CLEMENCE NYAMANDI
and
PAIDAMOYO GLENDA NYAMANDI
versus
NYASHA MHIYANGWA
and
SALTANA ENTERPRISES (PVT) LTD
and
WHISPER JATIRA
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20 June, 20, 21, 22 July, 7 September 2022
& 3 October 2023

Civil Trial

M Mlambo, for the plaintiffs
V Vhera, for the 1st defendant

CHITAPI J: The plaintiffs in this action claim against the defendants a declaratur that the plaintiffs are the lawful and rightful owners of a property called Stand 7871 Belvedere West, Harare. In consequence of the declaratur being granted in their favour, the plaintiffs further claim for an order that the 4th defendant should approve and sign over cession to them of rights, title and interest in the property. The plaintiff also claims costs on the punitive scale of legal practitioner and client.

The plaintiffs are husband and wife. The first and third defendants are natural persons whilst the second defendant is a duly incorporated company in accordance with the laws of Zimbabwe. The fourth defendant is the local authority for the area in which the property in dispute is situate. No specific relief is sought against the rest of the defendants, save against the fourth defendant as noted.

The plaintiff entered into a written sale agreement with the third defendant on 4 May 2012 in terms of which the purchase price was recorded as US$18 000.00 payable by way of

payment of US$10 000.00 on signature of the agreement and the balance of US$8 000.00 in three monthly instalments, the first instalment being due on or before 5 August 2012. Vacant possession of the property to the plaintiffs upon payment of the full purchase price. Cession of the property would be granted to the plaintiffs by the third defendant and was to be tendered through land developers within a reasonable time from the date that a letter guaranteeing the plaintiff's rights to the property would be served by the second defendant.

The second defendant generated the guarantee letter dated 7 May 2021. The letter confirmed that the third defendant was the "rightful owner" of Stand 7871 Belvedere West//Warren Park Housing Project. The plaintiff pleaded that the third defendant had in turn bought the property from the second defendant company. The second defendant was the approved developer on the approved property. The agreement of sale aforesaid detailed that the second defendant (under judicial management) was the owner of some "+ or ÷ 54 hectares" piece of land called Lot 4 of Warren Park under subdivision as permitted by the fourth respondent. One such subdivision was the one sold by the second defendant to the third defendant. It was, however, described as Stand 7860 Warren Park Township. Its land size of 1012 square metres was similar to the one for Stand 7871 which is subject of this action. This earlier agreement was signed by the third defendant as purchaser on 23 October 2016. There is no signature of the seller on that agreement.

The first and fourth defendants entered appearance to defend. The fourth defendant's legal practitioners then wrote a letter to the Registrar on 7 August 20-20 in which they advised that it was in fact the fourth defendant which advised parties laying claim to the property to seek a court determination. The fourth defendant indicated that it would abide by the decision of the court and was ready to sign the cession of the property to whomsoever the court declared to be the rightful cessionary to rights of ownership and title in the stand in dispute.

The first defendant in her plea contested the lis/claim. She pleaded that the third defendant could not have lawfully sold property which he did not own because the agreement his original purchase was for the purchase of stand 7860 and not stand 7871 which this action deals with. She also pleaded that the earlier agreement was not valid because the seller did not sign it. She averred that there must have been committed a connived fraud between the plaintiffs and the third defendant or that the plaintiffs were in fact defrauded by the third defendant.

In the alternative, the first defendant in pleading to the merits averred that she purchased the property in dispute on 22 March 2006 from one Beauty Kandido who had in turn purchased

the property from the second defendant in 2002 which date preceded the purchase date of the property by the third defendant. She pleaded that she was the prior purchaser and should in fact be recognized as the lawful purchaser as the alleged sale of the property to her pre-ceded the sale of the property to the plaintiffs by the third defendant.

The first defendant filed a counter-claim in reverse. She sought a declaratur that she is the lawful owner of the property in dispute Stand 7871 Belvedere West, Harare. She also sought an order that the fourth defendant should sign cession documents in the first defendant's name so that the first defendant becomes the registered owner or holder of title in the property. The first defendant sought a fourth order that the plaintiffs should demolish the structure which they constructed on the stand and vacate the same failing which the Sheriff be authorized to effect the demolitions and the plaintiffs' eviction therefrom. Lastly the first defendant prayed for costs on the punitive scale of legal practitioner and client against the plaintiffs, second and third respondents jointly and severally the one paying the other to be absolved.

