THE TRUSTEES FOR THE TIME BEING OF RURO TRUST
Versus
RUTH NYACHURU SIHLANGU

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 29 September 2022 and 6 September 2024

Opposed Application

T *Tanyanyiwa* Snr, for the applicant
A *Muchandiona*, for the respondent

KATIYO J: The parties appeared before this court arguing over agreement of sale of a certain piece of immovable property known as Remaining Extent Of Lot 301 of Greendale situate in the District of Salisbury measuring 6092 sqm including vested roadway held under Deed of transfer No 450/89.The respondent deed of transfer is annexed to the opposing affidavit marked annexure B1-B3.The immovable property is registered in the respondent is also described in B2 as " Certain piece of land being the remaining extent of lot 301 of Greendale situate in the District of Salisbury measuring 6092 sqm including vested roadway" A dispute between the parties arose which then resulted in the applicant approaching this court for the following relief.

IT IS ORDERED THAT:

1. The agreement of sale dated 19 May 2021 in respect of a certain piece of land being the Remaining Extent of Lot 301 of Greendale situate in the District of Salisbury measuring 6092 square meters including vested roadway held under Deed of Transfer Number 450/1989 entered into between the Applicant and the Respondent be and is hereby declared illegal and unenforceable at law.
2. The Respondent shall pay costs of suit.

I granted the *declaratur* and the respondent has since appealed to Supreme Court and the reasons for my decision are as follows.

Background

The Applicant is THE TRUSTEES FOR THE TIME BEING OF RURO TRUST, which Trust is registered number MA 0001310/2019 and whose address for service is care of Messrs Tanyanyiwa & Associates, 41 Victoria Drive, Newlands, Harare.

The Respondent is the RUTH NYACHURU SIHLANGU, a female adult whose address

for service is 89 Townsend Crescent, Redcliff. On the 19th of May 2021 the parties entered into an agreement of sale in respect of a certain piece of land being the Remaining Extent of Lot 301 of Greendale situate in the District of Salisbury measuring 6092 square metres including vested roadway held under Deed of Transfer Number 450/1989 (Hereinafter 'the property'). The Applicant proceeded to pay a deposit of US$20 000.00 and the balance of US$155 000.00 within the stipulated period. The Applicant also paid sum of ZWL496 500.00 and US$6 040.00 to Messrs Danziger & Partners stamp duty and conveyancing fees respectively. Following the conclusion of the agreement there was no transfer because of the need for a subdivision permit requirement. The subdivision permit marked as annexure iv was issued on 15 March 2022 whereas the agreement was entered into on the 19 of May 2021. Following this hurdle, the applicant through their legal practitioners wrote to the respondent and their conveyancers them the need to subdivide the property renders the agreement a nullity but the respondent did not agree with this interpretation of the agreement visa -vi the law. It is against this background that the applicant approached this court to declare the agreement of sale a nullity.

The respondent resides out of the country in the United States of America and is represented through a special power of attorney attached to her opposing papers. The respondent is adamant that the agreement of sale is in order. She does not deny that at the time of sale there was no subdivision permit from the City of Harare and because of that the property was untransferable. This came out when the City authorities in response to the payment of rates declined to issues rates clearance certificate for want of subdivision separating roadway which vested in the title deed of the respondent. The applicant is said to have taken occupation and began to collect rentals from the tenants. A subdivision permit issued marked iv has an annexure which served to show separation of the road from the Surveyor General diagram no 450/1989.The road is owned by City of Harare and yet the road had remained attached to the registered property of the respondent now subject of this dispute. What is clear though is that the 6092 sqm described as the extent of the piece of land includes the road in question. The respondent argues that section 39 of the Regional and Country Planning Act (Chapter 29:12) does not include land owned by a municipality.

Arguments

The Applicant argued as follows

The agreement of sale between the parties is illegal in terms of the Regional Town and Country Planning Act [Chap 29:121]. It is respectfully submitted that s 39(1) of the Regional Town and Country Planning Act [Chap 29:12] (hereinafter "the Act') reads thus:

"Subject to subsection (2), no person shall... (b) Enter into any agreement for the

change of ownership of any portion of a property…. except with a permit granted in terms of section forty.

