

AFRICAN CENTURY LIMITED
versus
ZIMBABWE NANTONG INTERNATIONAL PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 24 July 2018; 08 July 2019 and 23 January 2020

Opposed matter

A. Moyo, for the applicant
E. Mubaiwa, for the respondent

NDEWERE J: On 8 July, 2019, I granted the following order to the applicant:

“IT IS ORDERED THAT:

1. The respondent and all persons claiming through it shall upon service of this order give and grant vacant possession of the property known as:

Certain three pieces of land situate in the District of Salisbury;

- a) Called subdivision A of stand 1761 Salisbury Township measuring 1 190 square metres.
- b) Called the remainder of Stand 1761 Salisbury Township, measuring 1 190 square metres.
- c) Called Stand 1760 Salisbury Township measuring 2 379 square metres.

Known as stand 120-122 Baines Avenue Harare

to the applicant failing which the deputy sheriff be and is hereby empowered and directed to evict the respondent and all persons claiming through it from the aforementioned property and thereafter to grant vacant possession of the property to the applicant.

2. The respondent pays costs on the higher scale of attorney and client.”

This judgment contain the reasons for the above order which I granted on 8 July, 2019.

On the date of the hearing of the application, the respondent requested a referral of the matter to the Constitutional court. It said the issue it wanted the Constitutional Court to determine was whether the sale and subsequent transfer of registered title in the immovable property in question by and from Christian Care to the applicant was in violation of the respondent’s rights to property in terms of s 71 (2) of the Constitution of Zimbabwe.

Section 71 (2) of the Constitution of Zimbabwe No. 20 of 2013 states the following:

“Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.”

The applicant opposed the application for referral to the Constitutional Court. Its reasons were that the respondent was raising that issue for the first time and without giving adequate notice to the applicant. It argued that the referral was being raised simply as a delaying tactic while the applicant continued to suffer prejudice through the denial of its right to occupy its premises. It said if the referral was a genuine issue, it would have been raised earlier on during the pleadings and in the Heads of Argument.

The court found the applicant’s arguments convincing and dismissed the application for referral for being frivolous and vexatious. Clearly, the notice was not adequate; being raised as an ambush a few minutes before the hearing started. Further, the application had no legal basis. No one had affected the respondent’s right to acquire, hold, occupy, use, transfer, hypothecate lease or dispose of any property. The respondent was the one who was actually holding, occupying and using the applicant’s property against applicant’s will. It was the applicant’s rights to a property which he owned which were being deprived.

After the dismissal of the application for referral, the court then proceeded to hear the application on the merits.

The facts of the matter are that on 8 March, 2018, the applicant applied for an order vindicating its property known as certain three pieces of land situate in the District of Salisbury being;

1. Subdivision A of stand 1761 Salisbury Township, measuring 1190 square metres.
2. The remainder of stand 1761 Salisbury Township, measuring 1190 square metres.
3. Stand 1760 Salisbury Township measuring 2379 square metres also known as stand 120-122 Baines Avenue, Harare,

from the respondent who was in possession thereof against the applicant’s will.

The background of the matter was that on 29 September, 2017, the applicant entered into an agreement in terms of which it purchased the above property from an entity known as Christian Care for US\$1 800 000.00 (one million eight hundred thousand United States dollars). The property was sold through an Estate Agent(s) called Floburg Real Estate and Opulent Homes. This means the sale was a public sale; the property was advertised to the public at large for sale.

Before the agreement, the applicant's Managing Director and its Board of Directors visited and inspected the property to confirm that it was suitable for the applicant's Head Office. The applicant was given free access to the premises for purposes of inspection. The respondents never raised any objections.

The applicant went further and checked if there were any encumbrances registered against the property at the Deeds Registry office. There were none. Thereafter the applicant entered into the agreement of sale and paid the full purchase price and transfer costs. The property was transferred into the applicant's name on 4 December, 2017.

The applicant expected to take vacant possession of the property after the transfer of title to it. That did not happen because the respondent instructed the caretaker to deny the applicant permission to move into the premises.