In substance of the counter-claim the first respondent averred that she entered into a written sale agreement on 22 March 2006 with one Beauty Kandido as seller in terms of which she purchased the property in dispute for $ZWL500 000.00. She av erred that Beauty Kandido ceded her rights, title and interest to the first defendant. The first defendant further averred in the counter-claim that Beauty Kandido had in turn purchased the property from the second defendant on 5 April 2002. The first defendant averred that she did not carry out any developments on the stand firstly because she needed to raise money for construction. She also gave a second reason as that she considered it imprudent to construct a property on the stand because there were wrangles between the second and fourth defendants over the Belvedere stands. Thus, the first defendant pleaded, it was prudent to await resolution of the dispute.

The first defendant averred that she only discovered that the plaintiffs were carrying out construction works on the property in 2019 and that the plaintiffs claimed to have purchased the property from the third defendant in 2006. The first defendant averred that the plaintiffs and her agents continued to lay claim on the property and remained in occupation of the property continuing with construction. The first defendant averred that she made verbal demand of the plaintiffs to vacate the property but the plaintiffs did not take heed and refused to vacate.

In the plea in reconvention, the plaintiffs denied the applicants claim. They largely repeated the allegations made in the declaration in relation to the paper trail of their purchase of the disputed property from the third defendant. They pleaded that before purchasing the

stand, they confirmed with the second defendant's company which company was the approved land developer for the housing scheme on which the disputed property was part, that the third defendant was the rightful owner of the property. The plaintiffs pleaded that they took possession of the property in 2012 and have been paying rates and levies due to the fourth defendant. Additionally, the plaintiffs pleaded that they have since constructed a three roomed cottage on the property with the main house being under construction and at slab level. The plaintiffs averred that the fourth defendant never stopped any stand buyers from constructing properties and regularizing the developments. The plaintiffs averred that the first defendant sat on her laurels for eight years from 2012 when the plaintiffs took possession of the property and the institution of this action in 2020.

The parties held a pre-trial conference amongst themselves and failed to reach a settlement. A formal pre-trial conference was held in terms of the rules before WAMAMBO J on 15 March 2022. The matter was referred to trial for determination of the following issues:

"(i) Whether or not the plaintiff are the legitimate purchasers and holders of the rights, interest and title in stand 7871 Belvedere West, Harare.
(ii) In the alternative, whether or not there was a double sell of property to the plaintiffs and first defendant's sellers? If so, whose seller was the legitimate purchaser of the property?
(iii) In whose favour does the balance of equities tilt?
(iv) Whether or not the 4th defendant should approve and sign cession of the rights and interest in stand 7871 Belvedere West to the plaintiff?
(v) Who should pay costs of suit and at what scale?"

Upon consideration of the issues holistically there is in my view, only one issue being, "who between the plaintiffs or first defendant should be declared the rightful holder of ownership or title rights in the disputed stand 7871 Belvedere West, Harare" The rest of the listed issues are consequential and will of necessity follow upon the determination of the declaration sought by the plaintiffs in the main claim and as similarly sought by the first defendant in the counter-claim.

Evidence was led in support of the plaintiffs' claim and for the first defendant in support of her defence. The plaintiffs led evidence from the first plaintiff and from two witnesses whilst the first defendant's mother and one witness gave evidence for the first defendant. I summarize the evidence led as hereunder:

Evidence of Clemence Nyamandi

He is the first plaintiff. His evidence largely repeated what the plaintiffs pleaded in their summons and declaration. He narrated how he purchased for himself and the second

plaintiff the property in issue from the third defendant who was represented by his sister Agatha Mwamuka Jatira and that the sale was managed by and through an estate agent, Rawson Properties. He produced the agreement of sale executed on 4 May 2012 as exhibit 1. The property had been advertised for sale by the estate agent. The agreement was written on the estate agent's letterhead. He made an offer to purchase the stand and the offer was accepted. He then sought verification of the third defendant's title and obtained the written verification from the second defendant as evidenced in a letter of confirmation dated 7 May 2012. The second defendant was the developer for the stands.

