TEDZAI KAONDERA
versus
NYARADZO JABOON
and
MASHONALAND HOLDINGS LIMITED
t/a RUWA PROPERTIES
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 12, 13, 14 and 26 November, 2012

Civil Trial

F M Katsande, for the plaintiff
C Chengeta, for the 1st defendant
No appearance for the 2nd and 3rd defendants

MUTEMA J: The plaintiff and the first defendant have competing claims to stand 2609 Ruwa Township of stand 856 Ruwa Township ("the property"). This action was launched to compel the second defendant to pass transfer of the property to the plaintiff and that the third defendant registers the transfer in favour of the plaintiff.

The bare bones of the dispute are these:

In terms of a written memorandum of agreement of sale entered into between the plaintiff and the second defendant, the second defendant sold to the plaintiff the right, title and interest in the property. The plaintiff paid the full purchase price of ZW$9 000-00. Before the second defendant could pass transfer of the property to the plaintiff, the first defendant claimed to have purchased the same property and demanded transfer to her. The dispute was referred to arbitration and the arbitrator determined that unless the parties mutually resolved their claims over the property, the matter should go to court. The parties failed to settle the matter hence it found its way before me.

The plaintiff's contention is that she purchased the property and fully paid the purchase price and the first defendant was aware of this fact before she negotiated for the sale of the property to herself.

The first defendant's contention is that the purported agreement of sale between the plaintiff and the second defendant is invalid if ever it exists because the second defendant could not sign such an agreement without the express authority of the duly elected representatives or officials of Zvichanaka Housing Cooperative. The plaintiff was never a member of the cooperative. The property was rightfully and legally allocated to the first defendant by the cooperative. She paid everything that was stipulated by the cooperative as opposed to the plaintiff. The plaintiff is in illegal occupation of the property. She counter claimed for an order declaring her as the rightful owner of the property and that the plaintiff and all those claiming occupation of the property be ordered to vacate it. The plaintiff contends that the first defendant's claim in the counterclaim has prescribed in terms of the Prescription Act, *Chapter 8*:*11*.

The plaintiff's evidence is this:

She is claiming transfer of the property from the second defendant and that the third defendant registers it in her name. In 1989, the second defendant advertised stands for sale in Ruwa. A cooperative society called Zvichanaka Housing Cooperative was then formed to raise money to purchase the stands in question. Her mother Agnes Murungweni Chiwaura was a member of Zvichanaka as well as her two brothers Dennis and Davison. She produced exh 1 some of the receipts to substantiate her averment that her brothers and her mother were making cash contributions in 1989 that the first defendant, also known as Mangeya, receipted. Some of these receipts are in the name of "Chichavura" (obviously a misspelling) and "D Chiwaura" and "Denesi Chiwaura." Exhibit 2 are receipts for 1990, some of which are in the name D Chiwaura while others are for T Bhobho (herself using her maiden surname). Exhibit 3 are receipts for 1991 in the names P Chivaura and T Bobho (Bhobho). When her brother Davison discontinued his Zvichanaka membership in 1990 the mother joined her as a member in Davison's stead and she took over payment of the subscriptions. Her sister Prisca Chivaura also took over from Dennis who had opted out of Zvichanaka, hence the receipts in the names P Chivaura and T Bhobho reflected in exh(s) 2 and 3 as well as exh 4 – the 1992 receipts.

She also produced exh(s) 5, 6 and 7 – bunches of receipts in her name reflecting the payments she made to Zvichanaka for the years 1993, 1994 and 1995 respectively all signed by the first defendant N Mangeya who was then the secretary of Zvichanaka.

She said Zvichanaka failed to live up to its undertaking to construct a two-roomed structure and a toilet for each member. This was after a meeting had been held in Zengeza

where stand numbers were allocated to members of Zvichanaka via picking of numbers written on a piece of paper from a hat and she had picked stand number 2609. This was around 1995/1996 and the first defendant also attended that meeting and did not protest at her picking that stand number. Mai Chipo, a member of Zvichanaka went and showed her the physical stand whose number she had picked, having been sent to do so by the first defendant.

Having in vain waited for the two-roomed structure and toilet to be built she decided to go to the second defendant in 1998 to check on her name. There was also a suspicion that the cooperative funds were not being properly accounted for. She saw her name on the list of those who had paid the required purchase price of $9 000-00. Exhibit 8 is the Memorandum of Agreement of sale of the property drafted on 21 May, 1998 between the second defendant and herself.

