

GABRIEL MANDOMBO
and
SHYLET JANYURE
versus
W. KATSA
and
V.MAVHUNGA
and
ZIMBABWE HOUSING COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU & MAXWELL JJ
HARARE, 19 MAY, 2022

Civil Appeal

T Nyamucherera, for the Appellant
G.K. Muchapirei, for the Respondent

MAXWELL J:

This is an appeal against the decision of the Magistrates Court sitting at Harare on 16 May 2019.

BACKGROUND

The Appellants issued out summons in the lower court for the eviction of first and second respondents from number 20625 Cranbrook Park Ruwa (the property) and claimed costs of suit on an attorney and client scale. Appellants are husband and wife. First and Second respondents are also husband and wife. In the Particulars of Claim, Appellants alleged that the property was initially bought by the second Appellant from third respondent sometime in the year 2002. It was nonetheless transferred to the first Appellant after a mix-up in sales. In 2015 the property was ceded by first Appellant to one Kelvin Gwatidzo who failed to comply with the cession agreement and it was cancelled. Appellants alleged that first and second respondents took occupation of the same property without their consent. In their plea, first and second Respondents disputed that second Appellant ever purchased the property and alleged that the

purported sale was a result of a fraud. First and second respondents averred that the Appellants never had rights to the property.

The matter subsequently went to trial.

Judgment of the Court a Quo

The lower court noted that the Appellants insisted that second Appellant bought the stand in question from third Respondent in 2004. The first Appellant proceeded to sell the stand to Makaita Matsika and Takesure Madhevere who went on to build on first Respondent's stand. The stands were thereafter swapped. The court also noted that the Appellants were relying on the agreement of sale, the receipt which they indicated showed that second Appellant paid for the stand and a list which was compiled for stand owners when third Respondent was placed under Judicial Management in which the second Appellant was recognized as the one allocated the stand in question. The Court further noted that the stand in question was still registered in the name of the third Respondent and that third Respondent denied selling the stand in question to the second Appellant. After third Respondent called witnesses who discredited the receipt and the agreement of sale relied on by Appellants, the lower court concluded that the Appellants did not manage to prove their case on a balance of probabilities and dismissed the claim.

Appellants were aggrieved and noted an appeal in this court.

THE GROUNDS OF APPEAL

Appellants appealed on the following grounds; -

1. The learned Magistrate erred at law in concluding that the appellants did not discharge their onus of (*sic*) when actually the evidence presented before proved the contrary. This, inter alia, is in light of the following.
 - a) There was an extant decision under MC 6543/17 which recognized the first Appellant as the owner of the stand and which validated the process of stand acquisition.
 - b) The process of the third Respondent's recognition of second appellant's acquisition of the stand had not been set aside.
 - c) The agreement and the subsequent cession between the second appellant and the third defendant were not challenged by the third defendant.

2. The learned Magistrate erred at law in purporting to sit as a review court of a decision that had already been granted under MC 6543/17.
3. The learned Magistrate erred at law in dismissing the claim for eviction when the appellants had satisfied the elements of the claim as provided for at law.
4. The learned Magistrate erred at law in purporting to uphold the stand acquisition of the first and second respondents despite clear evidence that the property had been acquired by the appellants.

Appellants prayed for the setting aside of the decision of the lower court and its substitution with an order for the eviction of the Respondents with costs at an attorney and client scale.

SUBMISSIONS BY THE PARTIES

In heads of argument, Appellants submitted that they were seeking the relief for vindicatory action in the lower court, the eviction of first and second Respondents from stand number 20625 Cranbrook Park, Ruwa on the basis of ownership of the property. They further submitted that as the onus of proof that they had was on a balance of probabilities, a consideration of the evidence presented before the lower court will prove that it is more likely that what they stated is what happened than the position of the Respondents. Appellants submitted that second Appellant testified that she bought the property from third Respondent and produced proof of that. Further that the property was subsequently ceded to Takesure Madhevere and Makaita Matsika who unfortunately went outside the confines of the cession and built on the next stand, a property belonging to the first Appellant. Further that first Appellant ceded the property to Kelvin Gwatidzo but later repossessed it. This was confirmed by the first Appellant who testified that the first and second Respondents came looking for a stand and he advised them that he was in the process of repossessing the stand in question. According to him, the first and second Respondents proceeded to the third Respondent and purported to acquire the property. He averred that they were not innocent buyers and should not be protected by the law.

