

STOUT MBANO

versus

BRIGHTON GUMBOCHUMA

(In his capacity as Executor Dative of the
Estate Late William Mirirai Gumbochuma)

and

MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS & NATIONAL HOUSING

HIGH COURT OF ZIMBABWE

MUZOFA J

HARARE, 14, 15 July & 30 August 2021

Civil Trial

L.R Samukange, for the plaintiff

A.Muchadehama, for the 1st defendant

T.S Musangwa, for the 2nd defendant

MUZOFA J: The plaintiff seeks the eviction of the 1st defendant and all those claiming occupation through him from residential premises known as Number 2312 Msasa Drive , Marlborough, Harare ‘hereinafter referred to as the property’ . He also seeks costs of suit on an attorney and client scale. When the 1st defendant received the eviction summons, he entered appearance to defend and filed a plea. Subsequently an application for joinder of the 2nd defendant was made and granted. The 2nd defendant also opposed the claim. Although the plaintiff seeks no order as against the 2nd defendant, the 2nd defendant was joined to the proceedings to vindicate the 1st defendant’s claim to the property.

The plaintiff’s case is that he is the registered owner of the property. He paid the 2nd defendant to build a house on the property. In 2017 he discovered that the 1st defendant was occupying the property without his consent and authority. He thus seeks his eviction and all those claiming occupation through him.

The 1st defendant was sued in his capacity as the executor dative of the Estate late William Gumbochuma. Before filing his plea, the 1st defendant requested for further particulars which were provided. In his plea the 1st defendant stated that the plaintiff’s title was illegally and fraudulently obtained. The plaintiff cannot derive a benefit from defective title. He is in lawful occupation of the property. The 2nd defendant’s plea sets out how the plaintiff and the late Gumbochuma were involved with the property. The 2nd defendant purchased the undeveloped property from the plaintiff and then built a house on it for the late Gumbochuma.

The 2nd defendant allocated the plaintiff a stand in Donnybrook as part payment for his property. It was more of a swap agreement. The property belongs to the late Gumbochuma even though it is still registered in favour of the plaintiff.

At the pre-trial conference the following issues were referred for determination.

1. Whether or not 1st defendant has a lawful basis upon which to retain occupation of stand 2312 Msasa Drive, Marlborough, Harare.
2. Whether or not plaintiff is entitled to evict 1st defendant from stand 2312 Msasa Drive, Marlborough, Harare.

The plaintiff's case

During the trial, the plaintiff gave evidence in support of his case. He stated that, way back in 1994 he bought the unimproved property using proceeds from his terminal benefits. At that time his wife was employed by the Ministry of Public Construction which is now under the 2nd defendant. Around 1996/ 1997 the 2nd defendant introduced a VIP housing scheme. Together with his wife, they successfully applied to be part of the housing scheme. They were invited to deposit certain amounts for the building of a house on the property. They paid \$50 000.00 for such services. The 2nd defendant changed its mind and indicated it cannot build on private property. The 2nd defendant proposed a swap in terms of which the plaintiff would be allocated a bigger stand at Donnybrook where the 2nd defendant was implementing another scheme. No allocation was made. Instead, the plaintiff purchased a stand at Donnybrook and built a house without any input from the 2nd defendant. He then applied for title deeds that were issued with the consent of the 2nd defendant. Documentary evidence was produced in support of the plaintiff's title, payments for the purchase of the Donnybrook property and the payments towards the construction of a house on the property forming the subject of this dispute.

He was extensively cross examined by both legal practitioners for the 1st and 2nd defendants. The salient points that emerged under cross examination are that the plaintiff entered into a sale agreement with the 2nd defendant in terms of which he sold the undeveloped property to the 2nd defendant. Although he denied it, the agreement of sale was produced. It also emerged that at some point the plaintiff was required to surrender the title deeds to the 2nd defendant. He was elusive and eventually did not submit them. No follow up was made. It also emerged that the plaintiff was once sued by the Post Office Services Bank in terms of which an order was granted against the plaintiff as a guarantor together with others under HC 5645/12. Following that order, execution was levied as against the property herein. The plaintiff filed a court application under HC 8578/16 for the setting aside of the sale of the property. Kevin

Musimwa a legal practitioner representing the plaintiff then, being the applicant deposed to an affidavit on behalf of the applicants. In paragraph 16 of the affidavit, it was stated that the plaintiff sold the property to the 2nd defendant. Although the plaintiff denied giving such instructions, the documentary evidence was proof of that assertion. I comment in passing that under HC5645/12 the property in this case was not declared especially executable. What was declared especially executable is some property belonging to one Harold Makokoro registered under Deed of Transfer 4338/1990. Documentary evidence was produced to show that the plaintiff paid \$50 000 towards the construction of a house on the property. The plaintiff insisted that the payment was for the improvement of the property. The essence of the cross examination was to demonstrate that the title that the plaintiff holds on to is only on paper. He has no rights in the property at all.

The 1st defendant's case

The 1st defendant gave evidence as the executor of the estate late William Gumbochuma. He stated that he was appointed executor of his late father's estate in 1998. He knew the plaintiff as he once visited them at the property and introduced himself as the owner of the property in 1996. His father was still alive. He was involved in the case after the death of his mother. As the executor in both estates, he discovered that the property was still registered in the plaintiff's name. He also discovered that his late father had not paid the full purchase price at the time of his death. The 2nd defendant had extended an olive branch to his mother to pay off the debt. Unfortunately, she also passed on before paying off the purchase price. He took over and paid the balance. At some point he requested for the title deeds from the 2nd defendant. He was advised they were to be processed. He could not approach the court nor give pressure to the 2nd defendant for the title deed. The 2nd defendant had dealt with his family compassionately. At some point the property was about to be sold as a result of a case in which the plaintiff was involved. He filed process to defend the property in interpleader proceedings under HC 9232/16. To the best of his knowledge the property belongs to the estate late William Mirirai Gumbochuma.

What emerged from his cross examination is that the 1st defendant did not have proof that he paid the full purchase price for the property. He said he fully paid for the property in 2003 but had no receipts. He paid \$800 000.00 for the land and the construction of the house. They took occupation before the house was fully paid for. He also conceded that his claim can only be against the 2nd defendant. He explained that he had a cordial relationship with the 2nd

defendant. When he requested for the title deed to the property but could not get it , he gave the 2nd defendant's officials time to process it.

2nd defendant's case

Two witnesses gave evidence in support of the 2nd defendant's case. Owen Ndoro 'Owen' was called as the first witness. He is a Principal Estates Officer in the 2nd defendant's Ministry. He did not personally deal with the plaintiff and the late Gumbochuma. His evidence was based on documents from his office. He stated that between 1994 and 1995 the Ministry initiated a pay for your house scheme. Interested individuals would apply. If one qualified he or she would make monthly instalments to the Ministry. Thereafter the 2nd defendant would build the house for the beneficiary on identified state land.

According to the records there was a swap agreement recorded as an agreement of sale. The plaintiff sold the property to the 2nd defendant and in turn the plaintiff was allocated a stand in Donnybrook. He referred to the agreement of sale and letters from the 2nd defendant's office that showed that the plaintiff sold the property. At some point plaintiff was requested to surrender the title deeds but he failed to do so. The witness concluded that the correspondences between the parties show that the 2nd defendant had fully satisfied its obligation in terms of the agreement of sale. That is why it requested the plaintiff to surrender the title deeds. At some point the plaintiff misrepresented that he had handed over the title deeds to one Mrs Chisenga. The late Gumbochuma was a beneficiary of the VIP scheme. He made some payments but at the time of his demise he had not fully paid the purchase price. The outstanding balance was paid by his family. The late Gumbochuma was allocated the property. Under cross examination he could not clarify how the swap agreement was made. However when he was shown the receipts showing that the plaintiff paid for the Donnybrook stand he could not commit that indeed the plaintiff paid. He said the Finance department can only confirm. He denied that the Ministry reneged on the terms of the agreement that is why title was not passed to it. He insisted that the property belongs to the late Gumbochuma.

The second witness to give evidence was Mrs Chisenga. She is an Estates Officer at the 2nd defendant's Ministry. Her responsibilities include managing institutional Government houses. In her official capacity she was involved in the construction of a house on the property. Her role was to liaise with the surveyors during the construction of the house. She denied receiving the title deeds for the property from the plaintiff. Her cross examination did not elicit any relevant material except to confirm that she worked with the plaintiff's wife at some point.

