

BRIGHT MUGOROGODI  
versus  
KETHIWE VAN DER SANDEN

HIGH COURT OF ZIMBABWE  
BACHI MZAWAZI J  
HARARE, 6, 27 April & 22 June 2022

### **Civil Trial**

*K. Maeresera*, for the Plaintiff  
*E. Saundombe*, for the defendant

### **Introduction**

BACHI MZAWAZI J This is a summons matter, for *actio rei vindictio* and ancillary relief initiated by the plaintiff against the respondent. The Plaintiff claims ownership of the property, subdivision 6, Lot A, Greendale , Harare, also known as number 3, Rhodesville Avenue, Greendale, flowing from an agreement of sale and the subsequent transfer of title from that of the defendant's husband to himself. In his declaration, he asserts that the property in issue is in the possession of the defendant without his consent, therefore he seeks her eviction and that of all those who claim occupation through her from the mentioned property. In addition, he is praying for an order for the payment of utility bills owing to the local council and Zimbabwe electricity authority and holding over damages to the tune of ZWL \$1000.00, a month from the date of transfer to the date she eventually vacates the premises.

### **The Common cause facts**

The undisputed facts are that the defendant is legally married to the seller, Robertus Antoine Willy Van Der Sanden until the finalization of their divorce suit pending before this court in case HC 1209/18, which commenced on 8 February, 2018. On 28 November, 2018, the plaintiff entered into an installment agreement of sale for the purchase of the property in issue with the defendant's husband. Transfer of title and ownership into his name was effected through a Deed of transfer dated the 19 June 2019. Since then the defendant has been in possession of the

property. There is evidence on record that the parties have been embroiled in numerous law suits before this court wherein the defendant had been challenging the sale, transfer of the property, amongst others.

### **Plaintiff's case**

A copy of the agreement of sale dated 28 November 2018, receipts and documents supporting payment of the purchase price and the Title Deed, deed of transfer number, 9031/2830 dated 19 June 2019, bearing the plaintiff's name were adduced as evidence in support of ownership of stand, subdivision 6, Lot A, Greendale, Harare, also known as number 3, Rhodesville Avenue, Greendale. Reference was also made to a court order barring him from disbursing the last installment to the seller, pursuant to a court application made by the plaintiff to that effect. Plaintiff contends that, adequate notice to vacate the premises was given through the seller's legal practitioners addressed to defendant's former lawyers Chakanyuka and Associates dated the 4<sup>th</sup> of December, 2018, but defendant has refused to vacate his property. The plaintiff does not deny knowledge of several court cases over the same subject matter involving the defendant, the seller and another person. At one stage he made reference to a statement made on oath by the defendant wherein he was mentioned in Case number HC312/18 which involved first purchaser. He also admits that the defendant instituted court proceedings in cases HC2395/20 and HC1893/20, against him, challenging the sale and seeking the reversal of his title but then reneged at the eleventh hour by withdrawing both sometime in mid 2021. Plaintiff denies conniving with defendant's husband to disfranchise her from a share in the matrimonial home and any fraudulent dealings in respect to the agreement of sale. He also stated that the defendant has not been paying utility bills over a long period of time and has attached outstanding bills to that effect. In his evidence he states that since the defendant is aware of his ownership of the property she should pay him holding over damages of accrued rentals from the date of transfer of title. He did not call any witnesses.

### **Defendant's case**

The defendant also did not call any witnesses. She controverts that the plaintiff has no right to evict her from her matrimonial home. She testified that his title is tainted with illegality as the sale was a fraud borne out of a well-orchestrated scheme between plaintiff and her estranged husband to disentitle her from a share in the marital property in the pending divorce suit. Put differently, she asserts that, since the sale and the subsequent change of title was a sham, the

plaintiff has no right to evict her. As such, she contends that there is no basis for the holding over damages and the utility bills payment claims.

She chronicled how she met the seller, her estranged husband, a Dutch national of Germany origin, whilst working as an air hostess with the local air line. She stated that, the two contracted a customary law marriage in 2000 which was subsequently solemnized on 15 December the same year. She testified that, stand subdivision 6 of Lot A Greendale was purchased two months before their civil marriage but during the subsistence of their customary law marriage. She further, maintains that it is not only her marital home but a matrimonial property subject to division and distribution in an already instituted divorce case. In court she attested that the sale and transfer of the property was done after the commencement of the divorce proceedings, which is a clear indication that both the seller and the plaintiff were alive to the controversy surrounding the property. She, states that therefore the whole sale was a sham meant to frustrate her proprietary rights to the matrimonial property at divorce. She points out that the whole saga surrounding the transfer of title when the full purchase price had not been paid in contravention of a clear provision of the contract of sale further augments that the sale was not genuine.