She then proceeded to construct a three-roomed cottage and installed sewerage and water reticulation system. The second defendant gave her the site plan. The first defendant visited the site after the cottage had been built and a seven-roomed foundation had been laid. This was in about 2001 and the first defendant alleged that the property was hers and that she (the plaintiff) had paid only $300-00 and not the full amount, which was untrue. The first defendant would pass by the property seeing the developments but doing nothing about it.

She went to the second defendant to enquire about title deeds to the property in 2001 and was referred to Atherstone and Cook Legal Practitioners for the second defendant had advised her that the property had two competing claimants – herself and one Nyaradzo Jaboon (the first defendant). She did not know that N Mangeya was the same Nyaradzo Jaboon. She went to the first defendant to enquire as to who this Nyaradzo Jaboon was. The first defendant told her that the person was her young sister and she did not know where she was. This was despite other Zvichanaka members having advised her that Nyaradzo Jaboon was the first defendant.

She produced exh 9 – a letter by Atherstone and Cook showing that they wanted to process the title deeds for the property in her name. She explained that the list of paid up members was sent to the second defendant by the cooperative society. Exhibit 1 – 7 do not reflect all the payments she made for the property to amount to $9 000-00. This is so considering the effluxion of time and that she did not keep all the receipts as she did not anticipate this dispute. She disputed that the property belongs to the first defendant. She is currently in occupation of the property. She produced exh 10 – the arbitral award which

stipulated that the property in dispute, among others, could only be transferred either by agreement of the competing claimants or by an order of a competent tribunal. The plaintiff thereafter closed her case.

Nyaradzo Jaboon-Mangeya, the first defendant gave the following evidence:
Zvichanaka was formed in July, 1989, in order to seek accommodation for its members. A Mr Manyasha, who was then the chairman of Ruwa Local Board, advised of the existence of stands in Ruwa. She was a member of Zvichanaka which died after the arbitral award. She was its secretary. She unsuccessfully tried to produce receipts she alleged confirmed her membership due to failure to discover the same. She produced exh 11 to show that Zvichanaka was paying for the purchase of stands in Ruwa to the second defendant, dated 19 March, 1993 as well as exh 12 dated 8 August, 1994.

She does not know how the plaintiff obtained the agreement of sale, exh 8 because it was Zvichanaka that was supposed to sign the agreement of sale with the second defendant. When Zvichanaka sourced the stands it allocated members the stand numbers – whether paid up or not. Agreement of sale from Zvichanaka would confirm that one had paid up one's dues to Zvichanaka. The second defendant would offer the actual sale agreement to a member to enable a member to get title deeds. She produced exh 13, the Zvichanaka agreement of sale in her name for the disputed property which she would take to the second defendant in order to be furnished with the actual sale agreement. The import of exh 13 was to show to the second defendant that she was cleared. (The plaintiff put the authenticity of exh 13 in issue as it has no date and or Zvichanaka stamp or its acknowledgment by the second defendant). She explained that these documents (similar to exh 13) were prepared long ago in large numbers without dates and dates would only be affixed on them when a member was taking his/hers to the second defendant but in certain cases dates were forgotten. She also produced exh(s) 14, 15, 16 and 17 similar to exh 13 but bearing different members' names.

She also produced exh 18 – agreement of sale between the second defendant and Etina Macheke based on exh 17; and exh 19 – a letter from the second defendant advising Zvichanaka chairman to direct Etina Macheke to proceed to Atherstone and Cook to have title deeds processed in her name. Also, she produced exh(s) 20, 21 and 22 for Reward Mandigo to take to the second defendant for clearance, his agreement of sale with the second defendant and his title deeds respectively.

She confirmed holding a meeting in 1994 where members picked stand numbers from a hat but said the plaintiff never picked a card with stand number 2609, not even a card. She

could not explain how the plaintiff came to be claiming stand 2609. She confirmed the split in Zvichanaka. She averred that there were some members like the plaintiff who failed to pay up the required purchase price of $9 000-00, hence the plaintiff does not have enough receipts for her alleged payments and Zvichanaka records show that she did not pay the required amount.

She also confirmed that it was permissible for one to take over membership from a drop out member but only after speaking to "us and we write it down." The plaintiff's mother was a member but was paying subscriptions for herself. The plaintiff was not a member of Zvichanaka and she herself once raised issue with the receipts the plaintiff produced as exhibits with her mother when the plaintiff paid using different names. She suggested the plaintiff supply them with one name but the plaintiff did not turn up for the discussion. She also averred that the plaintiff did not pay any money herself but it was her mother who paid.

