

RUFARO MARKETING EMPLOYEES HOUSING
COOPERATIVE SOCIETY
versus
MOLLINE MUNJOMA

HIGH COURT OF ZIMBABWE
MUREMBA & MANZUNZU JJ
HARARE, 21 June 2018 & 13 September 2018

CIVIL APPEAL

H. Tererai, for appellant
H.D. Munharira, for respondent

MANZUNZU J: This is an appeal against the decision of the Magistrate sitting at Harare in which the court dismissed the plaintiff's claim with costs. In the court *a quo* the appellant a Housing Co-operative sued the respondent seeking an order for eviction from stand No. 1923 Crowborough, Phase 3, Harare. Furthermore, the appellant also asked for damages in the sum of \$1750 together with costs of suit. The basis of the appellant's claim was that it was the registered owner of the said stand which the Respondent was in illegal occupation as it alleged Respondent was not a member of the Co-operative. Their membership was restricted to the employees of Rufaro Marketing Company of which the respondent was not an employee.

The respondent's defence is two pronged. While accepting that she was not an employee of Rufaro Marketing Company, the respondent nonetheless said she applied and was accepted as a member by the then secretary of the Co-operative. She claimed was paying monthly subscriptions.

Section 6 of the appellant's constitution reads; "The Society is open to Rufaro Marketing Employees." This, the respondent accepts but it was argued on her behalf that at the time she joined there was no constitution which now defines the qualification for membership. The appellant argued the constitution was always there from the inception of the Society otherwise there was no way the Co-operative could have been registered without it as it was a mandatory requirement. While the respondent maintained the constitution was non-existent

when she joined yet could not say when it came into existence. The only probability is that the constitution was there at the birth of the Society.

The appellant maintained that respondent was not part of their membership neither did she pay subscriptions, which could only be paid through a deduction on one's salary, nor was she on the register of membership. The appellant said it suffered damages calculated on the basis of monthly subscriptions which a *bona fide* member would have paid.

In her judgment on 5 May 2015, after a full trial, the trial magistrate dismissed the appellant's claim with costs. The appellant has appealed against that judgment citing misdirection in the manner in which the trial magistrate analysed the evidence before her. The appellant raise the following grounds of appeal against the judgment of the Magistrate:

1. "The Magistrate erred at law in concluding that section 115 of the Co-operative Societies Act applied to the parties when Respondent was never a member of the Appellant. Hence the provisions of the Co-operative Societies Act were not applicable to the matter before her due to the evidence which was led.
2. The court *a quo* grossly erred by not taking into account witness evidence led by the Appellant which proved that Respondent was never legally a member of the Co-operative. The court failed to take into account that Respondent failed to provide same to the court which proved her membership to the Co-operative.
3. The Magistrate erred at law by concluding that the court is not in a position to evict Respondent when in actual fact she actually failed to provide documentary proof that indeed she was allocated that stand."

In her response to the grounds of appeal the trial magistrate had this to say; "I still insist that this matter should be dealt with under section 115 of the cooperative societies Act. The issue of the Secretary was not determined by any court and as such the court cannot use that as a basis for evicting the Respondent."

Section 115 of the Co-operative Societies Act Chapter 24:12 the relevant parts read as follows:

"115 Settlement of disputes

(1) If any dispute concerning the business of a registered society arises—

(a) within the society, whether between the society and any member, past member or representative of a deceased member, or between members of the society or the management or any supervisory committee;

or

(b)

and no settlement is reached within the society or between the societies, as the case may be, the dispute shall be referred to the Registrar for decision.

(2) Without limiting subsection (1), any—

(a) claim by a society for a debt due to it from a member, past member or the nominee or legal representative of a deceased member, whether such debt is admitted or not;

(b) claim by a member, past member or nominee or legal representative of a deceased member for a debt, whether admitted or not; or

(c) dispute concerning the interpretation of a society's by-laws; or

(d) recourse by a member who was surety for the repayment of a loan granted by the society to another member, arising out of a default by the borrower;

shall be regarded as disputes concerning the business of the society for the purposes of subsection (1).

(3) Where a dispute has been referred to him in terms of subsection (1), the Registrar may—

(a) settle the dispute himself; or

(b) refer the dispute for settlement to an arbitrator or arbitrators appointed by him; or

(c) refer the dispute to the Minister for decision.

