

TASHINGA HOUSING COOPERATIVE SOCIETY LIMITED
versus
TAKURA OMIRO CHIGOGO

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 29 and 30 January 2013 and 14 March 2013

P. Ngarava for the plaintiff
The defendant in person

PATEL J: The plaintiff in this matter is a housing cooperative located in Dzivarasekwa, Harare. It seeks the eviction of the defendant and all his occupants from Stand No. 4356, Tongogara Avenue, Dzivarasekwa 2. It also claims costs on an attorney and client scale. The defendant resists eviction on the ground that he bought the stand from one Salijeni Likukula and that he is the rightful owner of the property. The issues for determination are whether the plaintiff is the owner of the stand and whether the defendant has any lawful right, claim or counterclaim over the property.

Evidence for the Plaintiff

Anesia Kuchidzemandu is the Chairperson of the plaintiff. She testified that the cooperative was formed on 18 January 1989 and was duly registered on 10 August 1992, as per its certificate of registration [Exhibit 1]. The plaintiff's constitution was established in 1990 [Exhibit 2]. The plaintiff uses its members' contributions to purchase materials to build houses on the 225 stands which it purchased from the City of Harare in 1994. Once all the houses have been constructed, the plaintiff will obtain title deeds from the City and thereafter allocate individual stands to its members. Construction is almost complete, with 10 out of the 225 houses remaining for completion. The stand in dispute is occupied by the defendant and his tenants. He is not a member of the plaintiff and was unknown to it until about March 2003 and the subsequent litigation in the Magistrates Court. The plaintiff owns the stand, as is evidenced by the building plan approved by the City on 13 August 1998 [Exhibit 3]. The defendant and his family or friends are occupying the stand without the plaintiff's permission. He is not paying any rent and was told to vacate in writing. The matter was reported to the City which responded on 26 March 2010 confirming that the stand

belongs to the plaintiff [Exhibit 4]. The stand was allocated to Salijeni Likukula who was a member of the plaintiff until he resigned in 2003. At that time, his contributions were refunded and this was acknowledged by him in writing on 14 September 2003 [Exhibit 5]. His removal from membership was subsequently confirmed at a general meeting of the cooperative held on 20 November 2005 [Exhibit 6]. The fact that he returned the stand to the plaintiff is positively affirmed by him in an affidavit that he deposed to on 20 August 2008 [Exhibit 7]. According to the plaintiff's constitution, no individual member can sell any stand to a third party and the plaintiff has never authorised the disposal of the stand in dispute. There was nothing from Likukula to show that he authorised the defendant to occupy the stand. The defendant has never paid any contributions or other moneys to the plaintiff and he has no claim against it. When cross-examined, the witness stated that Likukula resigned from the cooperative because he was unable to pay his full contributions. The plaintiff has never authorised the defendant to pay off the outstanding contributions. All the litigation relating to the stand citing Likukula as the claimant was initiated by the defendant pretending to be Likukula.

Jowani Madore is the Vice-Chairperson of the plaintiff. He testified that Likukula was allocated the disputed stand in 1990 or 1991. He first gave notice to vacate in March 2003 because he was unable to pay his contributions. He formally resigned in September 2003 and restored the stand to the plaintiff. In August 2003 the plaintiff sent the defendant a notice to vacate the stand. The defendant has never applied to become a member of the plaintiff and is illegally occupying the stand. Apart from this, the witness generally reaffirmed the evidence given by the Chairperson as to the ownership of the stand and the limitations on its disposal to any third party. Under cross-examination, he stated that Likukula started accruing arrear contributions whilst he was in hospital following an accident. The witness was not aware of any agreement between Likukula and the defendant for the latter to pay off the outstanding debt. He was aware of an interdict order by this Court in October 2004 and a peace order issued by the Magistrates Court in August 2005. Both orders were granted against the plaintiff in favour of Likukula. He had heard that both actions were instituted by the defendant and not by Likukula himself.

Margaret Likukula is Salijeni Likukula's daughter. Her evidence was that her father left for Malawi in 2008. He ceased to be a member of the plaintiff cooperative in 2003 because he was unable to pay his current contributions and wanted a refund of

his past contributions. She confirmed her father's signatures on Exhibits 5 and 7 in which he stated that he had resigned and obtained a refund. The defendant is her ex-husband's nephew. Her father did not say anything about having sold the stand to the defendant. When cross-examined, she stated that the defendant had forced her to sign several documents, including one dated 14 September 2000, to the effect that he would stay on the stand to look after his nieces. She did not read this particular document before signing it. At that time, her father was working and living in Avondale as a gardener. The defendant began to reside at the stand in 1999 or 2000. Between then and 2005, he built a cottage with two rooms on the stand. She was never a member of the plaintiff and therefore could not authorise any construction on the stand or the payment of contributions by the defendant.

