

REPORTABLE (56)

RAYMOND KASEKE
v
(1) AA MUSUNGA (2) PATRICIA DHLAKAMA (3) THE
REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GUVAVA JA & BHUNU JA
HARARE: FEBRUARY 9, 2017

T. Magwaliba, for the appellant
A. Masango, for the respondent

GWAUNZA JA: This is an appeal against the whole judgment of the High Court, passed over 16 years ago on 10 January 2001.

The facts of the matter are as follows: -

The late Andrew Dhlakama (“Andrew”) and his wife were the owners of certain immovable property known as Stand 763 Malbereign Township. On 30 December 1994, the late Andrew then entered into an agreement concerning the property with the appellant. The terms of the agreement were *inter alia* that the property would be leased out to the appellant for ZWD 1 200.00 per month. It was a further term of the contract that the appellant would have the option to buy the house and in that case he would be required to pay a deposit of ZWD 10 000.00 and then pay at least half of the total agreed price of the house which was ZWD 215 000.00, by

August 1995. In the event that he failed to pay half of the purchase price, the agreement would exist as a lease agreement only and the appellant would continue to pay the agreed rent of \$1 200.00m per month.

The Dhlakamas then left the country and went overseas with instructions on how the appellant would pay the agreed sums, that is which banks and accounts it would be paid into. However, the couple after some months realized that the appellant had not only failed to pay the agreed half of the purchase price for the house, but was also defaulting on rent. They proceeded to cancel the agreement after giving him due notice and instituted eviction proceedings against the appellant in the Magistrates Court.

The appellant thereafter decided to counter sue the Dhlakamas in the High Court, arguing that he had not breached the terms of the agreement, tendering what he described as the remaining balance of the purchase price and praying that the house be transferred into his name. He argued further that the respondents having failed to give him 30 days' notice to remedy his breach as required by s 8(2) of the Contractual Penalties Act [*Chapter 8:04*], their purported cancellation of the agreement was a nullity for want of compliance with that Act.

CHIDYAUSIKU JP (as he then was), found no merit in the claim, dismissed it and upheld the Dhlakamas counterclaim for the appellant's eviction from the premises in question. The Appellant has now appealed to this court on the following grounds: -

- 1) The Honourable Judge President erred in finding that the evidence led by the Appellant did not prove the existence of a lease to buy agreement.

- 2) The Honourable Judge President erred in finding that the Contractual Penalties Act was inapplicable in the circumstances and that the first and second respondents were not obliged to render the required notice in terms of the said Act, prior to the termination of the lease agreement.

It is noted that although the appellant had in his Notice of Appeal, cited two additional grounds of appeal, he made no reference to them in his heads of argument as well as in argument. The court thus took the view that he had thus abandoned the two grounds.

The appellant prays for an order granting the appeal with costs, setting aside the whole judgement of the High Court and substituting it with an order upholding his claim and dismissing the Dhlakamas' counterclaim with costs.

It is my view that a finding on whether or not the appellant breached the agreement between the parties would dispose of this matter. Before addressing that issue however, it is important to determine the type of agreement that the parties entered into. The appellant's case is that the agreement was one commonly described as a 'lease to buy' the property in question. The respondents on the other hand submit that the agreement was one of lease with an option to buy in favour of the appellant.

The court *a quo* considered the agreement in question, which is entitled "LEASE: Memorandum of Agreement" and refers to the parties as 'lessee/tenant' and 'lessor/landlord' in

appropriate respects. Its paragraphs 1 to 11 contain the standard provisions and conditions that are found in any lease agreement. Its paragraph 12 then reads as follows: -

“The tenant shall deposit with the landlord the sum of \$10.000 (ten thousand dollars) as part of the deposit.

Rent to buy: and shall pay at list(*sic*)half of the agreed amount of \$215.000 in August 1995. If the tenant fails to pay then the tenant will be renting only at \$1 200.00 per month.”

