

NGONIDZASHE MUDIWA GWANDINGWA  
versus  
KENT MUTSA CHARLIE

HIGH COURT OF ZIMBABWE  
CHAREWA J  
MUTARE, 25 & 28 July 2022

### **Opposed Application- Summary Judgment**

Miss *LN F Garutsa*, for the applicant  
Miss *F Zendera* with *Mr T Kanengoni*, for respondent

CHAREWA J: Applicant seeks summary judgment on a claim for eviction of the respondent from the property known as Stand Number 7452 Mutare Township of Umtali Township Lands measuring 2630 square metres (the property).

#### Background

Applicant purchased the property from the City of Mutare and obtained transfer on 6 June 2016 under Deed of Transfer 2648/2016. By resolution dated 10 December 2007, City of Mutare resolved to sell the property to applicant. In 2008, the agreement between applicant and City of Mutare was complete.

Applicant went out of the country for several years. Upon his return in 2021, he discovered that respondent had taken occupation and constructed structures. He therefore gave respondent notice to vacate on 31 March 2021, and subsequently issued summons for eviction on 19 July 2021. Respondent having entered appearance to defend and filed his plea, applicant filed this application.

Documents and case files on record show that one Darlington Muzanechita purchased the same property from City of Mutare on 22 September 2003. Said Darlington Muzanechita then on-sold the property to respondent on 3 November 2012.

On 21 September 2021, and by HC 192/21, respondent filed an application for a *declaratur* against City of Mutare and applicant herein. Despite being served with notices of opposition in September and October 2021, he did not file any answering affidavit or otherwise

pursue the application. He subsequently withdrew that application on 20 June 2022 upon being served with an application for dismissal for want of prosecution, HC157/22 (CHA23/22). He did not oppose the application for dismissal which was subsequently granted on 21 July 2022.

### Issues

The single issue for determination is whether summary judgment is tenable in the circumstances.

### Applicant's submissions

Applicant submits that respondent has no defence to his claim and that he has merely entered appearance to defend and filed a plea to buy time and frustrate and harass applicant in his endeavour to recover vacant possession on the following grounds:

- a. Applicant is the registered legal owner with title to the property.
- b. He never permitted respondent to occupy the property which occupation is thus without his consent.
- c. Respondent has no legal right to refuse to relinquish possession as he is not challenging the validity of applicant's title as he did not counterclaim to set aside applicant's title.
- d. Respondent's agreement of sale with Darlington Muzanechita is not valid as it was entered into in contravention of such Darlington Muzanechita's agreement of sale with City of Mutare which consent to the sale or ratification of the cession of rights was not sought and obtained.
- e. In the premises, applicant's claim satisfies the requirements for vindication.

### Respondent's submissions

On his part, respondent claims, *in limine*, that there are disputes of fact which require the calling of evidence as he bought the property from the original buyer. Therefore, this is a case of a double sale between applicant and Darlington Muzanechita which issue cannot be resolved on the papers.

On the merits, he submits that he has a good and bona fide defence to applicant's claim in that

- a. Applicant's title was illegally issued as he purchased property which had already been sold to Darlington Muzanechita.
- b. Further, he did not require applicant's consent to occupy the property as he had the consent of Darlington Muzanechita with whom he entered into a valid agreement of sale.
- c. He has been in occupation for nine years and has made developments without applicant asserting his claims, and believes that applicant merely wishes to unjustly enrich himself.

### The law

It is trite that summary judgment is an extraordinary remedy against an unscrupulous litigant seeking to frustrate a claim.<sup>1</sup> In that regard, the claim must be clear and unanswerable and the defences inadequate in fact and in law.<sup>2</sup>

It is further trite that not every defence will defeat an application for summary judgment. In order to succeed the defences must be clear and complete, disclosing facts upon which they are based as at the time of the claim.

Further such defences must be sufficient to enable one to succeed on the merits or at least, place a *prima facie* case before the court to enable it to assess their *bona fides*.<sup>3</sup>

Consequently, the role of the court is precise: it is to assess whether a *bona fide* defence which is plausible and could possibly succeed has been raised.

### Analysis

#### In limine

It is pertinent to note that upon receipt of summons for eviction in HC140/21, respondent did not counterclaim asserting his right to ownership and therefore occupation of the property. Neither did he seek the setting aside of applicant's deed of transfer. Further his plea does not traverse the legality of the agreement of sale between himself and Darlington Muzanechita.

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<sup>1</sup> See *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260 @ 265/272B

<sup>2</sup> See *Chrismar (Pvt) v Stutchbury & Anor* 1973 (1) RLR 277

<sup>3</sup> See *Jena v Nechipote* 1986 (1) ZLR 29 (S). See also *National Railways of Zimbabwe v Verigy Enterprises (Pvt) Ltd & 3 Ors* HB13/17

Apart from his failure to prosecute his subsequent application for a *declaratur* in HC192/21, respondent does not, in that application or in this application attach any evidence that the sale agreement between himself and Darlington Muzanechita was in compliance with clause 8 of the agreement of sale between such Darlington Muzanechita and City of Mutare.

