

RUTH NYATHI

Versus

HILDA MHLANGA

And

BULAWAYO CITY COUNCIL

And

DEPUTY SHERIFF, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 24, 25 AND 26 FEBRUARY 2010

G Nyathi, for applicant
N Mazibuko, for 1st respondent
No appearance from 2nd and 3rd respondents

Opposed Court Application

Ex Tempore

KAMOCHA J: On 27 August 2007 one Fefa Michael Moyo – who was being represented by his wife Ruth – the applicant, entered into a memorandum of agreement of cession with the 1st respondent Hilda Mhlanga – “Hilda” wherein she bought the rights, title and interests of Fefa Michael Moyo in the property known as stand 3174 Nkulumane, Bulawayo.

According to the memorandum of agreement Ruth derived the authority to represent her husband through a general power of attorney granted to her by Fefa Michael Moyo – “Fefa” on 28 April 2000.

The purchase price was \$1.5 million which was paid in full by a cash payment when the agreement was signed.

In terms of the memorandum of agreement the seller was supposed to cede his rights, title and interest upon signing of the agreement. He was also supposed to give vacant possession of the property within 3 months of the signing of the agreement, which was by 1 December 2007.

The seller failed to honour his side of the agreement whereupon the buyer i.e. Hilda sought and was granted an order on 27 March 2008 against Fefa Michael Moyo. He was ordered and directed to proceed to the housing office at Nkulumane within five days of service of the order and sign all necessary papers to cede his rights, title and interest in the said property to Hilda Mhlanga. In the event of him failing to do so the Deputy Sheriff or her lawful assistant was ordered and directed to do so.

Fefa and all those claiming through him were evicted from the said property. An award of costs on an attorney and client scale was made against him.

The judgment was granted by default. When notice to evict Fefa Michael Moyo and all those occupying the property through him was issued Ruth Nyathi applied for and was granted a provisional order on 24 July 2008 stopping her ejection from the property.

On 14 August 2008 she filed a court application seeking condonation for the late noting of an application for rescission of the default judgment granted on 27 March 2008 under HC 300/08 and its rescission. She sought, in addition, leave to file opposing papers in respect of that case within 10 days of granting of this order.

Hilda Mhlanga through her legal representative raised a point *in limine* pointing out that Ruth Nyathi had no *locus standi* to file both the urgent application and the court application.

Firstly, when she entered into the memorandum of agreement of sale she represented her husband Fefa Michael Moyo by power of attorney granted to her by him. She did not get authority to institute proceedings on her own behalf. She was not a party to the proceedings in case HC 300/08 wherein Fefa Michael Moyo was ordered and directed to sign all the necessary papers for the cession of his rights, title and interest in the said property. She, therefore, could not seek the rescission of a judgment to which she is not party. Order 9 rule 63 of the High Court Rules only relates to a party against whom judgment has been granted in default. It states:

“A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.”

The provisions of Order 49, Rule 449(1) of rules of court would also not avail her either. The provisions would only avail a party affected by a judgment to seek its correction, rescission or variation where:-

- (a) the judgment was erroneously sought or erroneously granted in the absence of such party; or
- (b) there is an ambiguity or patent error or omission but only to the extent of such ambiguity, error or omission; or
- (c) it was granted as the result of a mistake common to the parties.

The judgment *in casu* was neither granted nor sought in error. It is a clear judgment with no error, omission or ambiguity. It was not granted as a result of a mistake common to the parties.

Further, Ruth claims occupation through her husband not through her own right. It is, therefore, Fefa Michael Moyo alone who can institute proceedings against his eviction from the property. She could only institute proceedings as Fefa Michael Moyo's agent which is not the case here. Consequently, she lacks the *locus standi* to institute these proceedings.

Her case is equally devoid of any merit. Firstly, she entered into a memorandum of agreement of sale of the property as an agent of her husband using a power of attorney and received the full purchase price. She now turns round that she had no authority to sell the property and alleges that the power of attorney was a forgery. It must have been forged by someone else and was in fact not granted to her by her husband.

She adduced no evidence from her husband to support her story. On the other hand Hilda Mhlanga filed two affidavits from one Phaniel Pfende and Dick Mbulaye who actually witnessed Ruth Nyathi producing the power of attorney and was handed a sum of R48 000,00. She also alleged that she repaid the purchase price through one Mr Ncube whom she denied was her agent. The evidence on papers filed of record clearly shows that he was her agent. She alleged that she had received \$47 000,00 instead of R48 000,00. The evidence of Phaniel Pfende and Dick Mbulaye is that she received R48 000,00.

In the light of the foregoing I would issue the following order.

It is ordered that:-

- (1) The applicant in case number HC 1617/08 be and is hereby dismissed with costs on an attorney and client scale; and
- (2) The provisional order granted by this court on 24 July 2008 be and is hereby discharged with costs on an attorney and client scale.

Sansole & Senda, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioners