NYARADZAI MAZORODZE
versus
NETTY DANA
and
EVELYN DANA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J.
HARARE, 01 July 2009

Court Application

Mr. *Chengeta*, for applicant
Advocate Takaindisa, for 1st and 2nd respondents

CHITAKUNYE J: On 4 August 2006, the applicant purchased a certain piece of land being Stand No. 459 Ardbennie Township 3 of sub-division A of Ardbennie situate in the district of Salisbury, also known as House No. 459 Kennard Road, Houghton Park, Harare from Rosina Tunhidzai Maunga. She obtained transfer into her name by virtue of Deed of Transfer No. 5325/2007 dated 17 October 2007

Rosina Tunhidzai Maunga, herein after referred to as Rosina, had purchased the property from a deceased estate, the estate of the late Boniface Matienga Dana and had obtained transfer into her name by virtue of Deed of Transfer No. 708/2004 dated 31 March 2004. The Master of the High Court had given authority for the property to be sold on 27 July 1999 in terms of s 116 of the Administration of Estates Act [*Cap 6:01*].

The two respondents are beneficiaries of the said estate of the late Boniface Matienga Dana together with six others.

The sale to applicant was done as a resale and was done with the involvement of the executor of the estate of the Late B. M. Dana and the beneficiaries. The beneficiaries had expressed dissatisfaction with the selling price to Rosina hence the resale.

Ever since obtaining transfer on 17 October 2007 the applicant has failed to take occupation of the property due to the two respondents' refusal to vacate the premises. The applicant has thus approached this court for an order that:-

> "1. The respondents, and all those claiming through them, occupation of house no. 459 Kennard Road, Houghton Park, Harare, be and are hereby ordered to vacate the premises within 48 hours from the date of service of this order upon them, failure of which the deputy sheriff, Harare be and is hereby ordered and authorized to eject the respondents.

2. The respondents be and are hereby ordered to pay holding over damages in the sum of $ 3 898 200 000-00 (three billion Eight Hundred and Ninety Eight Million Two Hundred thousand Dollars) plus interest at the prescribed rate from the 6 August 2006 to the date of payment.

3. The respondents pay costs of suit on an Attorney and Client scale, the one paying the other to be absolved."

The respondents opposed the application. In their opposition respondents raised what they termed a point *in limine*. Respondents argued that as a principle all evictions are by way of summons and not application and so applicant has chosen the wrong procedure. In this case they contended that there are material disputes of facts and there is also a pending case involving them and the executor. That case is case No. HC 4587/06. They further argued that in light of this the applicant cannot rush to conclude that by merely holding title deeds, she has the right to seek their eviction.

On the merits, the respondents contended that at the time the house was sold there was no need to sell it as they had liquidated the debt to CABS and the executor was made aware of this. They also argued that they never gave their consent to the sale of the house. As far as respondents are concerned the sale to Rosina was not valid and so applicant could not have obtained a better title.

An analysis of the respondents' reasons for opposing the application shows that the respondents are self contradictory and inconsistent.

On the point *in limine* the respondents argument that all evictions must be by summons and not application was not well supported. The respondents chose to substantiate this by saying that there were material disputes of facts such that applicant should not have come by way of application. Unfortunately such an argument does not refer to the principle that evictions must be by way of summons but that where there are material disputes of facts the matter be by way of action. Though the respondents argued that there were material disputes of facts they could not out line such material disputes of facts. It was incumbent upon the respondents to outline the material disputes of facts and not to rely on bald assertions.

The respondents did not deny that the property was firstly sold to Rosina who duly took transfer. That transfer was not challenged or set aside. They also did not deny that the sale to applicant was done after the parties including Rosina had engaged in some negotiations. The beneficiaries were not happy with the price at which the property had been sold at to Rosina. It

was then resolved to resell the property with the proceeds to be shared between the beneficiaries and Rosina.

It may also be noted that the case that they said was pending between them and the executor had nothing to do with the validity of the two sales. The prayer as contained in Netty Dana's founding affidavit in HC 4587 /07 reads as follows:-

> "We have thus approached this Honorable Court for a declaratory order that the purchase price for the sale of our property be deposited with the third respondent and that the first respondent surrenders the title deeds to conveyancers to be agreed upon by both parties."

This is essentially what respondents were seeking in HC4587/07. The relief they were seeking was for the purchase price from the resale to be deposited with the third defendant (Southgate and Bancroft Estate Agents) and that first respondent surrenders the title deeds to conveyancers to be agreed upon by both parties.