Appellants argued that the order in case number MC 6543/17 was premised on a certification by that court that the process of acquisition of the stand in question by the first Appellant was valid. According to them the recognition of the first Appellant's ownership of the stand in question in terms of the court order is binding and extant. In oral submissions, *Mr*

Nyamucherera stated that the lower court could not come up with a decision that was contrary to the extant order.

Respondents submitted in heads of argument that the Appellants did not discharge the onus of proving the claim for eviction. They argued that the lower court could not grant the relief that was being sought by the Appellants as there were two valid agreements of sale to the same property. According to them this is not an ordinary eviction matter as the third Respondent does not recognize the Appellants and disputes having entered into any agreement with the second Appellant on the property. Respondents further argued that Appellants did not prove that they were the owners of the property and that a competent court first has to determine the validity of the two agreements of sale which were produced in court confirming that there were two competing interests. They argued that Appellants ought to have obtained a declaratory order first before seeking the eviction of the first and second Respondents. The relief of *rei vindicatio* was not possible in the circumstances, they argued. Respondents pointed out that the third Respondent adduced evidence to the fact that the property was fraudulently acquired by the Appellants and was corroborated by a forensic scientist. Respondents argued that Appellants' evidence in the lower court was contradictory and marred with inconsistencies. Respondents pointed out that the extant court order Appellants seek to rely on is in respect of Kelvin Gwatidzo and does not give rights over the whole world or any other person who was going to occupy the property afterwards. They further pointed out that they are not aware of the circumstances under which the order against Kelvin Gwatidzo was granted. Respondents also pointed out that when the court order was granted, construction had already commenced and that Kelvin Gwatidzo had already vacated the property. Respondents submitted that they are currently in occupation of the property and that they have constructed a house. They further submitted that the first Appellant never sought to protect his right of ownership over the time the constructions were being done. In oral submissions, *Mr Muchapirei* submitted that the order in MC 6543/17 that Appellants sought to rely on did not validate their acquisition of the property and does not create real rights that are enforceable against the whole world.

ANALYSIS

In the first ground of appeal, Appellants fault the lower court for concluding that they did not discharge their onus. As submitted for Respondents, there were competing interests before the court and in the absence of a declaration of which agreement of sale was valid, the lower court cannot be faulted for dismissing Appellants' claim. The court order sought to be relied on by the Appellants did not declare them the rightful owners of the property. The order shows that it was a decision on the papers without oral submissions. The documents that were considered were not before the court *a quo*. Paragraph 3 thereof suggests that the order might have been granted in default as there is an indication that the plaintiff demanded costs on a higher scale should the suit be defended. There is no indication of whether the costs were granted or not. There is no merit in the first ground of appeal.

In the second ground of appeal, Appellants accuse the lower court of purporting to sit as a review court of the decision granted in MC 6543/17. Appellants approached the court seeking the eviction of first and second Respondents on the basis that they have no lawful cause to reside at the property. First and second Respondents satisfied the court that they had a lawful cause as they have an agreement of sale with the third Respondent. The lower court simply determined the issue the Appellants had brought before it. For this ground to succeed, Appellants had to show that the dispute had been conclusively settled on the merits by a court of competent jurisdiction and that the two actions are between the same parties, concerning the same subject matter founded on the same cause of complaint. The parties that were before the lower court were not the parties that were before the court in MC 6543/17. The cause of complaint was not demonstrated to be the same. There is therefore no basis for claiming that the lower court was reviewing an earlier decision. There is no merit in this ground of appeal.

The third ground of appeal is related to the first and there is no merit in it. Appellants claim that they had satisfied the elements of the claim as provided for at law. As stated above, eviction could not be ordered were competing interests had been proven. The court *a quo*'s decision cannot be faulted. In the fourth ground of appeal, Appellants accuse the lower court of upholding the stand acquisition of the first and second Respondents despite clear evidence that they had acquired the property. The lower court simply stated that the version of the defendants is most likely to have transpired. It did not go further to declare the

Respondents the rightful owners of the property. Appellants' accusation is therefore baseless. The lower court only acknowledged the existence of competing interests and was correct not to grant the claim.

Consequently, the appeal has no merit and it fails. Respondents prayed for costs on a higher scale. No justification was provided for the punitive costs. Ordinary costs will meet the justice of the case. The following order is accordingly made.

The appeal be and is hereby dismissed with costs.

TAGU JI Agree.

Lawman Law Chambers, Appellants' Legal Practitioners
Muvirimi Law Chambers, Respondents' Legal Practitioners.