

MAHLULELI NIXON DUBE

Versus

N & S PROPERTIES

And

NICHOLAS MASUKU

And

JONAH DUMAH

And

POLINA DUMAH

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 13, 14 AND 21 JANUARY 2010

N Mazibuko, for applicant
C Dube for 1st and 2nd respondents
T Sibanda, for 3rd and 4th respondents

Opposed Court Application

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

“It is ordered that:-

1. It be and is hereby ordered that the transfer of the right, title and interest in and to stand number 1820 Emganwini, Bulawayo, from Nicholas Masuku to Jonah and Polina Dumbe (sic) and is hereby declared to be invalid and accordingly cancelled.
2. The fifth respondent be and is hereby ordered to reverse the transfer of the right, title and interest in and to stand number 1820 Emganwini Township, Bulawayo from second respondent into the third and fourth respondents’ names and instead

- transfer the said rights into the name of the applicant, namely, Mahluleli Nixon Dube.
3. The second respondent be and is hereby ordered to sign all documents necessary to be signed at fifth respondent's offices to effect transfer of the right, title and interest in and to stand number 1820 Emganwini, Bulawayo into the name of the applicant, and should he fail to do so within seven (7) days of the granting of this order, then the Deputy Sheriff be and is hereby authorized to sign the said documents in his stead.
 4. The fifth respondent be and is hereby ordered to sign all documents necessary to give effect to the transfer of the right, title and interest in and to stand number 18200 Emganwinin, Bulawayo into the name of the applicant, namely Mahluleli Nixon Dube.
 5. The first and second respondents only, shall pay the costs of this application on a legal practitioner/client scale, jointly and severally, the one paying the other to be absolved, provided that the third, fourth and fifth respondents shall pay the costs of the application jointly and severally, only if they oppose the application.

Alternatively

6. The first and second respondents be and are hereby held to be liable to compensate plaintiff (sic) by paying him the equivalent of R150 000,00 being the current market value of stand 1820 Emganwini, Bulawayo."

When the matter came for a hearing the first and second respondents sought a postponement to enable them to file their heads of argument. Their application was dismissed as it was devoid of any merit whatsoever. They had been served with the applicant's heads of argument a year and three months ago on 13 October 2008 but did nothing about the matter until now. Their lack of seriousness does not end there. They also failed to do anything when they were served with the notice of set down on 4 December 2009 – a period of a month and 14 days ago.

The application for a postponement was also ill-conceived in that it was being sought when there was bar against them which had not been uplifted. They were barred for failing to file their heads of argument timeously. The application for a postponement could only be made if they had successfully applied for the upliftment of the bar. They made no such application. They remain barred and cannot be heard on the merits of the case. They had, however, filed their opposing papers which the court will consider as it deals with the merits of the case.

The brief circumstances giving rise to these proceedings are these.

On 21 October 2005 the applicant and the first and second respondents signed an agreement wherein the applicant purchased the right, title and interest in stand number 1820 Emganwini Township, Bulawayo from the two respondents. The right, title and interest in the property had been registered in the name of the second respondent's late wife.

The purchase price was \$270 000 000,00. A deposit of \$140 000 000,00 paid to the sellers by the buyer in respect of stand number 4583 Gwabalanda, Bulawayo was converted to a deposit of the property under discussion. The balance of \$130 000 000,00 would be paid in cash or bank cheque upon transfer of the right, title and interest in the property being effected at the Bulawayo City Council offices.

In terms of paragraph 5 of the agreement the parties agreed to lodge a copy of their agreement with the Bulawayo City Council. The applicant's legal practitioners accordingly did so under cover of a letter dated 24 October 2005 – four days after the agreement was signed. The letter reads thus:

Estate late Sihle Mlauzi – Stand 1820 Emganwini, Bulawayo DRB 175/2005

We send herewith a copy of a memorandum of agreement of sale entered into by and between Mr Nicholas Masuku and Mahluleli Nixon Dube in respect of stand 1820 Emganwini, Bulawayo. We actually represent Mahluleli Nixon Dube as represented by Thulani Ndlovu, but are writing to you at the instance of all parties to the agreement. Mr Masuku is the executor of the Estate of the late Sihle Mlauzi.

We are writing to you and sending you the agreement so that you may note our client's interest in the property so that the property may not be sold or transferred to anybody else except our client. Please note that the necessary paper work is being sorted out at the Assistant Master's office at the High Court and as soon as it has been finalized the parties will attend at your offices to effect change of transfer.

Yours faithfully”

At the same time the legal practitioners addressed another letter to the Master's office which reads as follows:-

“Estate late Sihle Mlauzi: DRB 175/2005

We refer to the writer's recent visit to your office to confirm whether or not Mr Nicholas Masuku was entitled to dispose of the right, title and interest in and to stand 1820

Emganwini, Bulawayo. We confirm that in our conversation with yourselves it was confirmed that Mr Masuku could dispose of the property.

