STANSILOUS PARAFFIN
And
PIA PARAFFIN
Versus
RAINBOW DISTRIBUTORS (PRIVATE) LIMITED

IN THE HIGH COURT OF ZIMBABWE
BACHI MZAWAZI & MUZOFA JJ
CHINHOYI, 08 July -19 August 2024

Civil Appeal

T. Kabuya, for the Appellant
S. Chatsama for the Respondent

BACHI MZAWAZI J:

Introduction

This is an appeal against the decision of the Magistrates Court sitting at Chinhoyi. The trial court had upheld the now respondents' relief for summary judgment against appellants. On the 8th of July 2024, after a long and protracted hearing we dismissed the summary judgment and allowed the appeal through an extempore ruling. A request for judgment was made on the same day before closure of business prompting us to request for the transcript of the record of proceedings as it bore the reasons for our judgment. These are the reasons.

Brief Factual Background

The common cause facts are that the appellants' father took occupation of the land in dispute at Murombedzi, Zvimba in the 1950s. Sometime, in 1955, as a pioneer businessman, their father, the late Simon Paraffin, was allocated stands number 56, 63 and 118 by the Government, whereupon he constructed some buildings. Unbeknown to them, in 1982, the Surveyor General through a Murombedzi Commercial General layout plan drew a plan that did not demarcate the appellants property from those of others in the vicinity. It consolidated stands 56, 63, and 118 and merged it into stand number 57.

The respondent obtained a title deed number 5876/88 over property stand number 57 as a whole, when he purchased his portion of the land from a third party not incorporated or mentioned by name in these and latter proceedings. What is clear and uncontested from the record is that there was the physical presence of some structures which the respondent purchased and which were in the proximity of those occupied by the appellants at the time.

When it then emerged that the appellants' family property had been inadvertently consolidated with that of the respondent, a query was raised with the Zvimba local Council. On pages 12 to 15, there is a litany of correspondence, minutes and resolutions that illustrate that both parties became aware of the error as a common mistake and they amicably arrived at an amicable resolution. As evidenced by the official documents from the local council the process to rectify the mistake through the Surveyor General's office with a view to then procedurally cancel the title deeds was commenced.However, for one reason or another, the respondents, then approached the Magistrates Court seeking the ejectment of the appellants on the basis of the same title deed they well knew was in the process of being revoked. Summons for eviction against the appellants were issued on the 7th of September 2023, in case number CHN CG 233/23.

Proceedings before the Trial Court

The arguments

The appellants onerously entered their appearances to defend and filed their plea to the said summons. They raised the defence that, they were legally on the property as their father had been lawfully allocated the stands which were then mistakenly consolidated with those owned by the respondent. They further, submitted that, they as a family had been in peaceful, open, translucent and undisturbed occupation of the property since the 1950's. Hence, by virtue of the duration of their stay which exceeds thirty years, the defence of acquisitive prescription was available to them. They further, pointed out that the error giving rise to the title deed which was used to evict them was well known to the respondents before initiating the *rei vindicatio* suite.

Respondent's Case

In turn, the respondents then plaintiffs in the main suit, raised the defence of summary judgment, claiming that the appellants had entered their plea only to delay the inevitable and had no bona fide defence to their *rei vindicatio* action. The main thrust of their argument for the summary judgment relief was that they had proof of ownership anchored in their title deeds. As such, as holders of real rights, they had indefeasible rights that can be exercised unperturbed against the world at large. In addition, they adverted that, the appellants were illegal squatters and land invaders having no lawful or authorised right to continue in occupation or possession of their immovable property. Of note, the respondents concealed to the trial court the that the relevant land authorities had resolved the dispute over the occupational rights of the appellants who from that context were not illegal squatters *per se*. This obviously and inevitably would have been the game changer to their claim of vindications of rights.

Further, they submitted that, the appellants' father is now deceased. He is the one who had rights to the contentious property. Therefore, the failure by the appellants to cite or incorporate his executor and estate invalidated their defence.

The Appellants' Case

The appellants counter-argued that, firstly, the issue that was before the lower court was whether or not they had no *bona fide* defence and nothing else. Which, from their own perspective they had provided the same in their plea. As it where, they contended that there were triable issues, as to when their father took occupation amongst others, only resolvable through evidence in a trial. Further, whilst acknowledging the propriety of incorporating their father's estate and executor in the lawsuit, they argued that they allowed the respondents to amend their pleadings when they had cited a wrong party. In the same vein, they would also seek the leave of the trial court to amend their pleadings and incorporate all the relevant parties as had been observed. The appellants also advanced that in any event, they did have the defence of acquisitive prescription both through their father and in their own individual capacities.

