MUNYARADZI GUNDUZA
Versus
MACDONALD TSURO
And
NOREEN CHIKARA
And
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 26 May 2022 and 3 June 2022.

OPPOSED APPLICATION

Mr. *T. Tazvitya* for the applicant
Mr.*T. Machaya* - for first respondent
Second respondent in person
No appearance for third respondent

CHILIMBE J

THE DISPUTE

[1] Applicant seeks an order for the ejectment of first respondent from premises known as Stand Number 2000, Budiriro Township of Willowvale, Harare. This property is also known as Number 2000, 31st Crescent, Budiriro 1, Harare. It will be referred to herein as "Stand 2000, Budiriro 1". The basis of applicant`s claim is simple. Applicant says he is the holder of a title deed confirming his ownership of the property in question. He now wants first respondent, who is in occupation of the property, to leave. The second and third respondents have not opposed the relief sought by applicant.

[2] First respondent resisted the application. He is the surviving spouse to the late Loveness Muqedani. The property at the centre of the dispute, Stand 2000 Budiriro 1, constituted part of the late Loveness Muqedani`s estate. This property was sold by second respondent, on behalf of the estate late Loveness Muqedani, to applicant. First respondent`s defence was premised on what he claimed as applicant`s flawed title. Applicant had utilised fraud, misrepresentation and other improper means to secure title to Stand 2000 Budiriro 1. In that respect, applicant could not exercise, as he now sought to do, the rights of one who validly held title to an immovable property. So went first respondent`s argument.

APPLICANT`S CLAIM

[3] The further details to applicant`s claim are as follows; -applicant purchased Stand 2000 Budiriro 1 from the estate late Loveness Muqedani on 11 August 2021.The estate was represented, in that transaction, by second respondent as executrix. Following the sale, applicant took transfer of the property in October 2021.Applicant contends that first respondent consented to the sale. Both the sale and transfer were apparently approved by third respondent. The third respondent exercised supervisory authority over the conduct of second respondent in winding up the estate. The first respondent was in occupation of the property as at the time that the sale and subsequent transfer took place

[4] Applicant further and stated in his founding affidavit that he was entitled to receive vacant possession of the property upon transfer. This obligation to deliver vacant possession was placed upon second respondent in representative capacity as the seller. Clause 4 of the agreement of sale captured that arrangement. Vacant possession was not delivered as envisaged. The reason being that first respondent was still in occupation of the property. Applicant averred in his founding affidavit that he gave first respondent three months' notice to vacate the property. He also notified first respondent that rentals at the rate of US$250-00 per month would become due and payable on the property.

[5]. According to applicant, both the notice to vacate the property by the end of a period of three months, and the demand for payment of rentals were ignored by first respondent. Faced with that resistance, applicant sued. Applicant reiterated that all the requisite formalities attendant to the transaction were observed. The issues raised by first respondent regarding impropriety, fraud and misrepresentation were all denied.

FIRST RESPONDENT`S DEFENCE

[6] First respondent claimed that applicant obtained title to Stand 2000 Budiriro 1 through deceitful means. He detailed the alleged misconduct in his opposing papers and argument. The allegations raised by first respondent before me had also been raised in a rather lengthy letter addressed on first respondent`s behalf, to second respondent. In essence, first respondent argued that sale of the property by second respondent to applicant was a sham. The resultant transfer and title borne by applicant were similarly invalid. The basis of first respondent`s protests were as follows; -

[7] There were a number of irregularities committed by second respondent in collusion with applicant in the process to effect the sale and transfer. Firstly, the property was sold at an

unreasonably low price. The amount of USD$32,000-00 which applicant paid for the property was inexplicably lower than (what first respondent argued was) the true value of the property. The self-same property had been purchased at a much higher figure of USD$50,000-00 in 2013

[8] In support of this argument of under-valuation, first respondent raised drew attention to what he alleged were several anomalies. Key among these alleged anomalies was the discrepancy between two sets of valuation reports relating to the property. One report described the dwelling on Stand 2000, Budiriro 1 as "*6 roomed house*" while the other stated that it was a "*7 roomed house*". The second respondent objected to this variance with considerable intensity. The correct description of the property was "*a 7 roomed house*". First respondent and counsel dwelt on this point at length in the papers and in argument. This discrepancy in the description of the rooms, it was submitted, partly accounted for the massive devaluation of the property from its true worth of USD$50,000-00, to the paltry USD$35,000-00 which applicant paid for it.

