

**SHADRECK BENJAMIN MANDAZA**

**Versus**

**JAMES WILLARD NYAMAREBVU**

**And**

**NYASHA NYAMAREBVU**

**And**

**THE BRENDER TRUST**

**And**

**THE REGISTRAR OF DEEDS**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 30 MARCH 2012 & 7 FEBRUARY 2013

*Advocate L. Nkomo* for the applicant

*T. Masiye-Moyo* for 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondent

Judgment

**NDOU J:** The applicant was a tenant of the 3<sup>rd</sup> respondent in occupation of immovable property known as sub-division B of Benga. In the year 2000 the 3<sup>rd</sup> respondent, through one of its founder members, the late Wilhelmina Cornelia Roets in her life time, gave the applicant a verbal right of first refusal in the event that the immovable property known as subdivision B of Benga is sold.

On or about 8 August 2008, 3<sup>rd</sup> respondent sold the immovable property at issue to 1<sup>st</sup> and 2<sup>nd</sup> respondents, who are husband and wife and were tenants occupying part of the property in dispute. The applicant, on the one hand contends that the sale of the immovable property at issue to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was in violation of the right of first refusal granted to him. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, on the other hand, contend that the applicant was afforded the opportunity to exercise his right of first refusal but declined to do so.

One of the issues raised by the 1<sup>st</sup> to 3<sup>rd</sup> respondents is whether or not the matter before the court is *res judicata* in the sense that the issue of right of first refusal by the applicant and his right of occupation has already been dealt with by another court i.e. Kadoma Magistrates' Court. It is beyond dispute that on 14 August 2008, the applicant approached Kadoma Magistrates' Court seeking an order to be given three months notice to vacate the premises in dispute. The applicant alleged in an affidavit that the 1<sup>st</sup> respondent was now his "new landlord". It was only after the Kadoma Magistrate ruled against him that applicant approached this court on 23 September 2008. The Kadoma Magistrates' Court judgment under case number 147/08 was not appealed by the applicant as evinced by papers in this application. Further, when the applicant approached this court he was at the same time defending an eviction suit at Kadoma Magistrates Court under case number 167/2008 as shown by papers filed in this application. His own opposing papers were signed on 22 September 2008 i.e a day before he filed this application. The incidents complained of allegedly occurred on 8 August 2008. In this application the applicant failed to disclose to the court that the issue of the right of first refusal was a matter before the Kadoma Magistrates' Court under case number 167/2008. From the papers before me it is clear that one of the issues for determination under Kadoma Magistrates' Court case number 167/2008 is whether or not applicant had a right of first refusal to purchase the disputed property and therefore that the sale to 1<sup>st</sup> and 2<sup>nd</sup> respondents was null and void. This was made an issue by the applicant in his papers in Kadoma Magistrates' Court. The judgment of that court is confirmed by the applicant himself in his *viva voce* testimony in this court. The applicant did not appeal the judgment and that judgment, whether wrong or right remains in force. There exists a system of appeals and reviews to set aside the decisions of the lower courts. As it is, the lower court in case number 167/08 made a ruling rejecting the existence of the right of first refusal and ordered the ejection of the applicant. If the applicant was not satisfied with the Magistrates' Court's rejection of his right of first refusal he should have appealed the judgment and not instituted an urgent application. The matter is *res judicata*.

Accordingly, the provisional order granted by this court on 23 September 2008 is discharged with costs on a legal practitioner and client scale.

*Calderwood, Bryce Hendrie & Partners*, applicant's legal practitioners  
*Hwalima, Moyo & Associates*, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' legal practitioners