

LUCIA KAELA
versus
FLAME CO-OP INVESTMENTS (PVT) LTD
and
KAMA CONSTRUCTION (PVT) LTD
and
CITY OF HARARE
(C/o Director of Housing & Community Services)
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 28 and 29 October 2015 and 13 January 2016

Trial

A Muchandiona, for the plaintiff
E Makaka, for the defendant

FOROMA J: This matter commenced as a court application and ended up as a trial having been converted to a trial by order of the court which directed that the founding affidavit notice of opposition and replying affidavit stand as pleadings. No further pleadings were ordered be filed.

At the pre-trial conference a joint pre-trial conference minute on the basis of which the matter was referred to trial captured the issues for trial as follows:

- (1) Whether both the late Margret Munetsi and the first defendant purchased Stand No. 18215 Measuring 1855 square meters from the third defendant.
- (2) Whether or not the first defendant is a *bona fide* purchaser?
- (3) Whether or not the first defendant had constructed a housing structure at the stand in dispute as at the time of commencement of these proceedings?

(4) Who between the Estate of the Late Margret Munetsi and the first defendant is entitled to the residential stand in dispute?

Reference to stand 18215 is a reference to stand 18215 Milton Park. Although the matter was commenced as a court application by Lucia Kaela NO in her capacity as *executrix dative* of the Estate of the Late Margret Munetsi (Nee Nodoro) (now plaintiff) against 4 respondents (now defendants) initially none of the defendants opposed the matter. Plaintiff's claim was for (a) the setting aside of a purported sale of stand 18215 Milton Park Harare to the first defendant as invalid (b) an order declaring the Estate of the Late Margret Munetsi as the lawful purchaser of stand 18215 Milton Park and that the third and fourth defendants register the said stand in the name of plaintiff (c) costs of suit on the scale of attorney and client to be borne by the first and second defendants jointly and severally to the one paying the other to be absolved.

Plaintiff testified on behalf of the Estate of the Late Margret Munetsi and closed her case. Her evidence was to the following effect. Her late sister Mrs Margret Munetsi bought stand 18215 Milton Park Harare from Kama Construction (Pvt) Ltd in terms of a written Deed of Sale Agreement which she produced as exh I. Kama Construction (Pvt) Ltd was represented by one Israel Magwenzi and the late Margret Munetsi who in the agreement is recorded as Margret Nodoro represented herself. The late Margret Munetsi purchased the property after one Chigodora had abandoned purchase of same and second defendant offered it to her (deceased Munetsi).

On account of her poor health Mrs Munetsi failed to maintain purchase installments on the Deed of Sale resulting in the seller instructing her then legal practitioners Ziumbe and Mtambanengwe legal practitioners to collect the balance outstanding from her.

Ziumbe and Mtambanengwe addressed a letter of demand to Mrs Munetsi which prompted her to seek assistance from her relatives in an effort to rescue the property from being lost as a result of cancellation of the deed of sale agreement. The plaintiff and her family members came together and ensure that the balance of the purchase price was paid in full and succeeded in rescuing the deed of sale agreement from being cancelled. Plaintiff produced some receipts which she indicated she found from amongst the late Margret Munetsi's possessions which were evidence of part payment towards the balance of the purchase price. These receipts were not all the receipts showing the total amounts paid to the second defendant through its legal practitioners aforesaid. She however was adamant that the full purchase price including any

interests had been fully paid up and in this regard produced letter by Messrs Ziumbe and Mtambanengwe dated 28 May 2003 addressed to second defendant confirming that the purchase price had been paid in full. The said letter was exh 8 and it confirmed that the deceased (late Margret Ndoro) had paid off the purchase price for the stand.

The plaintiff also testified that she was appointed *executrix dative* of the late Mrs Muneetsi. She used to plant some maize every rainy season on the said stand every year. In 2007 she visited the stand with a view of preparing it for planting some maize as usual and was surprised to find some people who were digging foundations at the said stand. On confronting the people digging foundation trenches she was advised that they had been engaged by one Gatsi to do so. Mr Gatsi was not present at the time. On a subsequent visit to the stand very shortly afterwards the plaintiff found Mr Gatsi present at the stand and she informed him that they should desist from construction work as the stand belonged to her late sister who had bought it from second defendant and produced a letter from Kama Construction (Pvt) Ltd to Messrs Mutezo and Partners dated 5 February 2001 as evidence but the first defendant was not interested in reading the letter and was dismissive. She left in a huff and tried to contact second defendant whom she informed that she had found someone digging foundation trenches on her late sister Mrs Munetsi's stand and the second defendant's Mr Chiwanza was not helpful resulting in her engaging her legal practitioners for assistance. The plaintiff obtained a provisional order in terms of which the first defendant was interdicted from continuing with development of the said stand. The first defendant is the only defendant that defended the plaintiff's claims. Its position has been that the plaintiff did not purchase the stand in question as she had not produced convincing proof that plaintiff had actually bought the stand in question. The first defendant called Mr Winstone M Gatsi and Mr Chiwanza of second defendant as its witnesses. Mr Gatsi the first defendant's principal witness testified that his family decided to sell their house in Chitungwiza in order to purchase a property in the residential areas of Harare. He responded to an advert for the sale of stand 18215 Milton Park advertised by Fingold an Estate Agency who were selling the stand on behalf of the second defendant. He testified that he made a due diligence on the real owner of the stand as he believed that the second defendant was selling the property as a developer.

After establishing through the third defendant that the property was available he proceeded to pay second defendant's developer's fees after which he was referred to the third defendant to enter into an agreement of sale in respect of the said stand. Mr Gatsi eventually purchased the said stand and set out to develop it. The initial development was intended to be a cottage. It was during the time that he was constructing the cottage that the plaintiff called on him at the stand and made claims to the stand as belonging to her deceased sister. He claimed that the plaintiff produced a letter which indicated that the deceased was supposed to pay a deposit towards purchase price but nothing to show that the purchase price was actually paid. He claimed that when the plaintiff approached him with claims that the stand belonged to her late sister he advised her to approach her lawyers with her problems as he had been sold the property. At the time the plaintiff approached him at the stand the construction of the cottage had reached half way to the window level. He had cleared the stand before excavating the foundation trenches. He noted that the land was virgin land as there was very tall grass. Mr Gatsi produced exh B12 being an agreement of sale between Kama construction (Pvt) Ltd represented by Lameck Nhamo Chiwanza and Flame Corp Investments represented by Theresa Gatsi. It is significant to note that the purchaser is not reflected as a registered company and the name is different from the first defendant as cited in the documents filed with the court as the purchaser is recorded as Flame Corp Investments in some of the documents and in others. Exhibit 13 as Flame Corp Investments ASA.

No evidence was adduced to explain the apparent discrepancy in the names of the defendant.

The documents produced by the first defendant to prove purchase of the stand reflect that the first defendant was represented by Theresa Gatsi but she was not called as a witness.

The first defendant's Mr W M Gatsi was quite adamant that he purchased the stand 18215 Milton Park from City of Harare and yet he could not produce any receipts as evidence of the amount he paid to City of Harare as purchase price or any agreement signed between the first defendant and the third defendant. His explanation was that the receipt he was issued with on payment of the purchase price was a small computerized slip which was misplaced. Mr Gatsi admitted that he had caused the arrest of Mr Chiwanza for selling the same stand twice.

In order to resolve the issue as to whether both the plaintiff and the first defendant purchased stand 18215 Milton Park it is necessary to analyse the evidence placed before the court on behalf of each of the parties.

The plaintiff testified that her late sister purchased the said stand and in support of this position produced the agreement of sale exh I on p 4-10 of the plaintiff's bundle of documents signed on 12 February 2001. It is a Deed of Sale Agreement between Kama Construction (Pvt) Ltd and the late Margret Ngoro for the sum of \$420 000-00 in respect of;

- (1) The cost of land surveyed and ready for title
- (2) Improvements to the land/servicing to include road construction and water reticulation.

This purchase was confirmed by Mr Chiwanza the first defendant's witness when he confirmed that the second defendant had sold the same stand to more than one person i.e. the plaintiff and the first defendant. The evidence placed before the court by the first defendant that the first defendant had bought stand 18215 Milton Park Harare was the oral testimony of W M GATSI which he supported by reference to exh B12 Fingold Real Estate Agreement of sale, Exh B 15 receipt for the sum of \$380-00 Million dollars dated 17 May 2007 and exh B13 from Acting Director of Housing and Community Services City of Harare dated 28 May 2007 as well as buildings plans for residential house on stand 18215 Milton Park. He also testified that he was the recognized rate payer for stand 18215 Milton Park according to the records of the third defendant.