[9] Secondly, first respondent took serious issue with how the applicant and second respondent allegedly misrepresented the letter which he, first respondent, had addressed to the Master of the High Court on 1 July 2021.

[10] The letter in question bore the following contents: -

> I, Macdonald Tsuro ID No 59-060931N-49 being the surviving spouse and beneficiary of the estate Loveness Muquedani do hereby consent to sell the following property; -
>
> **A certain piece of land situate in the District of Salisbury known as Stand 2000 Budiriro Township of Willowvale estate measuring 312 square meters.**
>
> I further consent that the net proceeds of the sale of the above immovable property to be shared equally among the beneficiaries after the payment of the Master`s fees, Executor's fees and all other lawful estate liabilities.

[11] First respondent argued that this letter did not at all signify his consent to the sale of the immovable property. In his own words, first respondent stated thus in his opposing affidavit; - *"I signed Annexure B1 [the above letter], as part pot 2nd Respondent`s application to the 3rd Respondent for the issuance of Consent to sale the said property*."

[13] The third argument raised by first respondent was that at the stage that he signed the letter of consent, it was his belief that the property had not yet been valued. Unbeknown to

him, the immovable property, together with the rest of the estate assets, had already been valued on 5 May 2021.

[13] As a fourth point, first respondent argued that there were several violations and inconsistencies regarding declaration and settlement of capital gains tax around the transaction.

FIRST RESPONDENT`S POINT IN LIMINE

[14] Based on the above issues, first respondent had raised a preliminary point. He argued that there were material disputes of facts irreconcilable on the papers. He argued for dismissal of the application or at the most, a referral of the matter to trial. I dismissed the preliminary point and gave my reasons *ex tempore*. I will traverse those reasons in the analysis of the above factual arguments.

[15] From the papers, it is indisputable that the applicant is invested with title to the immovable property. It is also not in contention that, apart from opposing the relief sought under the present proceedings, none of the respondents, (or any other party for that matter), has taken steps to attack applicant`s position as holder of legal rights to the property. This is particularly so with regard to first respondent. In that respect, applicant's title remains extant and secure. Even if the present application was to be dismissed, as an example, applicant`s title, unless challenged, would still obtain. The material dispute of facts alleged by first respondent had to be viewed against (a) the common cause facts and (b) the nature of the claim before the court.

[16] The definition of what constitutes "material dispute of facts irreconcilable on the papers", and how a court must process such, are matters well settled in our law. In *Cosmas Chiangwa v David Katerere and 5 Others SC 61/21* the court stated as follows [at pages 8-9] regarding what constitutes a material dispute of facts; -

> A material dispute of fact arises where a party denies material allegations made by the other and produces positive evidence to the contrary. Generally in considering whether or not there is a material dispute of fact, the court is enjoined to adopt a robust common-sense approach to such defenses

[17] The court cited with approval, the guidance by MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi 2009 (2) ZLR 132 (H*) where it was stated at 136F-G:

> I am aware that the respondent has repeatedly and vehemently denied in his affidavit that the purchase price of the centre pivot was $20 million. It is my view that it is not the number of times a denial is made or the vehemence with which a denial is made that will create a conflict of fact such as was referred to by McNally J (as he then was) in *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) and in all the other cases that have followed. A material dispute of fact 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.

