

MOLLY CHIURAISE  
versus  
GRACE SHURO  
and  
CITY OF MASVINGO

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE 13, 14 & 15 June AND 12 October 2016

### **Civil Trial**

*T Bhatasara*, for the plaintiff  
*J Mambara*, for the 1<sup>st</sup> defendant

TAGU J: The plaintiff issued summons against the defendants claiming-

- a) Ejectment of the first defendant and all those claiming occupation through her from house number 8916 Hwiramiti Street, Chesvingo, Masvingo within seven days from date of order.
- b) Payment of \$ 14 000.00 being arrear rentals from March 2009 to December 2014.
- c) Payment of holding over damages calculated from 1 January 2015 till date of ejectment at the rate of \$ 6.67 per day.
- d) Interest on the above amounts at the prescribed rate from date of service of Summons.
- e) Cost of suit.

The first defendant entered appearance to defend the matter. The second defendant was cited in its official capacity as an interested party in that the property in dispute is still under cession status. The second defendant did not enter an appearance to defend the matter. The first defendant filed its plea wherein it among other things stated that the property in question was sold to the first defendant's late husband Mr Simbarashe Shuro on 10 December 2001 and counter claimed for-

- a) An order compelling the plaintiff to sign all the necessary papers to facilitate the cession of title, interests and rights of stand 8916 Hwiramiti Street, Chesvingo, Masvingo into the names of the first defendant failing which the Deputy Sheriff, Masvingo or his lawful assistant be and are hereby authorised to sign such documents to facilitate the cession.
- b) That the second defendant be and is hereby ordered to cede title, rights and interests in Stand 8916 Hwiramiti Street, Chesvingo, Masvingo into the names of the first defendant.
- c) That the Plaintiff pays costs of suit on a higher scale.

At a pre –trial conference the parties agreed that the issues for determination in the trial are as follows-

1. Whether or not plaintiff is entitled to an order of ejectment, payment of arrear rentals and holding over damages and the quantum thereof.
2. Whether or not stand 8916 Hwiramiti Street, Chesvingo suburb, Masvingo was sold to the first defendant’s husband by the plaintiff’s husband during their lifetime.
3. Whether the agreement of sale dated 10 December 2001 is binding on the plaintiff and the first defendant.
4. Whether or not the plaintiff should sign all documents necessary to facilitate the cession of Stand 8916 Hwiramiti Street, Chesvingo Suburb, Masvingo into the names of the first defendant.

The plaintiff Molly Chiuraise and Sheillah Zimuto gave evidence in the plaintiff’s case. On the defendant’s side the first defendant Grace Shuro and one Obert Jakata testified. It was on the testimony of these witnesses and the documentary exhibits produced that the whole story unfolded. The following is the analysis of the evidence led before this court.

### **THE PLAINTIFF’S CASE**

Ms Molly Chiuraise told the court that she got married to the now late Walter Style Matumba on 6 August 1993 and their marriage was solemnised in terms of the then Marriages Act [*Chapter 37*] now [*Chapter 5:11*] as per exh 1 in her bundle of documents. At that time her husband was a civil servant whilst she worked as a typist for Zimbabwe Farmers Union. In or around 1996 they were on the housing waiting list of the second defendant. In 1997 they were handed the keys to the disputed property, that is, Stand 8916 Hwiramiti Street, Chesvingo, Masvingo. They moved into the house as a couple. In 1999 they formally

signed an agreement with the Ministry of Local Government and National Housing in respect of the same house as per exh 3. About the same period her late husband Walter Style Matumba took an early retirement and went on pension. She was later retrenched from her employment. As a result they decided to lease the said property to supplement the pension income and relocated to their rural home in Bikita.