Findings of the Trial Court

As already noted, the trial court found in favour of the respondents. It reasoned that the appellants had no bona fide defence against the respondent's claim of vindication. It was of the view that since the respondent had title deeds the appellants failed to prove their right of retention. It dismissed the appellants' triable issues argument. It also seems that the ground for the non-incorporation of the Estate became the primary court's main focal point at the expense of the defences that had been raised by the then defendants. This decision led to this appeal.

Proceedings on Appeal

Grounds of Appeal

The appeal was premised on the following grounds of appeal firstly, that the trial court erred and misdirected itself in granting the application for summary judgment where the appellants had a valid and plausible defence. Secondly, that, the *court aquo* grossly erred and misdirected itself by granting the application for Summary judgment where the respondent's claim had prescribed at law. Thirdly, that the trial court erred and grossly misdirected itself on a point of law in granting the summary judgment when there was an erroneous consolidation of both the appellants and respondent's stands which has been confirmed by the Local Planning Authority.

Notably, the same arguments and case law which was presented before the subordinate court are the same that were propagated before this court.

Issues

The issues to consider are:

1. Whether or not the trial court erred in upholding the respondent's summary application remedy?
2. Whether or not the court of first instance erred and or misdirected itself in dismissing the appellants defence on the basis of the point of law that had been raised at the hearing of the summary judgment proceedings?

Analysis of facts and evidence against the underpinnings of the Law

Apparently, what was before the trial court was an application for summary judgment. The requirements and parameters of a summary judgment were succinctly highlighted by the Supreme Court, as well captured and cited by the parties herein in the case of *Superbake Bakeries (Pvt)Ltd v Rumtowers Security(Pvt*)Ltd2014 (2)ZlR191(S).[1] The general rule is that all parties to litigation have the right to present their case or side of the story and be heard. The relief of summary judgment has been dubbed as a drastic measure as it makes an inroad into the doctrine of *audi alteram partem* rule. Its importance as a tool in the hands of a litigant faced with an adversary who has no genuine defence and only wants to frustrate their opponent's unanswerable or unassailable claim can however not been underplayed.

In *Oak Holdings (Pvt) Ltd v Chiadzwa S 136/ 85, Jena v Nechipote 1986 (1) ZLR 29 (S*) HUNGWE J as he then was noted that,

"It is trite that summary judgment is an extraordinary remedy against an unscrupulous litigant seeking to frustrate a claim. In that regard, the claim must be clear and unanswerable and the defences inadequate in fact and in law. It is further trite that not every defence will defeat an application for summary judgment. In order to succeed the defences must be clear and complete, disclosing facts upon which they are based as at the time of the claim. Further such defences must be sufficient to enable one to succeed on the merits or at least, place a prima facie case before the court to enable it to assess their bona fides. Thus the role of the court is to assess whether a bona fide defence which is plausible and could possibly succeed has been raised." *See , Jena v Nechipote 1986 (1) ZLR 29 (S); Mbayiwa v Eastern Highlands Motel (Pvt) Ltd S-139-86; Rex v Rhodesian Investments Trust (Pvt) Ltd 1957 R & N.* (My emphasis).

In the case *of Rosemary Bastin v Kuta John Madzima (In his capacity as the executor of the estate late Masawi Madzima*[2] it was commented as follows:

"There can be no doubt that the appellant did not point to any bona fide defence to the respondent's claim or to any triable issue as would dissuade the court a quo to grant summary judgment. While summary judgement is an extra-ordinary remedy given that it deprives a litigant, desirous of defending an action, the opportunity to do so without regard to *the audi alteram partem* rule, it has always been granted by the courts to an applicant possessing an unassailable case. It is trite that such an applicant should not be delayed by resort to a trial, whose outcome is a foregone conclusion"

In *casu*, as highlighted in the *Oak Holdings (Pvt) Ltd v Chiadzwa,* case above, the trial court's primary task was to assess whether or not the then defendants' plea disclosed a valid defence

[1] Summary judgment in terms of the rules is an extraordinary remedy which is granted to a party so that a matter maybe determined expeditiously where a defendant has entered an appearance to defend for the purpose of delaying the proceedings. The special procedure of summary judgment was conceived so that a *mala fide* defendant might be summarily denied except under onerous conditions, the benefit fundamental principle of the *audi alteram partem* rule. [2] SC37/2020

to the *actio rei vindicatio*, which was the plaintiff's claim. It suffices to note, that the respondents had no impervious or impenetrable claim. Why? They launched their ejectment action with the knowledge that the process to challenge the same title deed they relied upon had been initiated with their blessings and consent. By so doing they misrepresented facts and were not candid with first court.