Evidence for the Defendant

Takura Omiro Chigogo is the defendant in this matter. He produced a number of documents to assert his rights over the stand in dispute. These were as follows: an agreement with Margaret Likukula, dated 14 September 2000, for him to pay all arrear contributions in respect of the stand [Exhibit A]; receipts in the name of Likukula showing payments to the plaintiff from 12 May 2001 to 6 April 2003 [Exhibit B]; a letter from the plaintiff, dated 17 August 2003, stating that the plaintiff has reclaimed the stand following Likukula's resignation and giving the defendant notice to vacate by 30 August 2003 [Exhibit C]; an order of this Court in HC 9734/03, dated 27 October 2004, interdicting the plaintiff from repossessing the stand or evicting Likukula and the tenants on the property [Exhibit D]; an *ex parte* peace order granted by the Magistrates Court in B759/05 on 1 August 2005 against Kuchidzemandu in favour Likukula [Exhibit E]; a power of attorney from Likukula, dated 17 August 2005, authorising the defendant to deal with all issues relating to membership, ownership and litigation [Exhibit F]; a follow-up to the peace order against Kuchidzemandu in B759/05, dated 16 October 2007 [Exhibit G]; an order of this Court in HC 926/06, dated 16 October 2007, dismissing an application by Likukula against the plaintiff by default [Exhibit H]; a decision by the Rent Board in an application by the plaintiff for the ejection of the defendant, made on 22 April 2008, in which the Board "absolved itself from the instance" [Exhibit I]; a police report following a complaint of criminal trespass by the plaintiff against the defendant, dated 6 May 2009, stating that Likukula could not be located as he was

now resident in Malawi [Exhibit J]. The charge against the defendant was withdrawn before plea on 20 July 2010. According to the defendant, the foregoing documents showed that he was entitled to remain on the stand. Moreover, he has built a three room cottage and a main house with five rooms on the stand. He completed construction in February 2012 and all the buildings on the stand belong to him because he constructed them.

Under cross-examination, the defendant was taken through his own plea filed on 13 May 2009. He conceded that there was no evidence that Stand 4356 belonged to Likukula or that he purchased the stand from Likukula. He also accepted that Margaret Likukula, with whom he had an agreement to occupy the stand, was not a member of the plaintiff and that there was nothing to show that Likukula himself had notified the plaintiff about his occupation. The receipts for contributions paid to the plaintiff only reflected Likukula's name and not that of the defendant. He did not respond to the notice to vacate given to him by the plaintiff on 17 August 2003. He has never been a member of the plaintiff cooperative or applied for membership. Likukula's power of attorney authorised him to act for Likukula but did not also authorise him to stay on the stand. Apart from the proceedings before the Rent Board, all the litigation between the parties relates to Likukula and not the defendant. He was not aware that the order of this Court in HC 9734/03 had been rescinded. As regards the buildings on the stand, he was not able to furnish any approval for construction from the City of Harare.

Rights of Ownership and Occupation

Apart from a few minor inconsistencies, the witnesses who testified on behalf of the plaintiff were clear and credible as to the plaintiff's ownership of Stand 4356 and its allocation to Likukula until his resignation from the cooperative in September 2003. They also corroborated one another as regards the absence of any action or conduct on the part of the plaintiff authorising the defendant to purchase or occupy the stand.

The defences that the defendant has raised in this action are as follows: (i) that he purchased the stand from Likukula, notified the plaintiff thereof, and has been paying subscriptions to date; (ii) that he was authorised through the transaction with and authority from Likukula to stay on the stand; and (iii) that he is the owner of the

property and the buildings constructed thereon and is therefore entitled to occupy or lease out the stand as he wishes.

For his first defence, the defendant relies upon his agreement with Margaret Likukula and the receipts that he produced at the trial and later with his closing submissions. However, the so-called agreement simply refers to an arrangement for him to pay rates and cooperative contributions. It does not by any means constitute an agreement of sale. More importantly, it was signed by Margaret Likukula who was not a member of the cooperative and therefore had no right or authority to conclude any transaction relating to the stand. As for the receipts, those pertaining to cooperative contributions are in the name of Likukula, while the rates receipts from the City of Harare are in the name of the plaintiff. Apart from this, the defendant has not tendered any documentary evidence to support his allegation of having purchased the stand from Likukula. In any event, it is clear that Likukula himself had no mandate or authority to sell or dispose of the stand, whether to the defendant or to any other party.

