

REPORTABLE (20)

GRACE SHURO
v
(1) MOLLY CHIURAISE (2) CITY OF MASVINGO

**SUPREME COURT OF ZIMBABWE
GARWE JA, HLATSHWAYO JA & BHUNU JA
HARARE, SEPTEMBER 29, 2017 & FEBRUARY 22, 2019**

S. Banda for the appellant

T. Bhatasara, for the respondent

GARWE JA

[1] After a full trial, the High Court made an order for the eviction of the appellant,
and

all claiming through her, from premises known as 8916 Hwiramiti Street,
Chesvingo Suburb, Masvingo and for payment of arrear rentals in the sum of
\$14 000 as well as holding over damages in the sum of \$6,67 per day. The court
further ordered payment of interest at the prescribed rate together with costs of
suit.

This appeal is against that order.

FACTUAL BACKGROUND

[2] The first respondent, Molly Chiuraise, got married to one Walter Style Matumba (“Matumba”) at Masvingo on 6 August 1993. Having been on the housing waiting

list of the second respondent since 1996, Matumba and the Ministry of Local Government and National Housing entered into an agreement of sale in respect of Stand Number 8916, Chesvingo Township, Masvingo (“the property”). In terms of

the agreement, payment of the balance of the purchase price was to be effected in monthly instalments and the purchaser was to take occupation of the property from

1 June 1999. It was also a condition of the agreement that until such time as title to the property was transferred to the purchaser, he was not, without the prior written consent of the Minister, to let the property to any other person, or part with

possession or otherwise cede or hypothecate any rights thereunder.

[3] Between 2001 and 2002, the appellant and her husband Simbarashe Shuro (“Shuro”) took occupation of the property. The basis of such occupation was bitterly disputed between the parties in the court *a quo*. The appellant alleged that her husband, Shuro had purchased the property from Matumba in December 2001 and that, as a consequence, her family had taken occupation in March 2002. The first respondent’s version, on the other hand, was that the appellant and her family were paying rentals in respect of their occupation of the property.

[4] As fate would have it, Matumba became ill and passed on in January 2005 at his rural home in Bikita. As surviving spouse, the first respondent registered the estate of her late husband and was given authority to administer the estate in January 2006.

She proceeded to administer the estate and, as executrix, caused notices to be flighted in the Herald and other major papers calling upon all creditors and other interested persons to lodge any claims with her. There having been no claims lodged, she proceeded to wind up the estate and, in particular, awarded the property

in question to herself as surviving spouse. The final distribution account was subsequently accepted by the Master of the High Court in November 2006. On 8 December 2006, pursuant to the winding up of the estate, the second respondent formerly ceded the property in question to her, which cession she duly accepted.

[5] Thereafter the first respondent's legal practitioners wrote a letter to the appellant's husband, Shuro, demanding that he vacates the property. In turn, Shuro approached

the Masvingo Legal Projects Centre who wrote a letter to the Master of the High Court on 12 April 2007 submitting a claim against the estate. The response by the Master was that the distribution had since been completed and that Shuro was free to approach the courts for relief. Nothing of significance occurred until

31 May 2009, when Shuro also passed on.

PROCEEDINGS BEFORE THE HIGH COURT

[6] In December 2014 the first respondent instituted an action in the High Court for the

eviction of the appellant and all who claimed title through her. She also sought an order for the payment of arrear rentals, holding over damages and interest at the prescribed rate on the amounts claimed. The basis of her claim was that upon the rights, title and interest in the property being ceded to her by the second respondent,

she had become the owner thereof. Since the appellant had stopped paying rentals and owing to the fact that she now wanted to use the premises for her own purposes,

she now demanded the eviction of the appellant as well as the payment of arrear rentals and holding over damages.

[7] The appellant, as defendant, entered an appearance to defend. She averred that her

late husband, Shuro, had purchased the property from the first respondent's husband, Matumba. The purchase price of \$600 000 had been paid in full after which Shuro and his family had consequently been allowed to take occupation of the property in question. She attached a copy of what she alleged was the written agreement of sale between the two. She averred that, following the demise of her

husband, she had become the owner of the property. She accordingly prayed for an order dismissing the claim and in her counterclaim prayed for an order compelling the first and second respondents to facilitate the cession of the property into her name and for the first respondent to pay her costs.

[8] During the trial proceedings, the first respondent and her niece gave evidence whilst

the appellant and one Jakata, who described himself as an unregistered property consultant, gave evidence for the defence. It was Jakata's evidence that he was present when the appellant's husband, Shuro, paid the deposit of \$550,000 by bank

cheque and the balance in cash.

