EDMORE NYAKUDZI

versus

FOSTER TAMBULA

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE, 10 and 11 September 2012

**Civil Trial**

*P Matsanura,* for the plaintiff

Defendant in person

 KUDYA J: The plaintiff issued summons out of this court on 9 December 2011 seeking the eviction of the defendant and all who claim occupation through him from Stand 271B St Mary’s Zengeza Chitungwiza, payment of rentals of US$100 per month from 1 October to 30 November 2011 and holding over damages from December 2011 to the date of eviction, interest at the prescribed rate and costs on the scale of legal practitioner and client. The defendant contested the matter.

The plaintiff’s cause of action is based on the cessionary rights he acquired in the property from the defendant that were registered in his name by the municipality of Chitungwiza effective from 1 October 2011. The defendant raised the defence of undue influence in selling and ceding his rights in the property. In regards to selling he averred that he was tricked by the plaintiff into reducing the sale from US$11 000 to US$6 000 and secondly in regards to transfer by the promise to increase the purchase price to US$10 000 after transfer of cession.

The plaintiff and his wife testified. In addition he called the evidence of his friend Shamiso Godfrey Nyazika and produced six documentary exhibits. The defendant and his wifealso testified. He called the further evidence of Jameson Tadiwa, a legal practitioner of this Court who drew the sale agreement and witnessed the payments of US$6 000 and the alleged promise to pay the extra US$4 000. He further produced exh 7 and 8 through Tadiwa.

It was common cause that the parties came into contact through the efforts of Tadiwa. He took the plaintiff to the property who viewed it in the presence of the defendant’s wife who was at home. On 25 February 2011 the defendant sold his rights in the property to the plaintiff in terms of an agreement of sale, exh 1, drawn up by Tadiwa. The plaintiff paid and the defendant received a deposit of US$3 000. The balance of the purchase price of US$3 000 was paid in three equal instalments of US$1 000 at the beginning of March, April and May respectively. In terms of the agreement vacant possession was due three months after the payment of the last instalment. Thereafter the plaintiff became entitled to all rents and other benefits accruing in the property and liable for all rates, taxes and other imposts. Tadiwa and Associates were mandated to attend to the transfer of the rights within a reasonable time after the signing of the agreement. In terms of clause 14, the written agreement was the sole memorial of the contract between the parties. Any other terms, conditions, stipulations, warranties and representations were not binding between them unless reduced to writing.

The plaintiff stated that three months after paying the last instalment, he sought to take occupation. He, however, acceded to the defendant’s request to stay on for a further month until the end of September 2011. When the extended period expired, the defendant, at the instigation of his wife, refused to vacate the premises. The plaintiff secured the aid of Tadiwa to prevail upon the defendant and his wife to pass cession at Chitungwiza Municipal offices on 5 October 2011. The cession, exh 3 shows that the defendant assigned his lease to the plaintiff for US$6 000. The local authority consented to the assignment. Thereafter on 7 November 2011 the plaintiff paid off the outstanding municipal charges incurred by the defendant up to 2 October in the sum of US$588-00. The municipal account was changed from the defendant’s name to the plaintiff’s. The plaintiff produced exh 5, a bill from the local authority dated 30 June 2012 indicating a debt of US$261-14 for municipal charges and rates that remains unpaid.

Under cross examination he denied that he persuaded the defendant to reduce the price from US$11 000 to US$6 000. He denied that he promised to pay an additional US$4 000 to secure the consent of the defendant’s wife to sign the cession forms at the municipal offices. He was adamant that the defendant was reluctant to give him vacant possession as agreed; hence the present suit.

The plaintiff’s version on the viewing of the property, sale of the rights and payments was confirmed by Shamiso Nyazika and Tadiwa. His wife also confirmed his story that he never agreed to pay an additional US$4 000 to secure cession of the property from the defendant’s wife.

I found the evidence of the plaintiff and his witnesses simple, straightforward and credible. It was however not confirmed by Tadiwa in one material respect. It was also supported by the probabilities and the written contract of sale. I believed their version.

The defendant stated that the plaintiff took advantage of his undisclosed dire need for funds to unilaterally reduce the purchase price from US$11 000 to US$6 000. He stated that at the time of sale his wife was away at the rural home for 4 months. When she came, she refused to ratify the sale and withheld her consent to cede his rights to the plaintiff. At a meeting held in Tadiwa’s chambers, in the presence of their wives, the plaintiff agreed to pay an additional US$4 000. The addendum to the agreement could not be signed on the day it was reached because it was after 4pm. Tadiwa promised to have it ready the following day. On the following day, the plaintiff refused to pay the money before cession had been passed and promised to do so immediately after cession. The defendant and his wife signed the cession but received no payment. Tadiwa failed to help them recover the additional amount. His general version was confirmed by his wife.