Please now find herewith the memorandum of agreement entered into by Mr Masuku and our client Mahluleli Nixon Dube as represented by Mr Thulani Ndlovu. As you can see from the agreement our client had earlier on signed an agreement with Mr Nicholas Masuku in respect of another property in Gwabalanda, but this fell through and to remedy the situation, Mr Masuku then offered the Emganwini property.

We therefore request that you give the necessary consent for the property to be transferred from the deceased estate to our client's name. We believe this would not be too difficult as the property is on lease hold with the City of Bulawayo and does not have titled deeds.

We await to hear from you in due course."

The balance of \$130 000 000,00 was to be paid into the trust account of the applicant's legal practitioners on or before 30 November 2005 and was duly paid. The legal practitioners were to give a letter of undertaking to the sellers to pay over the money upon transfer of property. The legal practitioners did write the letter of undertaking to Mr Nicholas Masuku on 15 December 2005. The applicant had therefore discharged his obligation to pay the purchase price which was going to be paid to the seller on transfer.

Despite the stipulation in the agreement that the balance of \$130 000 000,00 would only be paid to the sellers on transfer the sellers on two occasions requested for part payment of the balance. On 23 January 2006 they asked for \$20 000 000,00 and two days later on 25 January 2006 they asked for \$10 000 000,00. They were advanced with those sums of money. In each of their letters for the requests they asked the applicant to bear with them and promised that the estate would be wound shortly and thereafter they would effect the transfer into applicant's name.

The sellers continued with the assurances and attributed the delay to the Master's office which had allegedly not given the necessary authority. They urged the applicant be patient with them while they were sorting out the matter.

It, however, turned out later that the sellers were not genuine at all but were instead outright dishonesty. A check at the housing office on 20 June 2008 revealed that the right, title and interest in the house were transferred from the second respondent's deceased wife's name to his name on 25 March 2008 and subsequently into the names of third and fourth respondent's names on 16 June 2008. They never, at any stage, intimated to the applicant that they were considering cancelling the agreement.

And yet, they purported to sell the same property to the third and fourth respondents into whose names the rights, title and interest were registered on 16 June 2008. City of Bulawayo effected the transfer notwithstanding the contents of the letter of 24 October 2005 from the applicant's lawyers quoted *supra* on page 3.

The third and fourth respondents averred that they were innocent buyers. They contended that the applicant who was the first purchaser should have sought an interdict to protect the property from being sold and transferred to innocent third parties. That contention is untenable in the light of the repeated assurances by the sellers that transfer into his name would be effected as soon as the paper work had been sorted out by the Master's office. At no stage did the sellers evince any intentions to sell the property to other parties. Moreover, the applicant had addressed letters to the local authority and the Master's office declaring his rights, title and interest in the property. The need for an interdict did not arise in the circumstances. In the result I find that the applicant did enough to protect his rights, interest and title in the property.

Were the 3rd and 4th respondents innocent purchasers? They submitted that they were and went on to state that they made a diligent enquiry and were satisfied that the property was free from any competent claims. The applicant contended that they either may not have carried out a diligent search at all or did so and found that there was the applicant's competing claim but because they held a view that since there was no caveat placed against the property and there was no prohibition in the form of a interdict to the disposal of the property, they could go into the agreement of the sale they decided to take a chance. That assertion was based on the fact that both the local authority and the Master's office have copies of the agreement of the first sale in their respective files relating to this matter. The files also contain the letters written on 24 October 2005 quoted *supra* at page 3. It would be a strange coincidence that both offices would fail to see those documents in their respective files. There is merit in the above contention.

This court therefore makes a finding that the third and fourth respondents either did not make any diligent search or if they did, they found out the correct position but decided to take a chance.

Even if they had been innocent purchasers ownership of the property was still vested with the local authority. What was transferred to the second purchasers were rights, interests and title in the property. The law in a situation like this is as stated by McNALLY JA in *Guga v Moyo and Others* 200(2) ZLR 458(S) at 459E thus:-

"The basic rule in a double sale where transfer has not been 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.” It has been stated that the balance of equities must weigh heavily in favour of the second purchaser before the court could favour her over the first purchaser.”

In casu no special circumstances affecting the balance of equities exist. The law consequently favours the first purchaser.

As regards to costs, this is a proper case to award punitive costs against the first and second respondents whose conduct is despicable. The applicant is entitled to recover his costs against them on an attorney and client scale jointly and severally one paying the other to be absolved.

As far as the third and fourth respondents are concerned they shall bear the costs on the ordinary scale jointly and severally one paying the other to be absolved.

In the result the application succeeds in terms of the draft order quoted above at page 1 with costs as stated immediately above.

The alternative claim falls away.

Calderwood, Bryce Hendrie & Partners, applicant’s legal practitioners
Messrs Dube-Banda, Nzarayapenga & Partners, 1st and 2nd respondents’ legal practitioners
Messrs James, Moyo-Majwabu & Nyoni, 3rd and 4th respondents’ legal practitioners