNADETTE MWITO
versus
ROBERT LUNGANGA KAMWANGA
and
NORMAN CHIREMBWE
and
THE REGISTRAR OF DEEDS (N.O)
and
SHERIFF OF THE HIGH COURT (N.O)
and
CHARLES SHUNGU

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE 29 March & 12 May 2022

Opposed Application

M Ngongoni, for the applicants
S Gahadzikwa, for the first and second respondents
No appearance, for the third respondent
No appearance for the fourth respondent
J. B Matandire, for the fifth respondent

MUCHAWA J: This is a court application to compel transfer of an immovable property situate in the district of Salisbury called Stand 5369 of Stand 4736 Prospect Township of Stand 157 of Prospect measuring 622 square metres (the property) into the applicants' names. The applicants are husband and wife.

The first respondent is the registered owner of Stand Number 4736 Prospect Township of Stand 157 Prospect measuring 9 294 square metres which he holds under Deed of Transfer Number 4244/2015. He was granted authority by the City of Harare to subdivide the said land, which he did.

The second respondent, through a Special Power of Attorney of the 5th July 2016, was authorized, by first respondent to sell the stands which were created as a result of the subdivision. Pursuant to that, an agreement of sale was executed with the applicants for the sale of Stand 5369

(the property). The total purchase price was set at US$21 000. It was the seller's responsibility to pay for the endowment certificate to the Harare City Council and the seller would comply with the conditions of the subdivision permit within six months.

The third and fourth respondents were cited in their official capacities to facilitate transfer as spelt out in the draft order. The fifth respondent was joined to these proceedings on 25 February 2022. He is opposed to the application on the basis that he is the owner of the stand in issue being Number 5369 as he bought such stand from the second respondent well before the applicants claim to have bought it.

The applicants have brought this application on the basis that they have paid the purchase price in full and the first respondent duly acknowledged all payments yet the first and second respondents have not complied with the conditions of the subdivision permit and have failed to complete the process within six months as per agreement of sale despite several verbal follow ups. The applicants therefore seek to compel transfer of the property into their names to protect their economic and property rights. The following order is sought:-

1. "The agreement of sale entered into by and between the applicants and first respondent dated 13 October 2017 in respect of an immovable property situate in the district of Salisbury called Stand 5369 of Stand 4736 Prospect Township of Stand 157 of Prospect measuring 622 square metres be and is hereby declared and confirmed as valid, binding and enforceable.
2. The first and second respondents be and are hereby ordered comply with the conditions of the subdivision permit dated 21 June 2016 to facilitate the transfer of Stand Number 5369 of Stand 4736 Prospect Township of Stand 157 of Prospect to the applicants.
3. The first and second respondents be and are hereby ordered to take all necessary steps and sign all the relevant documents to facilitate transfer of Stand 5369 of Stand 4736 Prospect Township of Stand 157 of Prospect to the applicants' names within ten (10) days of service of this order upon them.
4. In the event of the first and second respondents failing, neglecting and/or refusing to comply with paragraph 2 and 3 of this Order, the Deputy Sheriff of the High Court of Zimbabwe (N.O) be and is hereby authorized and empowered to sign all necessary papers in their stead to effect transfer of title, rights and interests in Stand No. 5369 of Stand 4736 Prospect Township of Stand 157 of Prospect measuring 622 square metres to the applicants.
5. Pursuant to paragraphs (1), (2) and (3) above the third respondent, Registrar of Deeds be and is hereby directed to register the applicants' names interests, rights and title in the immovable property called Stand No. 5369 of Stand 4736 Prospect Township of Stand 157 of Prospect measuring 622 square metres held by the first respondent under Deed of Transfer No. 4244/2015
6. The first and second respondents be and are hereby ordered to pay costs on a legal practitioner and client scale."

The first and second respondents raised two points *in limine*. The first is that the second respondent, as an agent of the first respondent has been improperly cited. The second is that there

are material disputes of fact which cannot be resolved on the papers filed of record and the applicants should have proceeded by way of summons and not application, as they did. I will deal with these two first.

WHETHER THE SECOND RESPONDENT HAS BEEN IMPROPERLY CITED

Mr *Gahadzikwa* submitted that the applicants' claim is contractual and is based on an agreement of sale in which the applicants purchased immovable property from the first respondent who was the seller of same. The second respondent is alleged to have only acted as an agent of the first respondent as authorized by a power of attorney granted by the first respondent. It was argued that the law of agency is clear that an agent is only accountable to his principal and no one else. The cases of *Lens Agencies (Private) Limited* v *Knight Frank and Rutley & Anor* 1997 (2) ZLR 167 (SC) and *Musemwa & Ors* v *Estate Late Tapombwa & Ors* HH 136/16 were relied on in support of this argument.

