

PHILEMON MUNOEMURWA SEMWAYO
and
ESTHER SEMWAYO
versus
CHARLES CHATARA
and
REYA CHATARA

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 21 May and 29 June 2007

STATED CASE

Mr *T Biti*, for the applicant
Mr *A Rutanhira*, for the respondent

MAKARAU JP: This matter came before me as a stated case for argument. After hearing the parties I granted the order sought and indicated that my reasons would follow. I now set them out.

On 23 November 2000, the plaintiff issued summons seeking the ejection of the defendant from certain residential property whose street name is no 509 ULC Area 13 Dangamvura Township, Mutare. The claim for ejection was resisted by the second defendant.

In her plea, the second defendant averred that she was married to the first defendant and that the latter had since deserted the matrimonial home at the disputed property. She further alleged that the second defendant had connived with the plaintiffs to dispose of the matrimonial home at undervalue in order to punish the second plaintiff for the matrimonial problems she and the first defendant were experiencing. She then prayed for an order granting her leave to refund the purchase price to the plaintiffs and allowing her to remain in occupation of the property.

At the pre-trial conference of the matter, the parties agreed to proceed by way of stated case as the facts of the matter were largely common cause. The second defendant declined to lead evidence in support of her averment in the plea that the plaintiffs had connived with her husband to dispose of the property at undervalue. At the hearing of the stated case, I inquired whether she wanted to lead oral evidence and again she declined the opportunity.

The issues that were referred to argument were two. These were whether the agreement of sale between second respondent's husband and the plaintiffs was invalid and secondly and

superfluously in my view, whether the second defendant had any lawful reason to resist ejection from the property.

It was submitted on behalf of the second defendant that at the time of the purchase of the property, the defendants were experiencing certain difficulties in their marriage and the disposal of the property was done with an intention to punish her for these matrimonial woes.

The facts of this matter are not dissimilar to the facts in *Muswere v Makanza* HH 16/05 where I had occasion to review the legal relation that a wife has to immovable property registered in the sole name of her husband. While holding that the law in this respect is palpably unjust, I came to the conclusion that the position in our law currently is that a wife cannot stop her husband from selling his property even if it constitutes the matrimonial home. In conclusion this is what I had to say:

“.....it presents itself clearly to me that as the position at law that a wife in the position of Mrs Makanza has no real right in immovable property that is registered in her husband’s sole name even if she directly and indirectly contributed towards the acquisition of that property. Her rights in relation to that property are limited to what she can compel her to do under family law to provide her with alternative accommodation or the means to acquire alternative accommodation. Her rights, classified as personal against her husband only, are clearly subservient to the real rights of her husband as owner of the property.”

I am still of the same opinion that the above presents the correct position at law.

It is further a settled position at law in my view that it is only when the wife in the position of the second defendant proves that the third party has associated with her husband for the purposes of defrauding the wife of her rights in the matrimonial property that a claim by the wife to resist eviction is upheld. (See *Ferris v Weaven* 1952 (2) All ER 233; *Maganga v Sakupwanyanya* 1996 (1) ZLR and *Nyatwa v Nene* SC 119/91).

In *casu*, the respondent declined the chance that I offered her to lead evidence to prove that the applicants associated with her husband for the purposes of defrauding her, notwithstanding that the matter had come before me as a stated case. Having declined that opportunity, the respondent was clearly out of court as even mere knowledge that the seller of the property is a married man who does not have the consent of his wife to dispose of the property is not enough to enable the wife to resist eviction at the instance of the purchaser. (See *Pretorius v Pretorius* 1948 (1) SA 250 (A); and *Muswere v Makanza* (supra)).

I will repeat herein my observation that the law as currently framed works an obvious injustice on wives in the position of the respondent. The position is sadly out of step with the thrust of legislative intervention in the field of family law that recognizes the rights of a wife in

the joint estate that she and her husband jointly accrue during the subsistence of their marriage. It is a position at law that is loudly crying out for legislative intervention and the sooner this is done the better for all. The calls to parliament to intervene keep on mounting.

It is for the above reasons that I granted the order that I did on the turn.

Messrs Bere Brothers, plaintiff's legal practitioners

Henning Lock Donagher & Winter, 2nd defendant's legal practitioners