NORMAN TENESI
versus
TINASHE SAINI
and
UNITED METHODIST CHURCH
and
REGISTRAR OF DEEDS NO.
and
DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 1 March 2012 and 8 May 2013

S Simango, for the applicant
Ms G Nyamayi, for the 2nd respondent

OPPOSED MATTER

MAKONI J: On 11 July 2007 the applicant and the first respondent in his capacity as executor of estate late Emure Saini, entered into an agreement of sale whereby the first respondent sold to the applicant right, title and interest in stand number 1899 Ruwa Township (the property). The purchase price was in the sum of six hundred and eighty million dollars ($680 000 000.00) and has paid in full. In terms of the agreement, the applicant was entitled to occupy the property or signing of the agreement but he did not.

On 8 August 2007 the first respondent and the second respondent entered into an agreement of sale of the same property for the sum of one hundred and sixty five million dollars ($165 000 000.00). It was paid in full. On 14 September 2007 the second respondent flighted adverts in the Herald and the Government Gazette seeking replacement of the lost title deed to the property.

The applicant got wind of the agreement between the first respondent and the second respondent, he approached the Ruwa Local Board (the Board) who administer the property and advised them. In turn the Board notified Messrs Honey and Blackenberg, who were the conveyancers of the property, of the problem pertaining to the property. This they did through a letter attached as Annexure C to applicant's papers. The letter was copied to the second and third respondents.

On 25 October 2007 the applicant, through his Legal Aid Society wrote to the third respondent requesting that he places a caveat against the property pending his verification of possible sale of the property.

On 30 October 2007 the property was transferred to the second respondent. The applicant approached this court seeking that the second agreement of sale be declared null and void and that the third respondent cancel the transfer of the property from first respondent to second respondent.

The application is opposed by the second respondent on the basis that there is no agreement of sale between the applicant and the first respondent. The second respondent disputes that there was a double sale. The second respondent avers in the alternative that if the court were to find that there is a double sale, then its title in indefeasible as it had obtained transfer and had no knowledge of the first agreement prior to transfer. It only got to know of the prior sale when it was served with the court application in these proceedings.

With his answering papers, the applicant attached an affidavit by the first respondent in which he admits entering into the two agreements. He avers that he entered into the second agreement as he had dire financial constraints. That is why he sold the property for such a paltry amount. It was his intention to return the money to the second respondent later but he was put under pressure and transfer was effected.

In its Heads of Argument, the second respondent argues, in the main, that there was a double sale. It then further submits that the agreement between the second respondent and the first respondent was not genuine but a mere fabrication in an attempt to defraud the second respondent of its property. This is the opposite of how they presented their case in the opposing affidavit. To avoid confusion I will deal with both aspects, starting with whether there was an agreement between the applicant and the first respondent.

This seems to suggest that there is a dispute of fact. I will adopt a robust approach and find that there was a genuine agreement of sale between the applicant and the first respondent. This factor is supported by the first respondent and the various efforts that applicant did to prevent the transfer of the property to the second respondent. What comes out of the first respondent's affidavit is that he entered into the second agreement with intend to defraud the second respondent. He desperately needed money and he hatched the idea to sell the property to it when he was well aware of the existence of the first agreement.

This leaves me with a double sale of the property. What are the rights of parties involved in cases of double sale of immovable property? The issue is now settled in our law. In *Grunall Brothers (Pvt) Ltd v Lazurus N.O and Anor* 1991 (2) ZLR 125 (SC) at 131(f) it was stated:

> "The two extreme cases are clear enough when the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. Per contra, when the second purchaser knowingly and with intend to defraud the first purchaser takes transfer, his real right can and normally will be overturned subject to considerations of practicality.

See also *Mwayipaida Family Trust* v *Madoroba and Ors* 2004 (1) ZLR 439 (S)

The issue is whether the second respondent had knowledge either at the time of sale or at the time it took transfer, of the prior sale to the applicant. The applicant in support of us contention relies on Annex C and D to his application. Annex C is a letter written to second respondent's legal practitioners who were the conveyancers.

It would be of assistance to quote the letter.

> Honey and Blackenberg
> Legal Practitioners
> 200 Herbert Chitepo Avenue
> P O Box 85
> Harare
>
> Attention: Mr Rosser
>
> Dear Sir/Madam
>
> **RE: STAND 1899 RUWA TOWNSHIP – WITHDRAWAL OF RATES CLEARANCE CERTIFICATE 2320/07**
>
> "Reference is your request for a Rates Clearance Certificate that was subsequently issued to you on the 10th September 2007 for stand 1899 Ruwa Township.
>
> This letter serves to withdraw the rates clearance Certificate No. 2320/07 issued to you on the 10th September 2007 for the reason that the stand is currently under disputes and is being investigated by the Zimbabwe Republic Police – Harare Central. It therefore follows that any further use of the Rates Clearance Certificate No. 2320/07 is forthwith suspended until such a time when the police investigations on the stand are over.
>
> We hope you have been guided accordingly and we are however sorry for any inconvincible caused".

