

MAIROS LISIMBA
versus
LIZZY CHIPENDO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 29 October 2009

Opposed Application

K Ncube, for the applicant
Ms T Mutero, for the respondent

CHITAKUNYE J: On 16 March 2007 and at Harare, the applicant entered into a sale agreement with Gatsikanayi Enock Nyamupanda (herein after referred to as Nyamupanda) for the purchase of a certain piece of land being stand number 9642 A Salisbury Township also known as number 2 Umuguza Close, Wilmington Park Cranborne, Harare, held under deed of transfer number 896/03.

The applicant duly paid the purchase price and title was passed to him on 20 April 2007 under deed of transfer number 2076/07

He however could not take occupation of the property as the respondent's son, Killian Chipendo was in occupation. As a result the applicant instituted legal proceedings for the eviction of Killian Chipendo and all those claiming occupation through him in case number HC 2951/07.

On 26 February 2008, the eviction order was granted and a writ of eviction issued.

On 26 August 2008 Killian Chipendo and all those claiming occupation through him were duly evicted by the Deputy Sheriff.

The respondent who was amongst those evicted on that date, re-took occupation of the property without any court order.

The respondent contended that she was not claiming occupation through Killian Chipendo but in her own right as the surviving spouse of the late Ronnie T Chipendo.

It is common cause that the Estate late R T Chipendo was administered by an executor dative – Muchivete Hungwe of Messrs Hungwe and Partners, legal practitioners.

The Executor dative obtained authority to sell the property in terms of s 120 of the Administration of Deceased Estates Act, [*Cap 6:01*] from the Master of the High Court.

Upon obtaining the Master's consent he duly sold the property to Nyamupanda. Title was passed to Nyamupanda by virtue of Deed of Transfer number 896/03.

After the sale, the executor dative did a final Administration Account and distribution plan. The proceeds of the sale were shared amongst the children of the late Ronnie T Chipendo.

The respondent did not partake in the proceeds as she was said to have divorced the late R T Chipendo in 1991, well before his death.

Nyamupanda as the new owner sold the property to the applicant on 16 March 2007. The applicant duly obtained title by virtue of Deed of Transfer number 2076/07 dated 20 April 2007.

It was in furtherance of his title to the property that on 26 February 2008 the applicant obtained an order for the eviction of Killian Chipendo and all those claiming occupation through him from this court.

The eviction was duly executed by the Deputy Sheriff on 26 August 2008. As already alluded to the respondent was one of those who were evicted from the property. She however re-took occupation without any court order. In *Mairos Lisimba v Lizzy Chipendo* HC 868/09, the applicant therein instituted contempt of court proceedings against the respondent for re-occupying the property after eviction.

The respondent opposed the application claiming that she was never cited in the proceedings that led to Killian Chipendo being evicted. As a surviving spouse she occupied the house in her own right.

In this case HC 2220/09, the applicant sought an eviction order against the respondent, her guests and invitees and all those claiming occupation through her from the property in question. The respondent opposed the application. Her opposition was based on her contention that she was the surviving spouse as she had never divorced the late R T Chipendo.

There was no denying that the respondent did not challenge the initial sale of the property by the executor dative to Nyamupanda. She also had not objected to the subsequent sale by Nyamupanda to the present applicant.

It was further not disputed the property was now registered in the applicant's name.

Section 14 (a) of the Deeds Registries Act [*Cap 20:05*] states that “the ownership of land maybe conveyed from one person to another only by means of a deed of transfer executed or attested by a Registrar”.

This is what transpired in this instance when ownership passed to Nyamupanda and later to the applicant in that order. As owner the applicant is entitled to claim the property from anyone who is in occupation.

Indeed as noted in *Chetty v Naidoo* 1974 (3) SA 13 A:

“There can be no doubt that one of the incidents is the right of the exclusive possession of the res with the necessary corollary that the owner may claim his property wherever and from whosoever is holding it. It is inherent in the nature of ownership that possession of the res would usually be with the owner, it follows that no other person may withhold it.”

The respondent’s defence to the application was bound to be affected by the decision in *Lizzy Chipendo v Tinashe Muchivete Zenda & Ors* HC 2655/09.

In that case the applicant who is the present respondent, was seeking condonation for the late filing of an application for review in HC 2575/09.

After the ruling in HC 2655/09 in which I dismissed the respondent’s application for condonation for the late filing of HC 2575/09, counsel for the applicant inquired on whether the respondent was still intent on opposing the applicant’s application in HC 2220/09 and HC 868/09

Ms *Mutero* for the respondent indicated that in view of the ruling in HC 2655/09 she was no longer opposing the relief sought by the applicant in HC 2220/09. She however expressed reservations about the relief in HC 868/09 which is an application for contempt of court.

I did not hear applicant’s counsel to insist with that particular relief.

It was conceded that essentially what the applicant was seeking in both HC 868/09 and HC 2220/09 was the eviction of the respondent from the premises in question. In HC 2220/09 the respondent was cited by her preferred name, and there is no doubt as to who the order affects, thus it may not be necessary to proceed to HC 868/09.

Should she defy the order in HC 2220/09 then contempt proceedings may be brought against her. This time she would have no excuse that the court order was not in her name.

In the circumstances the application in HC 2220/09 is granted in terms of the draft order, that is:

It is hereby ordered that:-

1. The respondent, her guest invitees and all those claiming through her shall, within 48 (forty eighty) hours of the granting of the order vacate the premises known as number 2 Umguza Close, Wilmington Park, Harare failing which the Deputy Sheriff is hereby empowered to evict them.
2. In the event that the respondent notes an appeal against this order, such appeal shall not have the effect of suspending the execution of this order.
3. There is no order as to costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Legal Aid Directorate respondent's legal practitioners