The first plaintiff further testified that the purchase price of the stand was US$18 000.00 which was paid to the seller's estate agent, Rawson Properties in agreed instalments. The plaintiffs took occupation of the property in 2012 and built and completed a cottage thereon in the same year 2012. He stated that on completion of the cottage, the plaintiffs' relatives occupied the cottage. The first plaintiff further testified that when construction of the cottage started in 2012 the first defendant's mother came to the stand and shouted and threatened the plaintiffs' representative who was staying on the stand. The first plaintiff testified that he later discovered that there was a dispute between the second and fourth defendants over the stands. The dispute resulted in a regularization exercise. The regularization exercise resulted in the fourth respondent confirming that the third defendant's allocation of the stand in dispute had no issues. The first plaintiff further testified that during the course of construction the first defendants' mother again came to the stand and shouted at the occupants. He stated further that following the regularization exercise, the plaintiffs visited the fourth respondent's offices and were then advised that there was double sale of the sand and that they should seek a court order to declare the owner of the property as between the warring parties.

The first witness for the plaintiffs was Agatha Mamuka (Nee Jatira) the wife to the third defendant. She is the one who signed the agreement of sale of the property between the plaintiffs and the third defendant. She testified that the property belonged to her and the third defendant and that they sold it to the plaintiffs for US$18 000.00 in 2012 and that the purchase price was paid in full. She identified the agreement of sale of the property and gave the background of how the plaintiffs acquired the property. The brief background was that the plaintiffs had through the agency of Bard Real Estate purchased a property stand 7860 in 2006 from the second respondent. The second respondent's representative and judicial manager, Cecil Madondo did not sign the agreement because the stand was already allocated to another person and signing it off to the plaintiffs would have amounted to a double allocation. The

witness testified that despite initially refusing to be allocated an alternative stand, the plaintiffs compromised and accepted the allocation of stand 7871 as a replacement. The witness produced a copy of the replacement agreement duly signed by the plaintiffs and the judicial manager dated 4 May 2007. The witness testified that the plaintiffs enjoyed undisturbed occupation of the stand which they took after signing the agreement. They commenced to pay development levies to the second defendant. They moved bricks to the site and commenced construction. She stated that she did not know of the sale of the stand to the first defendant except that she was advised by a director of the second respondent that some old woman was trying to kill herself over the stand.

The plaintiffs' second and last witness was the second defendant's judicial manager at the material time, Cecil Hondo Madondo. He testified that the plaintiffs purchased Stand 7871 and not Stand 7860 because the agreement for the proposed sale of Stand 7871 sold to the plaintiffs by the third defendant had been repossessed from one Beauty Kandido and allocated to the third defendant. He testified that the stand was repossessed because firstly, Beauty Kandido did not sign a sale agreement for the alleged purchase of the stand. Secondly, Kandido did not pay the balance of the purchase price amounting to ZWL$712 000.00. He also testified that the first respondent did not attend a creditors' meeting for the second defendant's creditors held in 2008 at the Master's Office and did not therefore register her claim to the property. The witness produced a verified list of purchasers of stands under the Belvedere West scheme prepared by the fourth respondent and the first defendant's name did not appear on the list. The witness explained that initially Stand 7860 was the one offered to the plaintiffs but that he did not sign that agreement because the same stand had been sold to another couple and Stand 7871 was then offered in place thereof to the plaintiffs. In relation to there being two agreements namely the one for Stand 7860 and 78971, the witness stated that he could have just altered the stand number but just prepared another agreement similar in content citing Stand 7871 in place of 7860 with the rest of the details remaining the same and that no further payment was made and none has required to be made.

