

HAMILTON PROPERTY HOLDINGS
(PRIVATE) LIMITED
versus
SELINA MUSARURWA

HIGH COURT OF ZIMBABWE
MUNANGATI- MANONGWA J
HARARE, 23 October 2024 & 19 March 2025

Opposed Matter

K Gama, for the applicant
N Mupure, for the respondent

MUNANGATI - MANONGWA J: The parties herein have requested for reasons for judgment and these are they: The applicant approached this court seeking the following relief;

1. That the respondent and all persons claiming occupation through her shall vacate stand number 282 Chadcombe Township of stand 221B Chadcombe Township,
2. Harare, measuring 4109 square metres, otherwise known as Stand 282 Kaye Eddie Dr, Chadcombe, Harare, within seven days from the date of this order failing which the Sheriff for Zimbabwe shall evict them from the property and give the applicant vacant possession thereof.
3. That Applicant pays costs of suit on the legal practitioner and client scale.

It is the applicant's case that it bought stand number 282 Chadcombe Township of stand 221B Chadcombe Township, Harare, measuring 4109 square metres, otherwise known as stand 282 Kaye Eddie Dr, Chadcombe, Harare ("the property") from the late Cyprian Musarurwa for US\$21 700. That an agreement of sale was signed between the parties. It is common cause that the applicant then approached the court seeking an order to compel transfer in case number HC 9593/19. Such an order was granted against the Estate of the late Cyprian Musarurwa on 4

September 2020 and led to the transfer of the property on 13 November 2023. The applicant is thus the holder of title in the property under Deed Number 2507/23. The applicant thus seeks eviction on the basis that it is the registered owner of the property and the respondents defiantly refuse to vacate the property.

On the other hand, the first respondent who is the widow of the late Cyprian Musarurwa the prior registered owner of the property, opposed the application. She alleged that the applicant did not buy the property, but it was ceded as security for a loan which was advanced by the applicant to her late husband. She contended that the alleged sale agreement between the applicant and her late husband was unlawful as her husband was made to sign an agreement of sale with the house taken as a guarantee for the payment of the loan. She further indicated that her husband had paid nearly the full amount of the loan apart from US\$9000 which remained outstanding at the time of his death. She further averred that she had approached the applicant who remained adamant at the time that it required specific performance.

The respondent raised two preliminary points to the effect that:

- i) there exists material dispute of facts which could not be resolved on the papers and that
- ii) there was material non-joinder as the applicant ought to have cited the estate of the late Cyprian Musarurwa. proceedings.

The applicant argued that there are no material disputes of fact as the property is in the name of the applicant and the respondent admits that her late husband signed the agreement of sale and that the husband received US\$21700 upon the signing of the agreement of sale. Applicant further argued that the agreement of sale is not an issue because it has not been cancelled nor set aside.

Suffice that there will always be disputes in a contested matter but the question is whether that dispute is material. The test to establish the existence of material disputes of fact was canvassed in the case of *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009(2) ZLR 132 H at 136 FG where MAKARAU JP (as she then was) stated:

“A material dispute of facts arises when material facts alleged by the Applicant are disputed and traversed by the Respondent in such a manner as to leave the Court with no ready answer to the dispute between the parties in the absence of further evidence.”

In *casu*, the court did not perceive any material dispute of facts given the relief sought. It is not an issue that the applicant is the registered owner of the property. It is not in issue that the respondent is occupying the property. The issue of the validity of the agreement of sale was deliberated by this court when it granted the order for specific performance in September 2020 and that order has not been overturned. That the respondent has brought up the issue of the validity of the agreement of sale does not in itself create a scenario where material dispute of facts are said to exist. In any case where there are dispute of facts, a judicial officer is enjoined to adopt a robust approach to determine such a case and it is only when a judicial officer is unable to readily decide a case without hearing further evidence that a matter will be referred to trial. This is not the case herein. The point *in limine* has no merit and is therefore dismissed.

As regards the second objection, it is pertinent to note that this is a claim for eviction, therefore there was no need for the applicant to cite the deceased estate of the late Cyprian Musarurwa. Applicant cited the Estate or its representative when it sought specific performance in HC9593/19 as the deceased was the one who purportedly owed a duty to effect transfer to the applicant. However, at this stage the estate has no role to play as the applicant seeks no relief from the estate but occupants of his property. In that regard, the point *in limine* has no merit and same is dismissed. The matter thus had to be determined on merit.

The claim for eviction is founded on *rei vindicatio* which is a common law remedy. The requirements were laid down in *January v Maferemu* SC14/20 as follows:

- a) The applicant must prove ownership of the property.
- b) That the defendant was in possession of the thing when the claim was instituted.

The respondent in rebutting the plaintiff's claim has to proffer a legally recognized defence. The four defences for *rei vindicatio* were listed in *Maferemu* case *supra* as follows:

- a) That the plaintiff is not the owner of the property in question.
- b) That the property in question no longer exists and can no longer be identified.
- c) That the respondent's possession of such property is lawful.
- d) That the respondent is no longer in physical control of the property.

In this case the respondent's defence has been that the agreement of sale was a sham and that there is a pending application to set aside the agreement and transfer. Suffice that the

applicant's ownership has not been impeached by way of it being reversed by a competent court. He thus remains the owner. It is not in dispute that the respondent is occupying the property. Therefore, where these two requirements have been satisfied the court can only conclude that the applicant managed to prove its case. An applicant who manages to satisfy the requirements for the granting of an eviction order is therefore entitled to recover possession of its property from the respondent (see *Chenga v Chikadaya & Ors* SC 7/13). Thus, in the absence of a satisfactory defence, the applicant's claim has to succeed.

The pinnacle of ownership of immovable property is a title deed. Title holders of property deserve protection by the law and not to be deprived of their rights to their property without their consent (see *Savanhu v Hwange Colliery Company* SC 8/15). The courts will be failing in their duty to protect the sanctity of registered title if they were to turn a blind eye to the entitlement of title holders to enjoyment of their holding rights.

The court therefore found that the requirements for *rei vindicatio* had been satisfied and, in the result, it granted the relief sought by the applicant. That being the case, the application succeeded. Whilst the applicant had requested that the respondent be evicted within 7 days the court decided on a longer period upon engagement with the parties. On costs, the general principle that a successful party is entitled to costs applied.

Accordingly, the following order was granted:

1. The respondent and all those claiming occupation through her shall vacate Stand number 282 Chadcombe Township of stand 221B Chadcombe Township, Harare, measuring 4109 square metres, otherwise known as Stand 282 Kaye Eddie Dr, Chadcombe, Harare, within 45 (forty-five) days from the date of granting of this order, failing which the Sheriff for Zimbabwe shall evict them from the aforesaid property and give applicant vacant possession.
2. The respondent shall pay Applicant's costs.

MUNANGATI-MANONGWA J.....

Gama & Partners, applicant's legal practitioners.

Samundombe & Partners, respondent's legal practitioners.