Analysis of the evidence

It is not in dispute that the plaintiff purchased the undeveloped stand from his terminal benefits. He was not candid with court how he dealt with the property. Initially he disowned the agreement of sale he entered with the 2nd defendant. However, he eventually conceded that he entered into this agreement but insisted that the 2nd defendant did not fulfill the terms of the agreement. As if the first denial was not enough, the plaintiff also tried to wriggle out of the assertion by his legal practitioners under HC5645/16. Where he stated he sold the property to the 2nd defendant. Even if the plaintiff initially denied the existence of the agreement of sale, my finding is that the parties entered into such an agreement in 1996. A letter was written to the plaintiff by the 2nd defendant on 6 January 1998 advising that the purchase price for the property was credited to his pay for your house scheme in respect of stand number 1290 Donnybrook. He was required to pay a balance of \$32 173-00. Despite the communication, in 2003 the plaintiff paid the full purchase price of \$115 173.00. By accepting the full purchase price the credit for the purchase price became useless. It was not explained by the 2nd defendant what the \$50 000-00 paid by the plaintiff towards the Marlborough property was for. According to the plaintiff it was for the construction of the house on the property. Whatever the position, the fact remains that the plaintiff is the registered owner of the property. Some payments were made towards the improvement to the property.

In respect of the 1st defendant's rights, it is said he took over and paid off the purchase price. There was no proof of such payment. The defendants relied on correspondences in the 2nd defendant's office that such payments were made. I accept that the 1st defendant purchased the property from the 2nd defendant. The 2nd defendant sold the property before receiving title. It only had personal rights in the property.

At the inception of the trial I drew the attention of the parties' legal practitioners that the issue before the court does not dispose of the dispute. The real dispute relates to the ownership of the property. The 2nd defendant did not make a counter claim to compel transfer neither did the plaintiff seek the cancellation of the agreement of sale. The dispute could have been disposed of in its totality. If indeed the 2nd defendant was so minded to fully vindicate the 1st defendant's rights it should have done so and avoid piece meal litigation. Despite agreeing with the court the parties were happy to proceed with the matter as filed.

I address the issues for determination.

Whether or not 1st defendant has a lawful basis upon which to retain occupation of stand 2312 Msasa Drive, Marlborough, Harare.

The principles of the *actio rei vindicatio* are settled in our law. Numerous cases have pronounced the applicable principles that the owner of property can protect his right against the whole world. The claimant has to establish that he is the owner and that the respondent is in occupation or in possession of the property without his consent¹. Proof of ownership shifts the onus to the possessor to prove a right to retention². Once the onus shifts to the defendant he can defeat the claim by establishing one of the defences recognized at law;

- i. That the applicant is not the owner of the property in question.
- ii. That the property in question no longer exists and can no longer be identified.
- iii. That the respondent's possession of such property is lawful.
- iv. That the respondent is no longer in physical control of the property

See the case of *Chetty v Naidoo (supra) and Residents of Joe Slovo Community v Thabelisha Homes* 2010 (3) SA 454 (CC)' per UCHENA JA in *January v Maferefu*³

In this case it is not in dispute that the plaintiff is the registered owner of the property. It is also not in dispute that the 1st defendant is in occupation of the property without the plaintiff's consent.

The 1st defendant is in occupation at the behest and authority of the 2nd defendant. *Mr Muchadehama* for the 1st respondent, raised the point that the claim must not succeed since the plaintiff is not seeking the eviction of the 2nd defendant through whom the 1st defendant claims ownership. The point was not taken further and rightly so since the issue was not pleaded. It is trite that an issue cannot be raised during a trial by a legal practitioner in the absence of an application to amend the pleadings. In his plea the 1st defendant alleged that the plaintiff's title was illegally or fraudulently obtained. There was no evidence to prove the illegality. The acceptable evidence is that the plaintiff purchased the undeveloped stand and title was passed on to him well before the involvement of the defendants. The challenge is based on the purported sale.

