

MUSHURE JANGARA
versus
B. CHINEMBIRI
and
B. NYAKUTUMBA
and
B. GUYEYA
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
SMITH J
HARARE 8 June 2001 and 16 January 2002

Mr Madzivanzira, for the plaintiff
Mr Mushonga, for the 1st, 2nd & 3rd defendants

SMITH J: The first defendant (hereinafter referred to as “Chinembiri”) entered into an agreement with the fourth defendant (hereinafter referred to as “the Council”) to buy Stand No. 1014, Old Tafara (hereinafter referred to as “the Stand”). The sale was the usual one of a “lease-to-buy”. In 1985 Chinembiri sold his rights, title and interests in the Stand to the plaintiff (hereinafter referred to as “Jangara”) for \$3 500 and Jangara took occupation. When the parties approached the Council so that the rights in the Stand could be ceded by Chinembiri to Jangara, the Council refused to consent to the cession on the grounds that Jangara already owned a stand in the municipal area. Jangara remained in occupation. In 1997 Chinembiri sold his interests in the Stand to the second and third defendants, who were married to each other, for \$40 000. The Council consented to the cession by Chinembiri to the second

and third defendants of his interests in the Stand. Jangara instituted an application for the setting aside the sale to the second and third defendants on the grounds that it was fraudulent, in that the parties deliberately intended to frustrate Jangara's rights in the Stand. The application was dismissed by GILLESPIE J on 4 November 1998 - see judgment HH 200-98. In his judgment the learned judge set out the facts of the case and dealt with the legal position. He dismissed the application on the grounds that it was procedurally incorrect (because of the dispute of fact which could not be resolved on the papers), the cause of action was bad in law and the relief claimed was not available. He accepted, however, that the underlying dispute as to the competing rights had not been resolved.

Jangara thereafter issued summons. In his amended declaration he claimed that the rights of the second and third defendants are based on fraud in that they had entered into the agreement with Chinembiri in order to frustrate his claim. They were not entitled to obtain cession of Jangara's rights. The letter from the Council, dated 30 May 1997, saying that Jangara could not obtain cession of Chinembiri's rights because he already owned a stand in Budiro was either false or else obtained with the connivance of a corrupt official. Jangara claimed damages in the sum of \$3 500 plus interest or, alternatively, an order setting aside the agreement of sale between Chinembiri and the second and third defendants. The first, second and third defendants opposed Jangara's claim. The second and third defendants counter-claimed, seeking an order ejecting Jangara from the Stand and claiming holding over damages at the rate of \$100 a day from 7 May 1997 to the date of ejectment.

The second respondent died before the hearing of the case and the executor of his estate has stepped into his shoes as second defendant.

Jangara gave evidence as follows. He has been staying on the Stand since 1985, when he bought it for \$3 500 from Chinembiri. He went with Chinembiri and his wife to the Council offices in Tafara to register the sale. They were advised to go to the Council offices in Remembrance Drive. There an official told him that he was not on the housing waiting list and so the cession could not be allowed. He was given the necessary form to fill in, which he did, and he was then placed on the waiting list. However Chinembiri had disappeared and he did not see him again until 1992 when Chinembiri came and asked him for more money. He refused and so Chinembiri resorted to his legal practitioners. It was not true that in 1985 he had a house in the municipal area. He bought Stand No. 3533 in Budiro in 1994 for his child. Because his child had no money to develop the stand, he sold it in the same year. His name had been on the waiting list before he bought that stand. In 1995 he re-applied for his name to be placed on the waiting list. In April 1998 the Council wrote to him saying that his name had been recorded on the waiting list and his priority date was 3 February 1995. His application was valid for 12 months, and had to be renewed by a personal visit to the Council offices in April each year. He and Chinembiri did not return to the Council offices to register the cession. Chinembiri then sold his rights in the Stand to the second and third defendants, but that sale should be cancelled as he had already bought the said rights. They knew that he had bought the Stand. They had used the same firm of lawyers. As regards the counter-claim by the defendants, he cannot be evicted as he bought the Stand and, as far as damages are concerned, he is likewise not liable.

Under cross-examination Jangara gave the following responses. When he tried to get cession of the rights in the Stand Chinembiri had co-operated. However, cession was refused because his name was not on the waiting list. He has only bought the Stand in Budiro in 1994, so he could not explain why the Council official had written the letter in March 1992 saying that he was disqualified because he was the owner/lessee of another stand within the Harare municipal area. Chinembiri had written to him saying that he had cancelled the agreement between them and offering to return the \$3 5000 but he had not agreed to the cancellation. He had not seen the advertisement in the Press in May 1997 advertising the Stand for sale.