Ms *Ngongoni* accepted that a claim for specific performance can only lie against parties to the contract who can legally perform the acts complained of and not against the agent, she however argued that in terms of the special power of attorney granted to the second respondent, he is the one supposed to pass transfer to the applicants, hence his citation. Further, it was argued that the second respondent was not a mere agent as he was given all the powers to pass transfer which he has failed to do. The applicants further claim not to have met the first respondent who is said to be based in Malawi. They insisted that they had therefore correctly cited the second respondent.

What is clear from the Power of Attorney on page 13 of record is that the first respondent appointed the second respondent to be his lawful attorney and agent, and in his name to enter into negotiations, agreements and delegate this authority to a legal practitioner of his choice. He was to sign any documents necessary for the subdivision and sale of his land and do whatever else was necessary. This role fits in squarely with the authority referred to by the applicants, The Law of Agency in South Africa 2nd ed, J. E. DE VILLIERS and J.C. MACINTOSH who describe an agent as:-

> "—a person who has been authorized to act for and on behalf of another (called the principal) in contracting legal relations with third parties; the agent represents the principal and creates, alters or discharges legal obligations of a contractual nature between the latter and third parties."

The second respondent was therefore the agent of the first respondent, the principal. The question as to whether he can be cited in his personal capacity relating to actions carried out as an agent, has been authoritatively settled. I am indebted to Mr *Gahadzikwa* for case law references.

The case of *Lens Agencies (Private) Limited (supra),* makes it clear that the privity of contract is strictly between agent and principal.

> "In my view, however, the privity of contract is clearly between landlord and tenant. The estate agent holds the deposit on behalf of his principal, the landlord, and is accountable to him alone. It is the landlord who is accountable to the tenant. The landlord does not claim interest on the deposit from the estate agent. Nor do I think it has been shown that he has a duty to do so, and then to account to the tenant. If that were the position the whole structure of the tripartite relationship would be affected."

The case of *Musemwa & Ors* v *Estate Late Tapombwa (supra)* squarely deals with the issue at hand. It was held as follows:-

> "The law is clear that where an agent executes a mandate on behalf of a known principal, he carries out the mandate on behalf of the principal and binds his principal. An agent who has actual or apparent authority is not liable for acts committed during the course of his employment. The principal remains accountable to the third party. The agent becomes liable only in instances where he has no authority to act and or has not disclosed his principal or the principal is unidentified."

The agreement of sale on page 20 of record shows that the seller was the first respondent and second respondent was only tasked by the first respondent to sell his property on his behalf, creating an agency relationship. The second respondent had actual authority based on the special power of attorney dated 5 July 2016. He cannot therefore be personally liable for such actions done during the course of his employment as agent. He is only accountable to the first respondent and first respondent is the one accountable to the applicants. It has not been alleged that the second respondent had no authority to act as he did. There is the special power of attorney filed on record page 13 which shows the basis of his authority. The agreement of sale shows that the second respondent disclosed the first respondent as his principal and such principal was clearly identified.

I find no sound legal basis which has been advanced by the applicants to justify the joining of the second respondent to these proceedings. The second respondent has been improperly joined to these proceedings. This point *in limine* is upheld.

WHETHER THERE ARE MATERIAL DISPUTES OF FACT

Though the first and second respondents raised the issue of there being material disputes of fact as to whether the applicants paid the full purchase price, this issue was not traversed as a preliminary point in oral submissions but was addressed in dealing with the merits. I will follow suit and shelve this issue for now.

The merits: Whether the applicants are entitled to the granting of a compelling order for specific performance

Ms *Ngongoni* submitted that the applicants are entitled to the granting of the order sought as they have discharged all their obligations by paying off the purchase price of US$21 000 in full.

On page 24 of record is an acknowledgement of receipt, annexure "H" which was systematically signed between the applicants and the second respondent. The information thereof shows the following:-

Date	**Amount Paid USD**	**Balance USD**
15 October 2017	1 100.00	19 900.00
28 October 2017	1 400.00	18 500.00
15 November 2017	7 500.00	11 000.00
10 December 2017	1 500.00	9 500.00
5 January 2018	3 000.00	6 500.00
12 January 2018	2 500.00	4 000.00

Annexure "I" on page 25 of record is relied on as proof of payment of the balance of US$4 000. It is a bank statement in relation to the first applicant. A transaction of the 21st of September 2020 whose narration is as follows, is claimed to have been payment into the second respondent's account. It says:

> "ZIPIT TRANSFER TO CHIGUMIRA CLIFMORE MR NARRATION TO ACCOUNT 21121040506 STAN 862031 CBZ BANK REF 660FBTC202652516"

This amount of $4 000 is said to have been paid as RTGS at the rate of 1:1 on account of SI 33/19.

Ms *Ngongoni* argued that the payment of RTGS $4 000 was in full and final payment of the purchase price and the first respondent was obliged to pass transfer to the applicants.

