

PATIENCE MHAKA

Versus

MARINOS CHRISTMAS MHAKA

And

SILENCE MATURURE

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 24 MARCH 2010

Opposed Court Application

KAMOCHA J: In this matter the application was dismissed after the parties had made their submissions. The court gave an *ex tempore* judgment. The applicant was aggrieved by the court's decision and noted an appeal to the Supreme Court. She then requested for the reasons of the court. These are they.

The applicant and first respondent were husband and wife. The husband was the registered owner of a property known as stand number 6448 Mkoba 1 North Township, Gweru where the couple used to live. The husband sold the property to the 2nd respondent during the subsistence of the marriage. The purchaser was an innocent third party who lived and worked in the Diaspora but had asked one Farai Zimete to find him a property to buy. Farai Zimete was the purchaser's agent.

When the agent saw the property, at the centre of the dispute, being advertised, he responded to the advert. He went to the Deeds Office to verify the status of the property he was about to buy. His investigations revealed that the property was registered in the name of the seller – Marinos Christmas Mhaka. The property was not burdened with any caveats, or any other encumbrances. He went to view the property with the seller who was the registered owner and was satisfied that that was the type of property his principal was looking for.

He then purchased the property and paid the purchase price in full. Trouble started when arrangements were being made to transfer the property in the names of the purchaser. The applicant launched this application seeking the following order.

It is ordered that:-

- (a) The agreement of sale entered into between the 1st and 2nd respondents for the sale of house number 6448 Mkoba 18, Gweru be and is hereby declared null and void.
- (b) Costs of suit shall be borne by the 1st and 2nd respondents on an attorney and client scale jointly and severally one paying the other being absolved.”

Her contention for the order she sought was that she was married to the 1st respondent in terms of the Marriages Act [Chapter 5:11]. Consequently, the house in question was a matrimonial home, which was shelter to her and the children of the parties. She said the sale of the house was without her consent and that she had not been made aware of it despite the fact that she had allegedly contributed towards the purchase of the house. She concluded that the sale was a sham because the purchaser did not inspect the house before purchasing it and did not even pay any purchase price.

The last two allegations can be easily disposed of as they seem to be baseless. Mr Farai Zimete averred that the purchase price was paid in full. There is no evidence to refute that statement. He said he never knew the seller prior to this sale and would therefore have no reason to collude with him in order to prejudice the applicant. He never knew that the seller was married to her let alone that their marriage was a turbulent one. When he checked with the Deeds registry the house was not jointly owned. It was registered in the name of the seller only. It is common cause that the applicant was not a registered co-owner of the house.

The applicant asserted that the buyer should have viewed the house himself. The contention does not deserve any serious consideration. Suffice it to state that the agent viewed it and his principal accepted his assessment of the property. What Farai Zimete did binds his principal. There was no need for the principal to travel all the way from the Diaspora to inspect the property again. Zimete said the purchase price was paid in full. The purchaser in this case was an innocent purchaser - an innocent third party.

What then is the position of the law when an innocent third party buys a matrimonial home from the spouse in whose name the property is registered? What relief is available to the other spouse? Sinclair, in *The Law of Marriage* Volume 4 at page 479 opines that the right of occupation of the non owning spouse in a matrimonial home avails as against the other spouse and not against an innocent third party. According to Bromely in *Bromely's Family Law*

at page 549 the wife's rights against an innocent purchaser can be no greater than they are against the husband himself. The learned author further states that it must be possible for the prospective purchaser to discover precisely what rights exist in the land and if they are of such a highly personal nature, known only to spouses themselves, which would be in an impossible position to know when he made enquiries, then the innocent purchaser is not to blame. *In casu* the purchaser was not made aware of the applicant's personal rights in the property. His actions were therefore unassailable. In *Muzanenhano & Anor v Katanga & Ors* 1991 (1) ZLR (SC) it was held that the right of a wife to remain in occupation (based on a claim under section 7 of the Matrimonial Causes Act) as against her husband depends upon the exercise of purely discretionary remedies but that the rights as between the spouses are personal between themselves and do not affect third parties, regardless of whether the third parties are aware of the dispute. The house in question has since been registered in the name of the purchaser. The remedy for the aggrieved spouse is to sue her former husband since the parties have since been divorced.

An award for costs on an attorney and client scale was awarded to the 1st respondent on the ground that the applicant was not candid with the court when she filed her divorce papers. She did not disclose to the court that these proceedings were pending in court leading to the court awarding the house in question to her. Her behaviour deserves to be censured.

As a result of the foregoing, the application was dismissed with costs on an attorney and client scale.

Garikayi & Co. applicant's legal practitioners
Gunda & Mawarire, respondent's legal practitioners