Whilst title deeds are *prima facie* evidence of ownership, the same does not obtain if that title is being challenged. That a title deed is prima facie proof of ownership until challenged, was well explored in the case of *Takafuma v Takafuma.*[2] The real rights that this legal document attracts is unquestionable. [4] Authority abound clearly spell out that an owner of a property has the right to vindicate his property from who so ever will be in unlawful possession of the same.[3]

There is irrefutable evidence borne in official documents, which are presumed correct until rebutted, that the respondents were not only privy to the dispute on the consolidated stands, but were also aware of the mistake in the consolidation of the stands.[4] They willingly, voluntarily and without duress attended the meetings with the relevant public officials, entered into resolutions and appended their signatures to them. They were aware of the official processes that called for the cancellation of their title deed as it had been agreed had been issued in error. It made the title deed defective. Cognisance is made of the requirements of section 14 of both sections 8 and 14 of the Deeds Registry Act [Chapter 20:15]. Nonetheless, the fact that remains is that the process to legally and procedurally cancel the deeds had already been put in motion.

Given that background even in those preliminary, interlocutory proceedings, the respondent failed to discharge the burden of proof vested upon it, to demonstrate that they had a lawful right to be on the combined property even if the matter proceeds to trial. In *Chenga v Chikadaya* above it was held that the defendant had the onus to justify his occupation in the common law

[2] 1994 (2)ZLR103(S)

[4] See ibid 4 below.

[3] See, *Chenga v Chikadaya & Others SC 17/2013, Z.M. Transport (Pvt)Ltd v The Sheriff of the High Court and 2* others HB 19/23.

[4] Mhandu v Mushore and Ors HH80/2011

remedy of *rei vindicatio*.[5] What it shows is that they did not have an unanswerable claim against the appellants.

This is further exacerbated by the fact that they did not deny that the appellants' family's stay on the property was lawfully sanctioned by the land authorities. In our view, the lack of candidness with the court by the respondents led to the misdirected decision made by the trial court. The appellants were the people who had been sued. They had the right to defend themselves so as to avoid the adverse consequences of a default judgment, which they did. They proffered valid defences. The respondent is the ones who instituted litigation against appellants. They made the initial blunder of not citing the appellants' father's estate and executor. They were well aware of this crucial fact through the meetings they held with the local authorities which are government and public offices. They could not turn around and use it as a weapon and point of law to derail the defence of those it had itself elected to sue.

Indeed it is an established legal principle that an estate acts through its executor.[6] In this case, the fault is that of the respondent as observed above. That be is it may, the appellants rectified the position by incorporating the estate.[7]

Just as the respondents sought amendments, the appellants did so way before the hearing of this appeal as evidenced the case of *Primo Tendayi Paraffin as the executor of the estate Late Simon Paraffin DR2412/23* versus*, Rainbow Distributors (Pvt) Ltd and others HCC13/24* involving the same parties*, s*till to be finalised at this court. The DR number shows that the estate was registered in 2023 well before the appeal hearing.

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[5] See, Sa*vanhu v Hwange* Colliery SC 8/15, *Chetty v Naidoo*,1974(3) SA (A) 19 at 20. *Fryes (Pvt) Ltd v Ries* 1957(3) SA 575 at 582. Section8 of the Deeds Registry Act [Chapter 20:15].

[6] . In Nyandoro & Anor v Nyandoro & Ors 2008 (2) ZLR 219 KUDYA J aptly held that: "A deceased estate must be represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position. Because a deceased's estate is vested in the executor, he is the only person who has locus standi to bring a vindicatory action relative to property alleged to form part of the estate." The learned judge also referred to the case of Clarke v Barnacle NO & Two Ors 1958 R&N 358 (SR) at 349B -

[7] Section 23 of the Administration of Estates Act (Chapter 6:01) states that "The estates of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the Form B in the second schedule by the Master …." In terms of section 25 of this Act, a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the,

In *Jayesh Shah v Kingdom Merchant Bank Limited,* SC4/17 her ladyship GWAUNZA DCJ remarked at p. 3 of the cyclostyled judgment that:

".... the court has this discretion is evident in r 132 of Order 20 of the High Court Rules. The rule provides that the court may allow a party, at any stage of the proceedings, to amend his pleadings…" See, *Commercial Union Assurance Co Ltd v Waymark NO* 1995(2) SA 73 (Tk) at 77F-

See, the dictum on amendments of pleadings, by DUBEJ, as she then was in the case of *Kenmark Builders (PvT) Ltd(In Liquidation) v Girdlestone & Anor* HH/243/19/ (2019)(1) ZLR658. That being so, the main action which was still to be heard gave the appellants an opportunity to amend their pleadings and to argue their case on the merits. They had already tendered their defence as to their right of retention which was not restricted to their late father but to their own individual occupation of the property in question.

In that regard, their second defence of acquisitive prescription was sustainable as a bona fide defence still to be tried and tested upon production of evidence in a trial. They claimed to have occupied the land for over thirty years. The date of their occupation was being challenged it became one of the triable issues that needed ventilation through a trial.

This was amplified in the case *of Rosemary Bastin v Kuta John Madzima (In his capacity as the executor of the estate late Masawi Madzima*[8] where it was commented as follows:

"There can be no doubt that the appellant did not point to any bona fide defence to the respondent's claim or to any triable issue as would dissuade the court a quo to grant summary judgment."

Disposition

In view of these observations, we are fortified in our stance that the trial court was supposed to look at the defences alone. The defences were bona fide and not meant to derail or defeat justice. There were a lot of triable issues that are best suited for a trial court in the interests of justice between man to man. Facts before this court and the subordinate court show that a challenge of the title deed has been initiated through a public office. The authenticity of the public official documents are presumed correct until challenged. Whilst the issue of the estate was one of

[8] SC37/2020

legal significance, as already observed, the initiator of the action was the one who failed to cite the estate in the first place. In any event the necessary amendments and incorporation of the estate were eventually made.

It is trite that, in terms of Magistrate Court Rules, an application for Summary judgment can be made in cases of ejectment where the Plaintiff has a belief that there is no bona fide defence to the action and that appearance to defend was entered solely for the purpose of delay. It suffices to conclude that, in our view, the appellants tendered a valid defence that there was an error common to both parties in the consolidation of the stands that belonged to both parties. Further, that they had been in occupation on the premises for over thirty years in their capacity and that of their father, therefore by virtue of the doctrine of acquisitive prescription they may stand a chance in a contested trial to succeed.

Evidence was also placed on record that the Title Deed relied upon by the respondent to seek the appellants' eviction through the Magistrates court had been irregularly issued as acknowledged by both parties in a meeting with the relevant authorities. Official documents placed before the trial court and this court indicate that there was mention of the cancellation of the Title deed in question without any objections from the respondents. This undoubtedly, illustrated that the respondents had no impenetrable defence against the defence mounted by the appellants. The trial court thus erred in granting the relief of summary judgment against such a background. The remedy was not appropriate in the circumstances, in light of the raised defences. The decision of the trial court is accordingly set aside.

The issue of punitive costs raised by the respondents is not sustainable. It actually works against them because they are the ones who were untruthful when they launched the summons actions for eviction well knowing that they had acknowledged the erroneous consolidation of stands belonging to both of them and the process to revoke the whole process had been initiated.[9]

[9] Manjala v Maphosa SC 18/2016 stated that "if a litigant lies in one material respect, the court would be entirely justified in taking the view that he has lied in all other respects and in treating his evidence accordingly." In this case, the court also cited the case of Leader Tread Zimbabwe (Pvt) Ltd v Smith HH131/03 where NDOU J stated as follows: "It is 10 SC12/2020 Page 6 of 19 trite that if a litigant gives false evidence his story will be discarded, and the same adverse inferences may be drawn as if he had not given any evidence at all." 12. As stated by Chitapi J in case of Bushu v Grain Marketing Board and Others (HH326/17), an incomplete document affords no probative value. A litigant must place full facts of his or her case before or to the court or judge

Accordingly, it is ordered that:

1. The appeal succeeds with costs
2. The decision of the trial court granting summary judgment against the appellants is set aside is set aside.
3. The matter should proceed to trial

MUZOFA J, I agree

Matsikidze Attorneys at Law, appellants' Legal Practitioners *SDM Chatsama Law Chambers*, respondent's Legal Practitioners.