Though in paragraph 4 of her opposing affidavit Netty Dana denied that the two respondents had agreed to the resale of the property, her own assertion in the founding affidavit in HC 4587/07 betrayed her. In paragraph 11 thereof she said the following of herself and the other beneficiaries:-

> "We thus approached the second respondent and expressed our disapproval of the manner the deceased's property had been disposed. The second respondent thus approached the third respondent and negotiations ensured which culminated in us agreeing that the property be resold and the proceeds of the sale be distributed as 34% for the fifth respondent and 66% for the beneficiaries."(the underlining is mine).

In paragraphs 12 and 13 she went on to say that:-

> "12. Our problem is that the first respondent insists that he wants to handle the purchase price for and on our behalf. We are skeptical about such arrangement as the first respondent let us down in the first transaction.
>
> 13. During the negotiations we had agreed that the third respondent should handle the sale of the property. We therefore suggested that the purchase price be handled and disbursed by the third respondent."

In HC 4587/07 the present respondents were the applicants. The respondents were RJC Executor Services (Pvt) Ltd., Richard John Chimbari, Southgate and Bancroft Estate Agents, Master of the High court of Zimbabwe, and lastly Rosina Tunhidzai Maunga, in that order.

The issue in HC 4587/07 was not whether the property should be sold or not but on who should handle and disburse the proceeds of the resale. The respondents were therefore not

being truthful when they said that they never agreed to the sale of the property. They were also not being truthful when they said that at the time of the sale they had settled the debts due and that there was no need to sell the property, or else they would not have agreed to the sell of the property.

The respondents' lack of credibility is further confirmed in their heads of arguments. In paragraph 5 thereof the respondents' argued that the property was never sold to Rosina yet it is common knowledge that the property was sold to Rosina and this sale has not been challenged to date. The second sale dubbed resale was done after all the parties had agreed to the resale and had gone on to agree on how the proceeds from this resale should be shared as between the seller Rosina and the beneficiaries who included these two respondents.

A Deed of transfer is prima facie evidence of ownership in immovable property. It is proof that the holder thereof has real rights in the property as the owner.

In s 2 of the Deeds Registry Act, [C*ap 20:05*] a real right is defined as "Any right which becomes a real right upon registration." In *Takapfuma v Takapfuma* 1994(2) ZLR103(S) @ p 105H to 106A, MCNALLY JA had this to say about the effect of registration of rights in terms of the Deeds Registry Act:-

> "The registration of rights in immovable property in terms of the Deeds Registry Act [C*ap 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered….. The real right of ownership, or *jus in re propria,* is the sum total of all the possible rights in a thing."

See also Wille's Principles of South African Law 8th edn. p. 255.

The owner can thus deal with the property as they please.

In casu Rosina's title was not challenged and so she had valid title to the property. She thus could pass such title to any one of her choice. In this case she passed such title to applicant by virtue of the agreement of sale signed on 4 August 2007 and applicant obtained untainted title to the property by virtue of the Deed of Transfer dated 17 October 2007.

In the absence of fraud such title is not easy to dislodge. The respondents' attempt at alleging fraud against Rosina is without merit. I have already alluded to the respondents' own assertion showing that they agreed to the resale of the property not because of any alleged fraud but because they were not happy with the initial selling price.

I am of the firm view that the applicant has a real right entitling her to seek the eviction of the respondents. The respondents have no defence to such right.

The applicant sought that the respondents vacate the property within 48 hours failure of which the deputy sheriff should be ordered to eject them. I am of the view that the period within which the respondents should be ordered to vacate may be altered in the interests of justice to ensure that they have adequate time to comply with the order. A period of 5 days would in my view suffice.

The applicant prayed for costs on a higher scale. Costs on a higher scale are not lightly given unless the circumstances warrant it. *In casu* the respondents simply had no valid defense to the claim. They unnecessarily put applicant to expense when from their own pleadings in this case and in HC 4587/07 they ought to have realized that they had no case at all. This is a case were applicant is justified in asking for costs on a higher scale.

Accordingly the application is hereby granted in favour of the applicant as follows:-

It is hereby ordered that: –

1. The respondents, and all those claiming through them, occupation of house No. 459 Kennard Road, Houghton Park, Harare, be and are hereby ordered to vacate the premises within five (5) days from the date of service of this order upon them, failing of which the Deputy Sheriff, Harare be and is hereby ordered and authorized to eject the respondents and all those claiming occupation through them.

2. The respondents are hereby ordered to pay holding over damages in the sum of $3 898 200 000-00 (three Billion Eight Hundred and Ninety Eight Million Two Thousand Dollars), plus interest at the prescribed rate from 6 August 2006 to the date of payment.

3. The respondents to pay costs on an Attorney and Client scale, the one paying the other to be absolved.

Chengeta & Partners, applicant's legal practitioners
*Mavhunga & Sigauke, r*espondents' legal practitioners