His wife differed with him on the details. She could not recall when she went to the rural home. She said it was for three months though she would come to Chitungwiza over the weekends to see her children. She misled the court that the property was registered in both their names. The last municipal bill, contrary to her version that the water charges were in both there names and the certificate of occupation exh 8 were in the defendant’s name only. Again the cession was in the defendant’s name only. She was not a part holder of rights in the property. She pretended, contrary to the plaintiff’s credible version, as supported by Tadiwa that she was not involved in the viewing of the house. It was clear from her testimony that she had marital problems with her husband and that she did not benefit from the proceeds of the sale. Instead of resolving her issues with her husband, she decided to extort the plaintiff for more money by refusing to vacate the premises.

Tadiwa confirmed the defendant’s version that the plaintiff and his wife agreed in his chambers to pay an additional US$4 000 to the purchase price after the defendant’s wife threatened to withhold her consent to cession and cancel the agreement of sale. The defendant’s wife only agreed to sign the cession papers after the plaintiff agreed to pay the additional amount. The plaintiff agreed to do so only after cession had passed. Thereafter the parties went to the municipal office were cession passed. The plaintiff declined to pay the additional amount and the defendant refused to vacate the premises. Tadiwa disagreed with the defendant and his wife that the plaintiff had US$4 000 on his person on the day cession was passed. Rather, he stated that the plaintiff agreed to make part payment on that day and the balance in instalments. Tadiwa produced exh 7, the unsigned addendum to the agreement that he prepared. He was uncertain of the date he prepared it.

The defendant did not explain how the plaintiff tricked him into reducing the purchase price. The defendant, his wife and Tadiwadid not disclose in the cession before the municipal officials the new purchase price of US$10 000. The defendant, his wife and Tadiwa failed to explain why the addendum was not coached in the terms allegedly agreed by the plaintiff. If he agreed to pay the US$4 000 on transfer of cession and had the money on him, the agreement should have recorded this fact, been signed by the parties before cession and the money held in trust by Tadiwa. If he agreed as alleged by Tadiwa to make part payment on cession and the balance in instalments, the reason why this was not captured in the addendum was not disclosed. Had the defendant done so, he would have complied with clause 14 of the agreement of sale. In my view the failure by the defendant to abide by clause 14 is a probability which militates against the truthfulness of his version that the plaintiff verbally varied the purchase price.

But even if I found that the plaintiff and his wife were untruthful in regards to the verbal agreement varying the purchase price, the lie would not undermine their claim for two reasons. The first was that the plaintiff was induced by duress to conclude that verbal agreement. The defendant, his wife and Tadiwa clearly stated that the wife threatened the plaintiff to withhold her consent to cession. Duress vitiates the verbal agreement. The subsequent actions attributed to the plaintiff clearly demonstrated that he never intended to be bound by the verbal agreement. The suggestion that the verbal agreement was a compromise would fail for the reason that the defendant failed to establish that the plaintiff knowingly and deliberately abandoned the legal rights conferred on him by the agreement of 25 February 2011. See *Local Authorities Pension Fund* v *Chegutu Municipality* HH 115/06 at p2-3 and *Georgias& Anor* v *Standard Chartered Bank Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 496F. The second reason was that the verbal agreement was invalidated by clause 14 of the agreement of 25 February.

The law does not support the defendant’s version that he required the consent of his wife to pass cession. He was the sole lease holder. His wife was not a joint lease holder. He did not require the consent of his wife to confer validity to the agreement of sale. See *Tewe* v *Hanoki & Ors* HH 72/02. I am satisfied that the plaintiff was a bona fide purchaser who did not cheat the defendant or his wife of their rights in any way. The owner of the property consented to the cession after satisfying itself that both defendant as the sole holder of cession and his wife agreed to the transfer of cession. The defendant held the misconceived belief that his wife had the power to cancel the agreement of sale and thus sought to hide behind her skirts to extort more money from the plaintiff. The plaintiff is the holder of rights in the property and is entitled to the relief sought.

The defendant has been cruel to him. He took his money but remains in the property to date. The plaintiff is unnecessarily incurring rental expenses of US$200-00 instead of residing rent free at his property. The defendant is not paying municipal and other utility charges at the property. He has put the plaintiff out of pocket in engaging a legal practitioner to conduct these proceedings. This is a proper case to mulct the defendant with costs on the higher scale.

Accordingly, it is ordered that:

1. The defendant and all those occupying through him be and is hereby ejected forthwith from Stand 271B St Mary’s Zengeza Chitungwiza.
2. The defendant shall pay to the plaintiff holding over damages in the sum of US$100 per month from 1 October 2011 to the date of his eviction together with interest thereon at the rate of 5% per annum from 9 December 2011 to the date of payment in full.
3. The defendant shall pay the plaintiff’s costs of suit on the scale of legal practitioner and client.

*Matsanura and Associates,* the plaintiff’s legal practitioners