SHEPHERD KATURUZA
versus
CHRISTINE PETA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 7 October 2019 & 13 November 2019

Opposed Application/Counter-Application

F Nyamayaro, for the applicant
Respondent in person

MANGOTA J: I heard this application and counter-application on 7 October 2019. I delivered an *ex tempore* judgment in which I dismissed the application and upheld the counter-application in part with costs.

On the following day, the legal practitioners of the applicant one Shepherd Katuruza ("Katuruza") addressed a letter to the registrar of this court. They requested for reasons for my decision. These are they:

Katuruza states, as a background to his application, that in 2013 the respondent one Christine Peta ["Peta"] and him concluded an agreement of sale in terms of which Peta sold to him a property which is known as No. 152 Port Glen Road, Ryelands, Borrowdale, Harare ["the property"]. He alleges that the sale could not be executed immediately because Peta told him that she wanted to sort out some boundary issues which related to the property. He avers that he took occupation of the property upon the agreement that he would pay monthly instalments of $2000 which would be deducted against the purchase price of $385 000. He asserts that he has been paying the stated instalment to Peta on a month-by-month basis. He states that on 23 April 2019 – and to his shock – he received a letter from Peta's legal practitioners. The letter, according to him, notified him to vacate the property. He says he resisted the eviction because his stay at the property was based on the agreement of sale which he concluded with Peta. He moves that Peta be interdicted from evicting him from the property

and that she be compelled to proceed with the arrangement of sale which the parties agreed upon in 2013. He states that he would lose the opportunity to purchase the property when he awaited the conclusion of the agreement of sale for six years. He insists that Peta should be compelled to conclude the sale of the property to him.

Peta opposes the application. She denies that she sold the property to Katuruza whom she refers to as her tenant who, according to her, signed an agreement of lease with her. She insists that the court cannot make any contract for him and her. She states that Katuruza paid rentals to her for his occupation of her property. Katuruza, according to her, did not prove the requirements of an interdict. She moves me to dismissing the application with punitive costs. She states, in her counter-application, that Katuruza stopped paying rent to her for the property which he is occupying. She says he has not paid rent to her for two months running. She claims arrear rentals of $4000. She insists that he has not been paying rates in terms of the lease agreement which he signed with her. She alleges that he owes total rates in the sum of $3250 which she is claiming from him. She avers that, when Katuruza moved into her property, the property contained her furniture which he is refusing to give to her. She moves that he be evicted from the property and that he be ordered to pay costs on an attorney and client scale.

The relationship of Katuzura and Peta remains elusive. His narrative is that it is a contract of sale of the property. Peta says it is one of lease.

Peta states, and I agree, that there are material disputes of facts in the case Katuruza asserts as much in his opposition to the counter-application. He says, *The matter is riddled with disputes of facts that cannot be resolved on paper.*

Given that both parties are *ad idem* on the observed material disputes of fact, Katuruza proceeded with the application much to his detriment. He should, on reading Peta's notice of opposition to the application, have realized that the same could not be resolved on the papers without hearing further evidence. He should, on the mentioned basis, have withdrawn the application with a view to instituting an action against Peta. His failure to withdraw and proceed by way of action works to his serious displeasure.

It is trite that, where material disputes of facts are disclosed and the same are not capable of resolving the parties' issues without hearing further evidence, the court may dismiss the application rather than to allow the matter to go to evidence *Magurenje* v *Maphosa & Ors* 2005 (2) ZLR 44 (H)]. *In casu,* and for the reasons which I stated in the foregoing paragraph, I remain constrained to refer the application to trial. Katuruza was made aware of the disputes of facts when he received Peta's notice of opposition. He should, therefore, not have wasted

the court's time persisting with a matter which he knew required *viva voce* evidence for its resolution.

Katuruza's statement which is to the effect that he purchased the property in 2013 cannot hold. He produced no evidence which supports the same. Copies of the transfer of money which he says he made to Peta and filed as annexures A – E cannot assist him at all. They cannot assist him notwithstanding the fact that he wrote on each of them the word "*purchases*".

It is not the writing of the word *purchases* on each transfer note which translates the parties' relationship from something else into that of purchase and sale of the property. A contract of sale should be clear and unequivocal. It is not proved in a roundabout way as Katuruza seeks to do *in casu*. Its proof should come out without any further ado.

On a reading of the founding affidavit, I remain satisfied that Katuruza did not ever enter into the contract of sale of the property. Paragraphs 15.4 and 16 of the same state the observed matter in a clear and lucid manner. These appear at page 8 of the record. Paragraph 15.4 reads:

> "15.4 Applicant will also lose the opportunity to purchase the house when he has been patient for about 6 years awaiting the conclusion of the sale agreement" (emphasis added)

Paragraph 16 reads:

> "The applicant has no other remedy known at law other than the interdict and the compelling of the respondent to conclude the sale of the property with the applicant." (emphasis added)

Katuruza made the above-mentioned statements on 30 April, 2019. He was, as at the mentioned date, awaiting the conclusion of the agreement of sale. This, in short, means that he is being economic with the truth when he states, as he does, that he purchased the property from Peta in 2013.

