

Bramwell Mhende & Anor v Cookham Inn (Pvt) Ltd & Anor

HH 45-21
HC 1395/11

BRAMWELL MHENDE
and
JOSEPHINE MHENDE
versus
COOKHAM INN (PRIVATE) LIMITED
and
CHIDO TAPERA MAPUNGWANA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 4 June 2015, 21 October 2020 & 5 February 2021

Date of judgment: 5 February 2021

Civil trial

Mr J. Samukange and Mr B. Pabwe, for the plaintiffs
Mr R. Harvey and Ms C. Mahlangu, for the second defendants
No appearance for the first defendant

MAFUSIRE J

[1] The plaintiffs' substantive claim is for an order of ejectment of the second defendant from a certain house in Southerton, a middle density suburb south of Harare. The full description of that property is: a certain piece of land situate in the District of Salisbury, called Stand 8540 Salisbury Township of Salisbury Township Lands, measuring 612 m², otherwise known as 32 Peall Road, Southerton, Harare. Ancillary to this claim is another directing the first defendant to grant the plaintiffs vacant possession of the property. Holding over damages at the rate of \$300 per month from April 2010 to the date the second defendant vacates the house, plus costs of suit at the scale of attorney and client, complete the suit.

[2] None of the parties are related to one another. They are all linked to one another through that property – a standard brick under tile, 3-bedroomed house; with a lounge; a dining room; a kitchen; a security wall, and a 2-roomed outbuilding. In this judgment, it is so much easier to refer to the parties by their actual names. The plaintiffs, Bramwell and Josephine Mhende, are

husband and wife (“*the Mhendes*”). They claim to have bought the property on the open market from the first defendant, Cookham Inn (Private) Limited (“*Cookham Inn*”), a private company the *alter ego* of one Frank Buyanga (“*Buyanga*”).

[3] At all relevant times the property was registered in the name of the second defendant, Chido Tapera Mapungwana (“*Mapungwana*”). The documents show that Cookham Inn took title of the property from Mapungwana in November 2009 following an agreement of sale for \$5 000. In turn, Cookham Inn transferred the property to the Mhendes in March 2010 following another agreement of sale for \$12 000-00. This was the period when the economy was under the multi-currency system, with the United States dollar being the most predominate. So, at the time of the commencement of this action in 2011 the property was, and probably still is, registered in the name of the Mhendes.

[4] Except for the claim for holding over damages and costs of suit, Cookham Inn supports the Mhendes’ claims. But Mapungwana not only contests them vigorously, but also he counter-claims for the nullification of the Mhendes’ title deed; the nullification of the antecedent title deed in favour of Cookham Inn, and the nullification of the respective or associated agreements of sale.

[5] Mapungwana’s grounds of claim in the counter-claim are multiple. But they boil down to this. He never sold his house to Cookham Inn. The purported agreement of sale by himself to Cookham Inn was a sham. The transfer from himself to Cookham Inn was fraudulent. All he ever did was to borrow a paltry \$5 000 from Buyanga which he meant to pay back, albeit on Buyanga’s terms. Buyanga would not lend him money without security. The security insisted on was in the form of an agreement of sale of the house, complete with, among others, transfer documents such as a special power of attorney to pass transfer and the seller’s declaration in terms of the Stamp Duties Act (*Chapter 23:09*), all to be signed up front. He complied because he was desperate for money to start up a business. No banks or other money lenders were giving out loans at the time. Buyanga, through his numerous companies seemed to be, and as it turned out, was the only one lending money.

[5] Mapungwana further claims Buyanga, or one or other of his employees or associates, forged the actual transfer documents that saw him lose his house to Cookham Inn. He scoffs at

the Mhendes for posturing as innocent buyers in the subsequent transfer from Cookham Inn to themselves. Among other things, they never inspected the house, their representatives being content just to inspect the property from outside. Furthermore, the paltry \$12 000-00 declared on the transfer documents as the purchase price, or the \$20 500-00 that they claim to have actually paid, were both so trifling that it shows they were complicit in the whole scam. According to him, the property was at that time worth not less than \$45 000.

