

MOSES NYASHA MWANANDIMAI
versus
SYDNEY KASEKE
and
SALTANA ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 7 February 2018 & 9 February 2018

Trial

Mr *Z.M Kamusasa*, for the plaintiff
Ms *L Rubaya*, for the defendant

MUNANGATI-MANONGWA J: The plaintiff herein approached this court seeking to be declared the legitimate purchaser and holder of the rights, interest and title in Stand No. 7971 Belvedere West, Harare, and an eviction order as against the first defendant and all those claiming occupation through him together with costs. The first defendant is contesting the relief sought on the basis that he bought the aforementioned stand from one Rhoda Krienke and hence has rights thereto. The second defendant did not defend this action.

At the pre-trial conference the following issues were referred to trial and call for determination by this court.

1. Who between the plaintiff and first defendant should be declared to be the *bona fide* purchaser of Stand 7971 Belvedere West, Harare
2. Whether the rights, interest and title in Stand 7971 Belvedere West, Harare should be ceded to the plaintiff.

3. Whether the plaintiff is entitled to evict the first defendant and all persons claiming occupation through him from Stand 7971 Belvedere West, Harare.

In support of the relief sought the plaintiff gave the following evidence: He registered on the waiting list for allocation of stands by the City of Harare in 2003. In 2007 he received a letter advising him that he had been selected for allocation of a stand in Belvedere West and he was to report to Tudor House Consultants. The said letter signed by the acting Director of Housing and Community Service was produced and stands as exh 1. Apparently Tudor House Consultants as *per* the evidence were Judicial Managers of second defendant Saltana Enterprises (Pvt) Ltd which company was appointed as developers of Belvedere West. Meanwhile a real estate West winds Realty had the mandate to dispose of the stands on behalf of Saltana Enterprises. The plaintiff was offered Stand 7971 Belvedere West, Harare measuring 1012 square metres and an agreement of sale was entered into between him and Saltana Enterprises duly represented by Cecil Madondo in his capacity as Judicial Manager in February 2007. He stated that the purchase price was Z\$14 674 000 (fourteen million six hundred and seventy four thousand dollars). The agreement was produced and is exh 3. Plaintiff gave evidence that he paid the purchase price in full although he was only able to produce a receipt for Z\$12 000 000.00 (twelve million dollars).

It is plaintiff's evidence that as the area was not yet serviced he took occupation by way of planting a maize crop from 2007 until 2012 when trouble started. On a visit with his mother to check on his crop he discovered that a certain portion of his crop had been slashed and in its place stood a cabin and the crop at the stand's boundaries had also been slashed. Upon enquiry of the cabin's occupants he was informed that first defendant had taken occupation as he had also bought the stand. Plaintiff approached his legal practitioners on the next working day and a letter was immediately dispatched to first defendant urging him to provide proof that he purchased the stand and urging him to desist from commencing any construction work. The first defendant in his evidence confirmed this development. On the very day 27 February 2017 a letter was written by plaintiff's legal practitioners to Saltana Enterprises bringing the issue of occupation of the stand to their attention and asserting plaintiff's position as the buyer. The letters to first and second defendants were produced as exh 5 and 6 respectively.

On 12 March 2012 the "second defendant" (hereinafter referred to as "Saltana" and used interchangeably with second defendant) addressed a letter to Ms Krienke the purported seller of

stand 7971 to first defendant, to provide proof of purchase of the stand and proof of payment as Saltana had no record of an agreement of sale with her, the said letter was copied to Mr Kaseke the first defendant.

The plaintiff gave evidence that the defendant did not stop construction despite such a call from plaintiff's legal practitioner. Whilst on the last visit to the stand there were foundation trenches, the next visit revealed that first defendant had begun to do a slab. It is common cause that plaintiff applied for an interdict against first defendant and same was granted by consent on 22 March 2012 in case no HC 2614/12 by MAVANGIRA J. The order *inter alia* interdicted first defendant from carrying any further construction or development on the stand in question and disposing or selling the stand. The first defendant continued with construction despite the court order and plaintiff's legal practitioners had to write to first defendant's then legal practitioners raising issue with first defendant's conduct which was in clear violation of the court order, exh 9 is proof thereof.

It is the plaintiff's case that in October 2012 Saltana urged him to pay his levies and reiterated that he is the legitimate owner of the said property. He proceeded to pay Z\$1 250 000.00 (one million two hundred fifty thousand) in June 2007 as service levies, the receipt was duly produced as an exhibit.

