

GLADYS KARENGWA  
**versus**  
ALBERT MPOFU

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 4 OCTOBER 2016 AND 13 OCTOBER 2016

### **Civil Trial**

*J Tshuma* for the plaintiff  
*K Dingani* for the defendant

**MATHONSI J:** House number 5671 Mkhosana Township Victoria Falls (the house) lies under a cluster of houses that were built by Zimbabwe Building Society through a scheme sanctioned by Victoria Falls Municipality which owns the houses in question. The scheme involved the mortgaging of the houses by the building society which allowed individual home seekers to purchase the units on certain terms and conditions while the Municipality retained ownership. The house in question was purchased through that scheme in the name of Dala Mpfu who happens to be the young brother of the defendant. In good time Dala Mpfu sold the house to the plaintiff for a purchase price of Z\$25 000 000-00 by virtue of a sale agreement signed on 26 April 2004. The municipality consented to the sale whereupon a cession was executed at the municipal offices on 7 June 2010 involving Dala Mpfu and the plaintiff with the Housing Administration Officer endorsing the approval of the municipality on 9 June 2010.

The matter should have ended there except that the defendant remains in occupation of the house and has refused to vacate which has prompted the plaintiff to bring a vindicatory action against him averring in his declaration that she is the owner of the house which the defendant is occupying. She craves the grant of an order ejecting the defendant therefrom. The defendant has defended the action. The defendant's plea is revealing even though it is brief. He states:

“Defendant pleads to plaintiff's claim as follows:

1. Ad paragraphs 1 -2

There are no issues arising save to say that defendant's address (for) service is that of his legal practitioners of record.

2. Ad paragraph 3

2.1 This is denied. The property in dispute belongs to defendant who bought it (from) one Dala Mpofu sometime in 2007.

2.2 The cession of the property to plaintiff was nullified under case number 1805/10.

2.3 The said Dala Mpofu was also ordered to transfer the property to defendant by the magistrate(s) court for the province of Matabeleland North sitting at Victoria Falls under case number 512/01.

3. Ad paragraph 4

Defendant is the rightful owner of the property and he is occupying it lawfully.

WHEREFORE defendant prays for dismissal of plaintiff's claim with costs of suit."

When the matter was referred to trial at the pre-trial conference the parties agreed on the issues for trial. They are:

1. Whether the plaintiff is the registered owner of the right, title and interest in the house;
2. Whether the defendant is in occupation of the house;
3. Whether the plaintiff is entitled to an order evicting the defendant from the house; and
4. Whether the defendant should pay costs of suit.

From the evidence that was led by both parties and concessions made there remains only one issue for determination by the court namely, whether the plaintiff is entitled to evict the defendant from the house. I say this because the deed of cession conveying title from Dala Mpofu to the plaintiff was not contested and the defendant testified that although he has remained in occupation of the house from inception in 1998, he has never intended to have it registered in his name and was content to retain the name of his young brother. It is also common cause that the defendant is indeed in occupation of the house.

In that regard considering that the issue of costs, while always discretionary upon the court, would ordinarily follow the result, it is not an issue at all. That therefore leaves the question of eviction as that which should be determined.

The plaintiff testified that she lawfully purchased the house from Dala Mpofu and she paid the full purchase price. At that time the house was mortgaged in favour of Zimbabwe Building Society (ZBS) and there was an outstanding amount which she cleared as the municipality had insisted that a cession could not be executed until the arrears were cleared. She does not remember the exact amount she paid to the building society. She produced a letter from ZBS to the effect that arrears were cleared even before they could register a bond.

The plaintiff also produced the sale agreement prepared by the law firm of Jabulani Ndlovu and Associates and signed by herself and Dala Mpofu on 26 April 2004 years before the defendant purportedly purchased the same house from his young brother. I say this because in his plea the defendant claimed that he had bought the house in 2007. Of course he was to change that story in his evidence in chief to say that he did not purchase the house from Dala Mpofu as pleaded but had bought the housing form from him in 1998 and paid the initial deposit and other dues to ZBS at that time. For that reason, although the house was issued in the name of Dala Mpofu it is his.

The deed of cession signed in 2010 aforesaid and approved by the municipality transferring right, title and interest in the house from Dala Mpofu to the plaintiff was also produced. The plaintiff stated that despite taking transfer the defendant has refused to vacate the house and remains in occupation without her consent. Before the municipality approved the cession, Mr Sibindi the Housing Superintendent had called the defendant and the plaintiff in the presence of his deputy to discuss the dispute.

At that meeting the defendant had not claimed ownership but had said the house was family property. The Superintendent took the conscious decision to approve the cession after satisfying himself that the defendant had no legitimate claim over the house. In light of the fact that the defendant is in unlawful occupation, is not paying any rent to her and has accumulated rates, water and electricity arrears, the plaintiff prayed for an order for eviction.