[6] Mapungwana also alleges that Buyanga was on an extended scam to deprive unassuming owners of their properties. When he reported him to the police, he was surprised to find that there was a long list of other victims of Buyanga's fraudulent deals who had lost, or were about to lose, their properties. In their plea to Mapungwana's counter-claim, the Mhendes deny any knowledge of the alleged scam. They deny it *in toto* and put Mapungwana to the strict proof thereof.

[7] The Mhendes did not give evidence. Their case was presented through Bramwell's brother, Emmanuel Mhende ("*Emmanuel*"), and one David Chengetai Ngwerume ("*Ngwerume*"), the attorney who drafted the impugned agreement of sale between Cookham Inn and the Mhendes. Shorn of exuberant detail, the plaintiff's evidence was simply that at the relevant time they were in Australia when they saw an advertisement in the press for the sale of the house. They were interested. They got Emmanuel to pursue it. At \$20 500-00 the price was a bargain, given the locality. Emmanuel, together with an estate agent, viewed the house from outside because the occupants would not let them inside. Ngwerume prepared the agreement of sale. It was executed. They paid the purchase price through the lawyers. They got title in May 2010. But they have failed to move into their acquisition because Mapungwana will not give them vacant possession. That is why they now sue for eviction and holding over damages. The rate for these damages is the scale of rentals for similar properties in the locality.

[8] Mapungwana gave evidence. He also called several witnesses: Ellen Runyararo Mawire from the Deeds Office ("*Mawire*"); Tawanda Peter Chitura ("*Chitura*") from the Zimbabwe Revenue Authority (ZIMRA); Susan Mutandawari ("*Mutandawari*"), allegedly one of Buyanga's many victims, and Leonard Tendai Nhari ("*Nhari*"), a forensic scientist. The

intrinsic aspects of Mapungwana's evidence and that of his witnesses germane to his counter-claim are these:

- He wanted money to start a personalised key holder manufacturing business. He gathered from the press that Buyanga or his companies were handing out small loans. When he approached Buyanga, he was not happy with his lending terms. Among other things, Buyanga would not accept his Mercedes Benz motor vehicle as adequate collateral. He wanted his house. Furthermore, his interest rates were astronomical. He decided to leave Buyanga and seek the money elsewhere. Buyanga bet him that he would never get any money from anywhere else. He said Mapungwana would surely come back but that if ever he managed to obtain the loan from elsewhere Buyanga was prepared to wager \$100 which he would gladly give to him. However, if he failed to get an alternative source of money and he came back to him, Buyanga would deduct the \$100 bet from the loan proceeds.
- Mapungwana failed to get any alternative source of money. He came back to Buyanga. Despite his protestations, he was informed the money would only be released upon his surrendering the titled deed to his house and signing the pre-printed security documents such as the agreement for the sale of his house; the special power of attorney to pass transfer; the seller's declaration and some notice to vacate the house. He signed. He was directed to one of Buyanga's lawyers, Farai Zuva, who made him authenticate the same documents by stamping his thumb prints beside his pictures. After that the money was deposited into his account, but minus the \$100 bet.
- Repayment of Buyanga's loan would be over a certain period at the rate of \$750 per month. At the end of that period, Mapungwana would have paid \$10 000. He paid the first instalment. However, he struggled to raise the second one. It was short by \$150. Buyanga would not accept it. But any instalment remaining unpaid on due date would attract interest at the rate of 1% per month. When he had eventually raised the full instalment and wanted to pay it, Mapungwana struggled to get hold of Buyanga. He was sent from pillar to post. At some stage he learnt that the amount due by him in respect of that loan had shot up to about \$18 000. He insisted on a face to face discussion with Buyanga. When eventually he managed to get access to him, Buyanga insulted him and practically chased him out of the office.
- By and by Mapungwana realised that his house had already been transferred to a company called Cookham Inn. He reported the matter to the police. There was a long list of other people duped by Buyanga. Several meetings were held with the police and the Attorney-General's office. Nothing fruitful materialised. He got informal assistance to file a court application to reverse the transfer of his house. The matter was never pursued. He eventually received the Mhendes' summons for eviction.
- Mawire is the Principal Examiner at the Deeds Office. The transfer of the property from Mapungwana to Cookham Inn was on a declared value of \$5 000. The property was described as a vacant stand. The transfer from Cookham Inn was on a declared value

