

NOMVUYO MADZIRO

In her own capacity and in the capacity as legal guardian
Of her minor children Ruvarashe I Madziro and Anesuishe W Madziro

versus

TARIRO PAUL MACHIRIDZA

and

DELATFIN CIVL ENGINEERING (PVT) LTD

HIGH COURT OF ZIMBABWE

MANZUNZU J

HARARE, 18 October 2021 & 28 June 2022

COURT APPLICATION

C Mateza, for the plaintiff

T Tanyanyiwa, for the 1st and 2nd defendants

MANZUNZU J

INTRODUCTION

The plaintiff issued summons against the defendants seeking firstly an order declaring the plaintiffs as *bona fide* purchasers and holders of rights and interest in stand 1404 Hydon known as Sandton Park, Harare (the property). Secondly the plaintiffs seek the eviction of the first defendant and all those claiming the right of occupation through him from the property. The plaintiffs seek costs of suit at a higher scale.

According to the declaration the plaintiffs allege that in 2015 they acquired rights and interest over the property from one Kuziva Zimunya who in turn had secured the same from the second defendant. In 2017 it is alleged, in a separate agreement between the plaintiffs and second defendant, the second defendant ceded to the plaintiffs all its rights and interest in the property.

It is further alleged that the plaintiffs have been in peaceful and undisturbed possession of the property since 2015 until in 2020 when the first defendant invaded the property claiming ownership rights over the property. As a result, the plaintiff seek relief as stated above.

The defendants entered an appearance to defend on 31 March 2021. They raised an exception to the declaration for failure to comply with R 11 (c) of the then High Court Rules 1971 which reads;

“Before issue every summons shall contain—
(c) a true and concise statement of the nature, extent and grounds of the cause of action and of the relief or remedies sought in the action;”

The plaintiffs seek a *declaratur* and eviction order against the first defendant. The defendants allege that the declaration does not contain an identifiable and recognized cause of action. Further that the plaintiffs pleaded personal rights arising from an agreement of sale with Kuziva Zimunya and such personal rights can only be enforced against Kuziva Zimunya. No real rights were pleaded by the plaintiffs such as can be exercised against the world at large. No order is sought as against the second defendant, neither are there averments making a case for the second defendant to answer.

Faced with these observations in the exception, Mr *Mateza* for the plaintiff argued that the elements of a spoliation were pleaded. This despite the fact that the plaintiffs are not seeking a spoliation order but rather an eviction order. It is not clear which agreement gave plaintiffs cessionary rights to the property. Is it the one with Kuziva Zimunya or second defendant as alleged in pp 4 and 6 of the declaration. It must be noted that the requirements for a spoliation order and eviction order are different.

It is untenable for Mr *Mateza* to argue that since the effect of eviction is to grant status *quo ante*, therefore one needs not make a prayer that possession be restored. Such an approach defeats the whole purpose of pleadings. In *Fungai Nhau v Memory Kipe & Anor HH 73/15* the court had this to say;

“By definition, pleadings must be concise and to the point. They must identify the branch of the law under which the claim or defence to it is made and should not contain evidence.”

In *Chifamba v Mutasa & Ors HH 16/08* the court remarked;

“Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter so that what they plead is what the law requires their clients to prove to sustain the remedy they seek------. Litigation in the High Court is serious business and the standard of pleadings in the court must reflect such.”

In *Nhau* case, *supra* the court went further to say;

“While still at that, it is time to remind legal practitioners once again, that in formulating pleadings they should always bear in mind the purpose of pleading. The essence of any claim is found in the pleadings whose function is to inform the parties of the points of issue between them to enable them to know in advance what case they have to meet, to assist the court define the limits of the action and to place the issues on record.”

The relief for a *declaratur* is also premised on two averments of a sale agreement between the plaintiffs and Kuziva Zimunya and second defendant. The averments are not congruent with

each other. The law governing applications for declaratory orders is well settled. The applicant must show that she/he is:

- An interested person
- That there is a right or obligation which becomes the object of inquiry
- That he/she is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter
- That there is an interested party upon which the declaration will be binding, and
- That consideration of public policy favours the issuance of the declaratur

See *Movement for Democratic Change v The President of the Republic of Zimbabwe & Ors*, HH 28/07; *RK Footwear Manufacturers (Pvt) Ltd v Boka Book Sales (Pvt) Ltd* 1986 (2) ZLR 209; *Family Benefit Friendly Society v Commissioner of Inland Revenue & Anor* 1995 (4) SA 120 (T)

The averments in the declaration lack particularity such as to inform the defendants as to what case they have to answer to. The plaintiff wants to be declared a legitimate purchaser, but is there an averment which says anyone has said she is not. In my view the summons and declaration can only be said to be bad at law and excipiable for want of disclosure of a cognisable cause of action. No argument was raised in support of costs at a punitive scale.

DISPOSITION

1. The exception raised by the 1st and 2nd defendants be and is hereby upheld.
2. The plaintiff's claim be and is hereby dismissed.
3. The Plaintiff shall pay costs of suit on an ordinary scale.

Chimwamurombe Legal Practice, plaintiff's legal practitioners
Tanyanyiwa and Associates, defendant's legal practitioners