GEORGE ANDRIES JOHANNES WHITE v RONALD WESTERMAN AND OTHERS (1983) Z.R. 135 (H.C.)

HIGH COURT
MAINGA , J.
14TH OCTOBER, 1982
(1979/HP/729)

Flynote
Land law - Deeds and documents - Assignment - Improper execution of - Nullity of document.
Conveyancing - Assignment - Defective title - Validity of title assigned.
Land law- Deeds and documents- Mortgage - Defective title - Effect of mortgaging property.
Land law - Deeds and documents - Provisional certificate of title - Import of.

Headnote
The plaintiff brought an action for recovery of his property, and for mesne profits, on the grounds that the first defendant, prospective, purchaser had failed to pay the full purchase price and rent agreed, He contended that the first defendant had in fact further surveyed and sub- divided the property, eventually attempting to pass title to the second defendant, who in his term, obtained mortgage on the property from the third defendants.

Held:
(i) The deed of assignment was signed only by the purported purchaser and was therefore improperly executed, null and void ab initio and should never have been registered.
(ii) The first defendant therefore, derived no title to the land from the provisional certificate and could not assign any title to the land to the second defendant.
(iii) The second defendant could not mortgage the property to the third defendants since he had no proper title to the land; the title having remained at all times in the hands of the plaintiff.
(iv) A Provisional certificate of title is subject to a claim of a better title which, if proved may serve to cancel or amend the provisional certificate.

Legislation referred to:

Lands and Deeds Registry Act, Cap. 287, s. 32.

For the plaintiff: F. M. Jere, Fred Jere and Co.
For the defendant: B. Ngenda, Ben Ngenda Advocate.

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Judgment
MAINGA, J.: After evaluating all the evidence, his Lordship continued: The following are the

undisputed facts this case:

(a) That the Plaintiff, George Andries Johannes White, is and was at all the material time the registered owner of Sub - Division 1 of Sub-division A farm No. 691 Ferngrove, Lusaka in the Lusaka Province of the Republic of Zambia; he had erected a house on Plot 8 which he later gave to his son, Norman.

(b) That the 1st Defendant, Ronald Westerman, became interested in purchasing the house and first approached the Plaintiff's son who later introduced him to the Plaintiff.

(c) That consequently, the 1st Defendant was allowed to occupy the house sometime in November, 1976, on the understanding that he would buy the property at K7,000.00.

(d) That in pursuance of that agreement, the 1st Defendant paid a deposit of K2,500.00 on the understanding that he would pay another K2,500.00 two weeks later after he had sold his car.

(e) That the 1st Defendant did not pay the second instalment as agreed because he had proceeded on a long leave outside the country and had defaulted but had agreed on return to remain in occupation.

(f) That the parties had agreed, as an interim measure, that the 1st Defendant would pay rent at the rate of K100.00 per month pending the completion of sale.

(g) That as time went on several meetings took place between the parties and their advocates who at the beginning were Mr Walisko for the Plaintiff and Mr Annfield for the 1st Defendant.

(h) That a lot of correspondence changed hands over the sale of the property.

(i) That a dispute arose between the parties after the 1st Defendant had defaulted in the payment of rent and also after the parties had failed to agree on the terms of the formal contract of sale.

(j) That the Plaintiff commenced the present action on or about the 17th day of May, 1979, but whilst the pleadings were going on between the Advocates, the 1st Defendant put up some developments on the property; surveyed and sub-divided the property; and obtained a Provisional Certificate of Title from the Registrar of Lands and Deeds without the consent and the knowledge of the Plaintiff.

(k) That the 1st Defendant assigned the property to the 2nd Defendant on 7th August, 1980 and that as result of the Assignment the 2nd Defendant obtained Provisional Certificate of Title and obtained a mortgage advance of K24,000.00 from his employers the 3rd Defendants, the Zambia State Insurance Corporation.

(1) That the 2nd Defendants moved on to the property on 12th August, 1980 and had since then made certain developments and renovations to the property amounting to K4,000.00.