Then on 9 February 2018 two months after the transfer, the respondent notified the applicant that it was holding on to the property because it had an "Unjust Enrichment and Builder's lien" over the property. The respondent said it carried out certain construction works on the property at the instance and request of Christian Care, the previous owner, and issued certificate No. 08 dated 1 June 2012 as stated in paragraph 5.3 of their letter to the applicant. The respondent said this amount had ballooned to US\$ 612 666.78 due to the addition of interest and other charges stated in paragraph 6 of their letter.

The applicant replied the letter and indicated that the alleged lien could not be exercised against the applicant, an innocent purchaser. It stated that it had purchased the property at the open market value five years after the date of the alleged certificate of lien. Applicant said since it paid the market value for the property, it had not been unjustly enriched.

The respondent still refused to handover the property, hence the application by the applicant for an order vindicating its property from the respondent which was filed on 8 March, 2018.

The respondent filed a notice of opposition and opposing papers on 22 March, 2018. It started by raising a preliminary point about the procedure adopted by the applicant. It said the applicant had incorrectly proceeded by way of court application, yet there were factual disputes to the matter. It also said the applicant should have joined Christian Care as a party to the proceedings. On the merits the respondent stated that it was holding on to the property by virtue of an unjust enrichment and builder's lien for the work it did on the property in 2012. The respondent confirmed that its claims were based on its contract with Christian Care, which the applicant was not privy to. The respondent also admitted that the applicant was a subsequent

proprietor and that the issues being raised were beyond the scope and knowledge of the applicant as it was not party to the contract.

On 27 March, 2018, the applicant filed an Answering Affidavit. It submitted that the points *in limine* raised by the respondent had no merit. It said they were no material disputes of facts because it was common cause that the applicant bought and took transfer of the property and was now the owner. There was no dispute about that fundamental fact. And it was common cause that in terms of the law an owner had the right to vindicate his property from whoever was possessing it. It was also common cause that the applicant was not privy to the contract between the respondent and Christian Care. That being the case, the applicant said it had no basis to join Christian Care as a party since Christian Care had performed its part in terms of the sale agreement and transferred the property to the applicant on 4 December, 2017.

The matter was argued on 26 July, 2018. The applicant narrated the following chronological facts:

- ‘(a) On 1 June, 2012, respondent informed Christian Care that it had completed construction works and it claimed payment from Christian Care.
- (b) Later the respondent allowed Christian Care to sell the property in order to raise funds and to use part of the proceeds of the sale to pay for the works. The property was advertised publicly on the market. The applicant was allowed entry to view the property. No objection was raised by the respondent.
- (c) On 29 September, 2017 Christian Care sold the property to the applicant, five years after the alleged works. No encumbrance was noted on the property. No objection to the sale was raised.
- (d) On 4 December 2017 the property was transferred from Christian Care to the applicant. Once more, no caveat had been placed on the property and no objection was raised.
- (e) On 9 February, 2018, the respondent instructed the guard to deny the applicant entry into the property.

The court noted that for a claim of vindication to succeed all an applicant needed to show was that it was the owner of the property in question. This principle was enunciated in *Joram Nyahora v CFI Holding* 2014 (2) ZLR 607 Once it has shown that it is the owner of the property, it can claim it from whoever is holding onto it. It is up to the claimant to prove a legal right to retain the property.

The respondent alleged a debtor/creditor lien. That claim cannot succeed because there was never a debt between the applicant and the respondent. Neither was the applicant aware of the Christian Care debt to the respondent as envisaged in *Nexbark Investments (Pvt) Ltd & Anor v Global Electrical Manufacturers (Pvt) Ltd*, 2009 (2) ZLR 270.

The respondent also alleged an unjust enrichment lien. That claim cannot succeed against the applicant either because the applicant bought the property at the open market value and paid the obtaining market rate for it. So the applicant was never unjustly enriched because he paid the market value for the property. And no further works were carried out by the respondent after the sale was concluded.

The case of *Wynland Construction (Pvt) Ltd v Ashley –Smit En Andere* 1985 (3) SA 798 referred to by the applicant is a case in point. As stated in that case, the one who was enriched was the developer, in this case, Christian Care, and not the applicant. Therefore the respondent had no legal basis to refuse the applicant occupation of its property.

For the reasons outlined above, the court granted the application by the applicant on 8 July, 2019, with costs on an attorney and client scale.

Kantor & Immerman, applicant's legal practitioners
Samuriwo Attorneys, respondent's legal practitioners