[9] During submissions before the court *a quo* various issues were raised and, in particular, whether the remedy of the *actio rei vindicatio* was available to the first respondent. The real issue that fell for determination, in my view, was whether the

property in question was correctly included as part of the deceased estate of the late

Matumba. In order for the court *a quo* to answer this question, the need arose to determine the claim by the appellant that the property in question had been purchased by her late husband and that therefore it ought not to have formed part of the estate of the late Matumba but rather that of her late husband.

[10] In its analysis of the evidence adduced before it, the court *a quo* came to the conclusion that the version given by the first respondent was the more probable.

It

found that the appellant's version was riddled by inconsistencies and that the authenticity of the written agreement allegedly entered into between Matumba and

Shuro was questionable. The court further found that the appellant had not been able to substantiate how the deposit of \$550,000 had been paid and had not produced any proof in regard thereto. Further, having seen water bills in respect of

the property in the name of the first respondent, the appellant and her late husband had done nothing to regularise the situation. The court was also of the view that, not having been appointed as executrix dative or heir to the estate of the late Shuro,

her *locus standi* to defend this action was doubtful.

[11] As regards the evidence of Jakata, the court found that his evidence was unreliable

and that he had been discredited. Jakata had been unable to explain how the appellant and her husband had approached him at his office when it was common cause that the property had been advertised by Messrs Mugabe and Partners, Legal

Practitioners. He had admitted he had no mandate from anyone to sell the property.

He could not remember giving the late Shuro a receipt for the cash he paid to him for onward transmission to Mugabe and Partners. He did not himself get a receipt for the money he had transmitted to Mugabe and Partners. He further claimed, contrary to a clause in the agreement which recorded that a cash deposit had been paid on signature, that the deposit had been paid by bank cheque. The appellant's version during the trial was that it was a bank transfer. The court found Jakata to be evasive and expressed the view that he gave the unfortunate impression that he was a hired witness. He could not say who had paid him for all his troubles or how

much he had been paid. All the evidence considered, the court preferred the evidence of the first respondent and rejected that of the appellant.

[12] On the probabilities, the court found it highly improbable that, in the written agreement of sale he allegedly entered into with Matumba, Shuro would have used the address of the property in question as his own when he was still to buy the

same. It found that since the late Matumba's bank statements were being delivered

at the property in question, it was not surprising that the appellant and her husband

had been able to have access to them and had thereafter fraudulently incorporated

some of Matumba's personal details into the agreement in question.

[13] The court also found that in any event, Matumba's estate had been wound up in terms of the law and the property properly ceded to the first respondent who had then legally acquired the property. The appellant could not have relied on the agreement allegedly signed by her late husband as she had not been appointed executrix dative. Nor could she, for the same reason, seek an order directing that the property be transferred to her by the second respondent.

[14] After considering all the above-mentioned features, the court *a quo* made a finding

in favour of the first respondent and, consequently, issued an order for the eviction

of the appellant and for her to pay arrear rentals as well as holding over damages.

Hence the present appeal.

PROCEEDINGS BEFORE THIS COURT

[15] In her notice of appeal, the appellant listed nine grounds upon which she sought to attack the decision of the court *a quo*. Shortly thereafter, she filed an additional three grounds of appeal. At the hearing of this matter, she however abandoned some of the grounds, in particular grounds 7,8 and 9.

[16] Perusal of the grounds of appeal shows that what is impugned is the finding by the

the court *a quo* that no sale agreement had been concluded between the first respondent's late husband and the appellant's husband and that, consequently, the appellant and her late husband had taken occupation of the property as tenants and not as purchasers. What is also impugned by the appellant was the decision of

the court *a quo* awarding arrear rentals and holding over damages in a situation where, so the appellant contended, the first respondent had not proved the quantum of such arrear rentals or holding over damages.

[17] The various grounds of appeal are repetitious. The same issues are regurgitated through the use of different terminology. This is not acceptable. Various decisions

of this Court have stressed the need for grounds of appeal to be formulated with clarity and precision. The same decisions have stressed the need to avoid unnecessary repetition and prolixity. In my view grounds 2,3,4 and 5 correctly reflect the basis upon which the judgment of the court *a quo* is being attacked. These grounds are valid. Consequently the remaining grounds stand to be struck off. It is so ordered.