After considering the whole agreement and its import in light of the evidence before it, the court *a quo* rejected the appellant’s interpretation of the document and stated as follows:

“It is apparent from the above that the agreement between the parties was an agreement to lease with an option to purchase. It is quite clear that for the agreement lease (*sic*) to convert into an agreement of sale the plaintiff had to fulfill certain conditions namely the payment of the \$10 000,00 deposit and the payment of half of the purchase price. The plaintiff does not plead that he fulfilled any of the two conditions”

I do not find any fault with this finding nor the reasoning behind it. The agreement signed by the parties is clear in its terms and meaning, and specifically articulates its composite nature by making reference to both ‘lease’ and ‘option to buy’. I am not persuaded that the parties in the light of this could have understood the agreement to be anything other than what it says. The appellant’s first ground of appeal, which suggests that the agreement was one of a ‘lease to buy’ the property in question, accordingly has no merit.

Having made the finding that the agreement signed by the parties was one of a lease with the option to buy the property, I will now consider whether, as claimed by the respondents, the appellant breached the agreement. To ascertain this point one only needs to turn to the record of proceedings in the trial court.

The appellant himself testified at the trial, and part of what he said in my view decisively answers the question;

Q: Possibly just in winding up, do you confirm that as of the 15th of June 1995, if we are to go by the letter on Page 11 of the bundle of documents, the last paragraph. The Dhlakamas were still ready to accept the sale agreement if you had paid the full price by August 1995?

A: Yes, I can see that.

Q: You did not pay?

A: **Yes.** (sic)

Q: Of course you have said that the amount which you have already paid now amounts to about ZWD61 592.00.

A: Yes

Q: That is the amount since January 1995?

A: Yes.

Q: You are still paying monthly rentals at ZWD 1 200.00?

A: No.

Q: How much are you paying?

A: **I'm not paying**

Q: Since when have you not been paying?

A: **For some time.**

A: Roughly when, you don't remember?

A: **I think it was around May when I made the last payment.**
(emphasis)

Later as the cross examination continued, the following is recorded,

Q: The agreement goes on to say the rent to buy, I (*sic*) shall pay at least half of the agreed amount of ZWD215 000.00 in August 1995.

A: Yes

Q: Did you pay half the purchase price on that date?

A: **No.** (my emphasis)

The appellant thus admitted not only that he failed to pay half of the ZWD 215 000.00 purchase price by due date, but also that he failed to pay the monthly rentals of ZWD\$ 1 200.00, to allow him to remain as a tenant.

I find this testimony to be quite damaging to the appellant's case since its effect was to concede the case brought against him by the respondents.

This brings me to a consideration of the appellant's second ground of appeal, that concerning the absence of 3 months' notice to him, of the cancellation of the agreement as required by s 8(2) of the Contractual Penalties Act.

Section 8 of the Act provides as follows: -

8 Restriction of sellers' rights

(1) **No seller under an instalment sale of land may**, on account of any breach of contract by the purchaser —

.....

(b) terminate the contract

unless he has given notice in terms of sub s (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.

(2) Notice for the purposes of subsection (1) shall ... **(my emphasis)**

Section 8(2) clearly relates to agreements of sale by instalment. The court *a quo's* finding, which I find to be sound, was that the parties' agreement was one of lease with an option to buy. It was not an agreement of sale. It is not in dispute that the appellant did not exercise the option to buy the property, a circumstance that resulted in the agreement maintaining the status of a lease agreement only. That being the case, the finding of the court *a quo* to the effect that s 8(2) of the Contractual Penalties Act did not apply to the circumstances of the case, is in my view unassailable.

I find that the appellant's second ground of appeal, like his first one, lacks merit.

I am satisfied when all is told that this appeal is without merit and in effect comes very close to being an abuse of the right of appeal. This is particularly so, given the inordinate delay of some 16 years in bringing this matter to finality. The appeal ought to be dismissed.

It is accordingly ordered as follows: -

The appeal be and is hereby dismissed with costs.

GUVAVA JA - I agree

BHUNU JA - I agree

Magwaliba and Kwirira, appellant's legal practitioners.

Musunga and Associates, first and second respondent's legal practitioners.