Mr *Gahadzikwa* submitted that the first respondent denies that the full purchase price was paid. The applicants are said to have an outstanding balance of US$4 000 from January 2018. Receipt of the purported payment of RTGS $4 000 is denied. It is argued that since the purchase price was in United States Dollars, payment should have been in in the same currency and that, in any event, the RTGS $4 000 was never paid. The purchase price was to be fully paid by May 2018 but remains unpaid. Further, Mr *Gahadzikwa* observed an inconsistency regarding the date of

payment of this amount. Whereas the applicants rely on annexure "I" which shows a transaction of the 21st September 2020, the answering affidavit on page 76 of the record, and in paragraph 2 claims that the last payment was made on 27 October 2020. He further noted that this alleged last payment was never acknowledged as received as was the practice of the parties reflected on annexure "H".

Furthermore, Mr *Gahadzikwa* referred to WhatsApp communications between the first applicant and second respondent which appear page 41 of the record and are said to show that as at 26 October 2020, the applicants were aware that there was a dispute as to the payment of the balance of US$4 000 and should have gathered evidence of proof of payment.

It was contended that the onus to prove payment of the balance of US$4 000 was on the applicants as the law is clear that he who alleges must prove.

The court sought to clarify with Ms *Ngongoni* on the ownership of the account into which the RTGS $4 000 was paid into. There is nothing on record, particularly in the agreement of sale to show that the narration of the transaction relates to the second respondent's account. There is no evidence of the prior payments which were acknowledged as received as having been paid into that same account and that it belonged to second respondent. It was not for the respondents to assist the applicants prove their case. In *Astra Industries Ltd* v *Peter Chamburuka* SC 27/12 it was held that the position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden of proving such allegation.

In *Savanhu* v *Marere No & Ors* 2009 (1) ZLR 320 (s) at 325 B – C MALABA DCJ (as he then was) had this to say about a claim for specific performance:-

> "The right to claim specific performance of a contract by the other party is premised on the principle that the appellant must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his own side of the bargain. Wessles, The Law of Contract in South Africa vol 11 para 3135 states that:
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> > "The court will not decree specific performance where the plaintiff has himself broken the contract or made a material default in the performance on his part (Lawson, s 472, p. 522). A plaintiff is not entitled to succeed against a defendant in an action for breach of contract unless he can show that he has performed his part or is ready to do so, and therefore he cannot ask for specific performance unless he has either performed his part of the contract or unless he has prevented from doing so by the defendant".

The facts *in casu* do not show that the applicants have discharged their obligations. The payment of the balance of US$4 000 remains disputed and, on the papers as they stand, it is impossible to resolve this issue either way.

I find myself in the position which was described in *Supa Plant Investments (Private) Limited* v *Edgar Chidavaenzi* HH 92/09 wherein MAKARAU J (as she then was), stated as follows:-

> "A material dispute of fact arises when such material facts put by the applicants are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

It is material to the resolution of this matter to establish whether the full purchase price was paid. The applicants have not favoured the court with any such evidence, as I have observed above. Where the facts are in dispute, the Court has a discretion as to whether to dismiss the application or allow the matter to go to evidence. The first course is appropriate where an applicant should, when launching his application, have realised that a serious dispute of fact was inevitable. See *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC).

The facts show that there was a dispute as to whether the outstanding US$4 000 had been paid particularly as seen from the WhatsApp communications of October 2020. There was no acknowledgement of payment, as had been the practice and Ms *Ngongoni* said this was because of soured relationships. Despite such knowledge, the applicants elected to proceed by way of motion proceedings as they are more convenient than action proceedings. They took a calculated risk of having the matter dismissed. I have no choice but to dismiss this matter on the basis of there being material disputes of facts which cannot be resolved on the papers.

There is therefore no reason to detain myself on the fifth respondent's opposition which is that there was a double sale on this stand. There appear to be disputes of fact on this issue but these only arose later as this was not raised by the applicants nor first and second respondent in their papers. It was only when the fifth respondent was joined to the proceedings that this issue arose.

The first respondent also raised the further fact that the applicants cannot get the compelling order sought as they have not put respondent *in mora* in terms of clause 9.1 of the agreement of sale which provides as follows:

> "9.1 In the event of the seller breaching any of the terms and conditions of this agreement and failing to rectify the breach within 30 (thirty) days from the date of written demand to do so, then the purchasers shall be entitled to either sue for specific performance or cancel the agreement and sue for damages as elected by the purchasers".

This too does not fall to be determined as I have already made a finding that there are material disputes of fact.

I accordingly dismiss this application with costs.

Marian F & Company Legal Practitioners, applicants' legal practitioners
Gahadzikwa & Mupunga, first and second respondents' legal practitioners
John Mugogo Attorneys, fifth respondent's legal practitioners