[18] A further issue that has arisen is the propriety of the Prayer. Ms *Banda*, for the appellant, moved for the amendment of the prayer to include an order for the

dismissal, in the court *a quo*, of the plaintiff's claim and for the grant of the defendant's counterclaim. Although the request to amend was opposed, this Court was satisfied that the prayer was not fatally defective and consequently granted the amendment.

APPELLANT'S SUBMISSIONS ON APPEAL

[19] The appellant's submissions before this Court are as follows. The first respondent is neither the owner nor lessor of the property. Consequently the *actio rei vindicatio*

is not available to her. She cannot, therefore, seek the eviction of the appellant. Secondly, that although the *quantum* of rentals had been put in issue, the court *a quo* had failed to make a determination on the matter. In the absence of evidence proving the monthly rentals payable in respect of the property, the court *a quo* erred

in awarding arrear rentals and holding over damages based on a monthly rental of \$200. The court therefore wrongly exercised its discretion and its decision should therefore be set aside. Lastly she submitted that the court *a quo* erred in finding that the appellant was a tenant of the first respondent in the absence of any evidence

pointing towards the existence of a lease agreement between the parties and in the face of the written agreement of sale which confirmed the sale of the property in

question to the late Shuro.

THE FIRST RESPONDENT'S SUBMISSIONS ON APPEAL

[20] In her submissions, the first respondent argues that she acquired real rights in the property and is therefore entitled to vindicate the property. The property, initially ceded to her late husband, had subsequently been ceded to her. She further submitted that the many findings of fact made by the court *a quo*, in particular, that no sale agreement had been concluded, were made after a careful analysis of all the evidence. She further submitted that rental in the sum of \$200 per month had been proved.

ISSUES FOR DETERMINATION

[21] It seems to me, on a consideration of the submissions made by the parties to this appeal, that the real issue between the parties is whether the court *a quo* correctly found that no agreement of sale had been concluded between the late Matumba and the late Shuro. The disposition of this issue would in turn dispose of the question whether the appellant and her late husband were tenants, in which event they would have been obliged to pay rentals, or whether they had validly purchased the property, in which event the prayer for her eviction and payment of rentals would fall away. In the event that this Court finds in favour of the appellant, two other issues would arise, namely whether the agreement of sale would have been, in any

event, valid and whether the appellant, who is not executrix dative, is entitled to sue for specific performance.

WHETHER THE PROPERTY WAS PURCHASED BY THE LATE SHURO

[22] It is clear, on a perusal of the agreement of sale entered into by and between the Minister of Local Government and National Housing and the late Matumba, that the first respondent was not, in fact, a co-purchaser of the property in question.

Her

name and particulars appear on the agreement merely on account of her having been

a spouse. She did not sign the agreement as a co-purchaser but as a witness.

[23] In these circumstances, the late Matumba could have, with the consent of the seller,

namely the Minister of Local Government and National Housing, or thereafter the second respondent, validly sold the property to a third party without the need for the consent of the first respondent. This position is now well established in our law.

23.1 In *Muzanenhamo and Anor v Katanga and Others* 1991 (1) ZLR 182, 186

E (SC) McNALLY JA stated as follows:

“So as a matter of broad principle, I am of the opinion that the rights of the husband and wife must be regarded as purely personal *inter se* and that these rights do not affect the rights of third parties...”

23.2 In *Maponga v Maponga and Others* 2004 (1) ZLR 63, 68 D – E

MAKARAU J (as she then was) also remarked: -

“It would appear to me in summary that the status of a wife does not grant her much in terms of rights to the immovable property that belongs to her husband. She only has limited rights to the matrimonial home that she and her husband set up. Those rights are personal against the husband and can be defeated by the husband providing her with alternative suitable accommodation or the means to acquire one. The husband can literally

sell

the roof from above her head if he does so to a third party who has no notice of the wife’s claims ...”

23.3 Attention is also drawn to the remarks of BHUNU J in *Joseph*

Mhuruyengwe v Margaret Vhiriri HH 10/2005.

[24] As already indicated, the main bone of contention between the parties was whether the property in question was the subject of an agreement of sale between the late Matumba and the late Shuro. The court *a quo* found the appellant and her witnesses not worthy of being believed. It found the evidence of Jakata, the so-called property consultant, to have been utterly discredited. It concluded that the probabilities did not support a finding that there had been a valid written agreement and that the written agreement produced during the trial must have been fraudulently prepared.

