

SUMMERGATE INVESTMENTS (PVT) LTD

Versus

NAOME THAKATHAKA

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 26 MAY & 9 JULY 2020

Opposed application

G. Nyoni for the applicant
Adv Phulu for the respondent

MAKONESE J: This is an application for a summary judgment against the respondent. The applicant seeks the relief of *rei vindicatio* in the following terms;

“Respondent and all those claiming through her be and are hereby ordered to forthwith vacate House Number 54a Leander Ave, Hillside, Bulawayo also known as the Remaining Extent of Subdivision 2 of Lot 63A Hillside situate in the district of Bulawayo.”

The applicant also prays for an order with costs.

The respondent filed a Notice of Opposition arguing that the applicant had not satisfied the requirements for the granting of a summary judgment. The respondent alleged that it was not established that applicant was the *bona fide* purchaser of the of House Number 54a Leander Ave, Hillside, Bulawayo also known as the Remaining Extent of Subdivision 2 of Lot 63A Hillside situate in the district of Bulawayo (hereinafter referred to as ‘the property’). The respondent essentially disputes the title that the applicant holds to the property.

Background

Solusi University obtained a judgment in the High Court of Zimbabwe against a company, known as Auction Intermarket Floors (Private) Limited to which the respondent was a director. The property in question which belonged to the respondent was attached by the sheriff pursuant to a warrant of execution dated 6 August 2014.

On 26 March 2018 the said property was sold by way of public auction by the sheriff. Mr Mohamed Zakariya Patel was declared the highest bidder and the “to be” purchaser of the property at the sum of \$76 000,00 in terms of Rule 356 of the High Court Rules 1979.

Rule 356 Reads:

“Declaration of purchaser by sheriff

If the sheriff is satisfied that the highest price offered is reasonable, having regard to the circumstances of time and place and to the state of the property market and that the sale was properly conducted, he shall declare the highest bidder to be the purchaser, subject to confirmation as hereinafter prescribed.”

It was on the usual condition in terms of Rule 359 that if there were no objections the sheriff would proceed to confirm the sale. An objection to the sale was filed by the respondent necessitating a hearing conducted by the sheriff on 22 May 2018. The sheriff ruled against setting aside the sale and confirmed the sale of the property through a confirmation letter dated 31 May 2018. The confirmation of sale referred to the purchaser as Mr Patel (the highest bidder the sum of \$76 000, 00). It is pertinent to point out that the full purchase price was to be paid into the sheriff’s account within 7 days, failing which the sale would be deemed to have been cancelled.

It appears the Sheriff issued what he titled ‘Amended Confirmation letter’ dated 31 May 2020. The only amendment being a reference to the purchaser as Summergate Investment (Pvt) Limited represented by Mr Patel the highest bidder. An agreement of sale was entered into between the Sheriff as the respondent’s representative and the applicant dated 21 June 2018 in respect of the property. The deposit was paid to the sheriff’s account as per the agreement through Toppers Uniforms a company owned by Mr Patel.

It appears all this while, the respondent remained dissatisfied with the Sheriff’s ruling. This led to the respondent making an application to this court under case number HC 1664/18 seeking the cancellation of the sale. The application was dismissed on 28 October 2019. The property was subsequently transferred to the applicant through a deed of transfer dated 19 December 2019.

The applicant then proceeded to issue summons for the eviction of the respondent and all those claiming through her any rights in the property. Summons was served on the defendant on 17 January 2020. On 22 January the respondent filed an appearance to defend. The applicant takes the view that with the subsequent sale of the property, the respondent is neither the owner of the house nor the applicant’s tenant. That the respondent has no claim to the property that in fact now belongs to the applicant and should therefore vacate the property for the applicant’s benefit. It is further the applicant’s view that the respondent has no *bona fide* defence to the applicant’s claim and is therefore resisting the application out of malice. The respondent is of the view that it is well within its rights in mounting a defence to the application. Respondent argues that applicant was only incorporated after the sale had been concluded, that the applicant was not the purchaser of the property at auction. Respondent alleges fraud perpetuated by the sheriff and applicant in cahoots.

The issue for determination is therefore whether a former owner of a property that was sold in execution is entitled to resist eviction by way of *rei vindicatio* on the basis of an

allegation that the property purchased at an auction was transferred to a third party by the purchaser of such property.

The Law

The law in regard to summary judgment is well settled, and the requirements to be met by the applicant and the respondent respectively have been crystallised through case law.

What the applicant has to establish in an application for summary judgment was captured by the court in *Majoni v Ministry of Local Government And National Housing* 2001 (1) ZLR 148 (S), the Court stated that;

“The principles applicable in a summary judgment application have been well documented. The quintessence of this drastic remedy is that the plaintiff whose belief it is that the defence is not bona fide and entered solely for dilatory purposes should be granted immediate relief without the expenses and delay of trial ...”

