

EMILIA VURAYAYI  
versus  
CHERINDE MANWERE

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 25 September 2023 and 15 May 2024

### **Stated Case**

*Z M Kamusasa*, for the plaintiff  
*C T Manyani*, for the defendant

MUNANGATI-MANONGWA J: The plaintiff approached court seeking that she be declared the owner of house number 64 Nzou Street, Rimuka Kadoma (hereinafter referred to as the property) and the eviction of the defendant. The defendant is defending the claim and challenges the relief sought. The application is well within the law in terms of s 14 of the High Court Act [*Chapter 7:06*] which empowers this court at the instance of an interested party to enquire into and determine any existing, future, or contingent right or obligation. The parties appeared in chambers on 12 September 2023 and given that the facts are not in contention, an order was made by consent that the matter proceeds on a statement of agreed facts.

Pursuant to provisions of Rule 52 of the High Court Rules, S.I 202 of 2021, the agreed statement of facts is as follows;

1. The Plaintiff acquired rights in House No.64 Nzou Street, Kadoma for the sum of US\$11 000.00 (Eleven Thousand United States Dollars) from Lilian Gumbochuma on the 10<sup>th</sup> of June 2013. She paid the full purchase price.
2. Prior to this cession of rights, Lilian Gumbochuma had inherited the rights to the property from her late father through a Certificate of Authority that had been issued by the Master of the High Court on the 12<sup>th</sup> of November 2007 under DR 759/07.
3. The Municipality of Kadoma effected the cession of rights into plaintiff's names.
4. Henceforth the rates and all other bills for the said property are being issued in plaintiff's names.

5. When plaintiff acquired rights to this property, it was being occupied by the defendant's tenant.
6. The defendant refused to vacate the premises alleging that he too had acquired rights in the same property from one Gillian Tapiwa Chivaura on the 19<sup>th</sup> of May 2009 with cession being approved by City of Kadoma on the 6<sup>th</sup> of July 2009.
7. It also emerged that Gillian Tapiwa Chivaura had allegedly acquired rights in the same property from Petty Munyuki sometime in 2006.
8. Petty Munyuki had also allegedly acquired rights in the same property from Smart Samuriwo on the 18<sup>th</sup> of July 2006 with cession having been approved by City of Kadoma on the 3<sup>rd</sup> of November 2006.
9. Smart Samuriwo had allegedly acquired rights in the same property from Lilian Gumbochuma's husband Francis Dzimbanhete on the 5<sup>th</sup> of September 2002.
10. Soon after allegedly selling the property rights to Smart Samuriwo, Francis Dzimbanhete immediately skipped into South Africa and never returned.
11. In order to secure occupation and cession of rights, Smart Samuriwo applied to Kadoma Magistrates Court under case number 138/06 for an order to;
  - a. Compel the said Francis Dzimbanhete and all persons occupying the property to vacate failing which they will be ejected therefrom.
  - b. Compel City of Kadoma to effect cession of rights into his name.
  - c. Accept payment of the balances of the purchase price in the sum of \$150 000.00.
12. The court granted the order in default of Francis Dzimbanhete and Smart Samuriwo proceeded to take cession of rights into his names as well as taking occupation of the property.
13. Before the alleged disposal of rights in the property in question by Francis Dzimbanhete in 2002, the said property belonged to Lilian Gumbochuma's late father Tererai James Gumbochuma and his estate was yet to be registered.
14. When the estate of the late Tererai James Gumbochuma was eventually registered, the property was awarded to Lilian Gumbochuma through a certificate of Authority dated 12<sup>th</sup> of November 2007 issued by the Master of the High Court under DR 759/07. She however did not immediately have the cession of rights passed into her name by City of Kadoma.

15. When Lilian Gumbochuma learnt of the disposal of the estate property rights by her husband to Smart Samuriwo, she applied for the order that had been obtained by Smart Samuriwo to be set aside on the basis that it had been granted in error as Francis Dzimbanhete did not have the legal capacity and authority to sell property that did not belong to him.
16. The default judgement was then rescinded by the court on the 15<sup>th</sup> of August 2013.
17. The house was then registered back into the late Tererai James Gumbochuma and using the certificate of authority, Lilian Gumbochuma then obtained cession of rights into her names before selling it to the plaintiff in this case.
18. Plaintiff then took cession and the house is registered in her name to date.

Issues for determination:

- i. Whether or not plaintiff should be declared the lawful holder of rights to House Number 64 Nzou Street, Rimuka, Kadoma.
- ii. Whether or not defendant is a *bona fide* innocent purchaser of the said property.
- iii. Whether or not the defendant or any person(s) occupying the said house through him should be evicted thereafter.