Chinembiri then testified as follows. In 1995 he sold his house to Jangara for \$3 500. After he was paid, the two of them went to the Council offices so that he could cede his rights in the Stand to Jangara. The official refused to register the cession on the grounds that Jangara was not allowed to own two properties in the city area. He was not aware that Jangara owned another property. The official told him that he should give Jangara back his money. Jangara asked if he could stay in the house because he had nowhere to go. He told Jangara that that was not possible because he wanted to go to his communal home. As far as he was concerned, the agreement of sale was terminated at the Council offices. Jangara sought the aid of a lawyer in order to get cession of the rights in the Stand. He went to the Council offices and the official asked him what he had done. He told him that he had gone to the house to give Jangara back his money but Jangara would not talk to him and threatened him with a spear. The official told him to go and see his lawyer, which he did. His lawyer offered the \$3 500 to Jangara but Jangara would not go and collect it so he took it back. About 1997 he sold the Stand to the second and third defendants. The Council official had told him not to conclude the sale of his rights in the Stand but to bring any potential buyer to the Council offices. His younger brother put an advertisement in the Press that the Stand was for sale and the second and third defendants responded. He sold the Stand to them for \$40 000. Before concluding the sale he took them to the Council offices where they were questioned and then pronounced to be suitable buyers. His rights were then ceded to them and the cession was approved by the Council official. He had instituted an action to evict Jangara but his case was dismissed at the pre-trial conference because he did not attend. That was because he was living at his communal home.

Under cross-examination Chinembiri made the following responses. He was willing to go to the Council offices a second time to try to get the cession registered but Jangara was not prepared to go with him. He was assaulted by Jangara and had to get protection from the police. The sale to Jangara had been cancelled by the Council official. It was not he who refused the

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cession, it was the Council official. He had not seen the letter inviting him to go to the Council offices with Jangara. The Council official denied permission for Jangara to buy the Stand. He did not know why permission was refused but the official said that it was against the Council's policy that one person could own only one house in the city area.

In re-examination Chinembiri said that when he and Jangara were returning from their visit to the Council offices at Tafara, Jangara had asked if he could stay in the house. He discussed the matter with his parents and all agreed that Jangara could stay there. There was no question of rent being asked for, because there were two lodgers in the house who each paid him \$50 and Jangara paid \$20 for the rent card. The lodgers paid him for two months after Jangara moved in and then Jangara evicted them.

The next witness was the third defendant, Guveya. She said that Nyakutamba had died. The two of them were married under customary law. She had seen the advertisement for the Stand in the newspaper. She phoned Chinembiri's younger brother and then she and her husband went to see the house. They liked it so they agreed to buy it. They went to the Council offices with Chinembiri and her late husband produced proof that he was on the waiting list for a house. The cession of Chinembiri's rights in the Stand to them was registered. She went to the house to give the lodgers one month's notice to get out but could not enter the house because Jangara refused permission. It was then that she learnt for the first time that he had bought Chinembiri's rights in the Stand. When Jangara instituted this action she and her late husband filed a counter-claim seeking the eviction of Jangara and damages at the rate of \$100 a day from the date the rights were ceded to them. There was no fraud involved in their purchase of the Stand.

Under cross-examination Guveya made the following responses. When they bought the house in 1997 it was not clear to them what had transpired between Chinembiri and Jangara. It was only in 1998 that Chinembiri mentioned the problems he was having with Jangara. He only told them the truth after he failed

to get Jangara evicted. The legal practitioner they went to with Chinembiri did not tell them about Jangara's involvement, nor did he tell them about the action in the High Court to evict Jangara. They were completely unaware of the dispute when they bought the house on 7 May 1997. When she went to see the house, she saw a young girl. She did not enter the house because it was not necessary. She could see that it was a 4-roomed house.

The final witness, called at the suggestion of the court, was Francis Makara, Senior Housing Management Officer of the Council. He testified as follows. Jangara and Chinembiri came to his office in Tafara in 1995 to effect cession of the latter's rights in the Stand. They were given the necessary forms and told to go to the Council head offices in Remembrance Drive. At head office it was found that Jangara owned stand No. 505 in Kambuzuma. As that stand was registered in his name he could not acquire another stand in Tafara. In 1998 Jangara's name had been placed on the list for a house. That meant that he was entitled to acquire another stand within the Council area. That was probably because it was found that he had sold his stand in Budiro in 1995. It was he who had written the letter (Exhibit 3) dated 30 May 1997 to Chinembiri's legal practitioners saying that Chinembiri had applied for permission to be allowed to cede the Stand to Jangara, but the request had been turned down when it was discovered that Jangara had a house in Budiro. He had advised Chinembiri to look for a buyer who did not own a house in Harare or Chitungwiza. If Chinembiri now applied for permission to cede his rights in the Stand to Jangara, the Council would grant permission. However the Stand has been ceded to the second and third defendants and so they are the owners. He would not have registered the cession had he known that there was a court case pending.

