

TINOS JESMIEL RUSHWAYA
versus
SHEPCO INDUSTRIAL SUPPLIES (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA & MUNANGATI-MANONGWA JJ
Harare, 1 April 2021 & 8 September 2021

Civil appeal

C Ngweshiwa, for the appellant
H P Ingabire, for the respondent

MUREMBA J: On 1 April 2021 we heard this appeal and dismissed it with costs. We have been asked for the written reasons thereof and these are they.

The facts of the matter were as follows. On 14 June 2019 the respondent issued summons against the appellant in the Magistrates Court for his ejection and the ejection of all those who were claiming occupation of stand No. 351 Peterman Road, Waterfalls, Harare through him. When the appellant entered appearance to defend the matter, the respondent made an application for summary judgment on the ground that the appellant had no *bona fide* defence to his claim.

The property in issue initially belonged to the appellant. However, the respondent bought it from the Sheriff of Zimbabwe in a judicial sale on 17 December 2018. The property was subsequently transferred into the respondent's name on 4 March 2019. Despite demand by the respondent for the appellant to vacate the premises after the property had been sold and transferred, the appellant failed, refused or neglected to vacate. This is what resulted in him being sued for eviction.

The court *a quo* granted the respondent's application for summary judgment on the ground that the respondent was now the rightful owner of the property with real rights over it against the whole world. The court *a quo* made a finding that the appellant had no *bona fide* defence to the respondent's claim. This was despite the fact that the appellant had argued that there were triable issues in the matter that were based on the appeal he had filed in the Supreme Court, a review application he had filed in the High Court and a fraud case he had opened with the police. The

court *a quo* said that as long there was no court order that reversed the judicial sale, the noting of the appeal did not reverse the ownership of the property.

In bringing this appeal, the appellant raised 6 grounds of appeal, all of which had no merit. In fact, most of them were not even grounds of appeal, but meaningless statements. What is disappointing is that they were drafted by a legal practitioner. They were as follows:

- “1. Court *a quo* erred in granting the respondent application for summary judgment.
2. The court *a quo* erred in finding for the respondent that there are no triable issues in the matter where it is clear from the notice of opposition that there are pending review applications and a police case.
3. The court *a quo* erred in upholding a sale that the appellant had noted a review against the decision by the Sheriff.
4. The court *a quo* erred in upholding a transfer that was done pending a lawful application seized with the High Court which would render the outcome of an academic purpose.
5. The court *a quo* erred in ruling that there are no triable issues yet admitting that there is an ownership wrangle as to who is the owner of the house.
6. The court *a quo* grossly erred in failing to award the appellant an opportunity to be heard, thereby acting contrary to the principle *audi alteram partem* of hear both sides of the story.”

The appellant’s counsel, Mr *Ngweshiwa* persisted with the argument that there were triable issues in the matter on the basis of the application for review which the appellant is said to have filed and the fraud case that he is said to have reported to the police. We failed to understand what these triable issues were. As was correctly found by the court *a quo* the appellant did not specify what the triable issues were. Despite that, from the record it did not look like there were any triable issues at all. All that the appellant needed to demonstrate was that he had a *bona fide* defence to the claim for eviction against him. We can do no better than cite the case of *Kingstone Ltd v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) that the court *a quo* cited. In that case it was held that,

“In summary judgment proceedings not every defence raised by a defendant will succeed in defeating the plaintiff claim. What the defendant must do is to raise a *bona fide* defence or plausible case, with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. The defence must allege facts which if established would enable him to succeed. The defendant must take the court into confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts. Care must be taken in suit for ejectment not

to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejection is sought to raise fictitious issues of facts thereby delaying the resolution of the matter to the detriment of the lessor.”

The case of *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H) buttresses the point that for a respondent to resist an application for summary judgment he or she must show that they have a good *prima facie* defence to the applicant’s claim. As was correctly observed by the court *a quo*, the appellant did not submit anything meaningful that could be regarded as a defence. It is true that he used to be the owner of the property but he lost title to it and real rights over it following the judicial sale. For as long as he has not regained title to it, he cannot have a claim over it anymore. He can be challenging the sale in the Supreme Court or seeking review in this court or he could have reported a fraud case to the police, but all that does not entitle him to resist eviction for now. In *Jena v Nechipote* it was held that,

“...an innocent purchaser who purchases the property at a public auction duly advertised at a public auction duly advertised by the sheriff and who has lawfully purchased the property and fulfilled all the conditions of sale by paying the purchase price and subsequently receiving transfer is entitled to the protection of the law”

It is pertinent to point out that the appellant’s counsel ended up conceding that the appeal had no merit and submitted that it could be dismissed.

It is in view of the foregoing that we dismissed the appeal with costs.

MUNANGATI-MANONGWA J agrees.....

Zimbodza & Associates, appellant’s legal practitioners
Muchengeti & Company, respondent’s legal practitioners