

STANLEY MAZORODZE  
versus  
MAI KAI DEVELOPMENT TRUST  
and  
BENARD MAHARA MUTANGA  
and  
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE  
TAKUVA J  
HARARE, 6 November 2013 and 12 February 2014

**Civil trial**

Advocate *T. Magwaliba*, for the plaintiff

Ms *S. Takawira*, for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

TAKUVA J: On or about the 20<sup>th</sup> of September 2002, the plaintiff purchased subdivision number 6 of the remaining extent of Sherwood of Philadelphia held under deed of transfer number 1524/50 from the first defendant. The first defendant was represented by the second defendant and one Goodwills Masimirembwa. Plaintiff duly paid the purchase price to the first defendant.

In August 2003, the plaintiff entered into an agreement in terms of which he sold back the property to the first defendant in what the parties referred to as the “buy back agreement”. In terms of this agreement, the first defendant would purchase back the property at a price of ZW\$40 000 000,00 payable on or before the 29<sup>th</sup> of August 2003. The first defendant breached this agreement and on 8 and 18 September 2003, the plaintiff indicated to the first defendant that he was cancelling the buyback agreement. On 2 February 2006, in case number HC 3860/04, this court ruled that the cancellation was valid. Despite this order, first defendant has refused or neglected to produce the deed of transfer for the relevant subdivision for the transfer to be effected to the plaintiff.

Plaintiff prayed for an order in the following terms:

- (i) That the first and second defendants shall deliver to the plaintiff's legal practitioners forthwith upon the service of this order upon them the certificate of registered title in respect of an immovable property known as, subdivision number 6 of stand 278 of the remaining extent of Sherwood Estate situated in the District of Salisbury.
- (ii) In the event that the first and second defendants do not comply for any reason with the terms of clause 1 hereto, the Deputy Sheriff, Harare or his lawful deputy shall enter upon the premises of the first and second defendants and take possession of the certificate of registered title in respect of the immovable property known a subdivision No. 6 of stand 278 of the Remaining Extent of Sherwood Estate situated in the district of Salisbury.
- (iii) The third defendant shall in the event of no copy of the certificate of registered title referred to in clause 1 and 2 above available at the premises of the first and second defendant, deliver and make available to the plaintiff's legal practitioners a copy of the said certificate of registered title forthwith upon the service of this order upon him.
- (iv) The first, second and third defendants be and are hereby interdicted pending the transfer of the immovable property to the plaintiff from dealing with the property in any manner or transferring it to any person other than the plaintiff.
- (v) The first and second defendants shall pay the costs of this suit on an attorney and client scale.

First and second defendants opposed the matter on the following grounds:

- (a) that they did not breach the buyback agreement;
- (b) that the plaintiff is not entitled to cancellation;
- (c) that the plaintiff is not entitled to the relief sought in that the property has been disposed to a third party Dominic Pfumbauta.

At the pre-trial conference the parties agreed on what they perceived to be the issues. When trial commenced all parties agreed that it was common cause that plaintiff and first

defendant entered into a buy back agreement. It was also common cause that the first and second defendants did not pay the full purchase price within the agreed period. What remained in dispute are the following two issues;

- (a) Whether there was a compromise agreement between the parties;
- (b) Whether the plaintiff has any rights, title and interest in the property in question.

Since the onus was on the defendants in respect of the first issue, the second defendant gave evidence first. He told the court that he is an Architect and a Gemologist. He holds a Masters' Degree in Property and Rural Development. Mr Mutanga's version is simply that plaintiff bought the property in October 2002 for ZW\$8.4 million. Later in March or April 2003 he decided that he was no longer interested in that property. He further stated that he could not remember whether plaintiff had paid the purchase price. According to Mr Matanga, the market value of this property was now ZW\$40 million and plaintiff wanted to be refunded this amount which request was turned down by the Trust. However, the Trust suggested that they buy back the property and the buyback agreement was entered into and he paid ZW\$40million to plaintiff by cheque on 10 October 2003. He said this was in order since he had obtained an extension of time to pay. After payment, they then sold the property to a third party one D. Pfumbauta and the trust received a letter of cancellation. As regards the decision in case number HC 3860/04, he said he never applied for its rescission and up to now he respects this order and is willing to comply with it.

Under cross-examination he admitted that the Trust breached the buyback agreement by failing to pay by the 29<sup>th</sup> of August 2003. He seemed to suggest that a tender of payment suffices although later he contradicted himself by saying he saw a cheque attached to some letters. Asked why if a certificate of registered title was obtained in 2008, the property had still not been transferred to the plaintiff, his answer was that the plaintiff was not entitled to the property since he cancelled the agreement and the Trust refunded him. The defendants closed their case after this witness' testimony.

Plaintiff testified as follows:

On 20 September 2002, the plaintiff entered into an agreement of sale with the first defendant represented by the second defendant. The sale related to an immovable property known as stand number 278 of the remaining extent of Sherwood of Philadelphia. The plaintiff paid the full purchase price of Z\$8.4 million in instalments. Later, on 26 August 2003, the parties entered into another agreement they referred to as a “buy back agreement” wherein the first defendant bought back the property from the plaintiff for Z\$40 million. This purchase price was payable by the first defendant on or before the 29<sup>th</sup> day of August 2003.

Notwithstanding this specific provision that the purchase price was due and payable on or before the 29<sup>th</sup> August 2003, first defendant failed to pay on or before that date. This prompted the plaintiff to instruct his legal practitioners to write a letter of demand which plaintiff personally delivered at the *domicilium citandi* in terms of clause 8(b) of the agreement. Both defendants did not respond.

