

CHEGUTU MUNICIPALITY  
versus  
SHINGIRAYI BOBO  
and  
THOMAS TAFIREYI  
and  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 6 March and 29 April 2015

**Opposed Matter**

*Warara*, for applicant  
*T. Mpofu*, for 2<sup>nd</sup> respondent

MATANDA-MOYO J: Applicant seeks the following relief against the respondents,

- “1. That the agreement between the parties is hereby confirmed as having been cancelled.
2. That the 1<sup>st</sup> respondent shall within 7 days of the date of service of this order sign all the necessary papers necessary for the re-transfer to the applicant, of a certain piece of land measuring 1 957 square metres if extent called stand 1789 situated in Chegutu failing which the Sheriff or his lawful deputy be and is hereby authorized to sign all the necessary documents to effect transfer in favour of the applicant.
3. The parties shall nominate an arbitrator in terms of the agreement of sale who within 30 days shall come up with the value of the stand repossessed and that compensation shall be paid to the first and second respondents in terms of the agreement so terminated.
4. That the first respondent shall pay the costs of this application.....”

The brief facts are that the first respondent was a council member of the applicant. He was issued with the stand in question as an exit package and paid a subsidized rate for the stand. On 12 March 2004 the first respondent took title of stand number 1789 Chegutu Township after having signed an agreement with the applicant. Such agreement was not availed by the applicant. Instead the applicant attached to its papers what it termed a standard agreement it signed with buyers.

The first respondent sold the stand to the second respondent. The applicant in terms of a condition on the title deed was required to give its consent to the transfer of the property to second respondent. The applicant has refused to issue such consent on the basis that the sale was irregular. The applicant insisted that it cannot authorise transfer on an undeveloped stand. The applicant now seeks an order to cancel the agreement and retake possession of the stand.

The first respondent argued that he was never placed in *mora*. No notice was ever given by the applicant of its intention to cancel the lease should the first respondent fail to rectify any breach complained of. The applicant can thus not be allowed to strip a purchaser of ownership without due notice having been given. The first respondent admitted that he indeed sold the stand to the second respondent as undeveloped land. He only became aware of the condition complained of by the applicant upon approaching the applicant for its consent to pass transfer. The applicant though consented to the transfer of the property to the second respondent and advised the first respondent through a letter dated 6 July 2007 that its records had already been altered to reflect the second respondent as the owner of the stand. However, the second respondent was required to pay a fee.

The second respondent's case is simply that the first respondent is the registered owner of the stand in question. The only condition on the title deed is reflected in paragraph 2 thereof which states;

“2. The stand shall not be transferred without the prior written consent of the Municipality of Chegutu or any succeeding local authority”.

The second respondent submitted that he was unaware of any other terms hindering the transfer of the stand. Such a restriction, argued the second respondent, did not amount to a prohibition against sale of the property. He further argued that according to the applicant's own evidence their records reflect the second respondent as the owner of the property and the second respondent is at a loss as to how the applicant would then cite the first respondent for cancellation of sale. The second respondent further alleged that this application has been actuated by greed as the applicant is unlawfully leasing the property to Econet. The second respondent argued that he deserves protection of this court as an innocent purchaser.

The issue for determination is ownership of the stand in question. Who is the owner of the stand? It is not in dispute that the stand is in the name of the first respondent. The ownership

of immovable property is determined by registration of title. It follows therefore that the first respondent is the registered owner of the stand in question and as a registered owner he enjoys unfettered rights except as maybe subject to the deed of transfer. Gowora J as she then was in the case of *Agro Chem Dealers (Pvt) Ltd v Gomo and Ors* quoted with approval the words of Lord De Villiers in the case of *Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd* 1913 AD 267 @ 276 which he said;

“..... There is no principle more clearly established in our law than that a clear transfer of land *coram legi loci*, which is in the nature of a semi judicial act, passes the dominieon to the transferee, and that, except perhaps in the case of ownership acquired by presumption, the title appeasing on the title deed is conclusive in favour of a bona fide purchaser, to whom such transfer has been effected. Even when land has been acquired by prescription the practice is for the party who has so acquired it to institute an action for duly registering his acquired rights in the Deed Office”.

Section 14 of the Deeds Registry Act [*Chapter 20:05*] also provides for passing of ownership from one person to another by means of a deed of transfer. The second respondent's counsel referred me to the case of *Machiva v Commercial Bank of Zimbabwe Ltd and Anor* 2000(1) ZLR 302(HC) where it was held that;

“And, while ownership remained vested in Chirenda by virtue of the extant registration in his name, such registration served as a notice to the whole world, the bank included that Chitanda was the owner of the land.

One of the important functions served by the requirement of land registration is the provision of information to members of the public, in particular to financial institutions who may want to encumber properties as security for money loaned to the owners of those properties. Similarly, people who intend to acquire land also resort to the records held in the Deeds Office to ascertain if the land which they want to purchase is free of any encumbrance ..... Generally speaking, members of the public are entitled to rely on the records held in the Deeds Office and to assume that such records reflect the position about land ownership and the burdens which may be reflected on the deeds of transfer. If positions were otherwise, the land registration system in the entire country would be a farce and the lending system in the financial sector would be thrown into chaos”.

I follow the same principle as laid down in the Gomo case supra that once the applicant transferred the stand to the first respondent it lost any right to treat the property as its own. On commenting on the conditions in the agreement of sale where City of Harare had the right to resume ownership and retake possession of the land the learned Judge Gowora said;

“It is correct, as contended on behalf of City of Harare that, in terms of the section local authorities have been accorded the right to impose conditions on the transfer of such land..... The deed of transfer exhibited to me does not contain conditions apart from ..... and

the further requirement that any transfer from the title holder will require its prior consent  
.....”

From the above comments it is permissible for the applicant to seek to cancel an agreement of sale on breach of conditions therein. It follows that the applicant can also seek to repossess title on breach of conditions on the title.

I am of the view that the applicant condoned the non-compliance with the conditions of sale vis-à-vis by the first respondent when the applicant changed its records to reflect the second respondent as the new owner of the stand. The applicant elected to so condone the non-compliance and cannot be allowed at this late hour to seek to enforce any rights it may have had against the first respondent.

This is a situation where applicant voluntarily surrendered a known right it had against the first respondent. The letter by the applicant of 6 July 2007 represents an unequivocal act of surrendering any legal rights of reclaiming the stand from the first respondent.

In its own words in the last paragraph of such letter the applicant wrote;

“In the light of the above, please be informed that council records have already been altered as per instructions for a fee that Mr Tarireyi had to pay. Altering records back to your name require further instructions from the same lawyers.....”

The applicant knew of rights being abandoned and the consequences thereof that the second respondent became the new owner of the stand in question.

The second respondent referred me to the case of *Laws v Rutherford* 1924AD 261 at 263 where Innes CJ said;

“The *onus* is strictly on the appellant. He must show that the respondent with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it”.

I am satisfied that in the matter in *casu* that *onus* has been satisfied. The applicant clearly abandoned its rights as against the first respondent. In actual fact the applicant condoned the breach of any conditions by the first respondent when he sold the stand to the second respondent. The applicant can only proceed against the second respondent in any claim in relation to the stand in question. The moment the applicant accepted the second respondent as the owner of the stand, it follows therefore that it could no longer proceed against the first respondent.

In the result the application fails and is dismissed with costs.

*Warara and Associates*, applicant's legal practitioners  
*Khanda and Company*, respondent's legal practitioners