

MATTHEWS TICHAONA KUNAKA
versus
AMOS PHIRI
and
MALLAN ZORODZAI CHISWA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 31 January and 8 March 2017

Opposed Application

E Jera, for the applicant
C Mupungani, for the 2nd respondent

TAGU J: The applicant is seeking an order for the cancellation of the Title Deed Number 2411/2012B registered in the name of the second respondent Mallan Zorodzai Chiswa, the return of his Mercedes Benz S 350 Registration Number AAH 0097 which is held by the second respondent as well as payment of costs on an attorney and client scale against the first and second respondents. The application is based on the fact that the transfer of the immovable property from his name and that of his wife Ellen Kunaka to the second respondent as well as the handing of the Mercedes Benz Motor vehicle to the second respondent by the first respondent was fraudulently done.

In his founding affidavit the applicant submitted that sometime in February 2012 he had to go to India for a period of two months. Before he left on 13 February 2012 he gave the first respondent a General Power of Attorney as well as his Mercedes Benz S350. The purpose of the General Power of attorney was to enable the first respondent to use the motor vehicle as collateral in borrowing US\$ 30 000.00 to use for a project they wanted to jointly enter into to export cigarettes to the Republic of South Africa.

When he came back on 16 April 2012 he had difficulties in locating the first respondent. To date the whereabouts of the first respondent is not known. First respondent's wife advised him that the first respondent was out of the country. He then proceeded to make

a police report against the first respondent Amos Phiri in August 2014 as it became clear to him that in fact the first respondent had defrauded him. In December 2015 he then spotted his motor vehicle being driven by a certain lady. He immediately alerted the police who swiftly moved in and impounded the motor vehicle. The lady advised the police that the owner of the vehicle a Mercedes Benz S350 belonged to the second respondent Mallan Zorodzai Chiswa. The second respondent was called and came. Second respondent then indicated that he had bought the said motor vehicle from the first respondent for US\$ 38 000.00. Further, the second respondent indicated he had also bought the immovable property of the applicant from the first respondent for US\$ 130 000.00 and had since taken transfer into his names. The applicant said he was shocked because he had not authorised the first respondent to sell his properties.

He further submitted that he had given the first respondent the power of attorney only to enable first respondent to use the car as collateral for a loan. The first respondent never obtained that loan but sold the vehicle without his consent. Secondly, the immovable property had a mortgage bond registered in favour of MBCA Bank. The original title deed is still held by the bank and he is still servicing the loan. The immovable property is jointly owned by him and his wife and had been sold without the wife's knowledge and consent. Further shocks revealed that the conveyancer who attended to the transfer is Peter Matsanura, a legal practitioner and officer of this court. Peter Matsanura in a supporting affidavit indicated that he never attended to the transfer since the signature that appears on the deed of transfer is totally different from his signature which appears in the Registrar of Deeds' register of conveyancers. From his analysis the second respondent was aware of the fraud because he failed to produce proof that he bought the properties from first respondent and despite having bought the said property in June 2012 the second respondent has never demanded vacant possession of the property and the applicant is still residing in the same property. Instead the second respondent is now demanding that the applicant should buy back the same properties from him.

In view of the fraud and the foregoing the applicant now wants the court to cancel the Title Deed and reverse the transfer as well as an order directing second respondent to surrender back the motor vehicle as the transactions were fraudulently done.

The second respondent opposed the application on the basis that in terms of clause 9 of the General power of attorney the first respondent had the power to sell the properties to him. He said he innocently and genuinely bought the said properties from the first

respondent. He therefore made a counter claim that if the court were to cancel the title deed and order the return of the vehicle the applicant must be ordered jointly and severally with the first respondent to compensate him in the sums of USD\$ 130 000.00 for the immovable property and USD\$ 38 000.00 representing the monies that he used to purchase the properties which are under dispute.

The applicant opposed the counter claim and prayed that it be dismissed with costs on a legal practitioner and client scale because it does not comply with Order 32 r 229 A (1) of the High Court Rules 1971. On the other hand the second respondent prayed that the court should condone non-compliance with the rules and allow the counter –claim to stand in the interests of justice by invoking r 4C.

In *casu* what the court found to be undisputed is that the applicant gave the first respondent a General Power of Attorney. It listed 21 things that the first respondent was supposed to do by saying that-

“Without in any way limiting the generality of the powers so conferred, my/our said Attorneys and Agents shall have full power and authority on my behalf and for my/our account and benefit”

The 21 things were then listed. In this case I am interested in the thing listed in Clause 9 of the General Power of Attorney. It says:

“9. To buy and sell movable and immovable property, to make, sign, give, and receive, in due and customary form, all acts or deeds of transfer of movable or immovable property, and to subscribe the necessary declarations as to the truth of the purchase amount; and...”

The applicant submitted that he did not authorise the first respondent to sell his assets in question. The second respondent on the other hand submitted that in terms of clause 9 above the authority given to the first respondent extended to the sale of the immovable property in question. The second respondent referred the court to a number of cases, notably *Fusire v Chiroto* HH 15/16 at p 3-4 of the cyclostyled judgment where the court held as follows-

“...it is trite that a person who signs a contract signifies his assent to the contents of the document and that if it subsequently turns out not to be to his liking he has no one to blame but himself...Contracts are sacrosanct unless the evidence shows that they were not entered into freely and voluntarily.”

The second respondent therefore submitted that by signing the general power of attorney containing clause 9 above, the applicant gave the first respondent the power to sell the property in question. In my view clause 9 indeed allowed the first respondent to sell movable and immovable property. The question that begs for an answer is which movable and immovable property? Was it the motor vehicle and the house in question? If the answer is

yes, the question is was the sale of these properties done above board or was it done fraudulently or not?