Yours faithfully

V. Mashavira
For the Secretary

cc. Deeds Office – do not action until further notice
The United Methodist Church – for your information.

As is clear from the above, the letter was copied to the third respondent. It is not clear from the papers whether the third respondent received it. There are no papers filed by the third respondent and there is no such averment in the applicant's papers. It was also copied to the second respondent. There is an inscription at the bottom of the letter which indicates that it was received by Messrs Honey & Blackenburg. Second respondent nor his legal practitioners do no deny that they received the letter. Second respondent, in para 6 of the opposing affidavit, avers that the letter does not reveal the existence of the agreement with applicant. It avers that Annex C related to some other case as it makes reference to investigations by police.

If the second respondent did not receive the letter, though it was copied to them, its legal practitioners did. It was incumbent upon them to advise their client and in my view investigate the matter further before the transfer since they were fully cognisant of the consequences of such a transfer. Knowledge on the part of a legal practitioner, through the delivery of the letter, is knowledge on the client due to the principal-agent relationship between them. The second respondent, at the time it took transfer, had knowledge of the first sale or was aware that there was a dispute regarding the property. The letter from the Board made reference to the specific property in issue. It went ahead with the transfer with full knowledge of the prior sale.

The second respondent does not comment about Annex D. I will take it that they do not dispute the fact the third respondent was requested to place a caveat against the property. I will take judicial notice of the fact that at the time of the transfer, the third respondent would place XN caveats against a property once it came to his knowledge that there was a dispute regarding the property. In this instance he did not and as a result the property was transferred to the second respondent.

This brings this case into a category which is in between the categories referred to in Grundall's, *supra* due to the oversight or incompetence of a public official. The approach to

be adopt in such instances was laid down in the Mwayipaida Family Trust supra where it was held that it would not be fair and just to rule that the failure by the Deeds Office to register the caveat had the effect of nullifying the respondents (in this matter) prior claim to the property. The court further stated that the general approach would be to give preference, except in special circumstances to the first contract. She then went on to quote MACDONALD J (as he then was) with approval in *BP Southern Africa (Pvt) Ltd* v *Desden Properties (Pvt) Ltd & Anor* 1964 RLR 7 (a) at 11 H-I when he stated.

> "In my view, the policy of the law to uphold the sanctity of contracts will be best served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view of Prof Mackerron, that save in special circumstances, the first purchaser is to be preferred".

The second respondent submitted factors which this court should consider as special circumstances so as to deny the applicant his primary right of specific performance. The first ground is that the second respondent did not deliberately deceive the applicant. He acted in good faith. I have already dealt with this aspect earlier on in my judgment when I analysed Annex C. Regarding the *bonafides* of the second respondent, the issue was also dealt with in the Grundall's case at p 133 C when the court stated:

> "It is relevant at this stage since the question of *malafide* has been canvassed extensively in argument, to point out that the doctrine of notice, as it is called, required nothing more than notice or knowledge of the prior claim. It is not necessary to prove *malafides* or fraud."

It is therefore not necessary to prove the *bonafides* of the second respondent.

The second ground is that the applicant failed to come forward with his claim when called upon to do so. The applicant explains that he did not see the advert and even if he had seen it, he had no problems in having the deed replaced as his transfer was being stalled by the lost deed. In my view it is a reasonable account if taken together with the steps that the applicant took to forestall the transfer.

The third ground is that transfer has already passed to second respondent who is in occupation. To grant specific performance would cause undue hardship to the second respondent. The applicant was diligent in efforts to protect his rights. He approached the relevant local authority and notified the third respondent of his interest. On the other hand, the second respondent chose not to investigate a possible double sale before it look transfer.

If it had, then the only contract that would have been there is that of the applicant. There are therefore no special circumstances warranting this court to deny the applicant the primary right of the wronged purchaser which is the remedy of specific performance.

In view of the above, I will grant the following order.

1) The agreement of sale between first and second respondent be declared null and void.
2) The Deed of Transfer in favour of the second respondent is hereby cancelled.
3) The second respondent to pay costs.

Prime Legal Aid Society, Applicant's Legal Practitioners
Honey & Blanckenburg, 2nd Respondent's Legal Practitioners