She explained that in HC 1805/10 the defendant had filed an application seeking an order nullifying the cession of title to the house to herself and compelling her to transfer or cede the house to himself, a legal impossibility if the cession to herself was a nullity. While she was away in Namibia the defendant had obtained default judgment against her on 16 December 2010.

This was however a pyrrhic victory because upon her return she sought a rescission of that judgment. An order to that effect was duly granted on 11 October 2012 in HC 480/11. On 21 February 2013 the defendant's application in HC 1805/10 was dismissed for want of prosecution in HC 270/13. In view of those developments the defendant had no basis for pleading as he did in his plea filed on 27 June 2013 after the order in his favour had been rescinded, that the cession of the house to the plaintiff was nullified in HC 1805/10.

I have already stated that in his evidence the defendant drifted away from the contents of his plea, abandoned the claim to the house on the basis of the nullification order in HC 1805/10 and that he had purchased the house from Dala Mpfu in 2007 in favour of saying that he had paid the deposit of \$7800-00 (presumably Zimbabwean Currency) in 1998.

Although he had purchased the house from the time it was allocated to Dala Mpfu, had paid him \$1000-00 (Zimbabwe currency) for the bank book through which the building society loan was repaid and had paid Dala Mpfu a further \$2500-00 again in 1998, in 2001 Dala started demanding his house back. He refused to surrender the house. The dispute which has culminated in this court action started then as he maintained that he should be refunded what he had paid. The defendant stated that he did not effect any improvements on the house but only planted trees.

It is not without a reason that the defendant could not produce any document to back up his claim. He could not produce a document to confirm that he bought the house from his young brother, neither could he produce any proof of payment made to Dala or indeed the building society. Everything that he claimed was not supported by documentation or evidence of any other witness.

If indeed the defendant is the one who paid the deposit to ZBS on the understanding that the house would be his and not that of his young brother, surely he would have taken action in the last 18 years to assert his rights. He did not. In fact by his own admission he never intended to change ownership from Dala to himself.

The entire testimony of the defendant was incoherent, inconsistent and improbable. For a start he contradicted his own pleading in claiming to have bought the house in 1998 by purchasing the housing "form" from his young brother and paying the deposit to the bank. In his

plea he averred that he had purchased the house from Dala in 2007. When he was summoned to the housing officer, according to the evidence of the plaintiff which was presented well and I have no reason to disbelieve, he stated that he was laying a claim to the house because it was a family house.

One then has to ask: Did the defendant purchase the house in 1998? Did he purchase it in 2007? If he purchased it in 2007 for how much did he purchase it? Was he in occupation by virtue of the fact that it was a family house or it was his own? If it was his own why did he not move for its registration in his name for almost two decades? There are more questions than answers.

That, considered together with the fact that the defendant was visibly shaken and possessed a bad demeanor, leaves me with no option but to reject his entire testimony as being not only unreliable but demonstrably false and contrived. In the end he could not establish any recognizable right over the house.

On the other hand, the plaintiff did prove that she purchased the house for value. The sale was approved by the municipality superintending low cost housing in Victoria Falls and all right, title and interest in the house were ceded to the plaintiff who now is the lawful holder of such. An attempt to impugn that cession was dismissed by the court leaving it intact. I conclude therefore that ownership has been established.

It is a celebrated principle of our law that the owner of property has a vindicatory right against the whole world. The *actio rei vindicatio* is available to the owner whose property is in the possession of another without his or her consent. The owner cannot be deprived of his or her property against his or her will. Once the right of ownership is proved, the onus shifts to the possessor to establish a right of retention. See *Zavazava and another v Tendere and Others* HH 740/15; *Serrano- Anton v Sibanda and Others* HB 216/16; *Jolly v A Shannon and Another* 1998 (2) ZLR 79 (H) 88A –B; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20A – C; *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) 438C.

While the plaintiff has discharged the onus of proving ownership and therefore the availability of a vindicatory right against the possessor who possesses the property without her consent, the defendant has dismally failed to discharge the onus which shifted onto him to prove

a right of retention. He did not effect any improvements on the house and therefore has no improvements lien. He has not even proved, on a balance of probabilities, that indeed he paid anything to his young brother or indeed the building society for the house. The matter must therefore end there.

I must add however that even if he had shown that he paid, that on its own would not save him from eviction in a vindicatory claim. His remedy lies against Dala Mpofu for damages.

In the result it is ordered that:

1. The defendant and those claiming occupation through him are hereby ejected from stand number 5671 Mkhosana Township, Victoria Falls.
2. The defendant shall bear the costs of suit.

*Webb Low and Barry*, plaintiff's legal practitioners

*Mlweli Ndlovu and Associates*, defendant's legal practitioners