The events leading up to the hearing of this case are as follows. In 1985 Jangara and Chinembiri entered into an agreement in which the latter sold his rights and interests in the Stand to the former. The purchase price was paid but the Council refused to register the cession. Jangara said that it was because he was not on the housing waiting list, whereas Chinembiri said that he was told it was because Jangara already had a house in the Council area. In 1992 Chinembiri instituted action against Jangara (case No. HC 5518/92) but his claim and defence to Jangara's counter-

claim were dismissed at the pre-trial conference on 17 June 1998. Whilst that action was still pending Chinembiri entered into an agreement with the second and third defendants on 7 May 1997 to sell his rights in the Stand to them. When Jangara became aware of that sale he filed a court application seeking an order setting aside that sale and the registration of the cession (case No. HC 4800/98). That application was dismissed by GILLESPIE J on the grounds that Jangara should have proceeded by way of a summons and not a court application. The judgment is reported as HH 200-98. Jangara then issued summons seeking the same relief.

Mr *Madzivanzira* submitted that Jangara has a legitimate claim against Chinembiri and therefore the court should uphold Jangara's claim. As regards the claim by Nyakatumba and Guveya, they should be dismissed because of their fraudulent conduct. It is unbelievable that Guveya would be satisfied with looking at the house from outside without wanting to go inside and see what condition it was in. She must have known about the dispute and that was why she did not insist on going into the house. Jangara gave his evidence well and should be believed. On the other hand, Chinembiri was not a credible witness. At no time previously had he mentioned that Jangara had assaulted him. Clearly he wanted to cancel the agreement with Jangara because he could get more money by selling the house to another buyer. Jangara has proved his case and is entitled to the order sought. As regards the counter-claim, there is no evidence before the court as to the proof of damages at the rate of \$100 a day.

Mr *Mushonga* argued that there was supervening impossibility in the implementation of the agreement of sale between Jangara and Chinembiri. That impossibility arose because of the insistence by the Council that no person would be allowed to have more than one house in the municipal area. That resulted in the agreement between Jangara and Chinembiri being terminated. Hence Chinembiri offered, in 1992, to refund the \$3 500 paid by Jangara. Nyakatumba and Guveya then purchased the Stand and the cession of Chinembiri's rights was registered by the Council. Jangara was not an impressive witness. His explanation that he bought the stand in Budiro in 1994 when the Council official said (Exhibit 3) in 1992 that Jangara owned the same stand cannot be accepted. Guveya was a credible

witness. It was the Council which refused to agree to the cession and thereby caused the agreement between Jangara and Chinembiri to be aborted.

The following facts are not disputed. Jangara purchased from Chinembiri the latter's rights and interests in the Stand in 1985 for \$3 500. When they went to the Council offices an official refused to register the cession. Jangara says the official refused because his name was not on the housing waiting list, whereas Chinembiri says that it was because Jangara already owned a house in the municipal area and Council policy was that no person could own more than one house. Subsequently Jangara, who had acquired a stand in Budiro, sold the stand and his name was placed on the housing waiting list. Jangara did not thereafter attempt to get the Council officials to register the cession to him of Chinembiri's rights in the Stand. However, in 1997 Chinembiri sold his rights in the Stand to Nyakutumba and Guveya and the cession of his rights to them was registered by the Council. It is clear that by then the Council would have had no objection to registering the cession of Chinembiri's rights in the Stand to Jangara. Jangara had been eligible to obtain cession since 3 February 1995. Before selling his rights and interests in the Stand to a third party, Chinembiri should have ascertained from the Council, at the time he was about to sell his rights and interests, whether Jangara was still precluded from obtaining cession. He did not do so. He claims that it was the Council that cancelled the agreement between him and Jangara. That is not so. The Council had no right to cancel the sale. All the Council could do was to refuse to implement it whilst Jangara was the registered owner of a house in Harare. Chinembiri had been paid for the rights he sold to Jangara. Therefore, there was no urgency on his part for the cession of his rights to be registered. He was not losing anything by reason of the delay in registration.

The equities in this case also require that the cession of the rights in the Stand to Jangara be registered. He paid the purchase price asked by Chinembiri and he has been staying in the house since 1985, which is more than 16 years. During that period he has paid all the charges due to the Council and has been responsible for all repairs to the house. The Council, according to the evidence of Mr Makara, is agreeable to the cession being registered and, had it been aware that there was a

court case pending between the parties, it would not have agreed to the registration of the cession of the rights in the Stand to the second and third respondents.

Accordingly, it is ordered that -

1. The fourth defendant register the cession to Jangara of the rights, title and interests in Stand No. 1014, Old Tafara, Harare.
2. The counter-claim by the second and third defendants is dismissed.
3. Costs of suit be paid by first, second and third defendants jointly and severally, the one paying the others being absolved.

Madzivanzira & Partners, legal practitioners for the plaintiff.

Mushonga & Associates, legal practitioners for the 1st, 2nd and 3rd defendants.