

SIMON MAZORODZE HOUSING CO-OPERATIVE
versus
LISA TAGARA

THE HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 16 February 2022 & 17 March 2022

Ms A. Kambanje, for the Plaintiff
Mr.Z.W. Makwanya, for the Defendant

Special Plea

MHURI J: On 3 November 2021 Plaintiff issued summons against Defendant claiming the eviction of Defendant and repossession of stand No 16586 Simon Mazorodze Housing Co-operative, Fountainbleau, Kuwadzana Phase 3 Dzivaresekwa Harare, arising from a breach of Plaintiff's by-laws and irregularities that characterize the allocation of the stand, and costs of suit on attorney- client scale.

Plaintiff's declaration was that in 2012 Defendant occupied stand No 16586 Simon Mazorodze Housing Co-operative, Fountainbleau Kuwadzana, Phase 3 Dzivaresekwa without approval of Plaintiff, the owner of the stand.

For a person to be a member of the society, he/she has to;

- Fill a joining form
- Pay a joining fee
- Comply with the society's by-laws

Defendant did not comply with all the requirements but took occupation of the stand, hence she has no legal right to occupy the property. Despite demand, she has refused or failed to vacate the property.

On 24 November 2021 defendant entered appearance to defend. On 20 December 2021 she filed a special plea pleading that

1. Plaintiff has not established a cause of action.
2. Plaintiff's claim has prescribed.

To substantiate the special plea, it was submitted by Defendant that it is the plaintiff that is the custodian of all procedures and decisions to admit a person as its member. In terms of the Co-operatives Societies Act [*Chapter 24:05*] (The Act) it is the Plaintiff through its by-laws which determines how its functions and decisions previously made are ratified by its members at Annual General Meetings. Therefore, the requirements mentioned by Plaintiff in its declaration were to be followed by Plaintiff before admitting any person as a member.

The discretion is Plaintiff's upon its terms and conditions subject to ratification at an Annual General Meeting, to join Defendant as a member and if Defendant had defaulted, she could not have been admitted in the first place. It was Plaintiff who looked for members and not the other way round, as it wanted a threshold to get registered and get land.

As for prescription, Defendant's submission was that in terms of section 15(d) of the Prescription Act [*Chapter 8:11*] Plaintiff's claim had expired. Defendant joined the Plaintiff in 2010 that is more than 5 years ago and the period within which Plaintiff ought to have brought the action in 3 years.

It was another point raised by Defendant that this matter between Plaintiff and Defendant is before the Registrar of Co-operative Societies for determination. In terms of section 115 of the Act once a matter is declared to be before the Registrar, it should be heard and determined by the Registrar before it can be referred anywhere. The Audit Report which Plaintiff is basing its claim on, was challenged and referred to the Registrar. Defendant submitted a letter written by the Registrar T. Shoko addressed to the Plaintiff dated 23 July 2021 to support this point.

In its replication, Plaintiff's position was that it has established in its declaration that it did not allocate Defendant the stand. Defendant did not fill in any joining form, neither did she pay any joining fee before being allocated the stand, there are no records to show she was admitted as a member. There is no relationship between it and the Defendant making Defendant an illegal settler and this justifies the prayer for her eviction. In terms of s 37 of the Act, one makes an application, and if accepted, pays the joining fee and thereafter pays contribution fees. Defendant did not comply with these requirements but allocated herself the stand. Defendant is not one of these people Plaintiff has receipts of since 2010.

As for prescription, it was Plaintiff's submission that it only became aware of the fact that Defendant was not a member in 2021 through an audit which unearthed that there were people who were not paying. It relied on s 16(3) of the Prescription Act which states:

"A debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises ..."

As regards the Registrar's letter dated 23 July 2021, it was submitted that the Defendant did not serve it with the letter, it tried to get it from Defendant to no avail.

The term cause of action was defined as:

"the entire set of facts which give rise to an enforceable claim, and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

Per GOWORA JA (as she then was) quoting WATERMEYER J in the case *ABRAHAMS & SONS v RAILWAYS and HARBOURS* 1933 CPD 626 at 637;

1. *JENNIFER NAN BROOKER*

vs

RICHARD MUDHANDA and THE REGISTRAR OF DEEDS

2. *ADRIENNE STALEY PIERCE*

vs

RICHARD MUDHANDA and THE REGISTRAR OF DEEDS

SC 5/18

In casu, Plaintiff is a registered Co-operative Society which owned certain piece of land in Kuwadzana Phase 3 Dzivarasekwa which was demarcated into various stands which were allocated to those persons who would have been registered as members. Defendant is one of the persons who occupied one of Plaintiff's stands being stand No. 16586 Fountainbleau Kuwadzana Phase 3 Dzivarasekwa in 2012. Defendant has since built a house on this stand and is living there.

As submitted by Plaintiff's counsel, to be a member of the co-operative and be entitled to the benefits, one has to apply for registration by filling in a form, pay a joining fee and thereafter pay contributions. According to the Plaintiff's records and as unearthed by an audit which was carried out in 2021, there was no record which showed that Defendant was a member of the co-

operative. There was no registration form, no receipts showing she paid the joining fee or any contributions.

In my view, this failure to fill in a registration form, failure to pay the joining fee, failure to make any contributions are the facts which give rise to an enforceable claim. These are the material facts which need to be proved to entitle the Plaintiff to succeed in its claim. These facts fall squarely under the ambit of the definition of cause of action as stated by GOWORA JA in the case of *JENNIFER NAN BROOKER (supra)*

I therefore find that the cause of action is well established in this case.

Turning now to the second point, section 2 of the Prescription Act defines “debt” as “.....anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.”

