KONONO KONONO
versus
BRIAN MAPURISA
and
COSMAS SATIYO

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 01 March and 22 May, 2017

Opposed Matter

Ms M.R Kenende, for the applicant
No appearance, for the 1st respondent
M Mandikumba for the 2nd respondent

MANGOTA J: I heard the present application on 1 March, 2017. At the close of submissions, l delivered an *ex tempore* judgment in which l dismissed the application with costs.

On 2 May 2017, I received correspondence from the Registrar of this court. The correspondence advised me of the appeal which the applicant filed with the Supreme Court under case number SC 155/17. It requested my reasons for the decision which l made when l heard and dismissed the application. These are they:

The applicant, by way of background, applied for a declaratory order. He moved the court to:

i. have the agreement of sale which the first and the second respondents concluded declared invalid – and
ii. declare him the lawful owner of stand number 437 Malvern Township of Waterfalls Villa measuring 2000 square metres in extent [" the property"].

The applicant purchased the property from the first respondent on 18 December, 2012. The purchase price of the property was pegged at $27 000. This was to be paid in three instalments of $19 000 with the balance of $8 000 being paid in two equal instalments.

The applicant attached to his application the agreement of sale which he concluded with the first respondent. He called it annexure A.

There is a patent error in the annexure. It shows that the balance of $8 000 would be paid in two equal instalments on the 6th and the 11th August 2012. The instalments could not be paid on the mentioned dates when the initial deposit of $19 000 was paid on 18 December, 2012 which is the date that the applicant and the first respondent signed the agreement of sale.

Whatever the position of the matter on the aspect which relates to the foregoing paragraph may be, the applicant asserts that he paid full purchase price for the property. He did not say when he paid it. His statement suggests that he paid it in December, 2012.

The respondents opposed the application. They, however, did not file any heads of argument. There was, in essence, no opposition to the application.

In the ordinary course of events, the application should have been granted as it was not opposed. However, in granting or dismissing an application, the court does not act in a robot - like fashion. It is, by and large, guided by principles of law which apply to any given case.

The current application fell wholely and squarely under two branches of law. It fell under the law of contract, on the one hand, and under the law of property, on the other. A consideration of those laws persuaded me to dismiss the application which was not being opposed. The following matters support the position which l took:

The applicant stated that the first respondent sold the property to the second respondent. He averred, further, that the property was transferred into the name of the second respondent.

Evidence which is filed of record shows that the first respondent sold the property to the second respondent on 30 April, 2015. It shows, further, that the property was transferred into the names of the second respondent and the latter's wife on 30 September, 2015. Reference is made in this regard to the deed of transfer number 4263/2015 which appears at page 29 of the record. The second respondent and his wife are, therefore, the lawful owners of the property.

The applicant purchased the property in December, 2012. He, for some unexplained reasons, did not move to assert his right in the property. He did not take transfer of the same from December 2012 to 7 December, 2015 which is the date that he filed this application. He advanced no reason at all for his inaction which ran for close to three

consecutive years. He continued to enjoy personal, as opposed to real, rights in the property. He has personal rights only. His assertion which was to the effect that he be declared the lawful owner of the property was misplaced. He could not be declared as such in the face of the second respondent who, together with his wife, have real rights in the property.

Silberberg and Schoeman discuss the principle which lies at the centre of ownership. The learned authors state at p 273 of their *Law of Property*, 3rd ed. that:

> "The principle that an owner cannot be deprived of his property against his will means that he is entitled to recover it from any person who retains possession of it without his consent." [emphasis added].

MCNALLY JA restated the same principle in *Mashave* v *Standard Bank of South Africa Ltd* 1998(1) ZLR 436 (s) wherein he stated at p 438 C- D as follows:-

> "The Roman-Dutch law protects the right of an owner to vindicate his property and, as a matter of policy favours him as against an innocent purchaser" [emphasis added]

The second respondent and his wife own the property. They cannot, therefore, be deprived of the same against their will. Their right in the property favours them as against the applicant who, to all intents and purposes, is an innocent purchaser.

MAKARAU JP [as she then was] brings out the meaning and import of the principle in *Alspite Investments (Pvt) Ltd* v *Westerhoff* 2009 (2) ZLR 226, at p 237 C – D wherein she stated:

> "There are no equities in the application of the *rei vindicatio*. Thus, in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners *against the world at large* and is used to ruthlessly protect ownership". [emphasis added].

It follows from the foregoing that once it is accepted, as it should, that the second respondent and his wife are the owners of the property, their right in the same cannot, at law, be disturbed. They hold onto the property against the whole world.

The applicant has no valid claim to the property. He has no real rights in the property. He has personal rights only. His remedy lies against the first respondent. He should sue him for breach of contract and recover from him what he paid as purchase price for the property.

I conclude this judgment with some disquiet. The applicant was legally represented when he filed this application. His legal representative entered into a discourse with me during the hearing of the application. The legal practitioner was, in the course of the hearing, made aware of the above basic concepts which relate to the law of contract and the law of property as well as the distinction which exists between the two. The legal practitioner appeared to have been on the same page with the court on why the application could not succeed. Notwithstanding that appreciation, the same law firm saw it appropriate to allow the applicant to appeal against such an obvious matter.

It is a worrying development when legal practitioners who are engaged by a litigant do not take it upon themselves to properly advise their clients of what the law does, or does not, allow. Such conduct by a legal practitioner who took the oath of office borders on dishonesty of some huge magnitude. It should, therefore, be frowned upon. For the reasons l stated in the foregoing paragraphs, l has no option but to dismiss the application. The application is, therefore, dismissed with costs.

Tavenhave & Machingauta, applicant's legal practitioners
Muringani, Mandikumba & Partners, 2nd respondent's legal practitioners