The court in *Cosma Chiangwa* (supra), also cited the case of *Muzanenhamo v Officer in Charge CID Law and Order and Others 2013(2) ZLR 604*(S) with approval. In *Muzanenhamo,* PATEL JA, (as he then was), having followed *Masukusa* and *Supa Plant* also listed the leading authorities and stated thus at 608 D-F; -

> In this regard, the mere allegation of a possible dispute of fact is not conclusive of its existence. See *Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Checkers Motors (Pvt) Ltd* v *Karoi Farmtech (Pvt) Ltd* S-146-86; *Boka Enterprises* v *Joowalay & Another* 1988 (1) ZLR 107 (S) at 114B-C; *Kingstons Ltd* v *L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451(S) at 456C-D and 458D-E. The respondent's defence must be set out in clear and cogent detail. A bare denial of the applicant's material averments does not suffice. The opposing papers must show a *bona fide* dispute of fact incapable of resolution without *viva voce* evidence having been heard. See *Room Hire Co supra* at 1165, cited with approval in *Villa Real Flats (Pvt) Ltd* v *Undenge & Others* 2005 (2) ZLR 176 (H) at 180C-D; *van Niekerk* v *van Niekerk & Others* 1999 (1) ZLR 421 (S) at 428F-G.

[18] On the facts, in *Cosma Chiangwa v David Katerere and Others (supra*), the court was seized with challenge to title in immovable property. In that respect, the court had to resolve the issue of authenticity of title. In casu, first respondent faces an eviction claim. He has, as stated, not taken steps, apart from protest, to reverse the applicant`s title. Essentially therefore, the real dispute before the court is whether the holder of title to immovable property has an impediment to the exercise of his rights in the property. What contestation has been raised and does that amount to material disputes of fact?

[19] The mainstay of first respondent`s defence is effectively an attack on the agreement of sale. This being the agreement of sale that led to the transfer of the property into applicant`s name. Again, the self-same agreement that he assented to in his letter of 1 July 2021.Despite spirited protestation and attempts to distance himself from that consent, the letter does, on its face, controvert its author. In addition, and as already noted, first respondent took no steps to

upset the applicant`s title. Alternatively, first respondent has not sought to enforce his rights in the immovable property. The same aspect was considered by the court in *Erenius Kufakunesu Makwanya v Elizabeth Majondo HH 66-13.* In that matter, the court was confronted with an ex-spouse`s challenge to a third party`s rights in the former matrimonial property. The third party had, like applicant, acquired title to the immovable property concerned. The property in question had been part of a matrimonial estate. That estate, in turn had been dissolved and distributed by a court as part of divorce proceedings. The court observed as follows [at pages 4-5]; -

> Though the respondent's counsel expressed intention to apply for a rescission of the default judgement to the trial magistrate, this appears not to have been done. The trial magistrate's judgment was delivered on 26 October 2011 and by 17 July 2012 when this appeal was heard no such application was evident. Faced with a scenario whereby the Agreement of Sale and the Default judgment authorising transfer were not being challenged before the courts of law, it is our view that the trial magistrate misdirected herself in not appreciating that the appellant's rights, title and interests in the property were unassailable. It is important to note that the registration of rights and interests in a person's name gives that person dominion over that property. [underlined for emphasis].

[20] In the same decision of *Erenius Kufakunesu Makwanya*, (supra), the absence of initiative on the part of the respondent in that matter, to take steps to enforce what she perceived as her rights in the immovable property was a key issue before the court. In similar fashion, first respondent in the matter before me launched spirited attacks on the conduct of applicant and second respondent. He addressed, though his lawyers on 15 October 2021, a lengthy letter of complaint to, and against the conduct of the second respondent. Second respondent replied to this letter on 19 October 2021.This letter, is important. In her reply, second respondent methodically addressed each and every material allegation that had been raised on behalf on first respondent in the said letter of 15 October 2021.

[21] Second respondent`s response to that letter was reasoned, factual and on point. In essence, second respondent denied any wrong doing. She accounted for all the steps that had been taken in the valuation, sale and transfer of the immovable property. (The third respondent, who is the statutory supervisor of second respondent, was notified of first respondent`s misgivings. He has raised to issue with second respondent`s conduct.) In closing, she exhorted first respondent to take the appropriate steps prescribed by law to

reverse the transfer of title of Stand 2000 Budiriro Township into applicant`s name. First respondent took no steps in that direction. I was unpersuaded that first respondent had raised "bona fide disputes of fact" to borrow the phraseology used by the court in *Super Plant Hire* (Supra).