(4) For the purpose of settling a dispute in terms of paragraph (a) of subsection (3), the Registrar may exercise any of the powers conferred on him under section *one hundred and fourteen*.

(5)

(6) Any person aggrieved by a decision made by—

(a) the registrar in settling a dispute in terms of paragraph (a) of subsection (3); or

(b)

may appeal to the Minister within sixty days after being notified of the decision, and the Minister may confirm, vary or set aside the decision appealed against or make such other order in the matter as he thinks appropriate.”

The construction of this section is clear that it applies, inter alia, to disputes between the Society and its members. It means if one is not a member of the Society then the dispute cannot find recourse to this section. In her judgment the magistrate said, “The fact that prima facie the defendant looks like a member” This was not to say she was a member. The onus was upon the respondent to show that she was a member. The judgment went further to say “She applied to join the cooperative as provided for in s 115 of cooperative societies Act.” This section has nothing to do with application for membership but rather a resolution mechanism.

In her analysis of the evidence, it is clear from the judgment that the trial magistrate lost direction of the issues before her. In her judgment the trial Magistrate acknowledge that

the stands were strictly for Rufaro Marketing employees for which Respondent was not such employee. The onus was on her to show that she was nonetheless a member. Instead of analysing that part, the judgment went astray and focussed on the conduct of the then secretary and whether any hearing was conducted to deal with the secretary. The judgment even went further astray by referring to section 115 of the Co-operative Societies Act, which had no relevancy to the matter at hand. The judgment then abruptly concludes with the allegation of abuse of office by the secretary and sealed with the dismissal of the action. The evidence established a clear right on the part of the appellant that it had the right of ownership and that was not disputed.

The issue of damages was not discussed at length although the evidence shows that the appellant made no case for damages. The issue before the court was that of the eviction of the Respondent on the basis that she was not a member of the appellant not about the misdemeanour of the secretary as the trial magistrate concentrated.

The second leg of her defence is that she was in possession of a High Court Order which declared that she was a member. The respondent said she was declared a member by this court and to that end she referred the court to the case in which she was the applicant against Rufaro Marketing Employees Housing Society Limited and one Takawira as the second respondent. This is Case No. HC 5961/05 in which this court granted a provisional order on 1 December 2005 in the following terms:

“TERMS OF THE ORDER MADE

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

- (a) Respondent and any other person action through them are barred and hereby interdicted from removing or threatening to remove Applicant from Stand No. 1923, Crowborough, Phase 3, P.O. Mufakose, Harare.
- (b) 2nd Respondent or any other person acting through him hereby evicted and barred from entering the applicant's premises or carrying out any form of construction thereon.
- (c) It is hereby declared that applicant is a legitimate member of the 1st Respondent and all allocations and actions taken by the 1st Respondent in this context are validly performed.
- (d) Respondents should pay the cost of this application.

Pending the Resolution of this matter it is ordered that:

- (a) Respondent and all those acting through them are hereby restrained and interdicted from removing or threatening to remove or harassing Applicants at Stand No. 1923, Crowborough, Phase 3, P.O. Mufakose, Harare.
- (b) Both parties are hereby ordered to maintain peace at Stand No. 1923, Crowborough. However in the event that the 2nd Respondent or any other person acting through him disturb the peace on the aforementioned stand Applicant is entitled to apply for their eviction.”

This order relied upon by the respondent as confirming her membership is, as the heading says, a provisional order. It is exactly that. From December 2005 it has remained as such. The Respondent did not see it fit to set the matter down seeking its confirmation. She now wants to rely on unconfirmed order to defeat the appellant’s clear right over the property.

This appeal has merit on the eviction claim but the same cannot be said of the damages claim. Mr *Tererai* who appeared for the appellant correctly conceded that appellant was not pursuing the issue of damages since no ground of appeal was raised against it. Section 115 could have been applicable only if the respondent was a member of the appellant. We found merit in this appeal. Accordingly, it be and is hereby ordered that:

1. the appeal succeeds in part with costs,
2. the following order is substituted for the order made by the magistrate; which is set aside:
 - (a) An order is granted for the eviction of the defendant and all those claiming occupation through her to vacate stand no. 1923, Crowborough, Phase 3, Harare.
 - (b) The claim for damages is dismissed.
 - (c) Defendant is to pay costs of suit.

Tererai Legal Practice, appellant’s legal practitioners
Legal Aid Directorate, respondent’s legal practitioners