

FRANCIS MAKANDIRASA MAZARURA
versus
RHODAH KATIVHU

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 27 February 2014 and 17 March 2014 and 12 June 2014

Civil trial

Ms *K. Muyagwa*, for the plaintiff
Ms *S. Chikotara*, for the defendant

MWAYERA J: It would not be stretching the imagination too far to point out that land is a basic necessity for both human beings and animals. It is on land that food and water are derived and shelter is constructed. The action before the court is centered on Plot 8 Village 62 Hoyuyu Mutoko. The plaintiff brought a claim for eviction of the defendant from the said plot. The basis of eviction claim being that plaintiff claims to be the owner of the plot. It is the plaintiff's contention that the plot was ceded to him in 2007 by his late father Enerst Chakanetsa Mazarura. He had by way of evidence an affidavit and general power of Attorney. Further the plaintiff's evidence was that after getting the cession affidavits he paid subscription fees to the Rural District Council which culminated in him getting a confirmation certificate of ownership of Plot 8.

The defendant on the other hand presented argument that Plot 8 Village 62 Hoyuyu Mutoko, was her piece of land and that at the time of death of the late Enerst Chakanetsa Mazarura, she was the surviving spouse and that Plot 8 was the matrimonial home. She got married to the plaintiff's father when the latter was staying at Plot 5. The plot was acquired through Government Land Acquisition Programme and that a directive was issued that they move to bigger plots leaving the old plot as grazing land and this was done in respect of all the other resettled villagers. She thus moved with her husband to plot 8, the plot in issue. She subsequently acquired confirmation letter of ownership of the piece of land from the relevant authority. Given this background the court had to grapple with;

- (a) whether or not the plaintiff has cession to Plot 8 Village 62 Hoyuyu Mutoko.

- (b) whether or not the plot belonged to the plaintiff thus having a legal basis to evict the defendant.
- (c) whether or not the non citing of the allocating authority is fatal to the proceedings.
- (d) whether or not the eviction case was dismissed on merit by Mutoko Magistrate Court.

The plaintiff testified on his own behalf and also adduced evidence from three witnesses namely Josiah Nyamhure the village head, Lazarus Musara his uncle and Nevson Jemwa a lands officer with the Ministry of Lands.

It will not be necessary to recount word for word what the witness told to court but it is important to comment on the witnesses' evidence and seek to relate it to the issues at stake in a bid to come up with a disposition. Josiah Nyamhure's evidence was basically to confirm that as a village head, he was aware the late Enerst Mazarura was allocated plot 5 under land resettlement and that when other villages were moved in line with the scheme he was moved to plot 8 and by then he was married to the defendant. He indicated that the late Enerst Mazarura always wanted to have the plot in his son, plaintiff's name although it was not registered in plaintiff's name. The witness' evidence was not of assistance in so far as the central issues for determination are concerned. He did not know and did not testify on whether or not plaintiff had the plot in question ceded. Even his evidence on alleged divorce token was not concrete, he only heard the parties wanted the matter resolved amicably but could not say with certainty there was passing or exchange of divorce token. It was clear from his evidence he was the village head of the village wherein the plot in issue is situated.

Lazarus Musara an uncle of the plaintiff confirmed that the late Enerst Mazarura moved to plot 8 together with defendant after marriage to the defendant. He recalled in year 2012 he was send to deliver "gupuro" token of 2 rand and some affidavits to the defendant. He left these with Prudence a daughter to the defendant. The witness's story was not of any assistance in determination of the issues at hand. It is not that the witness was not being candid with the court but that the evidence did not take the matter anywhere. He testified on common cause aspects that the plaintiff's father was married and staying with Rhoda at the village. Rhoda the defendant claims she did not receive any divorce token and the witness said he left it with a third party a child, one Prudence. One only wonders what custom that is aligned to.

Nevison Nyamhure also testified as the last witness on behalf of the plaintiff. The witness an employee of the Ministry of Rural Resettlement Mutoko left the court wondering

if the Ministry is aware their face is in such incapable hands in Mutoko. One would only gape in amazement as he recounted events that unfolded at his office. His office played the overseer of land issues on behalf of the Government. The office had the responsibility of issuing out land and keeping registers for villages in Mutoko. He narrated how the defendant approached him on 5 May 2008 with a court extract judgement from the magistrate court. The defendant advised him that the court had ordered that she stays at the plot number 8. She notified she was having problems with the plaintiff her late husband's son. The witness sought to have the court believe that the fact that the defendant was coming from court made him comply with a "court order" that plaintiff's claim had been dismissed and hence he went to the register and deleted Enerst Chakanetsa Mazarura's name and in its place endorsed the defendant's name as shown on the register exhibit tendered in court. He did not get any death certificate to confirm death of deceased. He told the court that out there at Mutoko if something is coming from the court then they just comply. He did not bother to read the court judgment or extract because if he had it was clear the purported one Enerst Chakanetsa Mazarura had testified as a witness in court and was not dead. It is clear from the magistrate's judgment the plaintiff was seeking to evict defendant from plot 8 and it is that claim which was dismissed. There is no indication in the judgement of Mutoko court which was tendered as Exhibit to show that the court was dealing with a deceased estate. The witness knew that his office had confirmed ownership of plot 8 in question to the defendant and yet again the same office went ahead to confirm subsequent ownership to the plaintiff. The witness clearly showed a care free attitude in the manner he carries about his duties. His evidence was incredible. Even though he tried very hard to convince the court that the defendant had misled him for him to change ownership it could not be accepted given the court extract he stated he religiously complied with showed the defendant's husband was alive. The witness impressed the court as a man of double standards whose investigation would probably rid the relevant authority not only of an incompetent but corrupt officer. The witness could not speak on behalf of the Rural District Council but he knew with certainty there were no cession forms filed as his office played over sight role on land distribution.