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It is also in dispute that the 1st defendant had obtained a Deed of Assignment and exchange, Exhibit P1 which was registered with the Registrar of Lands and Deeds Registry on 2nd June, 1980. The Deed is purported to have been executed on 20th May, 1980, naming the Plaintiff as the Vendor; the 1st Defendant as the Purchaser and Harold Edwin Bosworth as the Transferor. The Deed bears only the signature of the let Defendant.

The issue that I have to resolve first is the validity of that Deed of Assignment and Exchange. In resolving the issue I have been greatly assisted by the testimony of Mr Khan who was Acting Registrar of Lands and Deeds. According to Mr Khan, the Remaining Extent of Sub - Division A of Farm 691 was in the name of Harold Edwin Bosworth and that it was registered on 3rd November, 1964, while the Deed of Assignment and Exchange dated 20th May, 1980, was for various Sub - Divisions the parties to which were Andries White; Ronald Westerman and Harold Edwin Bosworth, the result of those Sub - Divisions being that the 1st Defendant became the owner of Sub - Division A of Sub - Division 1 of Sub - Division A of Farm 691. However, Mr Khan had explained that since the Deed of Assignment and Exchange was not executed by Mr White (the Plaintiff) and by Mr Bosworth it was not, properly executed and that is should not have been registered the first place. On the question of the validity of the Deed of Assignment and Exchange I am satisfied that it was not properly executed and that it ought not to have been registered. I find therefore that the Deed of Assignment and Exchange is null and void ab initio. It is also quite clear to me that the 1st Defendant was given a Provisional Certificate of Title on the strength of the Deed of Assignment and Exchange. As the Deed ought not to have been registered for want of proper execution, the 1st Defendant could not have derived any Title to the land which he subsequently purportedly sold to the 2nd Defendant. Since the 1st Defendant did not have Title to the land he could not assign it to the 2nd Defendant. It follows therefore that the Assignment between the 1st Defendant and the 2nd Defendant was null and void.

The other issue for me to resolve is the position of the 2nd Defendant and that of his employers, the 3rd Defendants the Zambia State Insurance Corporation. It is not disputed that the 2nd Defendant purchased the land belonging to the Plaintiff from the 1st Defendant on the strength of a Provisional Certificate of Title. The 3rd Defendants had engaged Mr Chiti as its Advocate within its legal Department to process the Assignment between the 1st Defendant and the 2nd Defendant and later to process a Mortgage Deed between the 2nd Defendant and the 3rd Defendant. I have no doubt in my mind that Mr Chiti had processed both the Assignment and the Mortgage Deed without deducing title. It is possible that since the 3rd Defendant's Legal Department was newly established at the time, Mr Chiti was not familiar with the problems of Conveyancing and had proceeded to prepare the Deeds without having first satisfied himself that the Land was free from any encumbrances. Since the 1st Defendant had no title to he land, he could not here assigned it the 2nd Defendant

and as there could have been no Assignment between the 1st Defendant and the 2nd Defendant it follows that the 2nd Defendant did not have a proper title to the land, this means that he too could not mortgage the property to the 3rd Defendant since he had no title to it. The unfortunate result therefore is that the property is and was at all the material time that of the Plaintiff, this is because both the 1st Defendant's and the find Defendant's Provisional Certificates of Title had been obtained irregularly.

The effect of the issue of a Provisional Certificate of Title is dealt with under Section 32 of the Lands and Deeds Registry Act, Cap. 287 of the Laws of Zambia.

"32 The issue of a Provisional Certificate shall confer upon the Registered Proprietor of the

land comprised in such certificate all the rights, benefits and privileges under Parts III to VI of a Registered Proprietor holding a Certificate of Title except that the court may at any time upon good cause shown at the suit of any person who claims that he has a better title, cancel or amend a provisional certificate and in that event may order the rectification of the Register accordingly."