[22] This brings me to the nature of the claim that has been brought against first respondent. Applicant seeks to evict first respondent from Stand 2000 Budiriro 1. The basis of applicant`s claim is simple. Applicant owns the property and wants first respondent out. He has concluded no arrangement with first respondent permitting the latter to remain in occupation of the premises. Applicant wishes to vindicate his rights in the immovable property. The position in our law on such claims is clear. In order to successfully resist an *actio rei vindicatio* where the claimant has established *a jus in rem,* a defendant must plead and prove a right of retention. In the matter before me, first respondent has not even alleged such right. What first respondent has done is to attack the validity of applicant's title to Stand 2000, Budiriro 1. Mr. *Machaya,* for first respondent referred me, in support of that contention, to the case of *Guoxing Gong v Mayor Logistics (Private) Limited and Another, SC 2-2017*. The premise of counsel`s argument being that in *Guoxing Gong,* the court held that defective title disentitled its impugned holder from exercising the rights of *vindicatio*. It is indeed correct that this legal principle, was taken in *Guoxing Gong*. But that authority is clearly distinguishable, on the facts, from the present matter. In *Guoxing Gong*, it was a fact that title had been secured through what the court found to be unconscionably improper methods. BHUNU JA expressed the court`s findings (and displeasure), in the following terms [pages 6-7]; -

> At this juncture, it does not seem to matter to me whether or not the appellant was the 1st purchaser as he alleges. What is material at this stage is that he obtained defective invalid title in defiance of a valid court order and caveat. It is an established principle of our law that anything done contrary to the law is a nullity. For that reason no fault can be ascribed to the learned judge 's finding in the court a quo <u>that the conduct of the appellant and his lawyer in obtaining registration of the disputed property in the face of a court order and caveat to the contrary was reprehensible. On the basis of such finding the appeal can only fail. The appellant and his lawyer's unbecoming and deplorable conduct in resorting to criminality in a bid to preserve their ill-gotten gains cannot go unpunished</u>. [Emphasis added].

[23] In that regard I find that the case of *Guoxing Gong* (supra) does not further first respondent`s argument. On that basis, I find that the validity of applicant`s title to the property has not, despite first respondent`s vehement protest, been materially challenged. That protest does not, however, amounts to mere strenuous objection. It is unsustainable. As a general rule, the position of the holder of rights at law is clear. The principle stated in *Cosma Chiangwa v David Katerere* (Supra) had also been articulated in *Lafarge Cement (Zimbabwe) Limited Versus Mugove Chatizembwa HH 413-18.* In that matter, the court laid out the principal considerations applicable to the holder of title to immovable property. MATHONSI J (as he then was), stated as follows [at page 2]; -

> The principles of the *actio rei vindicatio* are settled in our law. 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.

DISPOSITION

[24] First respondent has been unable to prove any right of retention. Similarly, first respondent`s attempt to challenge the authenticity of applicant`s title to the immovable property has not been sustainable. In such regard, the applicant is entitled to the relief sought. It is hereby ordered; -

1. That first respondent and all those claiming occupation through him be and are hereby ordered to vacate the immovable property called Stand Number 2000, Budiriro

Township of Willowvale, Harare also known as Number 2000,31st Crescent, Budiriro 1, Harare within 7 days of the date of service of this Order.

2. That in the event that first respondent and or anyone claiming occupation through him refuse or fail to vacate the property, the Sheriff of the High Court of Zimbabwe be and is hereby directed to evict first respondent and or anyone claiming occupation through him from the immovable property called Stand Number 2000, Budiriro Township of Willowvale, Harare also known as Number 2000,31st Crescent, Budiriro 1, Harare.

3. Cost of suit to be borne by first respondent on the ordinary scale.

Bere Brothers- applicant`s legal practitioners
Mashizha & Associates -first respondent`s legal practitioners