After all that evidence was adduced the court is still to grapple with the issues central to the matter. What is at stake is whether or not the plaintiff's father ceded his plot 8 village 62 Hoyuyu Mutoko to the plaintiff. The evidence from the plaintiff and witnesses does not point the cession as having been effected. In 2007 the plaintiff instituted proceedings for eviction of the defendant from the plot which application was dismissed on merit and or for

want of jurisdiction since the magistrate's ruling is not clear cut. Effectively, however, the defendant went back to the matrimonial home. In *casu* the plaintiff presented affidavits signed by his father for purported cession. Clearly such affidavits tendered in court are not due process of cession and in any event they were not originated from the relevant authority Mutoko Rural District Council. The exhibit annexure A and B simply outline but do not prove that indeed the cession was effected. Even the payment of cession fees as shown in exhibit 2A and 2B do not suffice as proof that the cession was effected. The last witness in the plaintiff's case Mr Nevson Jemwa clearly pointed out that the cession was not finalised and that the meeting held on 22 May 2012 exhibit 3 on plaintiff's bundle was a process to commence the cession process. The meeting resolved the plot should be ceded to the plaintiff but that does not change the complexion of the status of the plot in the absence of the cession. It is clear there is no cession which was effected in 2007 because if that was so the meeting of 22 May 2012 recommending such cession would not have been necessary. The plaintiff did not call anyone from Mutoko Rural District Council neither did they cite them as interested party or notify them. Such omission of inclusion of an interested party deals a fatal blow to the plaintiff's case. Upon consideration the totality of the evidence before the court it is sticking out that due process of cession was not effected and that there is no evidence to show the cedent ceded rights to the cessionary who then signed to confirm transfer. There is no evidence to show that the relevant authorities Mutoko Rural District Council were engaged in due process of cession to pass title rights and interest in the land to the plaintiff.

Having said that due process of cession was not shown to have been effected. It logically follows that the plaintiff has not been shown to be the owner of Plot 8 Village 62 Hoyuyu. The plaintiff sought to rely on the fact that Plot 8 was acquired as a result of the earlier acquisition of plot 5 by his late father when the same was a widower. Clearly it is not in dispute the late Enest Chakanetsa Mazarura acquired Plot 5 through a Government Resettlement Scheme before marriage to the defendant. Enest Chakanetsa Mazarura later married Rhoda, the defendant and the same Resettlement Scheme occasioned their move from plot 5 to plot 8. Enest Mazarura moved with his wife Rhoda to their matrimonial home. The plaintiff cannot seriously claim ownership on basis of assisting his father in his upkeep and development of plot 5 and subsequently plot 8. The plots were registered in the plaintiff's late father's name. There might have been intimation and intention to change the name and ownership but there was no such due process effected. An intention does not at all give title to the plaintiff. The minutes of committee that sat to deliberate on the issue tendered as

Exhibit 3 page 2 thereof outlines nothing more than the plaintiff's father's wish. The committee's resolution came from the common understanding that Chakanetsa Enerst Mazarura although he was still alive at the time his wish was to cede plot 8 to his son. The wish was never brought to fruition by due process of cession. The plaintiff also sought to rely on confirmation of ownership tendered as exhibit. This confirmation however, was on 10 May 2012 and certainly subsequent to the confirmation letter issued to Rhoda Kativhu on 12 January 2012. In the absence of documents and evidence stating that such confirmation was revoked or cancelled then in the spirit of maintaining sanctity of contract the defendant was the first to enter the contract and should unless there are compelling reasons not be prejudiced by a subsequent acquirer. The case *Southern Africa v Des den Properties* 1964 RLR (7) 4 1963 2 SA although it refers to double sale is relevant. It was held that the sanctity of contracts will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue claim for damages.