After considering the evidence before me and after studying the documents upon which the parties have relied, I am satisfied that the Plaintiff Mr George Andries Johnanes White has a better Title to Sub- Division 1 of Sub - Division A of Farm 691, Ferngrove, Lusaka over and above that of the 1st Defendant; the 2nd Defendant and that of the 3rd Defendants. I accordingly order the cancellation of the following:

(a) The Provisional Certificate of Title No. 17623, which was issued to the 2nd defendant Stanley Sumbi Sichivula on 7th August, 1980.
(b) The Provisional Certificate of Title No. 17603, which was issued to the 1st Defendant Ronald Westerman on 2nd June, 1980.
(c) The Provisional Certificate of Title No. 17601, which was issued to the 1st Defendant Ronald Westerman on 2nd June, 1980.
(d) The Provisional Certificate of Title No. 17604, which was issued to Harold Edwin Bosworth on 2nd June, 1980.
(e) The Provisional Certificate of Title No. 17502, which was issued to the Plaintiff George Andries Johannes White on 2nd June, 1980.
(f) The Provisional Certificate of Title, No. 17600, issued to Harold Edwin Bosworth on 6th June, 1980.

The effects of the above cancellations are:

(a) To re-validate the Provisional Certificate of Title No. 11313, which was issued to the Plaintiff Mr George Andries Johannes White on 26th March, 1963; to invalidate and nullify the Deed of Assignment and Exchange made on 20th May 1980, and registered on 2nd June, 1980;

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(b) To nullify the survey and subsequent sub-divisions of the Plaintiff's property as sanctioned by the Lands Disposition Committee on 28th February, 1978;
(c) To nullify the Assignment between the 1st Defendant and the Plaintiff's land on 7th August, 1980.

Finally, as the 2nd Defendant had no Title to the Plaintiff's property, he could not mortgage the same to the 3rd Defendant the Zambia State Insurance Corporation. It therefore follows that the Mortgage Deed executed on 22nd August, 1980, between the 2nd Defendant Stanley Sumbi Sichivula and the 3rd Defendant the Zambia State Insurance Corporation and registered on 25th August, 1980, with the Lands and Deeds is for all intents and purposes null and void ab initio. The Registrar of Lands and Deeds is ordered to rectify the Register accordingly.

I would like, in passing, to state that Mr Chiti, the Legal Counsel in the 3rd Defendant's Legal

Department displayed a great degree of negligence and incompetence in the manner he dealt with this conveyancing. The blame also falls squarely on Mr Chamutangi for having registered Deeds which were not properly executed. In my view both Mr Chamutangi and Mr Chiti lacked professional skill in the way they handled this property. The 3rd Defendants have themselves to blame for employing an inexperienced man to run its Legal Department. If things were not checked in time Zambia State Insurance Corporation stands to be drained of a lot of funds through the wrong Legal Advise given to it by its Legal Department.

Turning to the 2nd Defendant, Mr Ngenda had submitted that the 2nd Defendant was a bona fide purchaser for value. *It is not in dispute that the 2nd Defendant was a bona fide purchaser for value* and I have no doubt in my mind that had he known that the 1st Defendant had no Title to the property he would not have gone ahead to purchase the Plaintiff's property, this does not mean that he is entitled to the ownership of the property. The property belongs to the Plaintiff. I am however satisfied on the evidence before me that the 2nd Defendant has carried out some improvements on to the Plaintiff's property. It would be inequitable if he was not compensated for such improvements. According to the Valuation Report prepared by S.P. Mulenga Associates the *house is now worth about* K28,000.00. The 2nd Defendant stated that he has spent K4,000.00 on effecting some renovations and improvements to the Plaintiff's property. That figure has net been disputed and accordingly I find that the 2nd Defendant spent K4,000.00 on repairs and improvements to the Plaintiff's property. I accordingly older that the Plaintiff should refund the sum of K4,000.00 to the 2nd Defendant for the improvements and repairs he has carried out to his property.

On the question of what happens to the 2nd Defendant as a result of his illegal occupation of the Plaintiff's property I have decided to grant him 6 months grace period to remain in occupation of the house a while he is making arrangements to find alternative accommodation elsewhere. The

period of six months is with effect from today the 20th day of October, 1982, and he must vacate the property on or before the 20th day of April, 1983.

The Plaintiff has asked for mesne profits. I am satisfied that he is entitled to recover rent from the 1st Defendant at the rate of K100.00 per month from 1 March, 1977, to 20th April, 1983, when the 2nd Defendant will have vacated the property. The rent arrears will attract an interest at the rate of 6 per centum per annum.

The Defendants are ordered to pay the costs of and incidental to these proceedings.

Order accordingly
