

MARIA NYONI
versus
SIMON MUSANHU
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE 15 June and 22 September 2004

Opposed Court Application

Mr *Mafusire*, for the applicant
Ms *J. Wood*, for the 1st respondent
No appearance from 2nd respondent

KAMOCHA J: During the month of July 2003 first respondent decided to sell his house known as number 6 Alnick Way, Marlborough, Harare - "the property". He engaged a Mr Magorimbo of West Winds Realty Estate Agents as his agent who advertised the property in the Herald Newspaper on 24 July, 2003. The advert had a guide price of \$85 million.

On seeing the property in the paper applicant made arrangements with the respondent's agent and went to view it. It turned out that that was the type of property applicant wanted. She therefore made an offer of \$82 million. Magorimbo then got the applicant to make her offer in the prescribed standard offer and acceptance form. She did as requested by the agent and offered \$82 million for the property. Applicant had to pay cash in the sum of 10 million dollars and had to raise a bond for \$72 million. The standard form was supplied by Magorimbo and it read in part:-

"This offer will constitute an agreement upon acceptance by the seller and the parties agree that the terms herein shall form the basis of the formal agreement of sale. Any variation shall be subject to negotiation and the terms contained herein shall be binding on both parties on acceptance of this offer. The purchaser shall pay \$2 000 000-00 being the cost of preparing an agreement of sale."

The applicant signed the offer and acceptance form at Magorimbo's offices and left it there. Respondent was not there at that time but he later signed it on the same day - 24 July 2003.

The next day 25 July 2003 a formal agreement of sale was drawn up by the respondent through his agent. The applicant went to sign the agreement of sale at the respondent's office and Mr Magorimbo was already at respondent's office when she got there. Applicant did not go with Magorimbo to respondent's offices. Both parties and their witnesses signed the agreement on 25 July 2003. The agreement was conditional upon the buyer securing a loan for the full purchase price from her employers, Barclays Bank within 30 days of the date of the agreement of sale i.e. 25 July, 2003.

On that same date the parties and their witnesses signed an addendum to the agreement of sale which read in part:-

"The purchaser is indebted to the seller in the sum of \$10 million dollars which amount she will pay on signing this addendum to the original agreement of sale as follows:-

- | | | |
|----|----------------------|-----------------------|
| a) | Simon Kundai Musanhu | \$5.9 million dollars |
| b) | West Winds Realty | \$4.1 million dollars |
| | Total | \$10 million" |

Magorimbo had told the applicant that she was required to pay the above amount as a deposit. As per Magorimbo's instructions she issued out two bank cheques; one for \$5.9 million in favour of the respondent and the other for \$4.1 million in favour of the estate agents. She handed over the cheques to the respondent and Magorimbo after the addendum was signed.

Four days later Magorimbo as respondent's agent instructed the respondent's legal practitioners to "please proceed with the transfer" of the property from respondent to applicant.

The applicant obtained a loan from her employers for the entire purchase price outstanding on 30 July 2003. Within nine days of the agreement of sale the applicant's employers had provided the letter

of undertaking or guarantee in favour of the respondent for the full purchase price. The said letter of undertaking or guarantee was submitted to the respondent's legal practitioners by the applicant's legal practitioners within 18 days. By 14 August, 2003 the applicant's conveyancers were ready to lodge the bond registration to secure the purchase price made available by her employers. That, however, was never to be since all that progress which had been made within 19 days from the signing of the agreement of sale was scuttled.

Respondent decided to cancel the agreement on two grounds. Firstly he alleged that his agent was not registered with the Estate Agent Council. That, according to the respondent, therefore disqualified him from conducting agency business since he had no certificate allowing him to practise. This ground was not persisted with at the hearing for obvious reasons.

One cannot cancel a properly entered into contract just because one's agent has no practising certificate. What is important is that the agent introduced the seller and the purchaser who thereafter concluded a valid and binding contract. The parties signed three documents to conclude the contract namely the offer and acceptance form, the agreement of sale and the addendum to the agreement of sale. The respondent accepted and received a deposit of \$10 million.

