

DAVID FORTUNE CHITENGU
versus
STANLEY MUDAWARIMA
and
ELIZABETH SPIWE MUDAWARIMA

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 22 November 2016, 23 November 2016 and 24 May 2017

Civil Trial

D Sigauke for the plaintiff
T. K Hove for the defendants

FOROMA J: The plaintiff sued both the defendants for an order of ejection from Stand 28401 Salisbury Township of Salisbury Township Lands otherwise known as 24 Barbara Tredgold Circle Mbare Harare (the Property) previously owned by the first defendant and purchased at an auction sale in execution in a matter wherein the first defendant was the judgement debtor.

The first defendant and the second defendant are brother and sister and the second defendant is in occupation of 24 Barbara Tredgold Circle Mbare Harare claiming the right to occupy as a beneficiary and child of the defendants' late parents. She claims that she and her siblings and their descendants inherited the said property from her late parents. The plaintiff obtained title to the property after purchasing same by private treaty in terms of Order 26 r 7 of the Magistrates Court Civil Rules after an initial abortive sale by public auction. He holds the title to the said house under deed of transfer number 2071/15.

On obtaining deed of transfer number 2071/15 the plaintiff demanded that the second defendant who was in occupation of the property both at the date of sale and transfer vacate the property but the first defendant refused to do so claiming that the house was a family property wherein she too had an interest.

As a result of the second defendant's refusal to vacate the property the plaintiff sued her to vacate the property and joined the first defendant in the action as it was him from whom the plaintiff obtained title to the house in question.

Both the defendants testified in support of their defence and their evidence essentially established that they are brother and sister and the first defendant though younger than the second defendant was the eldest son in the family. Defendants also testified that on the demise of their mother who had survived their father the first defendant took transfer of the title to the property in a representative capacity. The defendants claimed that according to Shona Customary practice and tradition women did not inherit from men thus the second defendant could not inherit from her father. However when the first defendant took transfer of the property from the City of Harare he did so on behalf of himself and his siblings thus he had a duty to look after the deceased's family which included all female and younger male members of his family. The second defendant had been residing at the property before her father's death and continued to reside there at by virtue of her membership of the family for whose responsibility the first defendant had taken over from her father. She accordingly claimed that she had a right to stay on the property on that basis.

The first defendant endorsed the second defendant's defence and further acknowledged that the plaintiff had acquired the property through a judicial sale in execution. He however contented that he had challenged the sale in execution on the grounds that the property could not be sold in execution as it was not his personal asset it being family property in terms of the applicable Shona Customary Inheritance Laws and practices and that in any event the price realised was grossly unreasonable. His challenge of the sale in execution was also on the basis that it was irregular as a sale by private treaty. First respondent filed his objection to the sale out of time and needed to have the delay condoned by the court. His application for condonation was dismissed by the magistrates' court. Dissatisfied with the refusal of condonation the first defendant successfully appealed against such refusal to the High Court which granted him leave to file the objection to the sale in execution out of time. The first defendant did not pursue the objection to the sale in execution on account of indigency. He could not instruct his legal practitioner to pursue the objection. However he did not abandon the objection. He in fact pursued it through a claim in re convention to the plaintiff's claim. It suffices to indicate that the

first defendant's counter claim was invalid as he did not properly join the third defendant (the Registrar of Deeds). In fact the counterclaim was an attempt to object to the sale in execution through the back door. This is irregular and first defendant cannot be allowed to take a second bite of the cherry.

The plaintiff's testimony was largely common cause in that he testified that he acquired the property by participating in a sale in execution in a public auction initially and subsequently by private treaty. When his private treaty bid was confirmed and no objection to the sale was raised, transfer of the property was then passed onto him. As plaintiff acquired the property for investment purposes he required the second defendant to vacate the house as he wanted to rent it out and second defendant considered that she was entitled to occupy it free of charge. He claimed that he expected a rental of \$500-00 per month as the going rate for similar properties in the Mbare area. He thus claimed holding over damages of \$500-00 per month. I ruled the claim for holding over damages to have been abandoned at the pre-trial conference stage as no issue was referred to trial in regard thereto. At the pre-trial conference the issues for trial were settled as follows (1) whether or not the defendants have put up a defence recognizable at law against the plaintiff's *rei vindicatio* entitling them to retain the property, (2) accordingly whether or not the plaintiff is entitled to vacant possession of Stand 2840 Salisbury Township Lands of Salisbury Township otherwise known as No. 24 Barbara Tredgold Circle Mbare Harare, and (3) whether or not the transfer of property into the plaintiff's name should be set aside and the Registrar of Deeds (N.O) be ordered and directed to register the property into the name of the first defendant in terms of the defendants counter claim.

