ERNEST CHATUMUDZA MHIZHA
and
LLOYD GIBBON PARERENYATWA MHIZHA
and
TSITSI MHIZHA
and
W VIRIMAYI
and
THE CITY OF HARARE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 27 February 2002

Ms *Tasayapi* for the applicant;
Mrs *Chingeya* for the 2nd and 3rd respondent.

OPPOSED APPLICATION

Makarau J: After hearing argument, I dismissed the above application and indicated that my reasons would follow. These they are.

Applicant filed a court application in which he sought the following order:

"(a) The agreement entered between the respondents be and is hereby cancelled.

b) That the 1st and 2nd respondents are hereby ordered to sign all necessary Papers to pass cession into applicant's name within 14 days of being served with a copy of this court order. Upon their failure, the Deputy Sheriff is hereby authorised to sign such papers and pass cession into applicant's name.

c) 1st, 2nd and 3rd respondents pay costs of this application."

In support of his application, applicant filed a founding affidavit in which he deposed to as follows. In 1979, he entered into an oral agreement of sale with the first and second respondents in terms of which he purchased house no 5569 New Canaan, Highfields, (sic) for $1000-00. He then took occupation of the property. In 1991, the first respondent, acting on behalf of the second respondent, demanded the sum of $12 000 to effect cession in his favour. The agreement was reduced to writing. Unbeknown to him, the first and second

respondents sold the property to the third respondent and ceded their rights to him in July 2001. The respondents knew of his prior rights in the property and therefore perpetrated a fraud in ceding their rights in the property to third respondent.

The application was opposed.

In the second respondent's opposing affidavit was disclosed the fact that the 1st respondent was the applicant's young brother. He passed away in 1993. It was also indicated that the title rights and interest in the property in question were sold to one Faith Ziyenda by the second respondent as the sole owner of such rights by virtue of intestate inheritance. The said faith Ziyenda then had her rights title and interests in the property registered in the name of the third respondent, her husband.

At the hearing, applicant's legal practitioner applied to amend the application by deleting the name of the first respondent as a party to the proceedings. This was in answer to the averment in second respondent's papers that the first respondent passed on in 1993. In my view this was a non-application. No order of court could be made against the first respondent. His rights in the property passed on to his Estate upon his death and he should not have been made a party to the proceedings in the first place.

In these proceedings, the applicant's legal practitioner constantly referred to the sale of "a house". This is a practice, or shall I say mal-practice, common to a number of legal practitioners in proceedings brought before these courts involving the sale of immovable property or rights title and interests in immovable property. Legally, a house cannot be sold. This is so because of the operation of the legal principle *superficies solo cedit*. In accordance with this principle, buildings and other structures become the property of whoever owns the land on which they are built or erected. By operation of this principle, houses, as buildings or permanent structures, attach to the land upon which they stand. As such, permanently constructed houses do not and cannot have an independent corpus separate from the land upon which they are built. Any sale including a house is therefore a sale of the land on which the house is built or erected. Legal practitioners should therefore refer to pieces of land rather than houses when they are describing the sale of immovable property.

A further cause for disquiet in these proceedings is the apparent lack of appreciation of the system of land registration in this country in which the papers in these proceedings have been drafted. Title to immovable property in the high-density suburbs such as Highfield is either freehold or leasehold. Where it is freehold, the holder's rights of ownership are free of legal strictures other than those the holder has chosen to place against his title to the property or those that apply by virtue of law. In such a case, ownership to the property is held by way of a deed of grant, a deed of transfer or a certificate of registered title. Where title is leasehold on the other hand, the holder is not the owner of the land but enjoys certain defined rights over the property with the consent of the owner who invariably is the local authority under whose jurisdiction the property falls. In most cases, the rights of the lessee over the property are coupled with the right to purchase the property under a suspensive agreement of sale hence the coining of the term " lease to buy" that is associated with some tenure in the high density suburbs. In such cases, any sale involving the property by the tenant/purchaser can only be a sale of the tenant/purchaser's rights title and interest in the lease agreement. It is a sale of rights and not of the property. In my view, these are simple legal concepts that legal practitioners ought to ascertain when drafting papers for their clients. There is need to do so as the legal consequences attaching to properties that are freely held are different from those attaching to property that is being leased/ purchased. I make this observation because in the papers before me, both legal practitioners confuse the concepts and refer to ownership by the parties of a property that was clearly on leasehold.