In her testimony she ventilated that although the property was registered in the sole name of her husband, he had in the past fraudulently and clandestinely sold and transferred the family home to one, Ray Masamba. The defendant told the court that, after foiling the fraud, she challenged the first sale through several court applications and legal battles for a period spanning from 2014 to 2018 resulting in the first purchaser reneging from the transaction and reversing the transfer of title that had been effected. In her evidence, she points out that the *modus operandi* used in the first sale is identical to the current one and there is super abundant evidence that plaintiff was aware of the legal history encircling the property in question but concluded the sale nevertheless. On 8 February 2018, she issued divorce summons against her husband in case HC 1209/18. She also led irrefutable evidence that unlike the first sale, the second between her husband and the plaintiff took place on 28 November 2018, transfer on in June 2019, well after the commencement of the divorce proceedings which are still pending before this court.

Both in her pleadings and oral testimony the defendant asserted that no notice to vacate was served on her although plaintiff admits having visited her place of residence to view the property in 2017. She ascertains that two identical letters have been discovered as proof of notice

to vacate given to her. Both letters are addressed to her previous lawyers Chakanyuka and Associates with whom she had terminated services as far back as 2014. The first letter that has been produced through her supporting documents in relation to her case against the first purchaser is dated the 8 May, 2015. She pointed to the court that in her court proceeding before the first purchaser she had challenged the notice as she had disengaged that law firm. She then queried the coincidence of a duplicate letter dated the 4 December, 2018, bearing the same contents served once again to the same old lawyers claiming it was from the plaintiff. She adverted that it was not a mere coincidence that notice to vacate is served on her former legal practitioners when the plaintiff and the lawyers who generated both letters knew where she stayed and would receive service as she was in occupation of the property in dispute. She told the court that this was a clear case of misrepresentation and fraud riddling all the plaintiff's actions in this sale.

To buttress her stance, the defendant attested that, the plaintiff had a pre-sale view of the property in January 2018 when she had not concluded her cases with the first purchaser as she mentioned him in her court papers in those proceedings. This was not denied by the plaintiff. Instead his defence counsel capitalized on the same piece of evidence to discredit the defendant on the issue of her knowledge of the pre-sale visit. The plaintiff gave conflicting evidence in regard to why he did not inform the defendant of his intended viewing of the house. At first he said he was ushered in by the defendant's maid without the defendant's knowledge. Under cross examination, he changed goal posts and mentioned that the maid had phoned the defendant who then authorized them to view the property. When queried why then he failed to serve the notice at a place he had visited before he did not give any credible response. Further, she challenged the plaintiff that there was no direct and personal service because of the fraud shrouding the whole sale. In addition she stated that since plaintiff had had occasion to be at the property surely he should have found out the legal disputes surrounding the property at those very initial stages indicating once again that he was not an authentic *bona fide* purchaser.

### **Issues**

As can be gleaned from the above set of facts several legal principles emerge. Already on record are decisions of this court on some aspects of those law tenets pursuant to the multiplicity of suits brought by the applicant. Both decisions by MWAYERA J, in HC4339/ (as she then was) and CHIRAWU-MUGOMBA J in case HC312/18, were applications by the plaintiff against her

estranged husband and one Roy Masamba, over the initial sale of the property under contestation. The divorce court is still to decide on the proprietary rights of the defendant against the underpinnings of the legal principles explored in the above mentioned decisions. It suffices to note that, a joint pre-trial minute signed by the representatives of both parties dated 20 July, 2020, in the divorce matter in case HC1209/18, streamlined the issues to two. I will restrict myself to the two issues brought forward for trial. These are, Whether or not the plaintiff has the right to evict the defendant and Whether or not he is entitled to claim holding over damages and utility bills from the defendant?

### **An exposition of the law against the facts and evidence**

#### **The remedy of *actio rei vindicatio***

In tandem with the first issue, whether or not the plaintiff has the right to evict the defendant? The starting point is to examine the law on the rights of an owner to vindicate his property from anyone who is in unlawful possession of the same. The principles underlying the common law remedy of *actio rei vindication*, are clear and straight forward. In the *locus classicus* case of *Chetty v Naidoo*<sup>1</sup>, it was highlighted that,

“It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent.