of \$12 000. It is ZIMRA, not the Deeds Office, that is concerned with issues pertaining to the correct value of the property and the correct amount of stamp duty and capital gains tax.

- Chitura is the acting supervisor for ZIMRA's small client taxpayers service section. The capital gains tax clearance certificates used in both transfers from Mapungwana to Cookham Inn, in the first instance, and subsequently from Cookham Inn to the Mhendes, were counterfeit. They do not exist in the ZMRA data base. The reference numbers are fake. No stamp duty or capital gains tax was ever paid for any of them. Some of the references refer to some companies that have nothing to do with the transfers.
- Mutandawari's situation was on all fours with Mapungwana's, except that instead of Cookham Inn, it was another of Buyanga's companies. Her house is in Marlborough, a posher suburb than Southerton. It was transferred for the same paltry \$5 000. Its market value is around \$95 000. She has contested the steps taken to evict her.
- Nhari has over 40 years' experience as a forensic scientist. He examined certain documents given to him that were purportedly signed by Mapungwana, namely a special power of attorney to pass transfer and a seller's declaration for the purposes of stamp duty. His conclusion was that it was not Mapungwana that had signed them. The signatures were forgeries.

[9] Cross-examination of the witnesses, particularly the defence witnesses, has led to nowhere. Their evidence has largely remained intact. Mapungwana has proved his case. Demonstrably he was foolish. He admits as much. He prefers the term 'foolish wisdom' in describing his dealings with Buyanga. This clearly is a case that a court of law cannot relate to. Buyanga's loan dealings were illegal. He was not a registered money lender. But that is a small part of the problem. The larger parts are manifold. Mapungwana did not sell his house to Buyanga's company. Mapungwana may have gone into it with his eyes wide open. He made himself desperate for money. He ignored all the flashing red lights. Evidently the prospects of making supper profits from his business concept dulled his common sense. Undoubtedly, that was part of the 'foolish wisdom'. But the fact remains that he did not sell his house. Buyanga assured him that he would not lose his house. However, no sooner was that assurance given than the house was transferred.

[10] The documents in respect of the transfer from Mapungwana to Cookham Inn were forged. The transfer giving rise to deed of transfer no 4602/2009 was illegal. Further, no stamp duty or capital gains tax were paid as required by law. With this finding I need not concern

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myself with the subsequent transfer from Cookham Inn to the Mhendes or their *bona fides* in the entire transaction. They took precarious title. The transfer to them hung on nothing. If the first transfer was a nullity, as surely it is, so also is the second one to themselves which hinged on the first.

[11] In the circumstances, the plaintiffs cannot succeed. Judgment is entered for the second defendant. However, the second defendant is not entitled to any costs. He was largely responsible for the charade. The following order is hereby made:

- i/ The plaintiffs' claims are hereby dismissed in their entirety and judgment is hereby entered for the second defendant.
- ii/ Deed of Transfer No 4602/2009 dated 2 November 2008 in favour of Cookham Inn (Private) Limited, over a certain piece of land situate in the District of Salisbury, called Stand 8540 Salisbury Township of Salisbury Township Lands, measuring 612 m² is hereby set aside;
- iii/ Deed of Transfer No 966/2010 dated 25 January 2010 in favour of Bramwell Mhende and Josephine Mhende over the property aforesaid is hereby set aside.
- iv/ There shall be no order as to costs.

5 February 2021



Venturas & Samukange, legal practitioners for the plaintiffs
Ruzvidzo & Mahlangu Attorneys, legal practitioners for the second defendants