The observation I make above is not a discovery on my part. It is a repetition of a similar observation made by the Supreme Court in 1993 and which legal practitioners appear not to have taken heed of. *See Hundah v Murauro 1993 (2) ZLR 401 (S).*

It is not in dispute that the first respondent is not a party in these proceedings. The question then becomes whether or not the applicant has a claim against the second and third respondents.

The applicant deposes that he entered into an oral agreement with the first and second respondents in 1979 in terms of which he purchased the immovable property known containing cottage number 5569 Highfield Township. This agreement was according to the applicant ratified in 1991. While the applicant does not seem to rely on this agreement as granting him any rights, I will nevertheless comment on whether or not the second respondent could have been a party to that agreement in her personal capacity. I raise this comment in light of the discussion above as to the nature of title that obtained in relation to the property. In 1979, the property was owned by the fourth respondent with the first respondent holding certain rights title and interest in the property. The second respondent had none such rights and title in the property as could be sold to the applicant. On that basis, I cannot find that the alleged sale of 1979, assuming it did take place, created any binding obligations on the second respondent in her personal capacity.

I now turn to the second alleged agreement of sale. The applicant has alleged that he concluded a written agreement with the first respondent in 1991 in terms of which he purchased the immovable property containing cottage no 5569 New Canaan, Highfield or rights title and interest in the property for $12000. I again enquire as to what rights title and interest the second respondent had in the property as at the date of the alleged sale. She was not the owner of the property. She was not a joint tenant/purchaser of the property. She enjoyed occupation of the property by virtue of being the wife of the first respondent. In an effort to bind her in her personal capacity to the alleged second sale, the applicant deposes that the first respondent was acting on behalf of the second respondent when he concluded the written agreement. This effort on the part of the applicant does not bear any fruit. It cannot succeed as firstly, there is no indication on the alleged written agreement (a copy of which has been tendered in evidence), that he first respondent was acting for and on behalf of the second respondent in signing the agreement. Secondly and more importantly, the second respondent did not then have any rights title or interest in the property that she could have sold. The title rights and interests were all in the name of the first respondent as is clear from the cottage record kept by the City of Harare and attached to the second respondent’s papers. On the basis of the foregoing, the second respondent is not personally liable under the alleged second agreement of sale.

In these proceedings, the second respondent has been cited in her personal capacity as a party who contracted with the applicant. I have not found any basis for coming to this conclusion. If there were any contracts of sale relating to the property, such contracts could only have been concluded with the first respondent during his lifetime. The applicant should have sought to sue the second respondent in her capacity as the executrix of and heir to the Estate of the first respondent but he has denied himself that opportunity by failing to allege in his papers that the first respondent is late. In the absence of an allegation that the first respondent is late, the applicant could not in his

papers, cite and sue the second respondent in her capacity as Executrix or heir to the estate of the first respondent. The applicant was, to put it mildly, hoisted by his own petard.

On the basis of the non-suit discussed above, I would dismiss the application.

In the event that I erred in dismissing the application on the above basis, I would proceed to dismiss the application on another basis.

The second respondent came into the property by way of intestate succession. This procedure and administration is done under the authority of the Master of the High Court. It is a quasi-judicial function. After following the due process of the law laid down in the relevant guiding statutes, the Master made a decision that the first respondent's title, rights and interests in the property be awarded to the second respondent. It is not immediately available to me what factors the Master took into account to come up with the decision he did. The undisputable fact before me is that the Master made a decision by virtue of which the second respondent came into the property. The decision of the Master on this issue has not been attacked nor impugned in any way. It thus remains binding on the world at large unless set aside. I say it is binding on the world at large because it defines and grants a status to the second respondent. It accords not only a status to the second respondent as heir to the Estate of the first respondent, but also and consequently grants her certain rights to the property. If there was an intention to defraud the applicant of his rights and entitlement to the property, in my view, the fraud occurred at this stage and not when the second respondent later sold the property to the third respondent's wife. Title rights and interest in the property passed from the Estate to the widow, second applicant. It is at this stage that the interests of the applicant were overlooked, ignored or deliberately and fraudulently suppressed. If there was a valid agreement of sale, title ought to have proceeded from the Estate to the applicant during the intestate administration of the Estate. The applicant ought to have aimed his attack at this disposal of the property by the Executrix under the authority of the Master. He chose not to do so and in my view, therein lies his undoing. His

application cannot succeed.

For the above reasons, I dismissed the application with costs.

Mushonga & Associates, plaintiff's legal practitioners.
Chingeya-Mandizira, 2nd and 3rd respondents' legal practitioners.