In simple terms what can be deduced from the above *dicta*, is that the law recognizes and protects the proprietary rights of an owner of both movable and immovable property. So much that they can reclaim the property from whosoever will be in possession of the same without their consent. In other words, an owner has the right to vindicate or evict any third party from his property. However, in order to do so they have to satisfy two essential requirements which are,

1. There must be proof of ownership on the part of the person instituting the action;
2. The defendant must be in unlawful possession of the property.

These essential elements were enunciated in the appellate division cases of *Savanhu v Hwange Colliery Company*, SC 8/29 and *January v Maferefu*, SC 14/20. It follows that, once the

---

<sup>1</sup>1974 3 SA 13 (A)

plaintiff discharges the onus that he owns the property in issue and that the defendant is in possession of the same, the burden of proof shifts to the defendant. This is summarized in *Chetty v Naidoo*, as follows,

“The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* - the onus being on the defendant to allege and establish any right to continue to hold against the owner... (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at pp 382E, 383)...”

In turn, the defendant must prove the four main defences that:

1. The plaintiff is not the owner of the property.
2. The property in question is no longer identifiable or does not exist; it has, for instance, been destroyed.
3. The defendant's possession is lawful.
4. The defendant is no longer, in physical control of the property.

See also, *January v Maferefu*, above. The defenses need not be cumulatively proved. It is sufficient to prove any one of the four. Applying the law on vindication of rights to the facts and evidence in this case the next step is to establish whether the plaintiff has discharged the onus vested in him to prove ownership.

### **The plaintiff and the burden of proof**

As noted above, plaintiff has the onus to prove firstly his ownership and secondly that defendant is in unlawful possession of the property.

In this jurisdiction ownership of immovable property is proved by the production of a deed of transfer. A deed of transfer is a legal document that shows proof of ownership to an immovable property. In *Takafuma v Takafuma* 1994(2) ZLR 103(S), the Appellate court commented that,

“The registration of rights in an immovable property in terms of the Deeds and Registries Act [Chapter 20:05] is not a mere form...It is a matter of substance. It conveys real rights upon those in whose name the property is registered.”

See, *Sheriff for Zimbabwe v Humbe and Muchina* HH378/20.

However, it is an established principle of law that a deed of transfer is not conclusive proof of ownership. It simply raises a rebuttable presumption in favour of the holder of title until the challenger proves on a balance of probabilities otherwise. See, *CBZ Bank Limited v Moyo and Deputy Sheriff Harare*, SC 17/18.

A passage in the case of *Cunning v Cunning*, 1984(4) SA 585 (T), highlights that, in any event, the registration of transfer in the Deeds registry does not always reflect the true state of affairs. A title deed is therefore, *prima facie* proof of ownership which can be successfully challenged.

*In casu*, it is not in dispute that the plaintiff is the registered owner of the house in question and that the defendant is in possession of the same property without the plaintiff's consent. The question that arises is, is defendant in unlawful possession of the said property. The plaintiff has argued that since he is the registered title holder of the property, he has no relation with the defendant and has not sanctioned her stay therefore, she is in unlawful occupation. In that regard, he has discharged his burden on *prima facie proof* ownership. The onus to rebut the presumption on ownership and the lawfulness of possession of the property automatically shifts to the defendant.

### **The Defendant and the burden of proof**

The defendant is challenging the validity of the change of ownership and title. She alleges that it was a fraudulent sale meant to deny her a share in the matrimonial property. She led evidence to the effect that the plaintiff was not only aware of her rights and interests on the property, but he was already in the picture when she was fighting the first purchaser. This is evidenced by the already alluded to affidavit she filed in January 2018, in case ,HC 312/18, where-in she sought and was granted a provisional order for the registration of a caveat over a piece of land Subdivision of Lot 1, Greendale , known as number 3 Rhodesville Avenue, Greendale Harare. This was against her estranged husband, Robertus Antoine Willy Van der Sanden and Roy Masamba the first purchaser of the property. Of particular importance is para13 which states'

"I am still in occupation of the house and first respondent now intends to sell the property to one Brighton Magorogodo who came to the property on 6 January , 2018 at the instance of first respondent in the company of one Ceasar Chamanja with the intention of viewing the property"

The above, statement was repeatedly used by the plaintiff's counsel to discredit her testimony on the issue of her knowledge as to the visit made by the plaintiff to review the property prior to the sale.