The first plaintiff and the two witnesses were cross-examined but stuck to their testimonies. Their evidence as much as most of it was not in dispute or if so, not seriously so was straight forward. The testimonies were also supported by a paper trail of the devolution of sale of the disputed property from the first sale. In the case of the last witness, the judicial manager of the second defendant, commented on the paper trail of the sale of the property and noted that the first defendant did not pay the full purchase price in any event apart from the fact

that the agreement of sale that she sought to rely on was not signed by the purchaser. Further, the witness noted that the first respondent had not registered her interest as a creditor nor did she file a claim with the judicial manager on the property. He also noted that the sale would in any event not have been valid because Beauty Kandido was not on the housing list. The evidence of the witness was easy to follow and their credibility was not shaken.

The first defendant led evidence from Eda Mhiyangwa (Eda) the mother of the first defendant who held the first defendant's Power of Attorney and authority to represent her. Evidence was also led from a witness Future Abhasi, a property sales negotiator who testified that she was the one who sold the property in dispute to the first defendant in 2005 when the witness was working for Fairvest Real Estate which had the mandate to sell the property.

Eda is an elderly woman. I gave her authority to testify whilst seated considering her visibly old age. She testified that the first defendant purchased the property Stand 7871 in 2005 through the agency of Fairvest Real Estate represented by its negotiator Future Abhisu. The witness produced a copy of a sale agreement dated 23 November 2005 in terms of which one Beauty Kandido sold the disputed property to the first defendant as exhibit 5(a). Eda also referred to Annexure 5(b) being a cession agreement of rights, title and interest in the disputed stand from Beauty Kandido to the first defendant. The agreement is dated 22 March 2006. She testified that Beauty Kandido had bought the property through Borm Real Estate which company was the agent of the second defendant in 2002. She stated that the second defendant had advised her that there was a competing claim of the third defendant and that the first defendant should surrender the property to the third defendant and that the first defendant be allocated another stand. She stated that she refused the offer of a replacement stand. Eda then stated that no developments were carried out on the stand by the first defendant because she was advised to wait for the court to deal with the issue. She produced as exhibit 6 a ledger by Borm Real Estate. It is in the name of Kandido B for stand 7871. It covers the period 1 July 2002 to 31 March 2003. The opening debit balance is shown as $724 760.00 and the closing balance is shown as $697 777.77. Eda testified that Kandido having failed to pay the balance, the first defendant took over the payment. She testified that the purchase price of $500 000.00 due to Kandido was paid through Fairvest Real Estate.

The first defendant's witness Abhasi testified that she worked for Fairvest Real Estate in 2005 and 2006. She negotiated the sale of the disputed property to the first defendant from Kandido in 2006. She stated that she confirmed with the first defendant that Kandido was the owner of the stand. She testified that the purchase price was paid in full by the first defendant

and that from the purchase price was to be deducted the amount owing to the second defendant by the first defendant. She testified that she was advised of the double allocation of the stand when she took the cession agreement to the second defendant for verification. She also testified that there was a meeting held between the judicial manager and the first defendant's legal practitioners on 25 June 2007 to advance the first defendant's claims to the property. She testified that the matter was unresolved and it ended up under investigation by police. Under cross-examination the witness stated that the alleged agreement of sale between Kandida and the second defendant was not to hand and that Fairvest Real Estate was no longer operational. Again, Eda and the witness did not testify to any seriously disputed point. Their testimonies were easy to follow.

In my analysis of the evidence, the paper trail was as follows judging from the oral evidence and undisputed documents discovered by and produced by the parties. The second and fourth defendants executed an agreement of sale signed last by the fourth defendant 2 April 2002. In terms of the agreement the fourth defendant allocated to the second defendant, a piece of land situate in Warren Park Township measuring ± 54 hectares depicted on a plan referenced TPY 554/1. In so far as the terms of the agreement may concern this case, the second defendant was required to develop the land and subdivide it into housing stands which it would offer for sale. The second defendant was therefore the developer of the land and would sell stands to would be buyers. In relation to qualification for one to purchase a stand, clause 16 of the agreement which the judicial manager referred to was clear in its terms and read as follows:

> "16 BENEFICIARIES TO BE ON HOUSING WAITING LIST
>
> 16.1 The developer shall only sell stands to beneficiaries who are on Council's housing list or to those who qualify to be on the said list (hereinafter called waiting list)
>
> 16.2 The Director of Housing and Community Services shall determine who qualifies to be on the waiting list."

