

AUBREY CHIUTA DUBE  
versus  
BARNABAS CHIRENJE

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 14 & 15 November 2019

### **Civil Trial**

*O Shava*, for the plaintiff  
*T Zinto*, for defendant

ZHOU J: This is a claim by the plaintiff for the eviction of the defendant and all persons claiming occupation through him from the immovable property known as stand 5948 Westlea, Harare. The claim is opposed by the defendant who, in addition to contesting the ejection on the basis that he purchased the same property from a person who held himself out as the plaintiff, also counter-claimed for compensation for the improvements made on the property.

Both parties each gave evidence in support of their respective cases and called no additional witnesses. The plaintiff's evidence is that he purchased the immovable property in question from the City of Harare. He produced an agreement of sale to prove the purchase. In respect of the improvements the plaintiff's evidence was that he had put up a structure, up to the window level for the intended house. The defendant's evidence is that he purchased the immovable property from a person who is not the plaintiff. At the time of the purchase by the defendant there was only construction up to the slab level. He constructed a complete house and a cottage which he had constructed up to the level of lintels when the dispute started. He then stopped further construction on the cottage.

Three issues were referred to trial as appears from the Joint Pre-Trial Conference Minute. These are:

- ‘1. Whether or not the defendant should be evicted from Stand 5948 Westlea, Harare;
2. Whether or not the plaintiff should pay compensation for the improvements made on the property by the defendant and if so, the quantum thereof; and
3. Whether or not the defendant should buy an alternative stand for the plaintiff being the same value and size as the stand in question.

In respect of this last issue both counsel conceded that no evidence nor a legal basis exists for the defendant to be ordered to buy an alternative stand for the plaintiff. The issue does not even arise from the pleadings and it is inexplicable how the parties put it in the Joint Pre-Trial Conference Minute.

As for issue number 1 the onus is on the plaintiff. Mr *Zinto* for the defendant conceded that the plaintiff has established his case by proving that he is the *bona fide* holder of title in the disputed property. It is common ground that the defendant is a victim of a fraud by some other person who held himself out as the plaintiff. It is common cause, too, that the plaintiff did not sell his rights and title in the immovable property and, further, that he has not authorised the defendant to occupy it. On this basis the plaintiff is entitled to recover the property from the defendant.

On the question of compensation, the position of the law is settled. Compensation for improvements which have been effected on the property of another and enforcement of such rights depends on the class of the possessor or occupier as well as the nature of the improvement. In this case there was debate as to whether the defendant qualifies as a *bona fide* occupier or a *bona fide* possessor. A *bona fide* possessor is a person who genuinely but mistakenly believes that he is the owner of the property in his possession. A *bona fide* occupier, on the other hand is a person who genuinely believes that he is entitled to the possession or occupation of property in a capacity other than that of owner. I would have no difficulty in concluding that in this case the defendant, at the time that he commenced the construction work on the property genuinely albeit mistakenly believed that he was the owner of the rights in the property. It is clear from his uncontested evidence that the fraudster who purported to sell the property to him exhibited to him particulars bearing the names of the plaintiff. He would therefore qualify as a *bona fide* possessor. The question of any work which he continued to carry on by way of developments on the property would only make him a *mala fide* possessor from the date that he became aware of the plaintiff's claim to the property. This would only be relevant in relation to the quantum of compensation or more specifically, to any deductions which could be made from his proved compensation.

The main house on the property is a useful improvement. There was debate as to whether it was illegal or not. It is not in dispute, from the evidence of the plaintiff that the drawings for the main house were approved by the local authority in 2012. There were subsequent drawings, as per exh 3, which pertained to the alteration of the roof. These were approved on 25 October 2014. Although from the evidence led it appears that the roof was put

up before the amendments were approved that does not *per se* make the structure illegal. It remains a useful improvement on the property. There was also the argument by the plaintiff that the various stages of the construction were not approved and that no certificate of occupation was given in respect of the property. In my view these do not take away the fact that the structure is a useful improvement on the property. It has not been suggested that the main house was constructed otherwise than in accordance with the drawings which were submitted by the plaintiff himself as amended by the drawings pertaining to the roof.

The position in respect of the cottage is different. No evidence was led that it is a legal structure on the property. It would not therefore constitute a useful improvement on the property.

On the question of quantum the law is trite. The measure of compensation for useful improvements is the value by which the value of the property has been enhanced or the actual expenditure incurred in putting up the improvements (minus the labour costs), whichever of the two is the lesser. The defendant led no evidence to prove either of these two values. A valuation report which was produced, exh 5, gives the value of the whole property with the improvements. It is of no assistance to the defendant in discharging the onus to prove the quantum of compensation. On this basis the plaintiff is entitled to be absolved from the instance in respect of the counter-claim on the basis that the quantum of the compensation has not been established.

On the question of costs, no submissions were made to support the claim for attorney-client costs. These are therefore not warranted in the circumstances of this case.

In the result, It is ordered that:

1. The defendant and all person claiming occupation through him be evicted from Stand 5948 Westlea, Harare.
2. In respect of the claim in reconvention, absolution from the instance is granted.
3. Defendant shall pay the costs.

*Shava Law Chambers*, plaintiff's legal practitioners  
*Zvimba and Madzima Law Chambers*, defendant's legal practitioners