Several interesting facts emerge from the above averment. The first one is that the plaintiff did not dispute that as early as January, 2018, in the midst of court disputes over the property in

issue he was already interested in purchasing the controversial property. Evidence has been placed on record that the registered owner of the property was Roy Masamba as he had not reversed his title. Since Roy Masimba was the registered owner, the plaintiff must have had that knowledge as the seller was not the defendant's husband at that time. In other words, he went to view a property which was in the name of Roy Masamba from January 2018, the property had already been transferred into Roy Masamba's name on the 24 February under Deed Transfer number 664/15 2015.

If he was aware of that scenario surely he must have known that the rights of Roy Masamba over the same were being contested by the defendant. Irrebuttable evidence supporting that averment was also placed before this court that the utility bills of the property in question are still in the name of Roy Masamba.

Secondly, it is not disputed that on his visit to the property, in January 2018, he was in the presence of not only the domestic workers of the defendant but was also in the company of a middle man mentioned by name, who played a central role in the sale transaction between himself and the defendant's husband. This court was told that it is the same man who helped wire large sums of the purchase price paid in hard cash in this jurisdiction, taken to and then transferred in Zambia. Synonymous with the sale of immovable property in real estate is the fact that the purchaser who is in a position to part with large sums of money lives no stone unturned in gathering as much information as possible in respect to the property. In this case the plaintiff professed ignorance of the property sharing dispute surrounding the house when he visited the property for the purposes of viewing. He failed to explain to the court why he did not make sufficient enquiries as to ownership and all the relevant information pertaining to the property he was interested in. This in my view casts doubts to his version distancing himself from the knowledge of the legal battles shrouding the said property. If one is a genuine buyer and is prepared to part with huge sums of money, one takes all the precautionary measures to gather facts as to the authenticity of the sale.

Of note is that, the contentious affidavit mentioned above emanated from an application for provisional order for a caveat over the contested house, which had been granted in favour of the defendant against Roy Masamba and her estranged husband. This interim order was discharged in August 2018, in case HH468/18. On 22 October, 2018 the first seller, although he had

successfully obtained two judgments in his favor against the defendant, in case HH468/18 and 4339/15 on the issue of the *locus standi* of defendant in both cases, went on to seek and obtain a court order in case number HC7201/18 reversing the sale and change of title from his name back to that of the seller. The reasons for the reversal of sale cited by the first purchaser was the spirited fight put up by the defendant in the four year legal battles.

Thirdly, the legal practitioners who represented, the seller, Muhonde Attorneys, from 2014 in all matters involving the first purchaser also represented him in all transactions with the plaintiff. These legal practitioners are the ones who defended the seller in the challenges made by the defendant and were privy to her rights and interests in the property in dispute. They filed the opposing papers to the divorce action. They are the ones who wrote both letters of notice of eviction addressed to Chakanyuka and Associates. They wrote the Notice of eviction in May 2015 addressed to Chakanyuka and Associates whose instruction to receive service was challenged by the defendant in several court cases involving the first purchaser. They then wrote a carbon copy of the same letter again to Chakanyuka and Associates on 8 December 2018, this time giving notice to vacate and advising them of the concluded sale between the seller and the plaintiff herein. Receipts of all the money that was paid towards the purchase price in this country by the plaintiff, are clear evidence that they are from Muhonde Attorneys legal practitioners.

In my view the service of both notices of eviction on a third party with full knowledge of the defendant's residential address is a clear indication that the plaintiff, the seller and his legal Practitioner Muhonde and Attorneys where not acting in good faith.

This is further buttressed by the fact that the seller's above mentioned lawyers are the one who represented him in all his raging battles with the first purchaser. Evidence has been placed on record that they are also the ones who receipted the purchase money paid into their account by the plaintiff. For the plaintiff to then turn around and say he was ignorant of the existence of the defendant and all the disputes pertaining to the house is hard to believe.

In contradistinction to the first sale, where literally, the defendant had no leg to stand, on particularly based on the decisions of judges in the already cited judgment, emphasizing that property registered in the sole name of one spouse can be sold by that spouse during the subsistence of the parties marriage without their knowledge or consent in view of the community property

marriage regime. A position which has been critiqued by human and women's rights organization. A stance where property rights take precedence over family law rights.

