

MELTA MOYO

Versus

TJAWANDA DUBE

IN THE HIGH COURT OF ZIMBABWE

KABASA J

BULAWAYO 22 AND 23 JUNE, 12 SEPTEMBER AND 12 OCTOBER 2023

Civil Trial

P. Butshe-Dube, for the plaintiff

S. Siziba, with V. Ndlovu, for the defendant

KABASA J: - The plaintiff sued out summons against the defendant seeking defendant's eviction from Stand number 2 Gladstone Road, Bellevue, Bulawayo.

The plaintiff's claim, as elaborated in the declaration is that she is the owner of Stand No. 2 Gladstone Road Bellevue and she has title to the property. The defendant is a daughter to the plaintiff's elder sister who passed on in August 2020. This elder sister had asked for permission to stay at this house in 2014 when her health was failing. The defendant would visit her mother at this house and she was residing there with her mother at the time her mother passed on.

The plaintiff had not granted the defendant permission to reside at the house. Following the defendant's mother's death the plaintiff asked the defendant to vacate the premises but this was met with resistance. The plaintiff then issued summons seeking that the defendant and all those claiming occupation through her be ejected.

In resisting the claim the defendant acknowledged that the plaintiff is the holder of title to the property. She however contended that the property is a family asset whose acquisition was through contributions by two of the plaintiff's siblings and the plaintiff's mother. The plaintiff holds title in trust for the entire family. The defendant's mother moved into this house as a co-owner and the defendant moved in as her daughter. It is in that capacity that she is still residing thereat after her mother's death.

With the closure of pleadings the parties attended a pre-trial conference at which the following issues were referred for trial:-

1. Whether or not the plaintiff is the sole and exclusive owner of Stand No. 2 Gladstone Road Bellevue Bulawayo.
2. Whether the plaintiff is entitled to evict the defendant from the said house.

The onus on both issues was placed on the plaintiff. The plaintiff testified and closed her case after her testimony. The defendant also testified and called three witnesses before closing her case.

The plaintiff's testimony was to the effect that she was a teacher at Tekwane in 1982 before she moved to Bulawayo later that same year. She wanted to rent a flat so her sisters' children she was looking after could stay whilst going to school. A friend introduced her to an estate agent who asked her to raise \$3 750 to enable her to buy a house in Bellevue whose purchase price was \$15 000. The seller required a 25% deposit. She only had \$1 000 so she asked her parents for help and her mother, Tjagwa Moyo gave her \$1 750 whilst her sister, the defendant's mother lent her \$1 000. She then obtained a mortgage bond from CABS for \$11 250. The total amount came up to \$13 250 as she was charged \$2 000 interest. She paid the money through deductions from her salary. She also paid back the loans she had obtained from her mother and sister. No written agreements were executed for the loans as this was family.

After payment of the bank loan the bond was cancelled. She subsequently obtained title deeds for the property. The title deed, a letter speaking to the bond cancellation and the cancelled bond were produced into evidence and duly marked as exhibits 1 – 3.

The plaintiff explained that the house is not a family house and had it been bought through family contributions title would have been given to her brothers or even the defendant's mother as she was older than her. She obtained title because the house was hers, purchased by her. She denied suggestions that she had admitted at some family meeting that the house was a joint family effort purchase and the defendant's mother was a joint-owner.

She accepted that the defendant's mother had made improvements in the form of water supply through installation of a water tank, installation of a solar geyser and the house's interior and exterior was painted but this was for her sister's own comfort as she was residing there.

The plaintiff stayed at the house from the time she purchased it but left when she got married in 1983. She however went back in 1984 before she left again for Plumtree but her family remained at the house. In 2014 she put tenants in the house who later made way for the defendant's mother after she had asked to stay at the house. The defendant's mother stayed there from 2014 until her death in 2020. All family members could visit and stay at this house through her benevolence but there was no issue as to who owned house.

The plaintiff was subjected to an intense cross-examination but she did not waver on the detail regarding the purchase of the house and her ownership claim. She did add the detail regarding why the defendant's mother wanted to move to Bulawayo from Plumtree which detail had not been disclosed in her pleadings. This detail related to the fact that her sister did not want her husband who was by then unwell to die at the Plumtree home for fear that his children would lay claim to the house. She explained that this was said in confidence as between sisters and so she did not deem it necessary to divulge until she felt it necessary under questioning by counsel for the defendant.

The plaintiff gave her evidence well. I got the impression that she related the details of how she purchased the house from her recollection of what actually happened. She impressed as a credible witness.

The defendant was said to have been a young child in 1982 and would not have known what was going on. The defendant in her evidence did not claim to have personal knowledge concerning the purchase of the house. She however said she was present at a meeting where her mother took the plaintiff to task over the ownership of the house and the plaintiff did not dispute her mother's assertion that she gave her \$3 000 and their mother, defendant's grandmother, \$4 000, with Pasca, a sibling to the two sisters chipping in with \$2 000. This witness moved into this house as a daughter to the plaintiff's sister who was a co-owner. She was appointed the executrix dative to her late mother's estate and has every right to stay at these premises.

So determined was this witness to refute claims that the plaintiff borrowed money from her mother and sister only to pay the \$3 750 deposit with the rest of the purchase price paid to CABS where she had obtained a mortgage bond, that she spiritedly disputed that attempts to get receipts from CABS were in vain as CABS said they did not keep documents after 10 years.

How she could be so positive of that is a mystery as she did not say she also went to inquire from CABS and received a different response.

If indeed the plaintiff received a total of \$9 000 from her mother and the two siblings and she had \$1 000 that would have amounted to \$10 000, leaving a balance of only \$5 000 of the purchase price. The defendant would also have the court believe that her mother was giving the plaintiff monthly instalments to pay off the balance. Exhibit 1 which is the deed of transfer reflects that the bond for \$13 250 was registered in 1982 and cancelled in 1999. Would it have taken that long if the plaintiff had paid \$10 000 and every month she was getting monthly instalments from the defendant's mother?

Why would the family have opted to have the plaintiff get title when evidence showed that she had several siblings and she was not the eldest? Why was the house not registered in her parents' name if indeed it was a "family" house or even in any of the brothers' names or the defendant's mother's name? I pose these questions just to illustrate the improbabilities replete in the defendant's evidence.

The defendant made reference to a document drafted by her cousin who is a legal practitioner but such document was not signed by any of the parties. This document purported to be an agreement of sale entered into between the plaintiff and the defendant's mother. The plaintiff was not aware of it and it was said to have been given to the siblings' brother so he could have a meeting to discuss it. That never materialised and there is really not much that can be said about that document, especially given that the plaintiff was not aware of it and did not participate in discussions leading to the drafting of such document, purportedly meant to be a Memorandum of Agreement where the defendant's mother wanted to buy the property. How such an agreement could be drafted without the one who held title to the house's involvement is baffling.

The defendant did not impress as a credible witness but a witness who appeared bent on saying whatever was necessary to push her narrative. Her disrespect of her mother's sister which had the court admonishing her reminding her that the plaintiff was to all intents and purposes her mother, did not help the situation.

The fact that one Pasca, another sibling, who is said to also have contributed money to the purchase of the house was not willing to be part of the proceedings only raised doubts as to

the veracity of the defendant's story, a story she sought to tell on behalf of her mother. Her mother was content to leave this property in the plaintiff's name yet she was also a teacher who could easily have taken action had she been so inclined.

I found the plaintiff's narration of events clear and straightforward compared to the defendant's story.

The second witness is the one who drafted the Memorandum of Agreement of Sale. She is a legal practitioner who because of her legal training did acknowledge that the plaintiff was the sole owner of the property as the person who holds title to it. She however curiously qualified that by saying the house is owned by the family. This witness also spoke of the 2014 meeting but said the plaintiff had said she had re-paid her mother the amount she had received from her.

The question is why would there have been talk of repaying the mother if this was a house bought with contribution from family members? Does this not lend credence to the plaintiff's version that she borrowed the money to assist her in raising a deposit and so paid it back? I think it does.

This witness had no independent knowledge of what transpired between the plaintiff, her mother and defendant's mother. She could not comment on the mortgage bond with CABS because she was not privy to this. How she could, being a legal practitioner, draft an agreement which involved the plaintiff without taking any instructions from her is puzzling. She confirmed that the plaintiff's mother's estate was not registered, ostensibly because there was nothing to be distributed. If she was aware that the mother owned 25% of the property why did she not advise the family to have the estate registered, and whoever was to be appointed as executor would then sue for that 25% to be included in the deceased's estate?

Like the defendant this witness's evidence was based on alleged conversations which she heard at a meeting. Is one to ignore the very clear and lucid account given by the plaintiff in preference of evidence given by people whose claim to knowledge is nothing but their interpretation of conversations at a meeting which meeting plaintiff disputes? I think not.

The last witness is an elder sister to the plaintiff and younger sister to defendant's mother. Besides parroting the narrative that the plaintiff is not the owner of the property in question she too had no personal knowledge of the events that led to the purchase of the house.

She knew nothing until the meeting supposedly held in 2014. She is a sister to the plaintiff and the defendant's mother and daughter to the mother who is said to have contributed \$4 000 for the purchase of this "family" house and yet she was not aware of it. Was this family home meant to be a "family home" to some but not all the family members?

Just like the two witnesses before her a repetition of what allegedly happened at a 2014 meeting did nothing to dent the plaintiff's clear articulation of how she purchased the house.

The last witness was a wife to the plaintiff's brother who is now deceased. Her evidence largely hinged on the Memorandum of Agreement of Sale which was drafted without the plaintiff's knowledge or input and which is just a document with no signatures. It was not the one she said was brought to their home. Even if it was of what probative value is it? I would say none.

This trial was not one where the more witnesses the defendant called the stronger the case for her became. This witness's evidence was colourless and did not detract from the plaintiff's clear testimony.

The issue now is with these facts what does the law say?

Counsel for the plaintiff referred to section 14 of the Deeds Registries Act, Chapter 20:05 which provides that:-

“(a) the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by a Registrar.”

The plaintiff holds such deed of transfer.

In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S), a case the court was referred to by counsel, the Supreme Court had this to say:-

“The registration of rights in immovable property in terms of the Deeds and Registries Act [Chapter 139] is not a mere form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered.”

In *Afro Chem Dealers (Pvt) Ltd v Gomo & Ors* 2009 (1) ZLR 255 the court had this to say:-

“The registration of title in one’s name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right i.e. to enforce his right in the thing for his own benefit as against the world; that is against all persons whatsoever.”

In *Stanbic Finance Zimbabwe v Chivhungwa* 1999 (1) ZLR 262 MALABA J (as he then was) articulated the principles of *rei vindicatio*. The owner is entitled to recover the thing from any person who has possession of it without his consent.

MUZOFJA J in *Masanga v Sibanda* HH 702-21 had this to say on *rei vindicatio*:

“The plaintiff is the registered owner of the property. He is entitled to the property under the *rei vindicatio*. Where it is shown that a possessor so possesses the property against the owner’s will, no court discretion is allowed except to protect the rights of the owner. There are no equities or pleas of mercy that can be considered. See *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (1) ZLR 236, *Nzara v Kashumba* S 18-18.”

I have made a finding that the plaintiff proved on a balance of probabilities that she holds title to this immovable property as the sole and exclusive owner. All she needed to show thereafter is that the defendant is in occupation without her consent.

In *Oakland Nominees v Gelia Mining and Investment Co. Ltd* 1976 (1) SA 441 (A) HOLMES JA put it thus:-

“Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course the possessor has some enforceable right against the owner.” (See also *Unimark Distributors (Pvt) Ltd v E R F* 94, *Silvertondale (Pvt) Ltd* 1999 (2) SA 986).

The defendant and all the other witnesses who testified as her witnesses kept referring to this house as a “family house”. What is a “family house” at law?

In *Moyo & Ors v Madondo N.O* NDOU J posed this question in a matter where the issue of “family house” was raised. The learned judge had this to say:

“What is family house? What legal rights are they claiming from the classification of the property as “family house”... The applicants should have clearly outlined the source of their rights in terms of the law.”

In casu I have already made a finding on the plaintiff's credibility and am satisfied on the reliability of such evidence, the probabilities weigh heavily in her favour. With that said what legal rights can the defendant possibly claim with her classification of the house as a "family house." There is no "family house" but evidence shows the one with title and how such title was obtained.

Granted title can be impugned and as counsel for the plaintiff correctly submitted one can challenge title (*Ishemunyoro v Ishemunyoro & Ors* SC 14-19, *CBZ Bank Ltd v Moyo and Anor* S 17-18r). *In casu* such title has not been impugned and is acknowledged. I am also alive to the legal position as regards the fact that title is not absolute and where one can show that such title does not give the holder real rights exercisable against the whole world, that title holder may very well fail to successfully mount an action based on *rei vindicatio*.

Mr. Siziba's argument is that the plaintiff is not the owner of this property but a nominee. She holds the property on behalf of the others who contributed towards the purchase of the property. (*Kapfumo v Mutimutema and Anor* HB 115-22)

I have already made a finding that the property was not held by the plaintiff as a nominee. Her evidence established this fact.

Counsel for the defendant also cited several cases on the issue of *rei vindicatio*, the requirements thereof and the circumstances under which such an action can be successfully resisted (*Savanhu v Hwange Colliery Company* SC 8-15, *Nyahara v C F I Holdings (Pvt) Ltd* S 81-14, *Chetty v Naidoo* 1974 (3) SA 13 (A)”)

Has the defendant shown that she has some right of retention to resist the *rei vindicatio* action? In accepting the plaintiff's evidence I was alive to the fact that the defendant and the other three witnesses were not adducing inadmissible evidence. In terms of s27 (1) of the Civil Evidence Act, [Chapter 8:01] first hand hearsay is admissible. The point is such first-hand hearsay juxtaposed to the clearly articulated evidence led by the plaintiff did not detract from the complainant's credibility as a witness and so too to the reliability of her evidence.

I have already alluded to the issue of the title she obtained when it could have been held by the brothers or the elder sister. These supposed co-owners could also have had their names included on the deed of transfer if indeed they were co-owners. The preponderance of

probabilities are in favour of the plaintiff's version. Nothing speaks to the co-ownership of the house in question.

The plaintiff has successfully discharged the onus to prove that she is the sole and exclusive owner of the house and has every right to evict the defendant and all those claiming occupation through her.

As regards costs I am not persuaded that this is a case where punitive costs are warranted. There was no conduct on the part of the defendant deserving of censure.

In the result, I make the following order:-

1. The defendant and all those claiming occupation through her shall vacate Stand No. 2 Gladstone Road Bellevue Bulawayo within 7 days of this order.
3. The defendant shall pay costs of suit at the ordinary scale.

Mathonsi Ncube Law Chambers, plaintiff's legal practitioners
Messrs Makiya & Partners, defendant's legal practitioners