She told the court that the first defendant and her husband a Mr Simbarashe Shuro came in early 2000 to discuss the issue of lease and they deliberated more with Mr Matumba. Rental was agreed at the figure of ZW\$ 500. They handed over the house to the first defendant and her husband and they relocated to their home in the rural areas of Bikita. Mr Matumba would come to Masvingo at the end of every month to collect his pension and rent from the first defendant and her husband. This happened till sometime in 2004 when Mr Matumba became sick. The plaintiff was the one now coming to Masvingo to collect rent from the first defendant and her husband and she would use that money to purchase medicines for the sick Matumba. Unfortunately Mr Matumba passed on in January 2005 and the first defendant and Mr Shuro were duly advised of the demise in February 2005 when the plaintiff came to Masvingo to collect part of the rent from them. She then stayed at her rural home mourning the death of her husband without going to Masvingo to collect rentals. Her brother who was residing in Harare later advised her to come to Harare with her child since a place had been secured for that child to start Grade 1 in Harare. Because she did not have enough bus fare to go to Harare she decided to go via the first defendant's place in February 2005 collecting arrear rentals to supplement her bus fare. She got to the disputed property and saw the first defendant who indicated to her that Mr Shuro had gone out and that she did not have enough rentals. The first defendant gave the plaintiff a bit of money that she had and told the plaintiff to come back later to collect the full arrear rentals. Plaintiff collected half the rentals and proceeded to Harare. The plaintiff later returned in April 2005 in the company of her daughter Sheillah Zimuto to collect the arrear rentals. She found the first defendant and her husband Simbarashe Shuro present at the house in question. She was surprised to hear for the first time Simbarashe Shuro saying that plaintiff's late husband had sold the house to them. She queried why for the past four years the defendants were paying rentals of the same house to her if they had purchased it? She did not get a clear explanation hence she went into town and sought legal advice. She was advised that it was impossible to evict the first defendant and Mr Shuro before registering the late Mr Style Matumba's estate. She then went back to Harare where the estate was registered.

The plaintiff told the court that she was duly appointed the *executrix dative* to the estate of Mr Style Matumba as per exh 2. It was her evidence that she advertised for debtors and creditors as shown on exh 4 and 5. She said after receiving no claims against the estate she prepared a final liquidation and distribution account and caused it to be advertised as per exh 6. It was her further evidence that after receiving no objections to the account the Master of the High Court confirmed the account as per exh 7. Later the Master of the High Court sent her a copy of a letter dated 20 April 2007 per exh 11 wherein the Master of the High Court advised the first respondent that the distribution of the assets of the estate of the late Mr Style Matumba had been authorised and that the first respondent was now free to apply to court for the relief she was seeking.

With a confirmed account the plaintiff attended at the second defendant's offices and effected cession as evidenced in exh 8. In December 2006 the plaintiff then served personally on the first defendant and her husband a notice of eviction from her lawyers as per exh 9. This she did well before the first defendant wrote to her a letter dated 12 April 2007 through the Masvingo Legal Projects Centre wherein the first defendant was claiming the same house as per exh 10.

When the eviction notice was not complied with the plaintiff as a widow took time to mobilise resources and engaged lawyers to sue for eviction in 2009 in HC 6122/09 but her former lawyers Mpame & Associates negligently prosecuted her claim leading to it being withdrawn and she instituted the current proceedings in 2014.

Under cross examination by the first defendant's counsel the plaintiff denied the suggestion that she was not a joint purchaser of the said house and maintained that she was a jointer purchaser of the said house because her names appears on exh 3 under spouse's name on the memorandum of agreement made and entered into by and between the Minister of Local Government and National Housing and Style Matumba. The plaintiff categorically stated that the first defendant and her husband were their tenants who used to pay rent. She further challenged the authenticity of exh 12 which is a purported agreement between the late Mr Matumba and the late Mr Shuro and averred that even if assuming for argument's sake that Mr Matumba had sold the house there was no proof that Mr Matumba received the purchase price.