See, *Madzara v Stanbic*, HH 546/2015 *Maponga v Maponga and Anor* HH 21-2004 *National Provincial Bank Limited v Ainsworth* (1965) 2 All ER 472; *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) (2) RLR 261(A); *Muzanhenhamo and Another v Katanga* 1991 (1) ZLR 182 (SC); *Nyatawa v Nene* SC119/91 and *Muganga v Sakupwanyanya* 1996 (1) ZLR 217 (S)).

In the current case the property was sold after the institution of divorce proceedings. It is evident that the second sale was transacted in the midst of the court challenges of the first sale and after commencement of the divorce proceedings. The divorce matter is on hold since the defendant's husband is outside the country, as the old rules of this court required his presence at the pre-trial conference stage. If the seller had genuine intentions he could simply have waited for the divorce proceedings to be finalized from his experience from the reversed sale. So it is clear that the seller entered into the second sale well aware that the property was subject to the division of matrimonial property in the divorce case. At law a spouse has a right to sell a house forming part of the matrimonial estate but registered in his or her sole name. However, courts can intervene when such a sale is intended to defeat the other spouse's just rights. A clear distinction must be made in the sale of property registered in a spouse's single name, sold during the subsistence of the marriage when there is no divorce to speak of, and when divorce proceedings have commenced. The latter is a clear indication of a sham orchestrated to frustrate the matrimonial proprietary rights of the unregistered spouse. See the sentiments echoed in *Madzara v Stanbic* above and the cases cited therein against the bedrock of section 26 of the Constitution of Zimbabwe, Amendment Act No 20 of 2013. This is such a scenario. The purchaser in the first sale resiled, from the sale, acknowledging the ruse behind that sale in the face of the fights put up by the defendant. See *Muswere v Makanza and others* 2004(2) ZLR and *Chikuni v Mavhiyo* HH 21/2020.

In addition, the plaintiff failed to successfully support his ownership as it was put to him that registration of title was supposed to take place only after the payment of the full purchase price. He failed to explain to the court how then transfer took place in contravention of a valid and key clause of the agreement of sale. No contract of variation or novation of the original terms of the contract was placed before the court.

Clause 8 of the agreement of sale between the defendant's husband and the plaintiff reads as follows;

1. Transfer of rights, title and interest shall be effected by the seller(s) to the purchaser within a reasonable period from the date the purchase price is paid in full.

Clause 17 reads “: No variation to this agreement shall be valid unless reduced to writing and signed for by the Seller and the Purchaser. This clause was not complied with, meaning no ownership passed before the payment of full purchase price. There is evidence on record that the balance of the purchase price is held in trust following a court order by the defendant well after the transfer of title.

### **Disposition**

In light of the above it is clear that although the plaintiff does have documents that show him as the registered owner of the property he has failed to convince the court that ownership lawfully passed. The registration itself was contrary to a clear provision of the agreement of sale between the seller and the plaintiff. Therefore its validity is questionable. Registration and all rights of possession and *rei vindicatio* stipulated in clause 5.1 of the agreement of sale were to pass only after the payment of the last installment. Based on this ground alone the then transfer of property was dubious and illegal. In my view both the sale and the transfer are a legal nullity. In that regard nothing flows from nothing. See *Muchini v Adams* 2013 (1) ZWL 67 AT 72A, *Mcfoy v United African Company Ltd* [1961] (2) All Ed 1169. The plaintiff can therefore not evict defendants as he has no right of ownership of the property. It suffices to say that the defendant has managed to prove that the sale to the plaintiff was a fraud. He was lurking in the shadows during the defendant’s court battles with the first purchaser. All his actions, as well as those of the seller and his legal practitioners point to the fact that he knew this was a sham meant to frustrate the defendant’s entitlement to a share in the marital home. Further, since the sale is a fraud, plaintiff has no legal title to the property in dispute and he cannot be protected by the remedy of *rei actio vindicatio*. The claim on holding over damages and payment of utility bills automatically falls away. Thus the defendant has demonstrated that she is in lawful possession of the said property until such time the divorce court determines her marital property rights in the said property.

Accordingly, the plaintiff's claim is dismissed with costs.

*Chizengeya Maeresera & Chikumba*, the plaintiff's Legal practitioners.  
*Samundombe & Partners*, defendant's legal practitioners.