MUCHANETA NYAWO
and
EVANS ZUMBANI
versus
UNTU CAPITAL (PVT) LTD

HIGH COURT OF ZIMBABWE
MUCHAWA & MANYANGADZE JJ
HARARE, 13 January 2022

Civil Appeal

Mr I Mataka, for the appellants'
Mr R Chetereza, for the respondent

MANYANGADZE J: This is an appeal against the judgment of the Magistrates' Court, sitting at Harare, which granted an application for summary judgment filed by the respondent. After hearing argument from both parties, we delivered an *ex tempore* judgment in which we allowed the appeal and reversed the decision of the court *a quo.*

The respondent has requested full reasons for judgment. The facts forming the background to this matter can be summarized as follows:

On 22 January 2019, the respondent signed an agreement of sale with the Sheriff of the High Court of Zimbabwe in terms of which the respondent purchased an immovable property through a sale in execution. The immovable property bought by the respondent is described in the papers as House Number 10217 Budiriro 5A, Harare (the property). Consequent to this sale, on 24 January 2017, cession of the rights, title and interest in the property was registered by the City of Harare in favour of the respondent.

The first appellant is the surviving spouse of the late Mackenzie Zumbani, to whom the property belonged before its sale in execution. The estate of the late Mackenzie Zumbani (the deceased estate) was registered with the Master of the High Court (the Master) and the second respondent was appointed Executor of the Estate. He is cited in his capacity as Executor of the

deceased estate. Thus, at the time of the sale in execution, the property belonged to the deceased estate.

What gave rise to the sale in execution is a default judgment granted by the High Court against the first appellant and some unspecified members of the family of the late Mackenzie Zumbani. The default judgment was granted in case number HC 7096/17. An application for rescission of that default judgment has been filed and is pending under case number HC 1712/20.

On 7 October 2019, the respondent (as plaintiff) issued summons in the Magistrates Court for the eviction of the first appellant (as defendant) from the property and all those in occupation thereof through her.

The second appellant was subsequently joined, by consent of the parties, as second defendant. The appellants (as first and second defendants) filed a plea in which they vehemently resisted the eviction. Their main contention was that the property was a deceased estate which could not be alienated without the consent of the Master. In this regard, the non-citation of the Master was fatal to the respondent's suit.

The appellants averred, in their plea in the proceedings *a quo*, that the sale in execution was invalid, as it was not authorised by the Master. They further averred that a distribution agreement, awarding the property to beneficiaries of the deceased estate, has since been lodged with the Master. They also averred that an application for rescission of the default judgment that led to the sale is pending in the High Court.

The respondent, armed as he was with an agreement of sale and a cession agreement with the City of Harare, was of the view that the appellants' entry of appearance to defend and their plea was a waste of time. He filed an application for summary judgment.

In a ruling handed down on 21 September 2021, the Magistrates' Court granted the application for summary judgment and issued the following order:

"1. The application for summary judgment be and is hereby granted.
2. The first and second defendants and all those claiming occupation through them to vacate House Number 10217, Budiriro 5A, Harare.
3. The first and the second defendants to pay holding over damages at the rate of ZW$300 per month from the 1st of September 2019 to date of ejectment.
4. The defendant to pay costs of suit on an ordinary scale"

Aggrieved by the granting of summary judgment, the appellants noted the instant appeal. Their grounds of appeal are stated as follows:

> "1. The court *a quo* erred at law in conflating the non-joinder of the Master of High Court in the proceedings before it as an authority vested with overall administration of estates with that of a party with direct and substantial interest in a matter.
> 2. The court *a quo* erred in finding that the proceedings pending before a superior court, the High Court pertaining the same property in question as (*sic*) no bearing in this matter in an inferior court.
> 3. The court a quo erred in granting the eviction application on the basis of rei vindication wherein such principles do not apply to the present case, neither was it the cause of action.
> 4. The court a quo erred in granting an application for summary judgment, a robust remedy, in a matter fraught with material disputes of fact and called for a full blown ventilation. This is the reason why respondent herein had elected action procedure not application".

It will be noted that the grounds of appeal, and the averments made in motivating the same, are essentially an elaboration of the averments in the plea to the summons. They can be crystallised into one pertinent issue. The issue, on which the appellants' appeal is centred is whether or not the sale is vitiated by lack of authorization from the Master. The gravamen of the appellants' contention is that the property, which belonged to a deceased estate, should not have been disposed of without any input from the Master. The Master should have authorized the sale, as the one with oversight on all deceased estates. Having regard to this, the drastic remedy of a summary judgment should not have been resorted to.

The appellants' contention is captured in paragraph 23 of their heads of argument, where the point is expressed in the following terms:

> "The opposing affidavits and the cross referenced application for rescission of judgement show that the appellants have a good bona fide defence to the respondent's claim for eviction. Chief among the defences is the fact that the transaction that led to the attachment and the subsequent sale of property was not authorized by the Executor nor was it sanctioned by the Master of the High Court considering the fact that this is an estate property. It will be unjust to dispose this matter summarily. In case of *Shamuyarira* v *Goredema & Ors* HH 339-17, the court held that summary judgment by its nature is a drastic remedy which should not be granted except in cases where the defendant is clearly without a *bona fide* defence and for that reason engages in dilatory tactics".