The provisions of s 40 of the Act speak to the procedure of obtaining a subdivision permit and it in mandatory to obtain such a permit before entering an agreement such as the one that is the subject of this matter. The use of "shall"' in s 39(1) of the Act is peremptory. (See *Bezuidenhout* v *Mutual Insurance Association Ltd* 1978 (1) SA 703 (A). In *Schierhout* v *Minister of Justice* 1926 AD 99 INNES J, as he then was, aptly said that:

> "The disregard of the peremptory provisions of a statute is fatal to the validity of the proceedings affected."

When the parties entered into the agreement of sale in respect of the property on the 19th of May 2021 there was no subdivision permit. The subdivision permit was only obtained on the 15th of March 2022. Therefore, the agreement violated the mandatory terms of the Act which bar the alienation of any rights to a property except where there is a subdivision permit granted in terms of s 40 of the Act. In *Chioza* v *Siziba* SC-04-15 pp 9-10 it was held that:

> "It is common cause that the agreement *in casu* was for the sale of an unsubdivided portion of a stand and that at the date of the conclusion of the agreement, there was in existence, no permit granted in terms of s 40 of the Act. Therefore, in terms of clear authority from this Court, the agreement was illegal and unenforceable at law."

See *X-Trend-A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (SC) where MCNALLY JA at 348F stated as follows:

> "S 39 forbids for the change of ownership of any portion of property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for change of ownership of the unsubdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing or on an agreed date or when a suspensive condition was fulfilled. The agreement itself was prohibited.''

See also *Estate Late Canaan Moyo & Anor v Enock Marezva & Anor* HH- 222-17; *Tsamwa* v *Hondo* & Or 2008 (1) ZLR 401(H); *Mikesomen Investment Mambo* v *Chikata HH-134-15) (Pt) Ltd y Slicocks Investments (Pvt) Ltd* 2003 (2) ZLR 56(H) at 61F-62. The law regarding contracts prohibited by statute was summarized LEWIS ACJ (as he then was) in *York Estates Ltd* v *Wareham* 1949 SR 197 as follows:

> " As a general rule a contract or agreement which is expressly prohibited by law is illegal and null and void even when, as here, no declaration of nullity has been added by the statute." (See *Cleogoz Investments (Private) Limited v Cox (Hougaard*) & Anor HH-250-

17).”

The respondent contends in her opposing affidavit that because the land to be subdivided is vested in the City of Harare the sale is protected by the provisions of sec. 39(2) of the Act. However, this position is misplaced. The property in question is not owned by the Municipality and the Municipality is not part of the agreement between the parties. The Respondent is the one who after entering the agreement of sale with the Applicant applied for a subdivision permit from the City of Harare. The purpose of seeking such a subdivision is irrelevant once the agreement abolished by sec.39(1) of the Act is in existence. Moreover, the subdivision is not being done for the purposes of consolidating that portion of land with another one. Resultantly, the exceptions under sec. 39 (2) of the Act do not apply herein. The only question that needs exercise the mind of this Honourable Court is whether the agreement between the parties was to lead to a change of ownership and whether at the time of its conclusion there was in existence a permit in terms of sec. 40 of the Act. If the answer is in the negative a court of law will not associate itself with or relate to such an agreement. (See *Maranatha Ferrochrome (Private) Limited* v *RioZim Limited* HH-482-20) As LORD DENNING MR eloquently stated in *MacFoy* v *United Africa Co. Ltd* [1961] 3 All ER at 11721:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stand there.”

In response the respondent argued as follows, the Property sold to the applicant is located at No. I Lee Road, Greendale, the plan refers to the original Deed of Transfer No: 4144/53 and the surveyor- General's Diagram which was annexed to that original Deed of Transfer. The following is specifically endorsed on the plan:

"Notes: This plan serves to separate the road from the remainder".

It is further common cause that the road in question is already in existence and that it was in existence at the time that the applicant purchased the property. The Subdivision sought by the Applicant at the instance of the City of Harare is solely for the purpose of enabling the road authority to take transfer of the land on which Lee Road was built.