[25] It is an established tenet of our law that an appellate court should be slow in interfering with the factual findings made by a lower court and that this should happen only where it is clear that the decision of the lower court is irrational, in the sense that no sensible court, seized with the same facts, could have reached

such a conclusion. More particularly on the issue of credibility, a trial court enjoys an advantage that an appellate court would never have. In short, an appellate court can only interfere with the findings of a lower tribunal where it is convinced that the findings by the lower court are not supported by the evidence or are otherwise irrational – see *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664(S).

[26] In this case, the authenticity of the written agreement allegedly entered into by the parties' late husbands was in issue. No handwriting expert was called. The *onus* was on the appellant, as defendant, to prove that the agreement was genuine. She did not discharge that onus. The court *a quo* had no choice but to make its own observations based on some of the characteristics in the letters. Based on its observations, it found that the authenticity of the agreement was in doubt.

[27] The court *a quo* did not end there. It also looked at the probabilities and found that they did not favour the appellant. The appellant did not have a single document to show how the purchase price had been paid. Initially she claimed that the deposit had been paid by bank cheque. The copy of that bank cheque was not produced. She then changed her story and stated it was in fact a bank transfer. She was not able to produce proof of that either. The court also noted a number of unsatisfactory features in her evidence. Having allegedly purchased the house in December 2001, no effort was made either by her or her late husband to enforce the agreement. It is common cause that her husband only died on 21 May

2009 – eight years later. She and her husband had admitted seeing water bills for the property in the name of the first respondent. Faced with such a situation, they did nothing. In December 2006, a letter written by Mpame & Associates, demanding the eviction of the appellant and her late husband was served on them. The appellant and her late husband approached the Masvingo Legal Projects Centre who wrote to the Master indicating that the appellant intended to lodge a claim against the deceased estate of the late Matumba. They did nothing further. Moreover, the written agreement curiously reflected the late Shuro’s address as that of the property in question.

[28] The court found the evidence of Jakata to be highly improbable. Jakata had no written mandate from anyone to sell the house. How he handled the money that he says was given to him by the appellant and her late husband raised more questions than answers. Jakata did not provide a receipt for the money he says he received from the appellant nor was he provided with one when he eventually passed on the money to Messrs Mugabe and Partners, the purchaser’s legal practitioners. He could not remember who paid him for the role he played in facilitating the sale or how much he was paid. The court *a quo* found him to be evasive and described him as a “hired” witness.

[29] The above observations by the court *a quo* were supported by the evidence. Consequently there is no basis upon which this court can possibly interfere with

those findings. The probabilities also do not favour the appellant's version of the events.

*WHETHER THE FIRST RESPONDENT HAD LOCUS STANDI TO SUE FOR
EVICTION*

[30] Whether the first respondent had the *locus standi* to sue for the eviction of the appellant remains a live issue between the parties. It is common cause that the late Matumba had entered into an agreement of sale with the Minister in respect of the property in question. The purchase price was the sum of \$98401, payable by a deposit of \$17700 and the balance of \$80341 by monthly instalments of \$1043, payable on the first day of each month. In terms of the agreement, Matumba was to get title upon payment of the principal amount and any other charges payable in terms of the agreement. It is also common cause that Matumba and the first respondent took occupation on 1st June 1993. After the death of Matumba, his rights and interest in the property were then ceded to the first respondent by the City Council, the second respondent.

[31] In my view, the late Matumba and, subsequently, the first respondent, had the standing to evict the appellant and all those claiming through her. Whilst it is clear that they did not have title to the property, they were the registered purchasers of the property. They surely had the right to seek the eviction of the appellant.

[32] In *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S), the respondent had entered into an agreement to purchase a property on a lease to buy basis from the owner/lessor of the property. In terms of the agreement, title to the property would only pass on fulfilment of certain conditions, one of which was that the lessee-to buy was not to sub-let or assign the property without the written consent of the owner-lessor. The purchaser, who was living elsewhere, did not move into the house but instead sublet the property to the appellant and further assigned the property to him by selling his right of occupation and eventual right to take title. The consent of the owner was not sought before the respondent entered into a sublease with the appellant. At a later stage, the respondent sought the eviction of the respondent from the premises. The main issue on appeal was whether the respondent, as lessee-to-buy, had *locus standi* to sue for the eviction of the appellant without having obtained a cession of action from the owner-lessor.

