

NDUMISO DUBE

Versus

LEONARD DUBE

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 21 MAY 2008 AND 15 JANUARY 2009

K Ncube for applicant
N Mazibuko for 1st respondent
No appearance from 2nd respondent

Opposed Court Application

KAMOCHA J: The applicant seeks an order in the following terms:-

“It is hereby ordered that:

1. the 1st respondent be and is hereby interdicted from carrying out construction work of any sort on stand number 16764 Romney Park, Bulawayo until the proceedings in case number HC 1276/06 are finalised;
2. the 1st respondent be and is hereby interdicted from selling the stand in question to any person and also from transferring the same to any person save to the applicant;
3. the 1st respondent be and is hereby directed to remove all tools, implements, building materials including the removal of any person employed by him, from that portion of the stand that was purchased by the applicant within 48 hours of this order failing which the deputy sheriff be and is hereby authorised the remove (sic) such implements and such person from the stand;
4. the 2nd respondent be and is hereby interdicted from processing and registering transfer of the stand in question to any person save to the applicant; and
5. the 1st respondent be and is hereby ordered to bear the costs of this suit on the attorney and client scale.”

The applicant entered into a memorandum of agreement of sale on 27 January 2002. The seller who was the contractor purchased from the Municipality of Bulawayo stand number 13232 Romney Park, which was also known as 21 Andrea Drive, Romney Park, Bulawayo measuring 704 square metres.

In terms of the agreement the seller was required by the Municipality of Bulawayo to construct, on the stand, residential property to a value stipulated by the Municipality of Bulawayo and further the seller was expected to sell the residential property built thereon to a person who is a resident of Bulawayo and registered with the City Council as a person looking for accommodation. The seller (who is the 1st respondent) ended up allocating the property to Ndumiso Dube (the applicant).

The 1st respondent hereinafter referred to as Dube had purchased the said stand 13232 from City of Bulawayo on 19 June 1990 but the agreement relating to that stand was cancelled by the City of Bulawayo on 25 July 2004. There after the City of Bulawayo created a new and bigger stand which it numbered 16764.

An agreement of sale relating to stand number 16764 was entered into between Dube and City of Bulawayo on 28 July 2004. According to the agreement the new stand was sold for \$652 000,00. The new agreement has terms restricting the sale of the said property to third parties. Clause 17 recites thus:

“Save with the prior written consent of the Municipality, the purchase shall not at any time during the currency of the agreement nor during the period of 5 years immediately following the transfer of the property into the purchaser’s name, lease, part with possession, sell, donate, transfer or otherwise dispose, of the said piece of land or any portion thereof.”

The agreement forbids the cession assignment or transfer of rights and/or obligations to any other person by the purchaser without the prior consent of the Municipality of Bulawayo.

The question to be answered is whether or not the agreement between Dube and the applicant was still extant and enforceable in the light of the finding that the agreement relating to stand 13232 was cancelled by the Municipality of Bulawayo and a new one relating to stand 16764 entered into.

The applicant contended that the termination of that agreement did not affect matters between him and Dube and sought to have Dube bound by it. He however, adduced no evidence to show that the parties entered into another agreement relating to stand 16764. Whatever assertion the applicant made in respect of the stand is hotly disputed and there is simply no proof that the parties ever concluded an enforceable agreement in relation to the new stand. In the light of the clear dispute of fact the issues can only be resolved by way of trial proceedings.

The applicant sought to invoke the provisions of the Contractual Penalties Act [chapter 8:04] without showing that the parties concluded an instalment sale in respect of the new stand. Those provisions do not apply where a party seeking to rely upon them fails to prove the existence of a sale of land by instalments.

Finally, applicant sought to interdict Dube from carrying out construction work of any sort in stand number 16764 until the proceedings in case number HC 1276/06 are finalised without a valid basis for so doing. A look at the original agreement between him and Dube shows that Dube as the contractor was required, by the Bulawayo Municipality, to construct thereon a residential property. Dube was obliged, in terms of his new agreement with the Municipality of Bulawayo, to construct a dwelling house not later than 6 months from the date of agreement which should be completed 24 months from the said date. Consequently it seems to me that the application to interdict him from continuing with construction on the property is ill conceived.

In the result, I would dismiss this application with costs on the ordinary scale as there is no basis for awarding punitive costs in this matter.

Job Sibanda & Associates, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioners