

STEPHENE DZEHOVE
versus
WONDER MUVHURI
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MHURI & MAXWELL JJ
HARARE, 23 January, 2024 & 29 February 2024

Civil Appeal

P Tsimba, for the appellant
K Munyewende, for the respondent

MAXWELL J: This is an appeal against the judgment of the magistrates court sitting at Harare dated 29 June 2023.

BACKGROUND

Plaintiff (first respondent herein) issued summons to evict the defendant (appellant herein) from 1444 Tariro Township Hopley, Harare and costs of suit. Issues referred to trial were ownership and eviction from the property. Plaintiff's case was that he was allocated the land by second respondent as an employee benefit having been 35 years in employment. He tendered the allocation letter as an exhibit. He also called the Administrator of the Municipal Workers Union who testified of the scheme dating back to 1999. He confirmed that the allocation was clearly made to the plaintiff.

Defendant stated that he was in occupation since 2016. He got beacon forms from council employees as well as a UDCORP card. He testified that he did not go to City Council to regularize his documentation. He called a witness who started staying in Hopley in 2006 who also received a beacon form. He believed that one could have a UDCORP card if they did not own a stand. A witness from the housing department of the second respondent testified that their records showed that plaintiff was the registered owner of the land in question. He disputed that there was a double allocation.

JUDGMENT OF THE LOWER COURT

After analyzing the evidence, the lower court first considered the question of ownership. It referred to authorities on *rei vindicatio* including *Stanbic Finance Zimbabwe Ltd v Chivhunga* 1999 (1) ZLR 262 in which it is stated:

“The principle that an owner cannot be deprived of his property against his will means that he is entitled to recover it from any person who retains possession of it without his consent.”

The lower court observed that both parties were claiming ownership and that both had documents that give them title. It referred to the evidence of the official from the Housing Department who clarified that beacon forms were given after pegging only. It observed that the witness stated that UDCORP was an entity to regularize urban development after Murambatsvina and that it did not get its mandate from the allocating authority. The lower court found that first defendant went to the stand with no traceable title to it. It was of the view that the plaintiff had proved his case on a balance of probabilities and granted the relief sought.

GROUND OF APPEAL

The appellant was aggrieved and noted an appeal on the following grounds.

1. The court *a quo* also erred at law in awarding *rei vindicatio* against the appellant when both parties proved their right of ownership to the stand in question.
2. The court *a quo* erred at law in ignoring principles of double allocation when evidence produced during trial proved that there was double allocation.

Appellant prayed for the setting aside of the order of the lower court and its substitution with dismissal of the claim for eviction.

SUBMISSIONS BY THE PARTIES

Appellant claimed in his heads of argument that he was awarded the property in 2006 by the second respondent after being affected by the operation Murambatsvina. Proof of the allocation was a beacon form signed by officials of the second respondent. He took occupation and built a two roomed cottage. 16 years later first respondent came and started claiming the same stand. He referred to the law on double allocation as propounded in *Guga v Moyo* 2000 (2) ZLR 458 to the effect that the first purchaser should succeed where transfer has not passed. He submitted that there was double allocation and he should succeed as he went on the ground in 2006.

Ms Tsimba submitted that appellant took immediate occupation after allocation in 2006 and that he was not aware of first respondent's existence until 2022, when eviction summons was served. She argued that if the lower court had adopted the principles of double allocation the balance of convenience favored the appellant.

First respondent submitted that he was allocated Stand 1444 Tariro Township Hopely by second respondent through an employee allocation of stands scheme. He pointed that in the lower court, the authenticity of the documents he produced was not in issue yet that of the beacon form produced by the appellant was questioned. He submitted that appellant asserted the claim of double allocation and had the burden to prove that the documents he produced were authentic and not fraudulent. He submitted that appellant did not discharge that burden. He disputed that there is any double allocation to talk about where there is only one party allocated the property.

ANALYSIS

The sole issue in this matter is whether or not there was a double allocation of stand 1444 Tariro Township Hopely, Harare. Double allocation is a situation where a single piece of land is allocated to more than one individual or entity. The lower court was of the view that there was no double allocation as first defendant had no traceable title to the stand. That position cannot be impugned if regard is had to the record of proceedings.

On page 17 of the record, first respondent indicated that he was allocated the stand in May 2006. He indicated that the names of those who were allocated stands were in the newspapers. He produced a provisional allocation list as well as a Beacon form as exhibits. He indicated that a supervisor signed on the allocation letter. He stated that he started paying for service of the place before building. The payment was made to CBZ and later a stop order scheme was put in place where the payment went straight to the cooperative. He produced a receipt confirming a payment made in 2009 as an exhibit. According to him, the allocation forms are the only proof of ownership. He indicated that in 2016 he was notified of the presence of another person on the stand allocated to him. Under cross examination, he indicated that the allocation was done at Mai Musodzi Hall then the following day they were shown the stands physically. He went and put cement on the pegs by City of Harare.

In support of his evidence, the administrator of the Municipal Workers Union testified. He confirmed that first respondent was a beneficiary of an employee scheme. He confirmed the newspaper advertisement and the physical allocations with surveyors. He indicated that the allocated numbers changed as people were shown their pegs. The administrator indicated that people affected by Murambatsvina were given different portions and none would interfere with others. He further indicated that UDCORP is an entity he came to know in 2015 way after the allocations were done. UDCORP did not consult the land owners and dealt with individuals.

According to him UDCORP had no attachment to the employee scheme and had nothing to do with the money paid to the municipality.

The evidence of the first respondent was in contrast to that of the appellant. Appellant indicated that in 2016 Police Officers called them at Hopley saying there were stands there. He was taken there and was allocated a stand. On page 38 the following exchange occurred:

“Q. Who allocated you the stands. The allocating authority.
A. Under a tree at Hopley”

There was no direct answer to the question. On page 39 the following appears:

“Q. What documents were you given upon allocation of the Stands.
A. We would go back to Hopley after getting forms, we will fill the stand number.
Q. Who was giving you the forms
A. Council people.....
Q. Did you pay anything in relation to the stands.
A. We did not pay anything.....
Q. When you were issued UDCORP cards any beacon forms asked for
A. None.”

It is apparent what the appellant got a blank form. He filled in the stand number himself. He did not make any payment towards the stand. Possession of a UDCORP card was not necessarily as a result of an allocation as no beacon forms were used in the preparation of the cards. The lower court cannot be faulted for observing that there were some land barons involved.

Also, on page 41 the following appears:

“Q. So the forms were blank on the name
A. Stand Number
A. Yes, Stand number and signature
Q. So what you did was fill in.
A. Yes”.

Appellant had an unsigned form which he filled in himself. The evidence of the administrator of the Municipal Workers Union was not challenged. Appellant’s title to the stand was not proved. Furthermore, appellant did not establish how, as a person who was not a member of the Municipal Workers Union, he is claiming a stand in an area the witness said was allocated to employees of the Municipality.

There was no error in awarding *rei vindicatio* in favor of first respondent. Appellant did not prove right of ownership. It was not necessary to consider principles of double allocation as appellant did not prove that he was allocated the same stand by the lawful owner, the City of Harare. That he has some documents from UDCORP does not assist him.

Accordingly, the appeal fails.

Disposition

The appeal be and is hereby dismissed with costs.

MAXWELL J:.....

MHURI J:..... **Agrees**

Hungwe & Partners, appellant's legal practitioners
J Mambara & Partners, first respondent's legal practitioners