Finally, she said she would see that the plaintiff was developing the property as she passed by but would not speak to her although she knew that the stand was hers.

She closed her case by calling Knowledge Shindi who produced exh 23, an agreement of sale between the second defendant and his late father Francis Shindi which he himself signed. This was after he had got confirmation letter (exh 24) in the name of his father before he died which he later took to Zvichanaka executive which directed him to go to the second defendant whence he got the agreement of sale.

So this was the evidence adduced before the court in this matter. The evidence thus adduced should resolve the three issues which were referred to trial, viz:

1. Who is the owner of stand 2609 Ruwa Township of stand 856 Ruwa Township the piece of land in respect of which the plaintiff and the second defendant entered into the agreement of sale dated 21 May 1998?
2. Whether the first defendant ever acquired a right over the property which is enforceable against the plaintiff.
3. Whether the first defendant's claim against the plaintiff is prescribed.

The burden of proof rested on the plaintiff regarding issues 1 and 3 while on issue 2, on the first defendant. Since issues 2 and 3 are so interwoven that a disposal of issue 3 in the affirmative disposes of issue 2, simple logic enjoins me to deal first with issue 3.

Whether the first defendant's claim against the plaintiff is prescribed

This issue should not detain me. Section 15 of the Prescription Act, *Chapter 8:11* provides:

> "15 Periods of prescription for debts:
>
> The period of prescription of a debt shall be-
> (a) …
> (b) …
> (c) …
> (d) Except where any enactment provides otherwise, three years, in the case of any other debt".

In terms of s 2 of that Act, "debt" is defined thus:

> "without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, and delict or otherwise."

The first defendant's contention as gleaned from her written submissions (para C1) regarding prescription of her counterclaim is couched in these words:

> "… It is abundantly clear therefore that if there is to be lack (sic) of prescription, it should work against the one who is claiming. In this case, prescription would go against the plaintiff, not the first defendant. Prescription does not work against any of the parties in this dispute. The Arbitral Award did not provide for a time limit in which disputes would be brought before a competent tribunal. The first defendant's counter claim therefore has not prescribed and must succeed …"

Apart from the fact that it is difficult to make head or tail of the foregoing conflicting submissions, the first submission that if ever there is to be prescription, it should work against the party who is claiming i.e. the plaintiff, should be dismissed off hand as mere sophistry. I say so because the plaintiff is not the sole party claiming. Even the first defendant is also claiming in her counter claim. However, prescription cannot work against the plaintiff in *casu* but against the first defendant in view of the nature of the respective parties' claims. The plaintiff is *in situ* at the contested property and has made developments thereon. She wants the second defendant compelled to pass transfer of the property to herself and the third defendant to register such transfer. Clearly those two prayers do not and cannot attract the defence of prescription against her especially in view of the fact that both the second and third defendants have not contested her suit in that regard. On the other hand, the first defendant's counter claim is for an order that she is the rightful owner of the property and

that the plaintiff and all those claiming occupation of the property through her be and are hereby ordered to vacate the property within ten days of service of the order upon them. The nature of this claim clearly shows that it was incumbent upon the first defendant to claim her "debt" within the three year prescription period but she did not.

The second submission, viz that the arbitral award did not provide for a time line for bringing the dispute before a competent tribunal, calls for closer scrutiny. Section 17 of the Prescription Act provides:

> "17 When completion of prescription delayed
>
> (1) If-
> (a) …
> (b) …
> (c) …
> (d) The debt is the subject matter of a dispute submitted to arbitration, or …; and the period of prescription would, but for this subsection, be completed before or on, or within one year after, the date on which the relevant impediment referred to in para(s) (a), (b), (c), (d) or (e) has ceased to exist, the period of prescription shall not be completed before the expiration of the period of one year which follows that date."

In the instant case although the parties were not forthcoming regarding the exact date regarding when prescription commenced running against the first defendant, the plaintiff averred that she started developing the property in 1998 and continued up to year 2001 and this was to the first defendant's knowledge who would pass by seeing the development but did nothing about it. The dispute was referred to arbitration but the exact date is not known, suffice it to state that on 27 February, 2002 the arbitrator granted an interim interdict regulating *inter alia* transfer of the property in contention. This interim interdict was discharged on 25 March, 2002 and substituted another interdict that the property could not be transferred to either party save by an order of a competent tribunal or by agreement of the parties. Assuming, and correctly so, that prescription had commenced running against the first defendant for part of 1998, the whole of 1999 and 2000 and part of 2001 and had not reached the three year period by the time the dispute was referred to arbitration, it did not resume running until after one year of the date of arbitration i.e. 25 March, 2002 on the interpretation of s 17 (1)(d) of the Prescription Act. That one year expired on 25 March, 2003. The first defendant only counter-claimed on 27 July, 2011, more than 9/10 years later.