[33] This Court held that although the terms of a lease-to-buy agreement were such that the respondent initially acquired only a personal right exercisable against the owner-lessor and not against third parties without recourse to the owner-lessor, such a personal right entitled him to delivery of vacant possession of the property. But once he had been given vacant possession of the property and had assumed physical control over it, he then acquired a real right, entitling him to evict anyone who wrongfully occupied the property such as a trespasser. Although the respondent had not actually moved into the house, he had acquired control over

the unoccupied property, and thus acquired a real right over the property. Accordingly the respondent had *locus standi* to sue for the eviction of the appellant, even though he had not obtained a cession of action from the registered owner. The court further held that the fact that the respondent had entered into a sublease in breach of a clause in the lease-to-buy agreement requiring the prior consent of the owner before any sublease or assignment was effected did not preclude the respondent from suing for the eviction of the respondent.

[34] The facts in the above case are not materially different from those in the present case. The agreement that Matumba entered into was akin to a lease to buy agreement. Title was only to pass to Matumba after certain conditions were met, including the condition that there was to be no sub-lease and that title would only pass upon full payment of the purchase price and other charges in terms of the agreement. I am satisfied, on the basis of the above authority, that the late Matumba and thereafter the first respondent, to whom the property was subsequently ceded, had the requisite standing to sue for the eviction of the first respondent.

*IN ANY EVENT, AGREEMENT BETWEEN MATUMBA AND SHURO, IF PROVED,
WOULD HAVE BEEN INVALID*

[35] Having concluded that the finding of the court *a quo* that there was no sale agreement between the late Matumba and the late Shuro was a correct one, this should really be the end of the matter. However, for the sake of completeness, I

also consider whether the alleged agreement would, in any event, have been valid.

I have no doubt in my mind that the agreement would have been *null* and *void*.

[36] In *Chenga v Chikadaya and Others* SC 7/13, this Court was called upon to deal with the validity of an agreement similar to the one that formed the subject of the dispute in this matter. At page 8-9 of the judgment, this Court stated:

“The agreement of sale between the appellant and the second respondent was *null* and *void* for lack of authority. The second respondent was not authorised by the owner of the property to dispose of it on his behalf. He purported to dispose of rights in the property which rights he did not have.”

[37] Clearly, therefore, in the absence of the consent of the second respondent, the late Shuro could not have been entitled to demand cession of the property into his name. The same consideration applies to the appellant, his surviving spouse.

*FURTHER, AND IN ANY EVENT, THE APPELLANT HAD NO LOCUS STANDI
TO DEMAND THE CESSION OF THE PROPERTY INTO HER NAME*

[38] I am aware that, in terms of section 3A of the Deceased Estates Succession Act, Chapter 6:02, a surviving spouse is entitled to receive, from the free residue of the estate, the house in which the spouses lived immediately before the death and such house formed part of the deceased’s person’s estate. In this case however, the estate of the late Shuro was never registered. There appears to have been an attempt to register it but the process of registration and appointment of an executor was not completed. In these circumstances, therefore, the appellant

cannot seek, as she does in her prayer, an order compelling the first respondent and the Masvingo City Council to cede the property into her name.

ARREAR RENTALS AND HOLDING OVER DAMAGES

[39] In her declaration, the first respondent prayed for judgment in the sum of \$14,000 representing arrear rentals and \$6,67 in holding over damages until the date of the eviction of the appellant. The two claims were predicated on a monthly rent for the property in the sum of \$200,00. It is clear that the sum of \$200 is what the first respondent considered appropriate rental after the adoption of the multiple currency in 2009. At a pre-trial conference, the parties agreed that one of the issues to be determined at the trial was the *quantum* of the arrear rentals and holding over damages. During the trial, no evidence on what would have constituted fair rental was given by either party. All that the first respondent said was that she had taken into account inflation. At the end of the trial therefore the evidence did not establish that fair rental for the property would have been \$200 per month. How the rentals paid in Zimbabwe dollars were converted to US\$200 per month after 2009 remains unknown.

[40] I agree with the appellant that arrear rentals and holding over damages were not proved. Whilst the first respondent may have been entitled to some rental, such figure was not proved. The appellant is therefore entitled to absolution from the instance in respect of these two claims.

COSTS

[41] I am of the view that since the first respondent has largely been successful, a costs order in her favour should ensue.

DISPOSITION

[42] In the result, the following order is made:

[1] The appeal succeeds to the extent that paragraphs 2,3 and 4 of the order of the court *a quo* are set aside and in their place the following substituted:

“In respect of the claim for arrear rentals and holding over damages,

absolution from the instance is entered.”

[2] The appellant is to pay the costs of the appeal.

HLATSHWAYO, JA I agree

BHUNU, JA I agree

J. Mambara & Partners – appellant’s legal practitioners

Mupanga, Bhatasara & Partners – respondents’ legal practitioners