On 18 September 2003, plaintiff through his legal practitioners and in writing cancelled the buyback agreement. Plaintiff personally delivered the notice of cancellation at the address for service in terms of the agreement. Six weeks later on 10 October 2003, the second defendant tendered payment of the purchase price through his legal practitioners. However, payment was never made and plaintiff applied to this court for an order validating the cancellation. The order was granted under case number HC 3860/04 on 2 February 2006. Plaintiff failed to obtain from first defendant a deed of transfer for the relevant subdivision for transfer to be effected to the plaintiff.

According to the plaintiff, he entered into the buyback agreement after second defendant approached him and indicated that “things were difficult and plaintiff could not develop the stand since the paper work had not been completed”. He then offered to purchase the property for Z\$40 million after plaintiff had asked for Z\$50 million. The plaintiff denied entering into a compromise agreement wherein he is alleged to have agreed to allow the first defendant to sell the property to a third party and be paid from the proceeds.

Plaintiff prays for an order compelling the first and second defendants to deliver to the plaintiff’s legal practitioners the deed of transfer in respect of subdivision number 6 of stand 278 of the remaining extent of Sherwood Estate, failing which the Deputy Sheriff or his lawful assistant are authorized to obtain the said document from the first and second defendants. The

plaintiff further prays for an order interdicting the first and second defendants from dealing with the immovable property pending the transfer.

As pointed out before, despite second defendant's prevarication, there are only two issues to be resolved. As regards the first issue relating to whether there was a compromise agreement, it is necessary to closely examine the evidence of the parties. In my view, the second defendant's testimony is incredible for the following reasons;

- (i) The second defendant testified that he discharged his obligations in terms of the buyback agreement by paying the full purchase price by cheque. If he is telling the truth, then the so-called compromise agreement was superfluous.
- (ii) The second defendant failed to discharge the onus of establishing the compromise agreement in that he failed to substantiate this claim by providing proof or details of its existence.
- (iii) Further, second defendant did not explain why the parties failed to reduce this agreement to writing like what they did in respect of the previous agreements.
- (iv) The second defendant's version is highly improbable in that firstly, he claims to have paid the full purchase price by cheque, secondly, he said he was given time to pay and thirdly, he said plaintiff authorized him to sell the property to another person. These are mutually exclusive events which are glaringly absurd.
- (v) Both defendants did not even argue the case that they pleaded. It was argued for the first time during addresses that the matter had prescribed and that it was *res judicata*. While it is trite that a point of law and be raised at any stage of the proceedings, this can only be done where it does not cause prejudice or unfairness to the other party. See *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S).

In *Keavney & Anor v Musabaeka Bus Services (Pvt) Ltd* 1996 (1) ZLR 605 (S) it was held, per McNALLY JA (as he then was) that "the purpose of pleadings is to define the issues to enable the other party to know what case he has to meet. It is improper conduct therefore for a legal practitioner to advance a defence different from that pleaded ... The failure to plead the real defence suggests one or other of three possible explanations;

- (a) sheer idleness and incompetence on the part of the pleader;
- (b) a deliberate and unconscionable attempt to avoiding attracting the onus of adducing evidence; or
- (c) The defence was an after-thought.”

*In casu*, the defences belatedly raised are a clear after-thought. Raising them at the eleventh hour causes prejudice to the plaintiff in that he was unable to deal with them during pleadings and trial.

For these reasons, I find that the compromise agreement does not exist at all and the 1<sup>st</sup> issue must be resolved in plaintiff’s favour.

As regards the second issue, it follows that upon cancellation of the buyback agreement, the *status quo ante* was restored namely that the parties reverted to the original agreement of sale which accorded plaintiff rights, title and interest in the property. It is common cause that the buyback agreement was cancelled by way of a court order. The argument that the plaintiff breached the first agreement by failing to pay the full purchase price is lame in that defendants would not have entered into the buyback agreement with a party that did not have rights, title and interest in the property, for one may ask, what rights would plaintiff pass to defendants?

Much was said about plaintiff’s alleged tardiness to enforce his rights since 2006. In my view this criticism is baseless in that according to second defendant’s own words, the Certificate of Registered Title was issued in 2008. This then necessitated the plaintiff to institute fresh proceedings in order to have this document delivered to him.

For these reasons, I find that the plaintiff has rights, title and interest in the property. The second defendant stated that he is prepared to comply with the order in case No. HC 3860/04. Consequently, there was no need to defend this case at all.

Accordingly, an order in the following terms is granted.

- (a) That the first and second defendants shall deliver to the plaintiff’s legal practitioners within seven (7) days from the date of service of this order upon them, the Certificate of

Registered Title in respect of an immovable property known as subdivision No. 6 of stand 278 of the remaining extent of Sherwood Estate situated in the District of Salisbury.

- (b) In the event that the first and second defendants do not comply for any reason with the terms of clause 1 hereto, the Deputy Sheriff, Harare or his lawful deputy shall enter upon the premises of the first and second defendants and take possession of the certificate of registered title in respect of immovable property mentioned in (a) above.
- (c) The third defendant shall in the event of no copy of the certificate of registered title referred to in clauses (a) and (b) above available at the premises of the 1<sup>st</sup> and second defendants deliver and make available to the plaintiff's legal practitioners a copy of the said certificate of registered title within fourteen (14) days from the date of service of this order upon him.
- (d) The first, first and third defendants be and are hereby interdicted pending the transfer of the immovable property to the plaintiff from dealing with the property in any manner or transferring to any person other than the plaintiff.
- (e) The first and second defendants shall pay costs of this application on an attorney and client scale.

*Magwaliba & Kwirira*, plaintiff's legal practitioners  
*Govere Law Chambers*, defendants' legal practitioners