

ELLIOT NCUBE

versus

CARLTON TSHABANGU

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 16 NOVEMBER 2001 & 14 FEBRUARY 2002

R. Moyo-Majwabu for the applicant  
T.A.Cherry for the respondent

Opposed Application

KAMOCHA J: This is a summary judgment application which I granted after hearing both counsel in argument. My reasons for doing so are these. The respondent offered to sell the remaining extent of sub-division A of Wilfred's Hope Farm which he held under title deed 2499/92 and as depicted in diagram number 8300. He described the property to the buyer who accepted it on those terms.

He further described the property in the same terms in his mandate to the estate agent. The estate agent described it in similar terms in a letter to the Ministry of Lands, Agriculture and Water Development on 11 November 1997. A copy of the letter was given to him. The letter read in part:-

"Dear Sir

Re: The Remaining Extent of Sub-division A of Wilfred's Hope: Carlton Pilani Tshabangu

We have been consulted by Mr Tshabangu who owns the abovementioned property under Deed of Transfer number 24999/92 dated 29 October 1992 of which we enclose a photocopy.

Our client is anxious to sell the above mentioned property and has in fact found a buyer for same. In view of the provisions of the Land Acquisition Act, our client has to first offer the property for sale to the Minister.  
Thus, on

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behalf of our client we hereby offer the property for sale to the Minister at a purchase price of \$400 000,00.

The property is located 9 kilometres from Bulawayo along the main Bulawayo/Plumtree Road. The property is run basically as a beef cattle ranch.

If the Minister does not wish to purchase the property let us have the necessary certificate of "No Present Interest" as soon as possible."

The respondent accepted the description of what he was selling. There is no talk of selling a portion of the property in the above letter.

The Deed of Sale also clearly described the property, giving the acreage and Deed of Transfer under which the property is held. The only omission from the Agreement of Sale is the phrase "of subdivision A". The respondent signed the Agreement of Sale on 31 October 1997 and received the full purchase price in terms of the agreement.

The Deed of Transfer correctly describes the property concerned. The respondent's defence in a nutshell was that it was never his intention to sell the whole property. His intention, so he alleged, was to sell a portion of the said property. He alleged he was only selling the eastern portion of the property which did not include any improvements. He claimed that that was what the parties had agreed upon.

The respondent's allegations are clearly spurious since they are belied by documents filed of record. For instance on 8 April 2000 the respondent wrote to Coghlan & Welsh instructing them to release the Title Deeds of the said property. he went on to inform the lawyers that the applicant had acquired ownership of the property by paying the last payment. He never talked of a portion of the property.

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The respondent also alleged that he thought the estate agent was going to sub-divide the property. He is again being untruthful because the mandate that he gave to the estate agent does not give such instructions. All it says is this:

"Dear Sirs

I hereby instruct you to sell the above property and I agree to pay scale commission on the following recommended scale set by the Real Estate Institute of Zimbabwe which is higher than the statutory minimum scale fees, but is permitted by the Estate Agents Council in terms of Statutory Instrument 200/1987...."

The respondent never suggested to the estate agent to apply for subdivision and thereafter sell the undeveloped portion. It would therefore be unlawful to sell the

so-called undeveloped portion of the property before an application for subdivision is

made and approved. The legal practitioners and estate agent would not have allowed

him to enter into an agreement to sell what was still to be created out of a subdivision

not yet applied for and approved.

The agreement of sale signed on 31 October 1997 constitutes the entire contract between the parties and that no other terms, conditions, or representations

whatsoever had been made by either of the parties or their agents. This is what clause

12 of the agreement of sale says. In clause 7 the respondent disclaims any liability by

him for any error in the description or deficiency in area. Clause 8 thereof clearly

deals with the whole property and its improvements.

In the light of the foregoing it was quite clear to me that the respondent's

defence was not only spurious but was also dishonest. This was a proper case in which summary judgment had to be granted and the order infra was accordingly issued.

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It is ordered that:-

(1) An order evicting defendant and all persons and livestock taking under him from the whole of Remaining Extent of Subdivision A of Wilfred's Hope Farm situate in the Bulilimamangwe District, be and is hereby granted.

(2) Respondent pays the costs of suit.

Messrs James, Moyo-Majwabu & Nyoni plaintiff's/applicant's legal practitioners  
Messrs Hwalima & Associates defendant's/respondent's legal practitioners