The court in *Mbundire & Anor v Dalso Properties (Pvt) Ltd & Others* [2017] ZWHHC 15 held that summary judgment may be granted where the plaintiff proves that it has a clear and unassailable case against the defendant and that the defence raised, if any, is without substance in law and in fact.

On the other hand what the respondent is called to establish was enunciated by the court in *African Banking Corporation of Zimbabwe Limited v Magurira* HH 451-19, HC 10958/18 Ref Case HC 8591/18) [2019] ZWHHC 451 where it was stated that:

“In order to successfully resist an application for summary judgment a respondent in his opposing affidavit would be required to fully disclose the nature and grounds of his defence as well as the material facts on which it is based in a way that would satisfy the court that he has good prima facie defence to the action; see De Villiers v Human and Another [2016] ZAECGHC 85. However, not every defence raised by a respondent will succeed in defeating an applicant’s claim. See; Bulawayo City Council v Trishul Properties [2015] ZWBHC 04.

The court in; *Hales v Daverick Investments (Pvt) Ltd* 1998 (2) ZLR 234 (H), it was held that:

“Where a plaintiff applies for summary judgment against the defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good prima facie defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in-sufficient detail to allow the court to decide whether, if these facts are proved at the trial, this will constitute a valid defence to the plaintiff’s claim. It is not sufficient for the defendant to make vague generalizations or to provide bald and sketchy facts.”

The above set law is what stands between the respective parties *in casu*.

Application of the law to the facts

It is with the above that I shall set out to deal with the merits of the present application.

The case of *Larfage Cement (Zim) v Chatizembwa* HH 413/18 cited in the applicant's heads of argument aptly captures the law in relation to the principle of *rei vindicatio*. The court in *Larfage Cement supra*, stated the following:

“The owner of property has a vindicatory right against the whole world. It is a remedy available to the owner whose property is in the possession of another without his or her consent. Roman-Dutch law has always protected the right of an owner of property to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser, where the property would have been sold. The occupier would only have the defence of estoppel. See Mashave v Standard Bank of South Africa Ltd 1998 (1) ZLR 436 (S) at 438 C; Chetty v Naidoo 1974 (3) SA 13 (A) at 20 A-C; Oakland F Nominees (Pty) Ltd v Gelria Mining and Investment Co Ltd 1976 (1) SA 441 (A) at 452A.

Indeed the principle of the actio rei vindicatio is that an owner cannot be deprived of his or her property against his or her will. All the owner is required to prove is that he or she is the owner and that the property is in the possession of another at the commencement of the action. Proof of ownership shifts the onus to the possessor to prove a right to retention. See Jolly v Shannon and Anor 1998 (1) ZLR 78 (H) at 88 A-B; Stanbic Finance Zimbabwe Ltd v Chivhungwa 1999 (1) ZLR 262 (H); Zavazava & Anor v Tendere 2015 (2) ZLR 394 (H) at 398 G.”

What is abundantly clear is that the applicant in whose name the property was transferred through the deed of transfer is the owner of the property. This *prima facie* makes the applicant the owner of the property thereby entitling him to the remedy of *rei vindicatio*. What is also clear is that the respondent is on the face of it no longer the owner of the property that was sold to another in execution. The respondent's efforts at cancellation of the sale have been futile and thus the status *quo* persists. The respondent is desperately trying to invent a defence where there is none.

It can be noted that the respondent did not have to wait for an application for *rei vindicatio* to contest what in respondent's view is fraud on the part of the sheriff in sale of the property. The respondent was clearly unable to articulate the nature of the fraud allegedly perpetrated and against whom it committed. It remains open to the respondent to challenge the sale and prove its allegations. Until then, the applicant is well within its rights to seek vindication.

In my view, the respondent has not raised a *bona fide* defence. The respondent allegations of fraud are not supported by evidence. The date of the applicant's incorporation is not disputed, and the fact that Mr Patel was the bidder at the auction is also not disputed. It is my view that any qualms with such issues cannot be relied on by the respondent in circumstances where the sale has been confirmed and transfer has already been effected.

In *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236 where MAKARAU JP, as she then was, had this to say about applications of this nature:

“There are no equities in the application of the rei vindicatio. Thus in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership. The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the lollipop is not the rightful owner of the prized possession and the rightful owner cries to the mother for intervention, the mother must pluck the lollipop from the holder and restore it forthwith to the other child notwithstanding the age and size of the owner-child or the number of lollipops that the owner child may be clutching at the time. It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable future. If the lollipop is not his or hers, he or she cannot have it.”

The above applies with equal force in *casu*. The application for summary judgement is merited.

In the circumstances, I would accordingly grant the application with costs.

Moyo & Nyoni Legal Practitioner, applicant's legal practitioners
Mathonsi Ncube Law Chambers, respondent's legal practitioners