My above-mentioned observation finds support from the email which Katuruza addressed to Peta on 23 January, 2016. The email appears at p 56 of the record. It reads, in part, as follows:

> "1. I propose that the purchase price be US$400 000 with a down payment of US$150 000 and the balance payable within a four-month period. Given the initiatives already put in place I am confident of liquidating the balance way before the expiry period of the proposed four months. By the end of this week I shall confirm when I will effect the down payment.
>
> b. I propose that with immediate effect I pay the City Council rates. As discussed earlier on, I can go to Council and change the details so that the statements come in by (sic) name to avoid any inconvenience to you...

2. ...I am very serious and committed to ensure that the deal will go through very soon. I will be able to pay the balance within a short space of time." (emphasis added)

It follows, from the foregoing, that no contract of sale took place between the parties in 2013. The parties were, as late as 2016, still negotiating to sell the property to each other. The sale did not however, go through.

Katuruza's proposal to pay US$400 000 is markedly different from his statement which is to the effect that the agreed purchase price is US$385 000. That figure was never mentioned anywhere in the parties' correspondence. Nowhere is it stated that Peta agreed to the purchase price of US$400 000 which Katuruza proposed in the email. Nor is there any evidence which shows that Peta agreed to the down payment of US$150 000 which Katuruza proposed. There was/is, in essence, no contract at all between the parties.

Peta states that she did not sell her property to Katuruza. She alleges that she leased the same to him. She attached to her notice of opposition a copy of the lease which she says she signed with him on 3 January, 2014.

Katuruza disputes the allegation that he signed the lease with Peta. He states that the lease remains unknown to him.

The disputed signature places Katuruza's application further into the realms of a material disputes of fact which cannot be resolved on the papers. Its resolution requires the evidence of the questioned document examiner without which the issue of the signature which appears on the lease remains unresolved.

The manner in which Katuruza couched his draft order leaves a lot to be desired. Paragraphs 2 and 2.1 of the same convey the distinct impression that his intention is to move me to make a contract for Peta and him. Paragraph 2 reads:

"2. The respondent is hereby ordered to conclude the sale of No. 152, Portglen Road, Ryelands, Borrowdale, Harare with the applicant within 7 days of the date of this order." (emphasis added)

Paragraph 2.1 reads:

"2.1. should the respondent fail to comply with paragraph 2 above, the Sheriff of Zimbabwe is hereby authorised to sign all necessary documents to cause the sale and transfer of the property to the applicant at the price of US$385 000" (emphasis added)

Katuruza knows as much as I do that it is not the duty of the court to make contracts for parties. The court's obligation is to enforce what the parties agreed upon. Where, as *in casu,* no contract of sale exists between Peta and him, the court cannot make one for them. All the

court can do is to observe, as it is doing, that no contract of sale exists between the parties. It will, accordingly, not enforce a non-existent agreement. A non-existent agreement is a nullity. Nothing flows from it. Nothing, in fact, flows from nothing. [See *Macfoy* v *United Africa Co. Ltd* (1961) 5 ALL ER 1169 (PC) 1172.]

The principle of sanctity of contracts which was aptly enunciated in *Book* v *Davidson* 1988 (1) ZLR 365 (S) reigns supreme in matters of this nature. It states:

> "… If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the counts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract … to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie,* at all events contrary to the interests of any and every country."

Peta clarifies the meaning and import of the above-quoted *dictum.* Its meaning is that the principle of sanctity of contracts confines the court to interpreting a contract as well as to give effect to its terms and conditions. The principle does not allow the court to create a contract for the parties. The court, the principle states, should respect the parties' contract and enforce it as such.

Katuruza does not have any real rights in the property. He had a personnel right which arose from his lease of Peta's property. He lost that right when he ceased to pay rentals to Peta. His application for an interdict cannot, therefore, stand. Possession of a right – real or personal – is a *sine qua non* aspect in an application for an interdict.

The deed of transfer which appears at p 63 of the record shows that Peta owns the property which in the subject-matter of these proceedings. She, therefore, has every right to vindicate it from whoever is holding it against her will (See *Badela Ndhlovu* v *Spiwe Posi* HH 475/15).

Peta's counter-claim is anchored on the common law remedy of *rei vindicatio*. She, as the owner of the property, is entitled to recover the same from Katuruza who is holding onto it without her consent. She has, in fact, been able to show that:

'(a) she is the owner of the property;

(b) when she filed her counter-application, the property was still in existence and Katuruza was in possession of it – and

(c) Katuruza's possession of the property was/is without her consent.'

Katuruza does not, in short, have the right to retain possession of the property. *A fortiori* when he has ceased to pay rent for the same in terms of the parties' agreement of lease.

Peta, in my view, could not prove the issue of the furniture which she allegedly left at the property when Katuruza moved into the same. It was for the mentioned reason that para (e) of her draft order was, with her consent, expunged from the record. She, however, proved matters which related to paras (a), (b) (c) and (d) of her draft order.

In the final analysis, therefore, Katuruza's claim is dismissed in its entirety and Peta's counter-claim is upheld to the extent of the abovementioned paragraphs.

Farai Nyamayaro Law Chambers, applicant's legal practitioners
Zimudzi & Associates, respondent's legal practitioners