

MARY MUCHENGETI
versus
BENJAMIN CHAMWAITA
and
MARCLINE CHAMWAITA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 19 & 20 April 2016, 5 May 2016, 15 & 26 May 2017, 18 January 2018

Civil trial

S Hashiti, for the plaintiff
H Chitima, for the defendants

ZHOU J: The plaintiff instituted the instant action claiming an order for the eviction of the defendants and all persons claiming occupation through them from a property described in the summons as Share Number 24 of Sub-division. A, Portion of Mayfield Estate. The property is located in Harare in an area which is also known as Monavale Cluster Homes. The claim is opposed by both defendants.

The plaintiff's case is that she purchased the property referred to above from a company called Maffack Properties (Pvt) Ltd in January 2006. In 2011 she discovered that the defendants, who are husband and wife, had taken occupation of the property while she awaited transfer into her name from the seller. The plaintiff gave evidence in support of her claim. She produced among other documents, the agreement of sale as well as a copy of the development permit issued by the City of Harare as the Local Planning Authority for the place where the property is located. The agreement of sale was signed on 23 January 2006. Her evidence was that she paid the purchase price in accordance with the terms of the agreement. The plaintiff found that a two –roomed temporary structure had been erected at the property. Initially she did not find any person at the premises when she saw the structure. On a subsequent day she found the second defendant and told her that the property belonged to her. The second defendant told her that she had also purchased the same property from a lady who was resident in Marondera.

The two defendants gave evidence and also led evidence from Lovemore Mafuta who is a director of Maffack Properties (Pvt) Ltd. The defendants' evidence, which was also supported by that of their witness, was that they purchased Share Number 10 of Subdivision A Portion of Mayfield Estate from one Elina Maraidza who had purchased the same property from Maffack Properties (Pvt) Ltd. They then realised that that same property had been sold to another person. The defendants were then given by Lovemore Mafuta Share Number 24 which had already been sold to the plaintiff. They took occupation and put up a temporary structure and paid for the connection of electricity. Lovemore Mafuta's explanation as to why he proceeded to give the plaintiff's property to the defendants is that the plaintiff had failed or refused to make further payments to Maffack Properties (Pvt) Ltd as "top-up" upon the agreed purchase price.

The additional payments which Maffack Properties (Pvt) Ltd asked for from the plaintiff were not provided for in the agreement. The plaintiff did not therefore breach her contract when she failed or refused to make such payments. In any event, the agreement was never terminated and was therefore extant at the time that the defendants were given occupation of the property.

When Maffack Properties (Pvt) Ltd allocated the property in dispute to the defendants it purported to act in terms of a document headed "Variation Agreement" which was signed by the first defendant as the "Purchaser" and on behalf of Maffack properties (Pvt) Ltd as the "seller". The agreement purports to vary the agreement of sale in terms of which Elina Maraidza sold to the defendants her rights, title and interest in Share Number 10. Clearly such a purported variation was incompetent because Maffack Properties (Pvt) Ltd was not a party to the agreement which it was purporting to vary. That agreement was between Elina Maraidza and the first defendant. It is clear that in entering into the so called variation Agreement Lovemore Mafuta was trying to cover-up for his fraudulent activities after he had sold share No. 10 to another person. The allocation of the plaintiff's property to the defendants did not therefore constitute a sale as the defendant never purchased that property. They did not pay the purchase price for it. They therefore have no legal basis to remain in occupation of the property.

Even if I am to find that the transaction between the defendants and Maffack Properties (Pvt) Ltd amounts to a sale, what would be created is a double sale situation since the same property had already been sold to the plaintiff. The principles applicable to a double sale situation would thus apply. It is common cause that transfer has not passed to either of the

parties. The position of the law is settled. In the case of *Guga v Moyo & Ors* 2000 (2) ZLR 458 (S) at 459E-H; where MCNALLY JA said:

“The basic rule in double sales where transfer has not been passed to either party is that the first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages against the seller, which is usually small comfort. But that rule applies only ‘in the absence of special circumstances affecting the balance of equities’.
See Mckerron (1935) 4 SA *Law Times* 178, Burchell (1974) 91 SALJ 40. Burchell was of the view that ‘the balance of equities must weigh heavily in favour of the second purchaser’ before the court could favour her over the first purchaser.”

See also *Mwayipaida Family Trust v Madoroba & Ors* 2004 (1) ZLR 439 (S), at 443F-444C, *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S).

The plaintiff is the first purchaser *in casu*. The only issue is whether the balance of equities is in her favour. The defendants through their legal practitioner argued that they were innocent purchasers and, further, that they took occupation of the property and have spent some money on it in respect of the structure which they occupy. I do not accept that the defendants were innocent purchasers. A party who deliberately refrains from knowing the correct facts or chooses to be diligently and conveniently ignorant of existing facts cannot plead innocence. After buying share No. 10 not from Maffack Properties but from one Elina Maraidza the defendants discovered that Maffack Properties had sold that property to another person. The circumstances in which the property was sold to a third party are not explained by the defendants and their witness. The defendants went on to accept an allocation of share No. 24 not from Elina Maraidza but from Lovemore Mafuta of Maffack Properties. They made no attempt to verify whether the agreement with the plaintiff had been cancelled. They simply did not want to know the truth about the status of share No. 24. Indeed, even after the plaintiff had presented herself to them as the purchaser of the property the defendants continued to put up a structure on the property in dispute, and to make extensions to that structure.

The structure which the defendants put up at the property is an illegal structure which has not been authorised by the local authority. Expenditure upon an illegal structure does not constitute a special circumstance which would tilt the balance of equities in favour of the defendants. The defendants stated that they were authorised to construct the illegal structure by Maffack Properties. The structure does not constitute an improvement upon the property. It is actually an expense as it would have to be demolished at some point. The defendants must therefore look up to Maffack Properties (Pvt) Ltd and/or Lovemore Mafuta for the recovery of any loss incurred in erecting the structure. After all, they have already enjoyed use and occupation of the property to the prejudice of the plaintiff.

In all the circumstances, the plaintiff has proved her case against the defendants on a balance of provability, and is accordingly entitled to the relief sought.

In the result, It is ordered that:

1. Judgment be and is hereby given in favour of the plaintiff against the defendants for:
 - (a) the eviction of the defendants and all persons claiming occupation through them from Share Number 24 of Subdivision A, Portion of Mayfield Estate, also known as Monavale Cluster Homes; and
 - (b) Costs of suit.

Sinyoro and Partners, plaintiff's legal practitioners

Mutandiro, Chitsanga & Chitima Attorneys, defendants' legal practitioners