It is appropriate to dispose of issue number (3) first. As indicated above, the defendant's counter claim is an attempt to introduce through the back door objections to the confirmation of the sale of the property after the defendants failed to file a proper application to lodge objections to the sale in execution despite being granted condonation by the appeal court. Besides, the manner in which the Registrar of Deeds was made a party to these proceedings was irregular as no application for its joinder was made. For these reasons the claim in re-convention is without merit and it is accordingly dismissed.

Issues number 1 and 2 are in substance one and the same. The real issue that arises as between the parties namely whether the plaintiff is entitled to an order for the ejection of the

defendants from the property. In resolving this issue the court must determine as to whether the second defendant's right to reside at the property as it arises from a customary practice of inheritance is a real right or a personal right. It is axiomatic that a real right is enforceable against the world at large whereas a personal right is usually said to be enforceable only against a particular person or association of individuals on the basis of a special legal relationship such as a contract or commission of a delict.

When the first defendant took transfer of the property in dispute from City of Harare, he at law became the new owner of the said property. Ownership is broadly defined as the real right that potentially confers the most complete or comprehensive control over a thing. Silberg and Schoeman in the text book *The Law of Property* say:

“The right of ownership empowers the owner to do with his thing as he deems fit subject to the limitations imposed by public and private law See *Johannesburg Municipal Council v rand Township Registrar* 1910 TPD 1314 at 1319 and *Gien v Gien* 1979 (2) SA 1113 (T) at 1120.

In the context of African Customary Law as properly understood before statutory in roads the oldest male member of the family unit among siblings had an obligation to protect the rest of the members of the family more particularly the women folk not only from assets inherited from the deceased father but on account of his right to receive lobola on their espousal / marriage. Women folk in turn had a right of protection from the eldest male sibling which includes provisions of shelter for as long as they are not married including on divorce should they opt to return to their parental home on the break up of their marriage. The right to provision of shelter aforesaid was enforceable against the eldest male sibling in *casu* the first defendant and on his demise the duty devolved upon the next male in line including brothers or their sons.

The right to provision of shelter was enforceable against the elder brother on account of the legal relationship on account of being siblings or descendants of siblings.

Although the second respondent claims that she is entitled to the property as a family property, this with respect is a misunderstanding of the legal relationship between siblings in customary law as it applied before. As mentioned herein above the first defendant became the owner of the property on transfer and as owner he could then deal with the property as he deemed fit. He could lawfully dispose of the property without the consent of the first defendant provided he could provide the second defendant with alternative shelter. By parity of reasoning if the first defendant lost the property whether intentionally or unintentionally, the second

defendant's right would lie in being sheltered elsewhere at the first defendant's cost. This means that the second defendant's right to be provided with shelter at the property is not a real right but a personal right. In the circumstances since the first defendant lost his rights of ownership of the property to the plaintiff through the judicial process of execution the second defendant and all those in her class cannot enforce their personal rights to shelter against the plaintiff who as the new owner of the property can enforce a *rei vindicatio* against them. Indeed the law on the *actio rei vindicatio* is settled. The court in *Chetty v Naidoo* 1974 (3) SA 13 citing *Johannesburg Municipal Council v Rand Registrar and Other* (*supra*) at p 1319 stated as follows :

“...but there can be little doubt that one of its incidents is the right to exclusive possession of the *res* with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold it from another unless he is vested with some enforceable right against the owner e.g. a right of retention or contractual right.” See also *Stanbic Finance Zimbabwe Ltd v Chivhungura* 1999 (1) ZLR 262 (H), *Indium Investments P/L v Kingsheaven* (Pvt) Ltd and Other SC 40-2015.

From this ratio has been extracted the only recognizable legal defences to an *actio rei vindicatio* namely (1) that the defendant was not in possession of the property at the time of commencement of the action (2) that the plaintiff is not the owner of the property and (3) a recognised right of retention – see also *Savanhu v Hwange Colliery Co* SC 08/2015. The defendants have not established any of the three defences. Accordingly the plaintiff must succeed. I accordingly make the following order.

It is ordered that:

- (1) the 1st and 2nd defendants and all or any persons claiming though them vacate Stand 28401 Salisbury Township of Salisbury Township lands otherwise known as 24 Barbara Tredgold Circle Mbare Harare within seven days of this order failing which the Sheriff for Zimbabwe be and is hereby authorised and directed to evict all such persons in occupation of the property.
- (2) The 1st and 2nd defendants jointly and severally pay the costs of suit on an attorney and client scale the one paying the other to be absolved.

Musengi & Sigauke, for the plaintiff

TK Hove and Partners, for the defendants