In an event the plaintiff's acquisition of confirmation letter is rendered questionable given the subsequent meeting which was recommending the plot be ceded to him. The plaintiff also from the import of his evidence and witnesses in particular his uncle and the village head sought to prove ownership by alluding to the fact that the defendant had been divorced by his father and as such had no right to remain on the plot. He sought to rely on custom of "gupuro" token of divorce but it was haze as to whether or not the token had been handed over to the defendant in the presence of her parents and had been accepted or there was a plan to do so or that it was handed over to a third party by a relative, the witness who then notified the village head. This is clear twisting of custom to disown and stripe off Rhoda Kativhu the defendant's rights. It is not in dispute that Rhoda was married to Enest Chakanetsa Mazarura and that the two moved together and settled at their matrimonial home Plot 8 Village 62 Hoyuyu Mutoko. What is not clear is whether or not during his life time Chakanetsa Enest Divorced the defendant. The evidence does not show there were such formalities as per custom conducted conclusively. The question then is how is the plaintiff claiming ownership of the matrimonial home, and how is he claiming legal basis to evict the defendant. It is important at this stage for the court to make it clear that out our Constitution of Zimbabwe Amendment (No 20) Act 2013 is very clear on equality between man and women when it comes to land issues. This is for the obvious reason that land is a basic necessity and that no one should be discriminated upon on land resettlement or distribution

on grounds of sex, gender and custom, section 56 of the constitution on equality and non discrimination is opposite. Section 56;

- “(1) All persons are equal before the law and have the right to equal protection and benefit of the law.
- (2) Women and men have the right to equal treatment, including the right to equal opportunities in political economic, cultural and social spheres.
- (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour tribe, place of birth ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age pregnancy, disability or economic or social status or whether they were born in or out of wedlock.”
(Underlining my emphasis)

The plaintiff seems to be propounding legal right to evict on basis that the defendant a woman who was in unclear circumstances allegedly given a divorce token, and woman who did not give birth to children with the late Chakanetsa Enerst Mazarura cannot acquire the matrimonial home or even be issued a certificate of ownership of land. There is no legal basis established giving the plaintiff the right to evict the defendant for the plaintiff is not the owner of the property neither did he acquire title by cession as there was no due cession process effected.

The defendant remains the surviving spouse of the late Mazarura Chakanetsa. The fact that the plaintiff made it impossible for her to attend to her ailing husband or that she did not attend to the husband because of differences does not remove the status as a surviving spouse. Her rights can therefore not be tempered with simply because it was her late husband's wish to transfer title and ownership to the plaintiff. The wish never came to be accomplished. The fact that she was customarily married to the late Chakanetsa Mazarura again does not change the rights as a surviving spouse given provisions of Act 6 of Administration of Deceased Estate Act.

It has been shown that it is not even necessary in the circumstances of this case to proceed to Administration of Deceased Estate because the plaintiff instituted eviction proceedings in the Magistrates Court when the defendant's husband was alive. Again no legal basis for such institution of proceeding has been shown. The Magistrates Court effectively ordered the defendant to go back home citing jurisdictional challenges and half heartedly on merit. The decision by the Magistrate did not fully delve into the substance of the issues before this court because the issue of ownership remained sticking out such that one cannot

say the matter is *res judicata*. Argument and evidence has been presented and this court has pointed out that the plaintiff has no title or ownership of the plot in question which entitles him to seek to evict the defendant from not only her matrimonial home but her piece of land. Clearly the defendant together with the husband benefited under the Government Resettlement Programme wherein villagers were moved to self contained plots. The suggested reallocation by the plaintiff is discriminatory and disadvantaging a customarily married wife based on desire to displace the defendant from her home on basis of not having sired children with the now late Mr Chakanetsa Enerst Mazarura. It is that said discriminatory tendency contrary to our Constitution that led the plaintiff, in clear circumstances of no right of title or ownership culminating in no *locus standi* to seek to evict an owner of property from her property. Worth noting are provisions of s 80 of the constitution on rights of women.

- “(1) Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.
- (2) -----
- (3) All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement” (My emphasis)

It is clear from the above constitutional provisions that to seek to discriminate the defendant’s rights of ownership of property on basis of customary union would be in violation of the constitutional rights conferred on women. It is not only erroneous but void. The defendant has a right to stay at her home. The defendant is not only a confirmed owner of the property but as given by the plaintiff and witnesses the defendant got married to the late Enerst Chakanetsa Mazarura while still staying at plot 5 and the couple was later resettled at plot 8 where she clearly contributed to acquisition and development of the property. It is fairly settled that for one to successfully institute eviction proceedings, one should establish that he or she has absolute rights lawfully acquired. The plaintiff’s claim that he acquired the Plot 8 Village 62 Hoyuyu Mutoko cannot stand given there was no clear cession process effected. Further his claim of double allocation collapsed in the face of an earlier confirmation of ownership by defendant who was *in situ* at the matrimonial home. The intended cession and purported divorce was never effected. The plaintiff’s claim has no legs on which to stand. Clearly there is no right of ownership or legal basis on which the plaintiff can successfully seek eviction of the defendant from her home.

Accordingly the plaintiff's claim is dismissed with costs.

Muronda and Muyangwa Legal Practitioners, plaintiff's legal practitioners
Nyamushaya and Associates, defendant's legal practitioners