The evidence of the judicial manager as also amplified in his statement to the police, produced in evidence was to the effect that upon his appointment as judicial manager of the second defendant he did find a sale agreement purportedly executed between Beauty Kandido and the second defendant dated 5 April 2002. The agreement did not bear the signature of the purchaser, Beauty Kandido although the second defendant's director signed it. The judicial manager took issue with the validity of the agreement on that basis. He testified that payment was indeed made on the impugned sale but the balance outstanding was not paid.

The plaintiffs' counsel submitted on the authority of this court's decision in *Tichareva* v *Mutsetsema & Ors* HH 134/2018 that where a contract is reduced to writing, the parties must sign it to be bound by it. If a party fails to sign the written contract, that party does not become a party to it. Counsel for the first defendant averred that the allegedly unsigned agreement was produced by the judicial manager under cross-examination. Infact it was not. The fact of Beauty Kandido not having signed it, was tacitly acknowledged in exhibit 7 being a letter dated 25 June 2007 addressed to the judicial manager by the first defendant's legal practitioners. In that letter they stated that there was proof of payments made upon the initial purchase. Further it was argued that there was a handwritten note availed to the judicial manager by Brown Real Estate advising Kandido of the amount to be paid.

In my view, it may not really be necessary to split hairs over the missing signature of the first defendant. The determination of the dispute should be informed by the consideration of clause 16 of the agreement between the second and fourth defendants on conditions precedent to the alienation or sale of the subdivided land to would be purchasers. The condition was simple. Any sale of subdivisions created by the second defendant would be valid only if the would-be purchaser was registered on the fourth defendant's waiting list of persons seeking land or qualified to be on the waiting list. The decision on who qualified to be on the waiting list was the prerogative of the fourth defendant's Director of Housing and Community Services.

It is common cause from the evidence led that a dispute arose between the fourth and second defendant over the subdivisions created by the second defendant. The stand in dispute was part of the subdivided stands. The main point of dispute concerned the failure by the second defendant and its agents to ensure compliance with clause 16 of the agreement between the second and fourth defendants. The impasse on the issue of compliance with clause 16 resulted in the fourth defendant demanding regularization in the form of the buyers becoming clause 16 compliant or that they be enrolled on the waiting list among other issues of compliance.

A condition precedent constitutes an event or act that must be met or complied with before a contract to which the condition precedent relates can be considered valid. In property law, no rights can vest in a property in which a condition precedent has not been satisfied. The first defendant did not plead waiver of that condition in both the plea in convention or the claim in reconvention. In addition, the first defendant and her witness, the property negotiator, did not testify to any facts suggesting a waiver of the conditions by the fourth defendant. It is in any event trite that the defence of election or waiver should be specifically pleaded. There may

however be exceptions to rule but that does not arise in this matter. The evidence presented by the plaintiff and was undisputed was that the fourth defendant invited the purchasers of the stands to regularize the purchases and the first defendant did not do so.

The question then is whether Kandido whom the first defendant claims to have been the first purchaser acquired any rights in the stand? If she did not, then the matter ends there because she could then not cede any rights in the property that she did not lawfully acquire. Kandido was not listed on the fourth defendant's waiting list and neither was the first defendant who in any event did not claim to have been on the list. The judicial manager on account of the condition precedent not having been met considered the agreement as invalid which it was in my view. On the authority of the celebrated case of *MacCoy* v *United African Company* (1961) 3 AER 1169 at 1172, it is stated by LORD DENNING thus:

> "If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The purported sale of the property to the first defendant without the first respondent qualifying as a purchaser in terms of the criteria set out in clause 16 as quoted rendered the sale a nullity. It was not necessary *stricto sensu* for the judicial manager to obtain a court declaration of the invalidity of the agreement between Kandido and the first defendant. The subsequent agreements based on the invalid agreement of Kandida were similarly invalid as they proceeded from the invalid agreement. Nothing could sit on nothing so to speak.