In 2014 the City of Harare engaged the beneficiaries of Belvedere West to bring their agreements to Rowan Martin and as *per* plaintiff's evidence he was given an account within which to deposit rates. He is paying rates for the stand into the account. Although no receipts were produced this evidence was not challenged. Plaintiff stated to court that should he be declared the legitimate owner he is willing to engage first defendant as regards compensation given that there is now a complete house which in evidence first defendant referred to as a cottage. The plaintiff gave his evidence well and supplied documentary proof which supported material evidence. He did not call any witnesses.

The first defendant gave evidence that in 2003 he responded to a press advertisement by Borm Real Estate for the sale of the stand in question. He was working at Century Bank then and got a loan to purchase stand 7971 the stand in issue. He paid Z\$9 000 000.00 (nine million dollars) for it and he produced an agreement of sale thereto exh 10. The parties to the agreement are reflected as Rhoda Krienke and first defendant Sydney Kaseke.

It was defendant's evidence that the stand was on virgin land and he occasionally used to visit the stand and started development in February 2012. He in corroboration to plaintiff's evidence confirmed that in February 2012 there was a thriving maize crop which he slashed to make room for the cabin and to clear the boundaries. He confirmed receiving the letter from plaintiff's legal practitioners pertaining to the stand and states that he went to see Mr Kamusasa with his agreement of sale and was told the stand did not belong to him. The first defendant confirmed the granting of the interdict barring him from continuing with building or construction on the disputed stand, and he indicated that he clearly was aware of the effect of the court order and took the risk despite a warning from the judge. The first defendant gave evidence that after the court case pertaining to the interdict he met Mr Mutingwende of Saltana Enterprise or second defendant who told him there could have been a double sale as the agents who sold to the plaintiff may not have been aware that the stand had already been sold to him. The first defendant stated that Mr Mutingwende had told him that Rhoda Krienke had bought the stand from a company which had bought the stand from them. He further had acknowledged the arrangement with Borm Real Estate and that Rhoda Krienke owned the stand. The first defendant denied receiving the letter addressed to Rhoda Krienke although same was copied to him.

The defendant gave evidence that he believed that his seller Rhoda Krienke had rights to the property as same was confirmed in the letter from Borm Real Estate to his employers, exh 11 which letter also stated that Krienke had cleared arrears on the stand. The first defendant further told the court that the City of Harare asked him to bring the agreement of sale to Rowan Martin Building in 2017 and the stand was allocated to him. He did not disclose that the matter was pending before the court as the City of Harare had just asked persons to bring their agreements of sale to Rowan Martin Building. The issue of this call by the City of Harare was also referred to by the plaintiff. The first defendant stated that he was not looking for compensation should the case not be decided in his favour. He was willing to forego what he put into development. He confirmed that he is not paying rates for the property as he has not received a bill.

In deciding who between the two parties is a *bona fide* purchaser the court has to consider the evidence surrounding the actual purchase of the stand. It is not disputed that Saltana Enterprises (Pvt) Ltd the second defendant, was the developer and it went under judicial management with Mr Cecil Madondo as the judicial manager. It is also not in issue that it is the City of Harare which

referred the plaintiff to Tudor House Consultants the judicial managers for Saltana clearly advising the plaintiff that he had been selected for allocation of a stand in Belvedere West. That he was allocated a stand is supported by the agreement of sale which has been placed before the court. The court is satisfied that the plaintiff paid the full purchase price.

It also emerged from the consent order in HC 2614/12 that the plaintiff herein had made an application against Saltana relating or seeking to tie the developer to implement and attend to contractual and ancillary issues over the Belvedere West stands and the first defendant sought to be joined therein. The parties thereto had agreed that the first defendant could be joined

From March 2012 to October 2012 Saltana insisted that the plaintiff was the legitimate purchaser of the rights and interest in the disputed stand. Whilst Ms Rubaya sought to say that Saltana's mandate was then revoked no evidence was led as to when that revocation was done and if so what effect such revocation had on contracts already concluded. The court thus makes a finding that plaintiff bought the stand from an authorised seller being the developer Saltana.

That the stand was vacant has been confirmed by the first defendant. The defendant confirmed finding a maize crop on the stand in 2012 which shows that plaintiff had taken possession or occupied the property by utilizing it. The plaintiff explained why he could not build as a certificate of compliance had not been granted to the developer.