An analysis of documentary evidence produced by the first defendant shows that on 28 May 2007 Theresa Gatsi was written a letter by City of Harare Acting Director of Housing and Community Services advising her to proceed to Sunningdale District Office to sign an agreement of sale with City of Harare. Although Mr Gatsi testified that the first defendant did in fact attend at Sunningdale District office and had the value of the stand 18215 determined and paid he could not produce a copy of the agreement of sale with City of Harare neither did he produce the receipt from City of Harare for the payment of the assessed value of stand 18215. It is significant to note that in its summary of evidence the first defendant indicated that after visiting City of Harare to check on status of the stand and confirming that the stand had not been purchased by any one in particular the plaintiff he proceeded to pay all the required installments through the second defendant. This contradicts his evidence at trial. When challenged to produce the receipt

for the purchase price assessed by City of Harare and paid at Sunningdale District Office the first defendant's witness/Mr Gatsi indicated the receipt had been lost. Mr Gatsi did not produce an agreement of sale with City of Harare and despite being adamant that exh B 12 was an agreement for the payment of the Development costs due to the second defendant. Mr Chiwanza the only other witness called by the first defendant supported the first defendant's position that although the agreement of sale exh 12 reflected that it was an agreement of sale in reality it was an agreement for the payment of developer's developing costs and that the first defendant had to sign an agreement of sale with the third defendant. The first defendant did not call the third defendant to corroborate its evidence that he had bought the stand in dispute despite his inability to produce (a) receipts for the purchase price and (b) agreement of sale with third defendant – see *Tilton v Simoko and Another* HC 4610/11.

The first defendant sought to urge upon the court that the approval of building plans was evidence that the defendant had purchased stand 18215 as the Building Inspectorate cannot approve building plans in respect of premises which are not recognized as belonging to the person applying for approval of the stand's building plans. No one was called by the first defendant from the City of Harare Building Inspectorate to confirm that the plans in the first defendant's Bundle of Documents had been approved by their Inspectorate and that the various construction stages had indeed been approved officially by City of Harare in terms of the Building by-laws. For this reason the bulk of the first defendant's evidence regarding what the third defendant did was hearsay and did not weigh with the court. Despite the first defendant's claim that it was the recognized rate payer no receipts were produced for any rates paid to the third defendant by the first defendant nor did the first defendant produce rates bills raised for the stand in question in the first defendant's name by the third defendant

It is significant to note that the stage approval form does not show that the siting was approved. In respect of foundations the following remarks are endorsed – Siting Approval Foundation by Engineer due to expansive soils on site. The inspection sheet does not reflect as to who did the inspection and one cannot say with certainty whether the inspections were done by the third defendant or a privately contracted engineer/architect. Of concern though is the fact that the application for approval of plans refers to stand No. 18216 and not stand 18215 considering that exh B12 is not regarded by both plaintiff and defendant as the agreement for the purchase of

stand 18215 from City of Harare (third defendant) and the poor quality of the remaining evidence on the aspect. First defendant cannot be said to have proved on a balance of probabilities that it purchased stand 18215 Milton Park from City of Harare.

In the circumstances issues (1) and (4) of the joint pre-trial Conference Minute are resolved in favour of the plaintiff and against the first defendant. In the light of these findings issues b and c of the joint pre-trial conference do not call for determination.

In the result it is ordered that

- (i) The Estate of the Late Margret Munetsi nee Ngoro is declared the lawful purchaser of Stand 18215 Milton park Harare
- (ii) The third and fourth defendants register Stand No. 18215 in the name of the Estate of the Late Margret Munetsi nee Ngoro
- (iii) That the first defendant and all persons claiming occupation through the first defendant be and are hereby ordered to vacate Stand 18215 Milton Park Harare within 48 hours of service of this order on the first defendant
- (iv) That the first defendant pay the costs of suit.

Danziger & Partners, plaintiff's legal practitioners
Musunga & Associates, defendant's legal practitioners