**Whether or not plaintiff should be declared the lawful holder of rights to House Number 64 Nzou Street, Rimuka, Kadoma.**

The answer to this question is intertwined with the answer to the question whether the plaintiff has acquired rights to the property in issue? Despite the statement of agreed facts, it is important to put the facts into perspective. The property in issue initially belonged to Tererai James Gumbochuma who according to the record passed on in 1998. The deceased had a daughter one Lillian Gumbochuma who was married to one Francis Dzimbanhete. It is not clear under what law the parties were married. Apparently, Lillian Gumbochuma's husband Francis Dzimbanhete sold the property through an agreement of sale concluded between him and Smart Samuriwo on the 5<sup>th</sup> of September 2002. In the agreement he purported to be representing Lillian Gumbochuma. No cession was effected causing Smart Samuriwo to approach the Magistrates Court against Francis Dzimbanhete sometime in 2006 seeking an order to have the property registered in his name. At that juncture, Francis Dzimbanhete had skipped the country which resulted in a default judgement

being obtained in favor of Smart Samuriwo in Case No.382/06. Smart Samuriwo then disposed of the property to one Petty Munyuki, and since then the property has been exchanging hands through a series of buyers until it was sold to the defendant.

It was only in 2007 that Lillian Gumbochuma registered her father's estate with the Master of the High Court. Lillian Gumbochuma acquired rights to the property through inheritance as confirmed by the certificate of authority placed before the court dated 12 November 2007. Upon learning of the default judgement, Lillian Gumbochuma who denied consenting to the initial sale made an application for its rescission in 2013 to the effect that the property be transferred into the name of the original owner the late Tererai James Gumbochuma. Apart from denying consenting to the sale, Lillian Gumbochuma argued that she had no capacity at this time to sell the property as the estate of her father was not even registered. The default judgement was successfully rescinded, and the property was re-registered in the name of Tererai James Gumbochuma. Lillian Gumbochuma through a Certificate of Authority issued by the Master of the High Court on the 12<sup>th</sup> of November 2007 under DR 759/07 acquired cessionary rights to the property.

The said Lillian Gumbochuma proceeded to sale her rights to the plaintiff Emilia Vurayayi by concluding a Deed of Cession dated 10 June 2013. Cession of rights was then effected at City of Kadoma Council offices and to date the plaintiff is reflected in the official records of City of Kadoma as the holder of rights to the property.

The defendant asserts that she is the owner of the property after purchasing it sometime in 2013 from Lillian Gumbochuma who was the rightful owner of the property. The property was then transferred and registered into her name by City of Kadoma through cession.

The defendant argued that he is the rightful owner of the property after purchasing it from one Gillian Tapiwa Chivaura on the 19<sup>th</sup> of May 2009 with cession being approved by City of Kadoma on the 6<sup>th</sup> of July 2009. He states that Lillian Gumbochuma ceded her rights to the property to Smart Samuriwo and Francis Dzimbahete represented her. The defendant submitted that the order which Lillian Gumbochuma obtained in 2013 was erroneously sought and granted on the basis that the Magistrates Court (Kadoma) had and still has no jurisdiction to hear and determine a dispute involving an immovable property which was valued at US\$11 000.00 in 2013 whose value exceeds its monetary jurisdiction of US\$10 000.00.

It is a stated position of the law that ownership of immovable property under cession is prima facie proved by registration at the designated local authority (see *Moyo v Muwandi SC 147/03*). After registration, the person in whose name the property has been registered acquires rights and interests in the property. It remains a fact that the plaintiff is the one registered as the holder of rights at the City of Kadoma offices. She got rights from Lillian Gumbochuma who inherited the rights from her deceased father which fact was endorsed by the Master of High Court. It is important to note that the defendant in his plea is not denying that the original owner of the property after the death of her father is Lillian Gumbochuma. The defendant has not even raised a counter claim claiming the property.

The defendant's argument that the rescission of default judgment gotten by Lillian Gumbachuma is null and void given that the Magistrate Court has no jurisdiction to determine disputes pertaining to immovable property to the value of US\$11000 does not assist him. Regard must be had to the fact that for Smart Samuriwo to have gotten rights to the property he had approached the same Magistrate Court which gave an order for the cession of deceased's rights to him after Francis Dzimbanhete failed to enter appearance to defend. In essence, it is that court's order which led to a series of cession agreements from Smart Samuriwo to Petty Munyuki, to Gillian Tapiwa Chivaura. That order which purported to give rights to Smart Samuriwo was itself a nullity as it never cited the registered owner who in any case was deceased. Rather Francis Dzimbanhete who had nothing to do with the property was cited. It boggles the mind how the court gave the order against a litigant who had no rights to the property. That explains why the City of Kadoma had refused to effect cession. Apart from the court not having jurisdiction Francis Dzimbanhete had no rights to pass even with the claim that he purported to represent Lillian Gumbochuma. The estate had not been registered and Lillian Gumbochuma was not yet an executor. No legal action could result from any such arrangement.