The plaintiffs on the other hand were able to prove that the prior or first sale of the stand between them and the second defendant was clause 16 compliant and that the fourth defendant had no problem with that agreement and recognized it as valid. Correspondence from the fourth defendant being a confirmation that the first defendant was listed on the waiting list and also passed vetting by the fourth defendant for eligibility to purchase the stand in dispute was produced in evidence. The first defendant did not provide a similar paper trail. The argument that Beauty Kandida paid for the property to the second defendant's estate agent which payment was in turn passed over to the second defendant would not constitute a waiver of clause 16 of the agreement because the subdivided land could only be sold to beneficiaries on conditions set out in the agreement which alienated the land to the second respondent. The fourth defendant was not in the case of the purported sale to the first defendant brought into the picture nor did Kandido or first defendant seek regularization of the sale.

In my view, it must follow that the issue of a double sale and balance of equities does not arise in this matter because one sale, the one between the first and second defendant, followed from the invalid sale between the first and second defendant. No right from the invalid sale could vest in Kandida and thus she had no rights to cede to the first defendant. By contrast, the plaintiffs established that their agreement of sale was preceded by a valid agreement between the second and third defendants. The third defendant resultantly could lawfully, as he did, cede his vested rights in the stand. A double sale and balance of equities agreement would have arisen for my determination had both agreements to the same property been potentially legally valid.

The answer to the question as to who between the plaintiffs and the first defendant should be declared to be the lawful purchaser and owner of the property is answered in favour of the plaintiffs. In relation to the counter-claim, the first defendant's claim fails for the same reason that she cannot claim rights arising from a nothing.

The remaining issue pertains to costs. As has become fashionable with some if not most legal practitioners who institute or defend litigation, costs are invariably claimed as in this matter on the legal practitioner and client scale. The rules of court provide for a standard scale of costs where the court awards them. An award of costs on any other scale translates to a departure from the norm. For these reasons the award of costs other than in terms of the scale provided for in the rules must not only be specifically pleaded but must in addition be justified by the party seeking costs on that other scale. See *John Dhokotera* v *Zimbabwe Revenue Authority* HH 301/21 and cases referred to therein.

The further consideration is that the award of costs is the domain of the court which exercises its judicious discretion in the interests of justice in determining the incidence in my particular matter of costs. The court usually follows the general rule that costs follow the event. The court can however decide not to make a costs award in a matter. *In casu*, the history of the litigation should be considered. The parties engaged in what clearly was a boob committed by the second defendant. Had the second defendant not been wise enough to decide not to contest the matter and leave it to the discretion of the court, I would have been inclined to grant costs against the second defendant because had the second defendant and its agency been astute and stuck to the terms of the sale agreement between the second and fourth defendant by ensuring that the parties to whom they sold the subdivided stand were registered on the fourth defendant's waiting list and verified to be so by the Director of Housing and Community

Service, there would have been no issues arising from the sale agreements of the stand as happened in relation to stand 7871.

The evidence led by the parties and the documents produced shows that both the plaintiffs and the first respondent had an interest in the disputed property. Police was involved at some stage and investigated the complaints. The fourth respondent noted the interests of both the contesting parties and advised them that under the circumstances the court's intervention was required. The parties came to court because they had to. Neither of them can be said to have abused the court process. The court process was a necessity. The first defendant did not defend a matter in which she had no leg to stand on. The first defendant in her wisdom or bad advice did not claim damages in the event of her counter-claim failing. The matter is therefore left at that. Under the circumstances, I consider that an appropriate order in relation to costs is that there be no order of costs made.

Accordingly, the following order ensues. **IT IS ORDERED THAT**:

1. The plaintiffs are declared to be the legitimate purchasers and holders of all rights interest and title in Stand 7871 Belvedere West, Harare.
2. The fourth defendant is ordered to approve the cession of the property to the plaintiffs by the third defendant so that the plaintiffs are reflected in the official records as the legitimate owners of Stand 7871 Belvedere West, Harare.
3. The first defendant's counter-claim is hereby dismissed.
4. In relation to both the claim in convention and the counter-claim, there shall be no order as to costs.

Kantor and Immerman, plaintiffs' legal practitioners
Tamuka Moyo Attorneys, first defendant's legal practitioners