## **SHEILLAH ZIMUTO**

The plaintiff called Sheillah Zimuto to corroborate her evidence. The evidence of Sheillah Zimuto was to the effect that according to her knowledge and information of the matter her uncle Mr Matumba never sold the house because she was staying in the same town of Masvingo and she knew that there were tenants who were staying at the property in question when the plaintiff and her husband left for the rural areas. She knew that Mr Matumba would come to collect his pension and rent every month-end up until 2004 when he was sick. According to her evidence when Mr Matumba was sick the plaintiff would come to Masvingo town to collect rent from first defendant and Mr Shuro. She said she witnessed the plaintiff buying medicines for Mr Matumba each time she collected the rent from the defendants. It was her further evidence that after the death of Mr Matumba sometime in April 2005 the plaintiff came to Masvingo and put up at her house and on the morrow she accompanied the plaintiff to collect rent and was there when first defendant and her husband Mr Shuro for the first time started to say they had bought the house way back in 2001.

The plaintiff further told the court that she also claims for arrear rentals at \$200.00 per month for the full house since she regarded the first defendant as her tenant since 2000.

## **ANALYSIS OF PLAINTIFF'S EVIDENCE**

Ms Molly Chiuraise and Sheillah Zimuto gave their evidence extremely well. Despite vigorous cross-examination they gave an account which on the face of it was believable. Their stories were supported by various documentary exhibits. The fact that the first defendant and her husband were tenants paying rent was not vigorously contested save for bare denial. Ms Molly Chiuraise's evidence was corroborated in all material respects. Other than a bald denial Sheillah Zimuto was not specifically challenged on her testimony about rent. Even when the first defendant took to the witness stand she did not deny that Zimuto came with plaintiff to request for rent.

I will now examine the defendant's evidence.

## **GRACE SHURO**

Ms Grace Shuro told the court that she was married to the late Simbarashe Shuro in terms of the Marriages Act [*Chapter 5:11*]. She said from 2000 up to 2002 she was living with her husband at Mutimurefu Prison Compound where her husband was a prison officer. In 2001 her late husband went on retirement and they sought to purchase a house in

Masvingo as a family. They saw an advertisement at a notice board at TM Supermarket. They then went to see an agent who was working for an estate agent called Landmark by the name Obert Jakata. Obert Jakata then told them that Mugabe and Partners had a stand that was on sale. Obert Jakata took them to view the Stand No. 8916 Hwiramiti, Chesvingo, Masvingo. They found Style Matumba at home with a woman he called his wife and a child. They inspected the house and liked it. They then went to Masvingo Municipality to verify ownership and whether or not there were any outstanding utility bills on the Stand. They checked the status of the house with the Ministry of Local Government. When satisfied they visited Mugabe and Partners the following day on 10 December 2001.

On 10 December 2001 both parties met at Mugabe and Partners' Chambers. An agreement of sale was then drawn up and the late Simbarashe Shuro signed as buyer and Style Matumba as seller. The purchase price was agreed at ZW\$ 600 000.00. A deposit of ZW\$550 000.00 was paid on signing of the agreement by way of a bank cheque. The balance of ZW\$ 18000.00 was paid on 25 February 2002 and ZW\$2000.00 on 27 February 2002. The money was received by one Obert Jakata their agent for onward transmission to Mugabe and Partners who were the seller's agents. ZW\$30 000.00 was paid on 1 June 2002 directly to Mugabe and Partners and the amount was signed for by A. Mugabe.

It was her evidence that she and her husband took occupation of the said house on 1 March 2002 the same day that Style Matumba and his family vacated the premises after giving them an address at Mugijima, Masvingo. She said they did not have money to effect cession there and then. By the time they were ready to effect cession Style Matumba could not be found. Unfortunately Style Matumba passed on 7 January 2005 before cession was effected. She had to go to Bikita to look for some relatives of Style Matumba in the company of her lawyers. They approached one Conrad Matumba who referred the matter to Simplisio Matumba who was said to be a teacher in Mozambique. So the matter had to wait. They were then served with a letter from Mpame and Associates demanding their eviction. They then sought legal advice from Masvingo Legal Projects Centre. Nothing transpired until Mr Shuro passed on 31 May 2009. She then opened an estate file at Masvingo Magistrates Court but was advised that until the stand 8916 Hwiramiti was registered in her husband's names it could not be recorded as part of Mr Simbarashe Shuro's estate. She then left the matter as it was only to receive an application for her eviction in December 2009. On 19 January 2015 she then received a summons in respect of the present proceedings. In response she also filed a counter claim in which she seeks that the rights, title and interest in the property be ceded

by plaintiff to her. When questioned by the counsel for the plaintiff why the balance of the purchase price was paid as cash contrary to the terms of the agreement she said it was under the instructions of Style Matumba that the balance of the purchase price was to be paid in cash.