On the other hand, the respondent contends that it has a clear and straightforward case. It avers that its claim for the eviction of the appellants is unassailable. It bought the property in question and has the necessary documentation validating its ownership thereof. The essence of its response to the appellants' averments is captured in paragraph 27 of its heads of argument, wherein is stated:

"(a) The respondent is the rightful owner of the property in question, as per the agreement of sale and subsequent cession of the rights, title and interest in the property to the respondent. Therefore, the respondent may validly evict the occupants from the property.

b) The appellant's defences to a claim for eviction lack any merit
   i. The non-joinder of the Master is not fatal in the present instance;
   ii. The rescission application in the High Court has no bearing on the claim for eviction;
   iii. The sale in execution and agreement of sale is valid until set aside; and
   iv. The court a quo as a result validly granted summary judgment in favour of the respondent who had a clear and unassailable claim".

The law on the granting of summary judgment is clear and has been well set out in the case authorities. These include:

- *Shingadia* v *Shingadia* 1996 RLR 285, 1966 (3) SA 24
- *Oak Holdings* v *Chiadzwa* SC 136/85
- *Shamuyarir*a v *Goredema & Ors* HH 339/17
- *Kasongo & Ors* v *Murowa Diamonds* HMV 12/20
- *Rosemary Bastin* v *Kufa John Madzima* (*in his capacity as the executor of the Estate Late Mhorimo Musawi Madzima*) SC 37/20

In *Rosemary Bastin* v *John Madzima* (*supra*), MATHONSI JA expressed the principles governing summary judgment as follows, at page 11 of the cyclostyled judgment:

> "While summary judgment is an extraordinary 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. It is also trite that in order to defeat an application for summary judgment, a respondent must set out a *bona fide* defence with sufficient clarity and completeness to enable the court to decide whether the opposing affidavit discloses facts which, if proved at the trial, would entitle the respondent to succeed. See *Kingston Ltd* v *D Inoson's (Pvt) Ltd* 2006 (1) ZLR 45(S) at 458 F-459A"

In *Kudakwshe Blessing Shamuyarira* v *Goredema & Ors* (*supra*), CHIWESHE JP (as he then was) stated:

> "summary judgment may be granted when the plaintiff proves that it has a clear and unassailable case against the defendant and the defence raised, if any, is without substance in law and in fact. See *Pitchford Investments (Pvt) Ltd* v *Muzariri* 2005 (1) ZLR (H)". On the other hand in *Jena* v *Nechipute* 1986 (1) ZLR 29 (S). It was stated thus:
> "all that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that - there is a mere possibility of his success," "he has a plausible case",

> "there is a triable issue" or " there is a reasonable possibility that an injustice may be done if summary judgment is granted."

The learned Judge President then took into account a number of factors as triable issues constituting a plausible defence preventing the granting of summary judgment. These included the fact that the second respondent was an innocent purchaser, had no knowledge of the earlier agreement of sale, and was unaware the property in question had been the subject of litigation before MAKONI J.

In the instant case, the factual background already outlined points to triable issues that should have made the court *a quo* hesitant in granting the drastic remedy of summary judgment. To begin with, the respondent's consent to have the second appellant joined as executor of the deceased estate, reflects a realization on the part of the respondent that the property in question belonged to, or was co-owned with, a deceased estate.

Added to this, is the pending litigation in this court over the same property. There is also the question of whether or not the Master's clearance was required before disposal of the property, it being part of a deceased estate.

There are therefore material disputes that can only be properly canvassed through a trial.

The cases referred to describe summary judgment as "an extra-ordinary" or "drastic" remedy that denies the respondent the right to be heard. That should happen only where respondent clearly is without a *bona fide* defence. As CHIWESHE JP (as he then was) put it in *Shamuyarira* v *Goredema* (*supra*):

> "in my view therefore the defendant has an arguable case. It would not be in the interests of justice to shut her up at this nascent stage of the case. Summary judgment by its nature is a drastic remedy which should not be granted save in cases where the defendant is clearly without a *bona fide* defence and for that reason engages in dilatory tactics. That does not seem to be the case here. No basis has been established to deny the second respondent the right to be heard".

Can it be said that the appellants *in casu* are merely engaging in dilatory tactics and have raised no triable issues at all? Given the facts looked at, we think not. Ultimately, this appeal turns on ground of appeal 4. In our view, it encapsulates the basis for challenging the granting of summary judgment. There are material and triable issues, as indicated, that make the summary disposal of the matter a serious misdirection.

In the circumstances, it is our considered view that the court *a quo* ought not to have disposed of the matter by way of summary judgment. The appeal has merit and should be upheld.

In the result, it is ordered that:

1. The appeal succeeds with costs
2. The judgment of the court *a quo* is set aside and in its place be substituted as follows:-

   "the application for summary judgment be and is hereby dismissed with costs"

Chambati, Mataka & Makonese, appellants' legal practitioners
Danziger & Partners, respondent's legal practitioners

HON MUCHAWA J: AGREES……..…