Plaintiff is claiming Defendant’s eviction from stand No. 16586 for her failure to be registered as a member, to pay the joining fee and contributions as is required in terms of the provisions of the Act. In that vein, I agree with Defendant’s submission that Plaintiff’s claim is a debt and it falls under the Prescription Act.

Plaintiff’s position is that it only became aware of the debt in 2021 after an audit investigation which unearthed that Defendant and some other occupiers of its stands were not registered members of the co-operative. Section 16(3) of the Prescription Act relied on by Plaintiff on this point reads as follows:

“(3) a debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises. Provided that a creditor shall be deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care”.

Defendant “joined” Plaintiff in 2012. Plaintiff’s claim ought to have been instituted within 3 (three) years in terms of s 15 of the Prescription Act. This was not done. Plaintiff stated this was so, because it only became aware of the fact that Defendant was not a member hence an illegal occupant in 2021 through an audit report. It was not submitted and neither was it refuted that there were audits conducted before this which unearthed or ought to have unearthed the anomalies. It is not in dispute that management committees have been changing. I am therefore persuaded that Plaintiff only became aware of this cause of action in 2021. The cause of action had therefore not

prescribed when Plaintiff issued summons against Defendant. The issue of prescription as raised by Defendant is not well taken and I decline to uphold it.

The third point raised by Defendant is that in terms of s 115 of the Act once a matter is referred to the Registrar as a dispute, the Registrar is to hear and determine it before it can be referred to the courts. The Registrar is the first port of call in matters of this nature.

Section 115 provides, settlement of disputes:

- (1) If any dispute concerning the business of a registered society arises –
 - (a) within the society, whether between the society and any member, past member or representative of a deceased member, or between members of the society or the management or any supervisory committee; or
 - (b)and no settlement is reached within the society
.....the dispute shall be referred to the Registrar for decision.”

This section goes further to state the appeals structure when a party is aggrieved by the Registrar’s or Arbitrator’s decision and section 116 relates to an appeal to the Administrative Court.

It was Plaintiff’s submission that it was as a result of an audit which revealed that Defendant and others were illegally occupying stands, without any known record of payment or approval of Plaintiff. It only became aware of this in January 2021 through the audit report. As a result, Plaintiff issued summons against Defendant for her eviction from the stand hence these proceedings.

The audit report was challenged and the matter referred to the Registrar. A letter dated 23 July 2021 to this effect authored by T Shoko, Registrar of Cooperative Societies and addressed to the Management Committee, Simon Mazorodze Housing Cooperative refers.

It reads,

“RE: SIMON MAZORODZE HOUSING CO-OPERATIVE, DECLARATION OF A DISPUTE

The Registrar is rescinding the earlier communication to you dated 20 May 2021, which directed that you report to the Police matters emanating from your Audit Report.

This has been necessitated by the fact that the former Management Committee has raised allegations against the validity and authenticity of the Audit Report. This gives rise to a dispute in the Cooperative which the Registrar has taken note of and will proceed to handle the dispute as directed by the Cooperative Societies Act, [*Chapter 25:05*] sections 114 and 115.

While this dispute is pending before the Registrar you are directed to put on hold all actions emanating from the audit report that you intended to implement until the dispute has been rescinded.”

Defendant submitted that the dispute is still pending before the Registrar. This was not disputed. Even if it was or has since been determined by the Registrar, there are appeal structures in terms of sections 115 and 116 of the Act to be followed if one is aggrieved and before instituting eviction proceedings.

This also was not disputed by Plaintiff, its challenge was that, it was not availed with this letter by Defendant. This letter however was addressed to it and not defendant so it was incumbent upon Plaintiff to obtain it from the Registrar when Defendant brought it to its attention.

I agree with the Defendant's submission with regards to this point. Plaintiff prematurely brought this matter before this court. I find support in the case of:

ELIZABETH MASHINDI

vs

NGUNGUNYANA HOUSING CO-OPERATIVE

and

LUKE CHESANGO

WELLS HAMUNAKWADI

and

TIKHO SIBANDA

HH 143/22

In which CHINAMORA J relying on the case of

RATEYIWA

vs

KAMBUZUMA HOUSING CO-OPERATIVE & ANOR HH 52-07

withheld the court's jurisdiction and deferred to the domestic remedies provided in the Co-operative Societies Act. He found as persuasive, as I also do, the passage in Rateyiwa case (supra) to the effect that:-

"The remedies provided for in terms of the Act are in my view more than capable for the provision of adequate redress to an aggrieved party.

They are also in my view a cheaper form of dealing with disputes arising between the parties, which is commendable given that the intent in having formalities attaching to co-operative societies was an appreciation that they served those amongst in society without adequate means to embark on projects requiring capital out levy without assistance. It is my view proper that in this instance the

court withhold its jurisdiction on the basis that the applicant has not exhausted his domestic remedies.”

In this case, the dispute is already before the Registrar, he should therefore be left to conclude the matter. The procedures under sections 115 and 116 of the Act must be followed to their conclusion.

On this point, I will grant the Defendant’s special plea and strike off the Plaintiff’s claim with costs on the attorney – client scale, as this matter ought not to have been brought to this court had plaintiff exercised due diligence and obtained the Registrar’s letter which had been brought to its attention by Defendant.

The following order is therefore made;

that:

1. On the basis of the 3rd point, the special plea be and is hereby granted
2. Plaintiff’s claim be and is hereby struck off for being prematurely before this court.

The dispute before the Registrar be left to continue until finality.

3. Plaintiff to bear Defendant’s costs on an attorney – client scale.

Hungwe and Partners, plaintiff’s legal practitioners
Makwanya Legal Practice, defendant’s legal practitioners