In fact, the defendant fell foul of a sale which was necessitated by fraud. Without the knowledge and consent of Lillian Gumbochuma, her husband Francis Dzimbanhete misrepresented to Smart Samuriwo that he had Lillian's consent to dispose of the property. No wonder each party which bought the property from the other would quickly dispose same suffice that in 2006 alone the property changed hand thrice within a period of 5 months. This was from Samuriwo to Petty Munyuki and to Gillian Tapiwa Chivaura. It was a hot property with each purchaser seeking to get

back their purchase price and run. Since the initial sale of the property by Francis Dzimbanhete was premised on illegality resultantly being a nullity, it then points to the fact that upon purchasing the property from Gillian Tapiwa Chivaura the defendant inherited a defective title, in fact no rights ever passed as the rights to the property remained in the estate of the deceased. The result of the sale between the defendant and Gillian Tapiwa Chiara is that no rights or interest in the property passed to the defendant. Thus, the court finds that the plaintiff has rights and interest in the property which were duly and properly acquired by legal means through the actions of Lillian Gumbochuma.

**Whether the fact of defendant being a *bona fide* innocent purchaser is a defence to the claim?**

The defendant stated that he is a *bona fide* purchaser as he was not privy to the actual details embroiling the initial sale of the property between Smart Samuriwo and Lilian Gumbochuma represented by her husband Francis Dzimbanhete.

A *bona fide* purchaser in Black's Law Dictionary 9<sup>th</sup> edition was defined as;

“One who buys something for value without notice of others claim to the property ....; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

The law is noticeably clear that a purchaser including a *bona fide* one cannot acquire rights of ownership to property sold on a null and void agreement of sale or *mala fide* circumstances. It is not the innocence of the purchaser that matters. No rights are transferred by a seller or someone who does not have title to the property. The court has already determined that the sale by Francis Dzimbanhete was fraudulent and hence subsequent agreements of sale were tainted and no rights were passed to each of the purchasers. It is a common law principle that an individual cannot pass title that she does not have, and a buyer can acquire no better title than that of the seller (see *Amedee v Fidelity Ors* (20/9529) [2021] ZAPGJHC 837 par 95.) The defence available to the defendant was to prove that she bought the property from the owner, which onus she failed to discharge on a balance of probabilities (see *Cunning v Cunning* 1984 (4) SA 585 (T)). The only remedy available to the defendant is to claim damages from the seller who sold the property from her.

**Whether or not the defendant or any person(s) occupying the said house through him should be evicted thereafter?**

When the plaintiff acquired rights to the property, the defendants' tenant was in occupation of the premises. It is for this reason that the plaintiff sought eviction of the defendant and all those claiming occupation through her. The defendant refused to vacate the premises alleging that he too had acquired rights in the same property from one Gillian Tapiwa Chivaura on the 19<sup>th</sup> of May 2009 with cession being approved by City of Kadoma on the 6<sup>th</sup> of July 2009. He further stated that he is an innocent purchaser and should be left in undisturbed occupation of the house.

In *Musindo and Another v Kereke (nee Muroiwa)* HMA 32/22, it was held that eviction has its basis in the *actio rei vindicatio* which provides that the owner is entitled to reclaim his property from whosoever is in possession thereof unless the possessor is vested with some enforceable right (see *Chetty v Naidoo* 1974 (3) SA 13 at p 20B).

In applying the principle in the *Musindo* case, MALABA J (as he then was) in *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H) held that since eviction is founded on *actio rei vindicatio*, a plaintiff must prove that he is the owner of a clearly identified movable or immovable property and that the defendant was in possession of it at the commencement of the action after which the defendant will bear the onus of proving a right of retention.

In the present case, it is apparent that the plaintiff is the holder of the rights to the property. The defendant's right of retention which emanates from the purchase of property whose origins was necessitated by fraud is not well founded within the law. Given the finding by this court that the plaintiff is the lawful holder of rights to the property the defendants and all those claiming through him cannot remain in occupation in the absence of consent of plaintiff. The plaintiff is not agreeing to the continued occupation of the premises by the defendant. In that regard the defendant and all those claiming through him must vacate. That being so, the relief of eviction must be granted.

The plaintiff's claim is therefore well within the law. She has shown on a preponderance of probabilities that she has rights to the property and hence the legal right to evict the defendant from her house. The plaintiff having established her case, is entitled to the relief sought. Having succeeded in her claim, costs follow the cause.

**Accordingly, the following order is granted:**

1. The plaintiff is hereby declared the lawful holder of rights to house number 64 Nzou Street, Rimuka, Kadoma,
2. The defendant and all those claiming occupation through him be and are hereby evicted from house number 64 Nzou Street, Rimuka, Kadoma.
3. The defendant is to pay the plaintiff's cost of suit.

*Kamusasa and Musendo*, plaintiff's legal practitioners  
*T H Chitapi & Associates*, defendant's legal practitioners