This is particularly pertinent given that preamble a) to that agreement specifically provides that it was on a **pay-service-build and own scheme** (my emphasis). The ordinary interpretation of that provision is that Darlington Muzanechita could not own the property until after he had paid the purchase price, City of Mutare had serviced the property and Darlington Muzanechita had built or developed the property in accordance with plans approved by City of Mutare.

Neither the opposing papers in this matter, nor the application for a *declaratur* contain any evidence that Darlington Muzanechita paid for the purchase price, or that City of Mutare serviced the property and that Darlington Muzanechita developed the property in accordance with plans approved by City of Mutare.

In fact respondent himself has not taken the court into his confidence by providing evidence that he himself obtained approval of his development plans from City Of Mutare.

In the final analysis, even though City of Mutare had originally sold the property to Darlington Muzanechita, respondent has not put into issue the validity of the subsequent resolution of City of Mutare to re-sell the property to applicant.

The issue of a double sale does not, therefore arise particularly since, for four years, before on selling to respondent, Darlington Muzanechita did not and still has not queried the reselling of the property to applicant. There can therefore be no dispute of fact regarding applicant's ownership of the property.

The point *in limine* fails.

### The merits

The applicant is the registered title holder of the property. He thus has rights against all comers, and is entitled to vindication unless his title is disputed by someone with superior

rights. It is trite that, at common law, *actio rei vindicatio* presupposes that an owner of property must be able to recover it from whoever possess it without such owner's consent.<sup>4</sup>

The upshot of this is that a respondent must prove his right of retention. And in doing so, the respondent must, successfully raise one of the following defences:

- a. That he has acquired the property by prescription
- b. That he is in fact the owner;
- c. That the property has been alienated or destroyed; and finally
- d. That he has a superior contractual right to possess the property.

The long and the short of it is that in defending a claim for summary judgment in the circumstances, the respondent must have a good and *bona fide* defence which justifies his right to retention. *In casu*, the respondent's defence is that he is the legal owner having bought the property from the original buyer.

The respondent's difficulty is that property belonged to City of Mutare which remained the holder of real rights in the property pending the fulfilment of certain conditions. Secondly, respondent bought the property from someone who was not entitled to sell the property without the real owner's consent. All he acquired therefore were that original purchaser's personal, and not real, rights. Those personal rights are not superior to the applicant's real rights as holder of title.

Further, it is instructive to note that, for reasons which are not disclosed in the record, City of Mutare resolved to divest Darlington Muzanechita, the first buyer, of his rights and interests in the property in 2007 and sold the property to applicant in 2008. For reasons best known to himself, Darlington Muzanechita did not contest such divesture. Therefore, as at 3 November 2012, when respondent purchased the property, Darlington Muzanechita had no rights, real or personal, to transfer to respondent.

*Ergo*, respondent could neither be an owner of the property, nor the holder of superior contractual rights to applicant. He thus has no bona fide defence to applicant's claim which is clear unanswerable. He is the title holder of the property which title has not been challenged. He did not consent to respondent's occupation and possession of the property. His is a prior sale to that of respondent. Before his subsequent purchase of the property in 2012, had

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<sup>4</sup> See *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S), See also *Nyahora v CFI* SC-81-14.

respondent made a due diligence check, he would have discovered that City of Mutare had resold the property to applicant in 2008, and therefore that there were question marks as to the continued validity of Darlington Muzanechita's agreement of sale.

And given that respondent purchased the property from someone who could not transfer real rights without the consent of City of Mutare, and does not aver that such consent was indeed obtained, all he received were personal rights as against Darlington Muzanechita. His defences are therefore not sufficient to enable him to succeed on the merits or to place before the court a *prima facie* case of entitlement to title instead of applicant. The application for summary judgment must consequently succeed.

#### Costs

Applicant seeks costs on the scale of legal practitioner and client. I cannot fault his request. He has been unnecessarily put out of pocket by someone with no legal leg to stand on. This is evidenced by the shambolic application for a *declaratur*, which, it is kind to term an ill-conceived act of legal harassment, and which was rightly not pursued.

Further, note must had that respondent was advised of the untenability of his situation in March 2021, and has futilely persisted in occupying applicant's property, thus unreasonably depriving an owner of enjoyment of his property. I agree with applicant that his opposition was merely intended to buy time and frustrate applicant because when he was served with a notice to vacate and provided with applicant's transfer deed, he did nothing to seek its setting aside. Even when he was served with summons and up to this day, he has done nothing meaningful to have that transfer deed set aside.

His conduct does amount to an abuse of court process for which the court must show its displeasure with an award of costs on the scale of legal practitioner and client.

#### DISPOSITION

Accordingly, it is ordered that

1. The application for summary judgment is granted.
2. The respondent and all those claiming occupation through him be and are hereby ordered to vacate and render vacant possession of Stand No. 7452 Mutare Township of Umtali Township Lands to the applicant within 10 days of the date of this order.

3. In the event that the respondent and all those claiming occupation through him fail to comply with paragraph 2 above, the Sheriff or his Deputy is hereby authorised and directed to evict them
4. The respondent shall pay costs on the scale of legal practitioner and client.

*Messrs Tandiri Law Chambers*, applicant's legal practitioners  
*Matsika Legal Practitioners*, respondent's legal practitioners