

Civil Appeal – *Ex tempore*

FREDDY CHIMBARI N. O.
v
(1) JULIANA DUBE nee KUNYARIMWE (2) JONATHAN
KUNYARIMWE (3) THE MASTER OF THE HIGH COURT
(4) TENDAI PHINEAS NYAGWANDE (5) EDNA ZIVAI
NYAGWANDE

SUPREME COURT OF ZIMBABWE
PATEL JA, GUVAVA JA & HUNGWE JA
HARARE, 22 JULY 2019

J. Dondo, for the appellant

No appearance for the first, second, third, fourth and fifth respondents

PATEL JA: This is an appeal against the judgment of the High Court, granted on 20 December 2018, confirming a provisional order granted by that court on 24 October 2017. The effect of the judgment was to set aside the sale and transfer of the property in dispute to the fourth and fifth respondents and to enable the first and second respondents to exercise their alleged right of first refusal in respect of that property.

The first and second respondents were duly served with notice of set-down through their erstwhile legal practitioners (Mawere Sibanda) on 22 May 2019. The other respondents were also served with notices of set-down. However, they were not actively involved in this matter. In the event, all the respondents, having been duly served with

notices of set-down and having failed to appear at the hearing of the matter, were declared to be in default.

After hearing submissions from counsel for the appellant, the respondents being in default, this Court unanimously allowed the appeal. The legal practitioners currently acting for the first and second respondents have requested the reasons for judgment. These are as follows.

It is abundantly clear from the papers filed of record, *i.e.* correspondence between the parties, the agreement of sale in question and the Master's report on the procedure followed by the appellant, that the first and second respondents were not given any right of first refusal in relation to the property in dispute. Instead, they were granted an option to purchase the property, which option they failed to exercise within the stipulated period or within the further extension allowed to purchase the property.

It follows that the court *a quo* erred in granting the application before it by confirming the provisional order granted on 24 October 2017. The appeal therefore succeeds on the grounds of appeal noted herein. However, inasmuch as transfer to the fourth and fifth respondents took place after it was interdicted by the provisional order, the transfer of the property, as opposed to its sale, shall remain as having been set aside. This qualification is quite properly conceded by counsel for the appellant.

It is accordingly ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* confirming the Provisional Order granted by the High Court on the 24th of October 2017 be and is hereby set aside and substituted with the following:
 - “(i) The Provisional Order granted by the High Court on the 24th of October 2017 be and is hereby discharged and the application herein be and is hereby dismissed with costs.
 - (ii) The transfer of the property, known as 64 Borrowdale Brooke Estate, to the third and fourth respondents is hereby set aside.”

GUVAVA JA: I agree.

HUNGWE JA: I agree.

Dondo & Partners, appellant’s legal practitioners

Mawere Sibanda, 1st and 2nd respondents’ legal practitioners

Muvirimi & Associates, 4th and 5th respondents’ legal practitioners