

MARTIN NYAHASHA  
versus  
K . MUTYAMBIZI  
and  
SALTANA ENTEPRISES (PVT) LTD  
and  
CITY OF HARARE

IN THE HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 24 April, 8 June 2018 and 4 July 2018

### **Opposed Application**

*T. Mudambanuki*, for the applicant  
*T.T.G Musarurwa*, for the 1<sup>st</sup> respondent  
No appearance for the 2<sup>nd</sup> respondent

DUBE J: This is a stand dispute. The application is based on the following synopsis. On 25 June 2002, Viola C Chikurangeyi bought stand number 7935 Belvedere West, Harare [hereinafter referred to as the stand] from the second respondent. She in turn sold the stand to the applicant and his wife on 29 October 2003. In November 2016, the applicant discovered that the first respondent was undertaking construction on the stand. Applicant states that he has never sold his rights to anyone. He asserts that the first respondent's conduct of carrying out constructing on his property is unlawful and infringes on his right to occupation. He seeks an order declaring him the rightful owner of the stand.

The first respondent avers that she bought the property in question from Lazarus Kajau in 2014. Mr Kajau had bought the stand from Tawona and Tarisai Tawenga who had entered into an agreement of sale of the stand with a third party. The third party had bought the stand from the judicial manager of the second respondent on 30 April 2007. She is a *bona fide* purchaser of the stand. She was unaware that the applicant had bought the stand from the second respondent before her. She does not dispute that the applicant is the first purchaser of the property. Mr Kajau avers in his supporting affidavit that he sold the stand to the first respondent in 2014. He was unaware of the sale of the stand to the applicant.

The first respondent accepts that the applicant bought the stand first and that it was wrong for the judicial manager to sell the stand which had already been sold. He contends however that there are special reasons why he should be awarded the stand instead of the applicant. The first respondent contended that she has effected improvements on the property which include a cottage and a fence is currently erecting a main house on the property. The second respondent did not defend the application.

The applicant bought the stand in 2003 from the second respondent. The applicant was the first purchaser. The sale of the stand to him was above board. The applicant never lost his rights to the property. When the judicial manager took over the affairs of the second respondent in 2006, stand 7935 Belvedere was no longer available to the second respondent or the judicial manager. At the time that the judicial manager took over the management of the development, he took over only the stands that were available to second respondent. Because the judicial manager represented the second respondent in the sale, it can be said that the stand was sold by the same person. All the stands that had previously been sold by the second respondent were no longer available to the judicial manager. The judicial manager resold the stand in 2007 when it was unavailable to it. The fact of the matter is that the sellers sold the same stand to two different people. The judicial manager could only sell those stands that were available to the second respondent. The judicial manager made a mistake when he sold a stand that had already been sold to the applicant.

The first respondent accepts that the Applicant is the first purchaser. She contends that she has made improvements to the property. The first respondent has not filed a counterclaim. Her rights over the property are not in question today and therefore the court cannot consider whether there are special reasons justifying that she be declared the rightful owner of the property. It is the rights of the applicant that are in issue. An opposition to a claim is simply that, it is not a sword. It has no effect of a counterclaim. The respondent's opposition does not entitle her to an order. The court was simply asked to declare the rights of the applicant.

The stand has not yet been registered in the applicant's name. The applicant has a personal right over the stand as he has not acquired real rights over the property. Section 14 of the High Court Act [*Chapter 7:06*] empowers the court to issue a declarator declaring existing, future and present rights. It reads as follows,

**“14 The High Court may determine future or contingent rights**

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

Although the applicant has not registered the stand in his name, he has recognisable rights to the stand. The applicant seeks an order to declare him the rightful owner of the stand. He is not yet an owner but has existing and future rights in the stand. There is nothing to stop this court granting an order that reflects the legal position as reflected by the facts. I am satisfied that the applicant is entitled to an order declaring his rights over the property. This is my order and I will grant an order those accords with the facts.

In the result it is ordered as follows;

1. The applicant has rights in stand 7935 Belvedere West, Harare.
2. The second respondent shall pay the costs of this application.

*Jarvis Palframan*, applicant’s legal practitioners  
*Mberi Chimwamurombe Legal Practice*, 1<sup>st</sup> respondent’s legal practitioners