It is common cause that the first defendant bought the stand through Borm Real Estate. No evidence was placed before the court that City of Harare had mandated that estate agent to act on its behalf. Ms Rubaya sought to argue that there is no evidence that discredits the authority of Borm Real Estate and that there is no evidence that confirms the sole mandate of Saltana in disposing the stands. These arguments cannot hold because no evidence was placed before the court that City of Harare had mandated Borm Real Estate to act on its behalf and nothing is on record of Borm being a partner to City of Harare. Most pertinent is the fact that first defendant is not alleging that he bought from Saltana but from an individual who had acquired rights already so the issue of a mandate from City of Harare falls away. It was incumbent upon defendant that they purchase the stand from a person holding rights to the stand. This is in contrast to the plaintiff's situation where the City of Harare referred the plaintiff to Saltana. Similarly, the first defendant's submission that when Cecil Madondo took over as judicial manager he was unaware that the stand had been sold cannot stand as no evidence was led to establish that aspect.

The court agrees with Mr Kamusasa that there was no double sale in this case. A double sale occurs when a seller sells the same immovable property to two purchasers. This is not the case herein.

The first defendant bought the property from Rhoda Krienke. The question is did she have any rights to the property. The first defendant by his own admission stated that he was only shown the cite plan or map which is attached to the agreement of sale and nothing else. Apart from exh 11 a letter addressed to the first defendant's then employers there is nothing before the court to prove Rhoda Krienke as a holder of rights. A close scrutiny of the letter also reveals shortcomings. It reads:

“This letter serves to confirm that the above stand has been ceded to Sydney Kaseke by Rhoda Krienke who is the registered owner of the above mentioned stand. We also confirm that Rhoda Krienke has cleared of the arrears on the above stand.”

The purported cession has not been established or proved by the first defendant. The sale itself was conditional upon payment of Z\$9 000 000.00 (Nine Million Zimbabwean dollars), no proof of such payment was rendered.

Most interesting is the fact that the defendant initially said in evidence the said Krienke had bought the stand from a company which had purchased it from Saltana. The thrust then turned to Borm Real Estate being an agent of Saltana. This could not be because the agreement of sale produced by the first defendant states the seller as Krienke and not Saltana. Further, as early as March 2012, Saltana made it clear that it had no record of Krienke buying a stand from them, if she had, they challenged her to bring an agreement of sale and proof of payment.

Whilst the first defendant denies receiving a copy of the letter, this requirement has been in his knowledge since 2012. The plaintiff's summary of evidence filed on 30 October, 2012 referred to this in para 12 thereof. Thus from the evidence available the only conclusion to be made is that the defendant did not buy stand 7971 from an authorised seller. The purported seller had no rights or interest in stand 7971 hence first defendant was duped.

Further, the first defendant's conduct points towards a purchaser who realised that all was not well with his agreement of sale and wished to take occupation upon such realisation. No explanation was rendered as to why he did not assert occupation from 2003 up till 2012. To then proceed with development in spite of warnings from the plaintiff's legal practitioners and a court order interdicting him from developing the property shows a desperation on the part of a litigant

who believed that improving the property would catch the court's sympathy. To even fail to disclose to City of Harare the status of the stand shows *mala fides*. The purported allocation of the stand in 2017 would show that the first defendant never had rights to the property and the cession referred to in the letter from Borm Real Estate was a sham. As the court had to decide on the issue of rights to the stand, the purported allocation cannot stand. In any case the first defendant failed to call evidence from the City of Harare to confirm the purported allocation. Thus, the first defendant never acquired rights or interest in stand 7971.

Without any acquired rights or interest in the stand it follows that the first defendant cannot remain on the stand and has to be evicted. Notably the first respondent had not filed a counter-claim and spanned offers for compensation when he said categorically he took the risk in developing the stand and does not expect anything from anyone. Whilst the first defendant may have other remedies open to him it is not this court's prerogative to delve into that. The plaintiff having established his case on a balance of probabilities he is entitled to the relief sought. Accordingly it is ordered that:

1. The plaintiff be and is hereby declared the legitimate purchaser and holder of rights, and interest in stand No. 7971, Belvedere West, Harare.
2. The first defendant and all those claiming occupation through him be and are hereby ordered to vacate stand No. 7971 Belvedere West, Harare within 7 days of the service of this order.
3. The first defendant to pay costs of suit.

Kamusasa & Musendo, for the plaintiff's legal practitioners
Messrs Mandizha & Company, the 1st defendant's legal practitioners