The 1st defendant has personal rights yet the plaintiff has real rights in the property. The 1st defendant has no claim or valid defence as against the plaintiff. There was no agreement between the parties. Since the 1st defendant looks to the 2nd defendant for

¹ *Lafarge Cement (Zimbabwe) Limited v Mugove Chaitzembwa* HH 413/18

² *Zavazava & Anor v Tendere* 2015 (2) ZLR 394 (H) at 398 G

³ SC 14/20

vindication, the court must consider the 2nd defendant's rights in the property to dispose of this issue.

Without making a specific finding on the validity of the agreement of sale between the 2nd defendant and the plaintiff I determine this case assuming there was an agreement of sale. This was a sale of immovable property. Like any sale there must be delivery of the *merx*. In this context, it must always be borne in mind that registration of transfer is the equivalent of delivery of movables. In *York & Co v Jones*⁴, Murray B CJ stated:

"A seller of immovable property is under at least three duties to the purchaser in regard to the delivery of the property. He is firstly bound to effect transfer in the Deeds Office into the purchaser's name. Secondly, he is obliged to give physical possession of the property to the purchaser on or before the stipulated date. Thirdly, he is under a duty even after transfer and giving of possession, to guarantee the purchaser against eviction, that is, subsequent dispossession, total or partial, by third parties claiming a title superior to that which the purchaser has obtained from the seller."

Also in *Wessels Law of Contract*⁵

"4497 ... In the sale of immovable property, the delivery is effected by registration *coram lege loci*. In Holland, this registration was usually carried out at the Court of the Schout and Schepenen, but in South Africa it takes place at the Deeds Offices of the different provinces.

4498 Immovable property is not considered to have been delivered, and no ownership passes until registration has been effected and, therefore, there cannot be a delivery of land or houses without registration."

This position has been applied in our jurisdiction in numerous cases. I was referred to instructive *dictum* in *Gumbo v Sibanda*⁶ where the court stated:

'Where a contract of sale has been concluded and the purchase price paid, the purchaser only acquires a personal right against the seller. No real rights accrue until transfer of the property has been effected.'

Since a sale agreement gives rise to personal rights as against the seller, the 2nd defendant acquired personal rights from the plaintiff. No transfer of title was effected. Even after realizing that the plaintiff was uncooperative in handing over the title deeds the 2nd defendant did not assert its rights through the courts. This was necessary since the plaintiff is now challenging the validity of the agreement of sale. The difficulty that the court finds itself in is that, the validity of the sale has not been pleaded therefore the court cannot make a finding on the issue. The court has to determine the case based on the pleadings. The pleadings are clear that the 2nd defendant has an inferior title and even if it passed such rights to the 1st defendant those rights still remain inferior to the real rights held by the plaintiff.

⁴ 1961 R&N 490 (SR) 493F-494A-C

⁵ 2 Ed. paras 4497 and 4498

⁶ *Gumbo v Sibanda* HB 20/02

The 1st defendant being a holder of personal rights he cannot enforce them against the plaintiff. He can only enforce them against the 2nd defendant. The 1st defendant has no lawful basis to remain in occupation in the face of a claim by the plaintiff who has real rights in the property. The equities of this case demanded that the matter be addressed wholly considering that the 1st defendant has been in occupation for over ten years. The blame lies at the feet of the legal practitioners for failure to properly advise their clients.

From the foregoing the defendant has failed to show that the plaintiff's title in the property was illegally obtained. Similarly he failed to show the lawful right to occupy the property. The plaintiff has shown on a balance of probabilities that he is the registered owner of the property, and the 1st defendant is in occupation without his consent.

The plaintiff claims costs of suit on a higher scale. I was not given reason to award costs as requested. There is no valid reason to grant such costs.

Accordingly, the following order is made.

Judgment is entered for the plaintiff in the following terms

1. Eviction of the 1st defendant and all those claiming occupation through him from stand No 2312 Msasa Drive, Marlborough. Harare registered under Deed of Transfer No 1030/1994
2. Costs of suit.

Samukange, Hungwe Attorneys, plaintiff's legal practitioners
Mbidzo, Muchadehama & Makoni, 1st defendant's legal practitioners
Civil Division of the Attorney General's Office, 2nd defendant's legal practitioners