Even if I were to go by the first defendant's *ipse dixit* that she only had knowledge that plaintiff had occupied this property in 2006, still her counter claim would be prescribed.

Having found that the first defendant's counter claim against the plaintiff is prescribed, the second issue referred for trial, viz whether the first defendant ever acquired a right over the property which is enforceable against the plaintiff, falls away. This leaves me to determine the last issue.

Who is the owner of stand 2609 Ruwa Township?

On this issue the plaintiff gave her evidence in a clear and straightforward manner despite the effluxion of time involved. I have no basis or reason not to believe her. On the other hand the first defendant, while acknowledging that she is a senior citizen and also the same effluxion of time involved, was a very poor witness who was difficult, evasive who either would deliberately eschew answering simple questions the first time or not at all. It is difficult to place any reliance on her testimony.

The authenticity of her exh 13 is doubtful. It has no date or Zvichanaka stamp. She said it was issued to her in 1998 but what baffles belief is why she decided not to assert her rights until the arbitral award in 2002 – a period of four years without approaching the second defendant for her agreement of sale yet she was the secretary of Zvichanaka. She had no plausible reason why she failed to assert her rights of ownership over the property from 1998 or even from 2006 (going by her word) when she saw the plaintiff developing what she claims to be her stand. Under cross-examination the following exchange ensued:

Q: So from 2006 to 2011 when you counter claimed you were aware the plaintiff was asserting rights over the stand and was in fact erecting structures?

A: I told the executive.

Q: Did the executive take any legal measures to stop development from 2006 – 2011?

A: I am not able to answer that question.

Q: But in 2011 you instructed your legal practitioners to claim that you are the rightful recipient of the stand and that the plaintiff and all those claiming occupation through her be evicted (para 6 of counter claim)?

A: I did not say that.

Q: You did not instruct them so?

A: That is not what I instructed them to do.

Q: So it is your legal practitioner's initiative?

A: That is correct.

Q: How did you acquire stand 2609?

A: I was paying the cooperative.

Q: Where is your agreement of sale?

A: It is in my file.

The first defendant did not even produce a single receipt confirming payment of her subscriptions to Zvichanaka unlike the plaintiff who produced exh(s) 1 – 7 – receipts for various payments totalling $8 533-00. She explained that the total purchase price for the stand was $9 000-00 and that the difference between the two amounts is explained away by misplacement due to passage of time. She produced exh 8 – her agreement of sale with the second defendant dated 21 May 1998 unlike the first defendant who has none such. The plaintiff's explanation regarding how she ended entering into the sale agreement with the second defendant is credible. If the second defendant did not have a list of paid up members from Zvichanaka with her name on it, surely the second defendant would not have concluded the agreement of sale with her. Also, it would be stretching the domain of coincidence to absurdity to allege as the first defendant did that the plaintiff never picked a piece of paper written stand 2609 from a hat while the plaintiff contends that she did at Zengeza and then at Ruwa the plaintiff ends up on stand 2609. In fact initially the first defendant totally denied that a lucky dip was ever held at Zengeza but later conceded that it was held but denied the plaintiff's participation in it.

The first defendant's exh(s) 13 – 24 for whatever they are worth are found lean on probative value. Even her witness Knowledge Shindi's testimony has also no probative value.

On the totality of the evidence adduced before me in this case on the issue at hand, I find that the plaintiff has managed to prove her ownership to stand 2609 on a balance of probabilities. In the event, I make the following order:

(a) It is hereby declared that the sale of stand 2609 Ruwa Township between the plaintiff and the second defendant prevails over the subsequent purported sale of the same property to the first defendant;

(b) Within ten days of service this order the second defendant shall sign such papers as may be necessary to pass transfer to the plaintiff of stand 2609 Ruwa Township of stand 856 Ruwa Township of the Remainder of Subdivision H of Galway Estate

situate in the district of Goromonzi, failing which the Deputy Sheriff be and is hereby authorised and directed to sign such documents;

(c) The first defendant shall pay the plaintiff's costs; and

(d) The first defendant's counter claim be and is hereby dismissed with costs.

F M Katsande & Partners, plaintiff's legal practitioners
Pundu & Company, 1st defendant's legal practitioners