### **OBERT JAKATA**

Obert Jakata's evidence was to the effect that he was approached by Mr and Mrs Shuro who wanted to buy a house. He was aware that Mugabe and Partners through their agent Larartic Investments had properties on sale. He then showed the first defendant and her husband a property in Rujeko and House No. 8916 Hwiramiti Street Masvingo. The first defendant and her husband settled for house number 8916 Hwiramiti Street. He then accompanied them to Masvingo Municipality to verify the status of the property and its ownership. Having been satisfied the parties agreed to meet at Mugabe and Partners the following day. It was his further evidence that the following day 10 December 2001 Style Matumba came with his uncle a Mr Chikukutu and an agreement of sale was drawn up by the lawyers. Simbarashe Shuro signed as buyer and Style Matumba signed as seller. The agreement was witnessed by himself, Chikukutu, Grace Shuro and one Tusu. According to him ZW\$ 550 000.00 deposit was paid by way of bank cheque. Style Matumba later advised that payment should be made in cash hence he received ZW\$18 000.00 on 25 February 2002 and ZW\$ 2000.00 on 27 February 2002 which amounts he recorded on the face of the agreement of sale. He was to leave this money with Mugabe and Partners for collection by Style Matumba. However, the balance of ZW\$30 000.00 was paid directly at Mugabe and Partners and Mr Mugabe signed for it and it was witnessed by one Tusu.

### **ANALYSIS OF DEFENDANT'S EVIDENCE**

The court noted that most of what was said by the first defendant and her witness were not supported by documentary evidence. They referred to exh 13 the Court Application, exh 14 the Notice of Opposition, exh 15 the certificate of death for Mr Simbarashe Shuro and the Memorandum of Agreement of Sale purportedly entered into by and between the late Style Matumba and the late Simbarashe Shuro. However, the court noted a lot of discrepancies in the defendant's story. I will highlight some of the discrepancies hereunder. Ms Shuro told the Court that when they viewed house 8916 Hwiramiti Street, Chesvingo, Masvingo on 9 December 2001 the tenant at the house was away and her room was locked.

But Obert Jakata said he was introduced to a female tenant who was present in the presence of Ms Shuro and her husband. This clearly showed that their evidence was at variance. Ms Grace Shuro told the court that when they got to Mugabe & Partners' offices on 10 December 2001 in the company of her husband and Obert Jakata, they found Mr Matumba sitting in the offices already. Obert Jakata in his evidence said when they got there Mr Matumba was not present and had to be called to come to the offices as a buyer had been found. If Ms Grace Shuro's testimony is to be taken as the truth, and that of Obert Jakata as a lie the question that boggles the mind is this - 'how did Mr Matumba know beforehand that a buyer had been found who was to come to Mr Mugabe's offices? Clearly the two gave conflicting evidence. Further, Ms Shuro testified that they went to the Ministry to check if the house had been fully paid for. She was emphatic that they did not inspect the file of Mr Matumba's house since same was not given to them. However, Mr Obert Jakata said Mr Shuro inspected the file as it was in the interest of the buyer to do so. The question now is where is the truth?