See Section 56 of the Act. It was submitted that there was absolutely no need for the respondent to obtain a Subdivision permit prior to entering into an Agreement of Sale with the Applicant because Section 39 (2) of the Act specifically provides thus:

> "(2) Subsection (I) shall not apply to
> (a) land within the area under the jurisdiction of a municipal council or town council which is owned by the municipality or town concerned; or" In the leading case of *X-Trend a Home (PVT) LTD* v *Hoselaw Investments (PVT) LTD* 2000 (2)

ZLR 348, the Supreme Court explained the purpose for which Section 39 of the Act was enacted at Page 355 C - D, as follows:

> "The evil which the statute is designed to prevent is clear. Development Planning is the function and duty of Planning Authorities, and it is undesirable that such authorities should have their hands forced by developers who say "but have already entered into conditional agreements; major developments have taken place; large sums of money have been spent. You can't possibly now refuse to confirm my unofficial Subdivision or development" It is crystal clear therefore, that the Agreement which was entered into by them parties in this matter is not one which is prohibited by Section 39 of the Act. It is quite clear that the Applicant in this matter is abusing the procedure of a *declaratur* in an unashamed attempt to escape from the consequences of a lawful Agreement which is legally binding and enforceable.

It was also argued that nothing can be more revealing than the fact that the Applicant deliberately decided to withhold the crucial documents referred to in Paragraph 7 of the Respondent's Opposing Affidavit as well as the fact that the issue of the alleged illegality of the Agreement for contravening Section 39 of the Act was never mentioned in the letter from the Applicant's lawyers dated 11 April 2022.

It is submitted that the Applicant is seeking to abuse the procedure of a *declaratur* in a desperate bid to run away from a lawful and legally binding agreement of sale. To make matters worse, both the Applicant's Founding and Answering Affidavits are not dated and that omission is fatal to the application. It was also unprocedural and incompetent for the Applicant to purport to file an Answering Affidavit on the 13th June 2022 after it had already filed and served its Heads of Argument on the 8th June 2022. Respondent accordingly prays for the dismissal of the application for a "*declaratur*" with costs on a punitive scale since the application is a gross abuse of court process.

Conclusion

Most of the facts are common cause in this matter. The issue for determination is a mere interpretation of section 39 of the Regional Town and Country Planning Act (Chapter29.12). Section 39(1) of the Act it is clear in its wording that,

It says:

Subject to subsection (2) No Person shall …

(b) enter into any agreement

(i) for the change of ownership of any portion of a property…except with a permit granted in terms of section forty.

Section forty of the act simply speaks to the procedure of obtaining such permit. There is no doubt in this case that the land was unsubdivided and could not pass transfer in that form. From the arguments in this matter the respondent did not have much to submit on the law but rather concentrated on the events leading to the agreement and all the paperwork. What is clear is that this issue is not about what transpired but simply to answer the legal question before this court. It is conceded that the road which vested on this property was described through the same deed of the respondent and the property could therefore not be transferred without a subdivision permit. One of the essential elements of a contract is its enforceability both in terms of specific performance and legality. The question in this case is whether at the time it was entered into was enforceable. As much as the respondent argues that it was because the road belonged to the city authorities and there was no need for a permit. What she fails to appreciate is that she held a title deed encompassing the road as well and it was not possible to transfer the property. It is different from a scenario where the city authorities held the land to the exclusion of any third party. I do not think sub section (2) of the same act was meant to cover the scenario in this case. Transfer of tittle to this property was dependent on the subdivision of permit being granted. As an application it could either be declined or granted thereby rendering this contract potentially unenforceable. Assuming the respondent had taken a position of not applying for a permit it meant the applicant potentially stood to lose. The intention of the legislature was to prevent potential loses to anyone who may deal in land without proper documentation as it brings about many complications in terms of planning or even losses. In Chioza v Siziba (supra) the Court was very clear in its interpretation of the law. Any agreement which does not comply within the law is void *ab initio*. The case of York Estates ltd v Wareham 1949 as cited in this matter states as follows

"As a general rule a contract or agreement which is expressly prohibited by law is illegal and null and void even when, as here, no declaration of nullity has been added by the statute." The quote above is self-explanatory. As for the argument that the affidavits are not dated, is not supported by evidence, if at all the evidence proves to the contrary.

Disposition

Having analyzed all arguments for and against this application, I do not see why the respondent is of the opinion that this was a legal agreement in the face of the statute which prohibits such acts. It is my considered view that the applicant has established well-founded grounds for a *declaratur* and therefore should be granted.

KATIYO J:

Tanyanyiwa and Associates, applicant's legal practitioner
Danziger and Partners, respondent's legal practitioners