

REPORTABLE (30)

Judgment No. SC 39/06

Civil Appeal No. 334/05

FARAI NDEMERA v

(1) ROSALIND MARIE (2) BLESSING MANYECHE (3) THE
REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE, JUNE 20, 2006

A M Gijima, for the appellant

A Moyo, for the second respondent

No appearance for the first respondent

No appearance for the third respondent

CHEDA JA: After hearing both counsel in this appeal, we dismissed
it with costs and said the reasons would follow.

These are the reasons:

Two applications were heard by the High Court together as they
involved the same parties and the same property. The background to the applications
was given in the judgment of KAMOCHA J as follows:

“The triangle of the double sale is as follows:

The said property was owned by Rosalind Marie Ngulube – the first respondent who sold it to Farai Ndemera - the applicant - for \$600 000 000,00 on 12 July 2004. The purchaser had to pay \$300 000 000,00 on or before 14 July 2004 and the balance upon transfer of the property into his name.

Farai Ndemera 'Ndemera', complied with the terms of the agreement and paid \$300 000 000,00 by the due date and went on to pay \$230 000 000,00 before transfer leaving a balance of only \$70 000 000,00.

While Ndemera was religiously complying with the terms of the agreement Ngulube was busy offering the same property to other people for a higher price.

On 3 November, 2004 she entered into a sale agreement with Blessing Manyeche. The property was sold for \$700 million which Manyeche paid in full and transfer into his name was effected on 9 December 2004.

Ndemera in the meantime had taken occupation of the property although it had not yet been transferred into his name.”

When Ndemera learnt that the property had been sold and actually transferred to Manyeche he made a court application to reverse the sale and transfer to Manyeche.

Ndemera also claimed in the alternative that Ngulube refund him the \$550 million plus interest at the prevailing bank rate.

On the other hand, Manyeche also sued for the eviction of Ndemera from the property.

On the alleged knowledge of the prior sale of the property to Ndemera before it was sold to Manyeche the court found that Ndemera had not shown that Manyeche was aware that Ndemera was a prior purchaser. It found that Ndemera had contradicted himself about the visits of Manyeche to the property and viewing it before he purchased it.

Mr *Gijima* submitted that the balance of convenience favoured Ndemera as he had already settled on the property and had children attending school in the area.

However, this was countered by the fact that Ndemera had acquiesced in the cancellation of the sale to himself because he even went as far as providing his bank account to which the refund of the money he had paid for the property could be deposited, that is, his Zimbank account.

He only sued the complainant about the sale when he had problems about recovering his money.

The finding by the court *a quo* that he acquiesced in the cancellation of the contract by Ngulube cannot be faulted.

He could not arrange for a refund if he still wanted to enforce his right and entitlement to the property.

The respondent was entitled to cancel the contract once the appellant agreed to accept a refund.

He could not have both the refund and the property.

It was for these reasons that we found the appeal to be devoid of merit and dismissed it with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

P Chiutsi, appellant's legal practitioners

Kantor & Immerman, second respondent's legal practitioners