The other area of concern is that Ms Grace Shuro under cross-examination conceded that the signature of Mr Matumba in exh 3 and the one in the purported agreement of sale in exh 12 look different. This puts in doubt the authenticity of exh 12. Further she conceded that she had no single receipts for the payments or deposits/transfer slips. Asked how the deposit of ZW\$ 550 000.00 had been paid she said it was a bank cheque. She changed to say it was a bank transfer. Challenged to produce the proofs she suggested that banks during that period had no RTGs forms. This left her evidence in doubt. The other unbelievable aspect of her evidence was that she was asked why they did not effect cession at that time since she had said Mr Matumba was willing to do so. Her explanation was that they did not have money. This flies in the face of the fact that at that time they were able to hire a lawyer to accompany them to Mr Matumba's rural areas of Bikita, yet cession fees were relatively small compared to the amount they spent on the lawyer. The first respondent in my view, was caught evidently not telling the truth when she denied seeing exh 11. This was a reply to her letter in exh 10. If she and her husband had not received exh 11 surely they should have been expected to make a follow up. Their conduct was not consistent with common sense to just wait for eviction in the face of exh 11. Particularly if one takes into account that Ms Shuro admitted seeing water bills having been changed and were now coming to the property in the name of the plaintiff and not Mr Matumba, this should have jolted her to find out what was happening than to just sit and did nothing about it. A person who would have bought the

house from Matumba would have wondered why the bills were now in the names of Molly Chiuraise.

One other aspect that makes the first defendant's claim weak is that she admitted that she is not the executrix dative or the heir of the late Mr Shuro's estate. This puts her *locus standi* to sue for cession in doubt as she had no agreement with Matumba or the plaintiff. Under cross-examination on this aspect the first defendant failed to proffer a good explanation.

Coming to the evidence of her agent Mr Obert Jakata it was seriously discredited during cross-examination. For example Mr Obert Jakata admitted that he was not a registered estate agent. He could not explain how the first defendant who had seen an advertisement put by Mugabe & Partners came to his office instead since he had nothing to do with Mugabe & Partners. Further he conceded that he had no written mandate from anyone to sell the house in question. He could not remember whether he gave Mr Shuro a receipt for the money paid to him or not. He further admitted that he did not receive a receipt from Mugabe & Partners after he went to leave the ZW\$18 000.00 and the ZW\$2 000.00 at their offices. He said a bank cheque was issued for ZW\$ 550 000.00 by Mr Simbarashe Shuro as deposit money that Mr Style Matumba later deposited. This evidence contradicted what Ms Grace Shuro said that it was transferred. To make matters worse this differed with what clause 2 of exh 12 says that a deposit of \$550 000.00 had been paid in cash .This witness Mr Obert Jakata was evidently evasive and lying because he at one stage told the court that when they got to the offices he saw exh 3 the file of Mr Matumba. Pressed whether he indeed saw the details of the plaintiff in the agreement he changed his story and said he did not see exh 3 at all. To me he appeared a hired witness who was bent on giving falsehoods to advance the case of the first defendant. One aspect was that he could not remember who paid him and how much he received in assisting the first defendant and her husband in purchasing the house in question. All he could say was that he received a token of appreciation and that he may have forgotten the finer details due to lapse of time. Lastly he said one Tusu was a secretary at the offices of Mugabe and Partners who signed as a witness to exh 12, but quickly changed his evidence when he failed to identify Tusu's signature among the ones who signed.

Comparing the evidence of the plaintiff and that of the first defendant the court was left with no option than to accept the evidence of the plaintiff as the only credible evidence and disregarded the evidence of the first defendant since it was full of contradictions and falsehoods. In my view the plaintiff managed to prove on a balance of probabilities that she

was the credible owner of house number 8916 Hwiramit Street, Chesvingo, Masvingo. It is evident that the first defendant and her husband having heard of the demise of Mr Walter Style Matumba, used hook and crooks to take over the house in which they were renting. Their story as to how they purchased the said house leaves a lot to be desired. For example it boggles one's mind how Mr Shuro could have used the same address of house number 8916 Hwiramiti, Street, Chesvingo, Masvingo as his own address in the agreement of sale exh 12, when he was buying the same house. Given the fact that Mr Style Matumba's bank statements and other utility bills were coming to the same address during his life time, and especially before he died, it is not surprising that the first defendant and his husband had access to the same and fraudulently used Mr Style Matumba's details to craft exh 12.

