

MARY GWANDE  
versus  
SHUPIKAI MUKOMBEZA  
and  
ZVIMBA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE  
BERE J  
HARARE, 17, 18 and 19 October 2011

### **Civil Trial**

*P Muchemwa*, for the plaintiff  
*C. Chengeta*, for the 1<sup>st</sup> defendant

BERE J: In this matter the plaintiff seeks an order compelling the defendant to change ownership of House Number 987 Kuwadzana, Banket (the stand) from her name into that of the plaintiff failing which the Director of Housing, Chinhoyi be directed to effect such a transfer.

The basis of the plaintiff claim is an alleged verbal sale agreement of the stand about 12 years ago.

It was the plaintiff's contention that she bought the stand for one bag of cement, 25 kg of maize seed and 10 x 50 kgs bags of maize after which she proceeded to erect a 3 roomed cottage thereat

In her plea the defendant denied ever entering into any sale agreement in the manner alleged by the defendant or at all.

The first defendant's version was that sometime in 1997 she offered the plaintiff temporary shelter at the stand in question which was just a virgin stand, after she and her late husband had purchased it from Chinhoyi Council.

The first defendant further admitted to have received from the plaintiff a bag of cement and a 25kg bag of maize not as payment for the stand as alleged by the plaintiff, but as token of appreciation by the later who was staying on the stand free of charge.

The joint pre-trial conference upon which the matter was referred for trial identified a single issue for determination at trial, viz whether or not the parties entered into an agreement of sale of the stand.

This is one rare case where the case centred on the evidence of the plaintiff and the first defendant. There were no any other witnesses available in this matter. It was more of a “boxing approach” when one had to consider where the truth lay.

The plaintiff gave evidence to the effect that sometime during the year she could not remember the first defendant suggested to her that it was her intention to dispose of her stand to her but that council would not accept such a transaction unless some structure had been put on the property.

She said pursuant to this she then started putting up a permanent structure using zinc sheets and bricks. The result of her effort was a three roomed cottage.

She went on to suggest that before she had even constructed the cottage itself she gave the first defendant a bag of cement and a 25kg bag of maize seed towards the purchase of the stand leaving a balance of 10 x 50 bags of maize which the first defendant undertook to collect at some future date. It was her evidence that the first defendant never collected the maize in question and that the first defendant subsequently reneged on the sale agreement hence this action to enforce the agreement.

The version of the first defendant was completely different from the story told by the plaintiff.

She told the court she was introduced to the plaintiff by a colleague who advised her the plaintiff was desperately looking for a place to stay. The first defendant stated that she decided to offer the plaintiff free accommodation on the stand on condition the plaintiff would pay rates to Council.

It was the plaintiff’s uncontroverted evidence that she negotiated with some neighbours to enable the plaintiff’s children to get water and the arrangement went on well for quite sometime until the relationship between the plaintiff’s children and the neighbours soured to the extend that it became necessary for the plaintiff to have water connected at the stand.

It was the first defendant’s evidence that in order to have water connected council required one to have had a plan for the main structure on the stand. It was her further evidence that because it was the plaintiff who desperately wanted water connected, she asked her (the plaintiff) to pay for that plan and the plaintiff naturally obliged.

The alleged sale as explained by the plaintiff was not without some difficulty in following. If followed to its logical conclusion her story was that the agreement in question was subject to a condition precedent.

If this was the import of her evidence, one is left to wonder why the plaintiff rushed to effect the delivery of a bag of cement and maize seed when the construction of a permanent structure on the stand had not been completed yet this was a requirement which had to be fulfilled first before the sale was concluded.

Even as I write this judgment there is no structure at the stand that is recognised by Council. Exhibit number 6 from Zvimba Rural Council clearly states that the stand is undeveloped because of the absence of the principal building on the property.

The absence of the principal building on the property casts sufficient doubt on the story told by the plaintiff. She cannot possibly be believed when she alleges there was a purchase agreement with the first defendant because her own version does not support the existence of the agreement which she claims to have entered into. Even more importantly, is the failure by the plaintiff to indicate to the Court when this agreement allegedly took place. Buying an immovable property is a major achievement in one's life and the defendant could not even advise the court as to when precisely she entered into the sale agreement with the plaintiff.

The other difficulty with the plaintiff's case was that she claimed to have bought the stand but ironically she was not able to advise the court on the purchase price, for that property. In a contractual agreement, the purchase price is as important as the merx itself.

Even if I were to accept that this was a barter transaction, surely the cement, maize seed and the 10 bags of maize were supposed to represent a certain agreed and specified price for the stand. One cannot buy a stand for a price she does not know. It further compounds the plaintiff's case and makes it extremely difficult to comprehend.

Accepted, the plaintiff told the court she did not go to school. Despite this, she struck me as an intelligent middle aged lady who presented herself as a cunning and calculative litigant.

In one breadth she said she paid the purchase price to the council and in another she said she paid the money to the plaintiff only for the court to note that exh 2 represents the payment of rates which the first defendant alleged the plaintiff was obliged to pay.

The plaintiff conveniently purported to remember specific years when it suited her and when she felt cornered she pleaded not to have gone to school and consequently not being an educated person. It is a monumental risk to trust such witnesses particularly where there is no any other evidence to support their story.

It is also surprising that having alleged to have purchased the stand in question almost 12 years back, the plaintiff never took the initiative to have a proper cession of the stand done to protect her rights.

In the court's view, the lucidity of the story told by the first defendant duly supported by exh 3 up to 6 was beyond reproach, the clarity of which could not be missed by any fair minded person. Her story was told with a convincing, polite and emphatic tongue.

The first defendant struck me as an honest woman who fell victim to the cunning character of the plaintiff who sought to punish her for demanding what was legitimately due to her as a result of the plaintiff's son's conduct.

Surely if the first defendant had sold her property she would have specifically stated the price for the stand to the plaintiff.

There is no way the first defendant would have continued to gather building material as evidenced by exh 3 and 4 on the property she would have sold some years before.

I believe the first defendant's story that during the happier times the plaintiff's son gratuitously gave her a bag of cement to use in attending to the cracks of her house and that the maize seed was given in similar circumstances.

I think it would be extremely naïve for anyone to think that the first defendant enlightened as she is would have acquiesced to the sale of her valuable piece of property, viz stand 987 for a paltry bag of cement 25kg bag of maize seed and 10 x 50 kg bags of maize. That story by the plaintiff is simply unbelievable. Even the most gullible cannot buy that story

Plaintiff's case is accordingly dismissed with costs.

*Harare Legal Project Centre, plaintiff's Counsel*  
*Pundu and Company, first defendant's legal practitioners*