The applicant submitted that the sale was done fraudulently hence the transactions are a nullity. In support of his contention the applicant referred the court to a number of case authorities. The court was referred to R.H. Christie, *Business Law in Zimbabwe 2nd ed Juta & Co* at p 149-150 where the position of an owner whose property had been transferred without his consent was succinctly expressed as follows;

“An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring a vindicatory action to recover his property from anyone, including a bona fide buyer, in his hands he finds it. The general rule that the seller can give no better title than he has operates in favour of the true owner, unless the purchaser proves that the true owner is estopped from denying the seller’s authority to sell.”

Admittedly the first respondent was the applicant’s agent. However, the applicant cited the judge in *Ndlovu v Ndlovu* HB 43-14 who when commenting on the principle allowing the owner whose property had not been transferred with his consent to recover it from whoever possessed it as follows:

“The legal principle enunciated above is solidly noble because since time immemorial, at every stage of human evolution, societies have suffered the inevitable unfortunate phenomenon of having in their midst, an array of thieves, fraudsters, robbers, cutthroats, the throwbacks in evolution etc. with no qualms whatsoever in employing force or chicanery to dispossess fellow humans of ownership of their property. If the law did not jealously guard and protect the right of ownership and the correlative right of the owner to his/her property, then ownership would be meaningless and the jungle law would prevail to the detriment of legality and good order.”

In the current case the first respondent was served with this application with all the allegations of fraud and improper conduct against him as per the certificate of service filed of record. He did not oppose the application. This means that he does not deny all the averments made against him. When the applicant got hold of the first respondent towards the month end of April 2012 the first respondent made a promise to come and see the applicant at the applicant’s offices in Belgravia, Harare but to date has not done so.

In my view, and taking into account the background to this matter, I am satisfied that the transfer taken by the second respondent for both the motor vehicle and the immovable property was done fraudulently for the following reasons:

1. The motor vehicle and the house having been sold, if indeed they were sold by the first respondent to the second respondent the proceeds of the sale were never remitted to the applicant.

2. The applicant made a police report after realising that the first respondent had defrauded him and his whereabouts are unknown. In fact the first respondent has since been carded by the police as a wanted person.
3. The car was only going to be used as collateral for a loan if that loan had been taken. No such loan was taken for purposes of exporting cigarettes to South Africa.
4. The Title Deed to the immovable property had a mortgage bond registered in favour of MBCA Bank and the applicant is still servicing that loan. The original title Deed at the material time was and is still being held by the Bank. The bond was not cancelled and one wonders how the first respondent managed to change the Title Deeds without the consent of the Bank into the names of the second respondent.
5. The immovable property was jointly owned between the applicant and his wife Ellen Kunaka. The consent of Ellen Kunaka was never sought.
6. The second respondent has never produced any proof that he bought the said properties from the first respondent other than a fraudulently obtained Deed of Transfer.
7. Despite having taken transfer and holding title to the immovable property since 2012 the second respondent to date has never demanded vacant possession of the said property. The applicant still resides at the property meaning that the second respondent must have been aware that the transfer was done fraudulently.
8. Finally and most importantly the second respondent did not deny the contents of the supporting affidavit of Peter Matsanura who made it clear that he did not attend to the transfer in question as he denied ever signing the Deed of Transfer that the second respondent holds. All these undisputed facts are so central to the issue of fraud that the applicant alleged in his founding affidavit. The fact that the property was not transferred by a conveyancer makes Title Deed Number 2411/2012 registered in the name of Mallan Zorodzai Chiswa liable to be cancelled on the basis of fraud.

The applicant has managed to prove his claims and the application will be granted.

This brings me to the issue of the counter-claim. What is undisputed is that the applicant brought a Court Application for the cancellation of the Title Deed. The first respondent sought to bring a counter claim. I agree with the applicant that the counter -claim is fatally defective because it does not comply with Order 32 r 229 A (1) of the High Court Rules 1971. Having been confronted with a court application the first respondent should have filed a counter court application. This he did not do. To resort to Order 1 r 4C of the Rules of

the High Court would be to stretch too far the interests of justice since the counter – application is fatally defective.

The counter application is therefore dismissed.

This brings me to the last issue of costs. The general rule is that costs follow the event or put in another way success carries costs. The rationale for this principle is that the successful litigant should be indemnified from expenses which he incurred by reason of being unlawfully compelled to either initiate or defend litigation. This rule should only be departed from where good grounds are shown to exist. See *Mahembe v Matambo* HB-13-13.

In *Rantenbach v Symington* 1995 (4) SA 583 it was stated that a Court’s discretion to award costs on a legal practitioner and client scale is not limited only to cases of dishonesty, improper or fraudulent conduct but also includes all case where circumstances warrant such order. In this case given the degree of fraud and dishonesty displayed by the first and second respondents, this is case where costs on a higher scale of legal practitioner and client scale is called for.

In the result it is ordered that:

1. The Title Deed Number 2411/2012 registered in the name of Millan Zorodzai Chiswa be and is hereby cancelled.
2. The 2nd Respondent be and is hereby ordered to surrender and handover the Mercedes Benz S350 Registration Number AAH 0097 to the applicant within seven days of service of this order failure of which the Officer in Charge, Highlands Police Station or any member of the Zimbabwe Republic Police, is hereby ordered and authorised to seize the motor vehicle from the 2nd Respondent or whoever may be in possession thereof and hand it over to the applicant.
3. The 1st and 2nd Respondents shall meet the costs of this application on an attorney and client scale.

Moyo & Jera, applicant’s legal practitioners
Manase & Manase, 2nd respondent’s legal practitioners