The first defendant submitted that the house in question was not part of the matrimonial property and further argued that the estate of the late Style Matumba was not properly wound up. In dismissing the plaintiff's claim to the said house which she said may have been sold by the late Style Matumba to the late Simbarashe Shuro, the first defendant relied on a number of cases such as *Maponga v Maponga and Others* 2004 (1) ZLR 63 H where MAKARAU J (as she then was) said-

"It would appear to me in summary that the status of a wife does not grant her much in terms of rights to the immovable property that belongs to her husband. Firstly, she has no right to any property that her husband has that is not the matrimonial home. She only has limited rights to the matrimonial home that she and her husband set up. These rights are personal against the husband and can be defeated by the husband providing her with alternative suitable accommodation or the means to acquire one. The husband can literally sell the roof from above her head if he does so to a third party who has no notice of the wife's claims, thus completely alienating the matrimonial home without making any reference to the wife."

I totally agree that this is the general position of the law. However, in this case the estate of the late Style Matumba was, in my view properly wound up because all the legal requirements for the winding up of the estate were followed. Cession was then made in favour of the plaintiff. She therefore legally acquired the house in question. However, be that as it may, from the totality of the plaintiff's evidence I am not satisfied that stand 8916 Hwiramiti, Street, Chesvingo suburb, Masvingo was sold to the first defendant's husband by the plaintiff's husband during their lifetime. The rights, interests and title to the house belonged to the plaintiff.

Having found that the plaintiff is the rightful owner of the house in question, the next issues to determine are whether or not the plaintiff is entitled to an order of ejectment, arrear rentals and holding over damages. Also whether the agreement of sale dated 10 December

2001 is binding on the plaintiff and the first defendant and whether or not the plaintiff should sign all documents necessary to facilitate the cession of Stand 8916 Hwiramiti Street, Chesvingo Suburb, Masvingo into the names of the first defendant.

The plaintiff's claim is one based on *actio rei vindicatio*. It is settled law that the principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his or her property against his or her will and that he/she is entitled to recover it from any person who retains possession of it without his/her consent. The plaintiff must in such a case allege and prove that he/she is the owner of a clearly identified movable or immovable asset and that the defendant was in illegal possession of it at the commencement of the action. See *Jolly v A Shannon & Anor* 1998 (1) ZLR 78 (HC).

Once ownership has been proved the onus shifts on the defendant to prove a right of retention. See *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C, *Makumborenga v Marini* SC-130-95 at p 2 and *Musanhi v Mount Darwin Rushinga Co-operative Union* 1997 (1) ZLR 120 (SC).

*In casu*, the plaintiff managed to prove ownership of House 8916 Hwiramiti Street, Chesvingo, Masvingo. Further, the plaintiff managed to prove that the first defendant and all who claim ownership through her are her tenants who are illegally claiming ownership of the same property. The plaintiff managed to prove that the first defendant has failed to pay rentals and have fallen into areas. She therefore managed to prove that the first defendant is liable to pay holding over damages. The plaintiff managed to prove that if ever the agreement that was purportedly entered into between the first defendant's late husband and her late husband is found to be valid, which she disputed, the said agreement is not binding on her. She again managed to prove that the first defendant has no locus standi to sue on that agreement since she is not an *executrix dative* to the estate of the late Mr Simbarashe Shuro. In my view the plaintiff is therefore not bound by that agreement of sale and consequently she has no obligation to sign all documents necessary to facilitate the cession of Stand 8916 Hwiramiti Street, Chesvingo Suburb Masvingo into the names of the first defendant.

In the result judgment ought to be granted in favour of the plaintiff. The first defendant's counter claim is therefore without merit and is dismissed. It is ordered as follows-

1. Ejectment of the first defendant and all those claiming occupation through her from number 8916 Hwiramiti Street, Chesvingo Suburb, Masvingo within seven days from date of this order be and is hereby granted.

2. First defendant to pay \$14 000.00 being arrear rentals from March 2009 to December 2014.
3. First defendant to pay holding over damages calculated from 1 January 2015 till date of ejection at the rate of \$6.67 per day.
4. Interest on the above amounts at the prescribed rate from date of service of Summons.
5. Costs of suit.

*Mupanga Bhatasara Attorneys, plaintiff's legal practitioners*  
*J Mambara & Partners, first defendant's legal practitioners*