In the same vein, the second defence put forward by the defendant is equally unsustainable. He submits that the power of authority granted by Likukula empowered him to deal with any matter relating to the stand. The authenticity and validity of the instrument are questionable inasmuch it purports to have been executed on 17 August 2005, well after Likukula's resignation from the cooperative on 14 September 2003. Assuming its validity, it may be accepted as merely authorising the defendant to deal with all issues, including litigation, relating to Likukula's membership and rights of ownership in the cooperative. In essence, it appoints the defendant to act as Likukula's agent in his cooperative affairs. However, it does not confer any right of ownership or occupation in the stand upon the defendant himself.

As regards ownership of the stand, the witnesses for the plaintiff clearly demonstrated that the plaintiff was and continues to be the rightful owner of the stand and that it has not sold or disposed of its rights therein. Moreover, this was effectively conceded by the defendant himself under cross-examination. It follows that he is not entitled to occupy or use the stand as he deems fit. His remaining objection is that he constructed the buildings on the stand with the requisite approval and therefore cannot be required to vacate the property to his detriment and the unjust enrichment of the plaintiff. In furtherance of this position, he claims that the buildings were approved by the City of Harare. Regrettably, the document dated 16 March 2010 that he has

attached to his closing submissions seems quite irrelevant and does not support his contentions. To the contrary, the evidence adduced at the trial clearly shows that neither the City of Harare nor the plaintiff approved or authorised any construction on the stand by the defendant. Consequently, the defendant is estopped from claiming any right of occupation or compensation derived from his illegal construction as against the plaintiff. His rights, if any, are confined to a possible claim for restitution from Likukula and his family.

Procedural Objection

In his closing submissions, the defendant belatedly raises the argument that the plaintiff failed to pursue Case No. HC 9734/03 to finality. Because it is still pending and has not been finalised, so he argues, the institution of the present action was improper.

In this regard, the court records show that the default judgment in that case was rescinded and set aside on 13 September 2006 in Case No. HC 963/06. The plaintiff was given leave to file its opposing papers and defend the main matter. The effect of that rescission is that the plaintiff is no longer interdicted from repossessing the stand and evicting the occupants thereof in accordance with due process. In any event, it is patently obvious that it was for the cited applicant in that case, *i.e.* Likukula, or for the defendant himself, having applied for and been granted joinder, to pursue the matter to finality. It was certainly not incumbent on the plaintiff, as respondent in that case, to conclude the matter. It follows that the supposed pendency of Case No. HC 9734/03 did not in any way preclude the plaintiff from instituting and proceeding with the present action.

Disposition

It is common cause that the plaintiff purchased 225 stands, including Stand 4356, from the City of Harare in 1994. However, it will only acquire the relevant title deeds from the City once all of the stands have been fully developed. Nevertheless, it is abundantly clear from all of the documentary and oral evidence before the Court that the plaintiff remains the owner of the stand in dispute. It has not sold the stand or authorised its disposal to Likukula or the defendant or to any other person. It is also clear that the defendant and his family or tenants are occupying the stand without any permission or authority from the plaintiff. The defendant is not a member of the

plaintiff cooperative and has never applied to join the cooperative. Moreover, he has failed to establish any other legal basis for occupying the stand. On the 17th of August 2003, he was given written notice to vacate the stand by the end of the month, which notice he acknowledged having received with an undertaking to vacate by the end of December 2003. He did not vacate the stand then and persists with his occupation thereof to this day. Having regard to all of the foregoing and the plainly perverse conduct of the defendant, the plaintiff is entitled to enforce its rights with a punitive award of costs.

In the result, it is ordered that:

1. The defendant and all those claiming rights of occupation through him shall vacate the house, structures and premises situate at Stand No. 4356, Tongogara Avenue, Dzivarasekwa 2, Harare, within 10 days of this order being served upon them, failing which the Deputy Sheriff be and is hereby directed and authorised to evict them from the said stand.
2. The defendant shall pay the costs of suit on a legal practitioner and client scale.

Mhiribidi Ngarava & Moyo, plaintiff's legal practitioners