Although this ground was not insisted upon at the hearing respondent had given it as his sole ground for canceling the agreement of sale in his notice of cancellation of 31 July 2003.

The second ground was an allegation that his agent had failed to disclose that a higher offer had been made for his house than that made by the applicant. Respondent alleged that applicant was dishonest and that she colluded with his agent to deceive or defraud him by inducing him to sell his house for less than he could have got from another buyer who had offered \$104 million. He concluded that the applicant and his agent had connived to conceal the alleged higher offer.

These allegations against the applicant by the respondent are of a serious nature. They, however, seem to me, to be bald and wild. The respondent has not produced any evidence to suggest that the applicant knew that there was a higher offer than hers. Neither is there any evidence to indicate that she connived with Magorimbo respondent's agent to conceal the said higher offer in order to lead him to accept her lower offer. There is also no evidence suggesting that she was aware that respondent's agent knew of the higher offer. All the respondent is doing is just speculation. Mere speculation will never be evidence. If at all there was any misrepresentation made by the respondent's agent there is no basis for thinking or believing the applicant was party to it. There is simply no evidence to suggest that applicant colluded with the representor.

Respondent suggested that since the sale, in his view, was arranged with great haste and the only person who would have benefitted from a misrepresentation as to the price that the property would fetch was the applicant, she must have colluded with respondent's agent. This is mere speculation. There is nothing wrong with arranging a sale in the shortest possible time. That in fact is efficiency. Respondent was party to the fast conclusion of the sale by signing the offer and acceptance form on 24 July 2003 and signing the agreement of sale and the addendum to it the next day at his offices.

In the light of the foregoing there does not seem to have been any misrepresentation at all but what seems clear to me is that the basis for the purported cancellation was a desire to sell the property at a higher price. Evidence on documents filed of record reveals that by 8 August 2003 respondent was already advertising the property for \$120 million.

Respondent suggested that there was a dispute of fact which could not be determined on the papers. I do not agree. My view is that this is a proper case where the court should adopt a common

sense and robust approach and conclude the matter on the papers. I find that there was no valid reason for the respondent to repudiate the agreement of sale. It is therefore still valid and enforceable. If the respondent feels prejudiced by his agent's actions his remedy, in my view, is to sue his agent for damages but he cannot resile from a contract that was validly concluded.

The applicant requested for an award of costs on an attorney and client scale. In the light of the respondent's conduct I would accede to the request. The respondent signed the relevant documents relating to the sale of the property and even received the deposit only to purport to cancel the agreement when transfer was about to be effected. He did that because he wanted to sell the property for a higher price of \$120 million.

I however do not accede to the request for an award of costs *de bonis propriis* on an attorney and client scale against the legal practitioner. I do not think this is a proper case to do so.

In conclusion I would issue the following order:

IT IS ORDERED THAT:

1. The first respondent shall transfer to the applicant his rights, title and interest in the property known as Lot 1 f Lot 74 Marlborough Township of Marlborough, measuring 4047 square metres, held under deed of transfer number 479/98 otherwise known as No. 6 Alnick Way, Marlborough, Harare.
2. Within seven 7 days of the date of service of this order, the first respondent shall submit to the conveyancers, Byron Venturas and Partners, the title deed to the property and sign the requisite power of attorney, declaration and any other document required to be signed, and take whatever step may be required to pass transfer of the property to the applicant;

3. In the event that the first respondent refuses and/or fails and/or neglects to comply with this order then the second respondent shall, at the first respondent's cost prepare and submit to the conveyancers, a replacement title deed and the sheriff for Zimbabwe or his lawful deputy shall, at the first respondent's cost, be authorised, empowered and directed to sign all the necessary transfer documents in place of the first respondent and to take all the necessary steps that the first respondent would have been required to take to pass transfer of the property to the applicant.
4. The first respondent shall pay the costs of this application on the attorney and client scale.

Scanlen & Holderness, applicant's legal practitioners.
Byron Venturas & Partners, first respondent's legal practitioners.