TONDERAI MATINGO
versus
FRANK HUMBE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 6 October 2022

Date of judgment: 26 October 2022

Opposed application

Ms *C. Mazhindu*, for the plaintiff
Mr *L. Madhuku*, for the defendant

MAFUSIRE J

[1] The plaintiff applies for summary judgment. She seeks the defendant's eviction from a certain property situate No 67 Guildford Estate Township, Borrowdale Harare ("***the property***"). The property is registered in the name of the plaintiff. She bought it at a judicial sale conducted by the Sheriff. This was following a judgment of this court in HC 11601-17. That judgment pitted one Desmond Muchina ("***Muchina***") as the judgment creditor, against one Godfrey Munyamana ("***Munyamana***") and his estate agency firm, or *alter ego*, Sparkles Services (Pvt) Ltd ("***Sparkles***"), as the judgment debtors. At all material times, the property had been registered in Munyamana's name. The sale in execution was to satisfy the judgment debt owed Muchina by Munyamana. After paying the full purchase price to the Sheriff, the property was duly transferred to the plaintiff. But she could not move in. It is occupied by the defendant. He refuses to vacate. He claims a right to title, and the corollary right of possession. He claims he bought it way back in 2013 from Munyamana. He claims his rights over the property precede those of the plaintiff. He alleges fraud. He argues that the applicant's title in the property is defective by reason of that fraud. He alleges proceedings are pending before this court in several matters, including HC 11367-15 in which he claims transfer of the property. As such, it is incompetent for the plaintiff to seek his eviction, especially by way of summary judgment.

[2] In moving the court for summary judgment, the plaintiff avers that hers is a claim *rei vindicatio*. A claim *rei vindicatio* is a claim by an owner of a thing to recover possession of the thing from wherever found and from whomsoever holds it against his or her will: see SILBERBERG & SCHOEMAN'S *The Law of Property*, 5th ed., at p 243; *Chetty v Naidoo* 1974 (3) SA 13, at p 20B, and *Alspite Investments (Pvt) Ltd v Westerhof* 2009 (2) ZLR 226 (H), at p 236D - G. The law says an owner deprived of possession against his / her will can vindicate the property wherever found, and from whomsoever is holding it. This is so, because one of the incidents of ownership is the owner's entitlement to the exclusive possession of the thing. The law presumes possession of the thing as being an inherent nature of ownership. Flowing from this, no other person may withhold possession from the owner unless they are vested with some superior right enforceable against the owner. Thus, to defeat a *rei vindicatio*, the defendant must allege such defences as will go to the root of the elements of this remedy. For example, a claim *rei vindicatio* may be defeated by proof that the possessor is himself / herself the owner of the thing in question, or that he /she is not in possession or occupation of the thing, or that his / her possession or occupation of the thing is by agreement with the owner.

[3] *In casu*, it is not in dispute that the plaintiff is the registered owner of the property or that the defendant is in occupation against the plaintiff's will. The defendant's claim to some right or entitlement in the property, and conversely, the plaintiff's disentitlement to it, is predicated on an alleged fraud. But the notice of opposition does not articulate who exactly perpetrated the fraud; against whom; and in what manner. The nub of the defendant's ground of opposition in his affidavit is this:

- he purchased the property from Munyamana and paid the full purchase price;
- Munyamana refused to pass transfer to him;
- the claim for transfer of the property to him is still pending in this court under HC 11367-15;
- the property was subsequently attached at Muchina's instance following a default judgment obtained against Munyamana;
- Munyamana deliberately refrained from defending Muchina's claim;

- the defendant is pursuing a rescission of judgment against the default judgment obtained by Muchina;
- the circumstances of this case ***point*** to a fraud and sham proceedings;
- the transfer of the property to the plaintiff was in bad faith and the applicant ***might possibly*** have been aware of this because he never came to view the property before purchasing it;
- the property was sold by private treaty under unclear circumstances as opposed to a sale by public auction;
- the defendant has ***reason to believe*** there was collusion between Munyamana, Muchina, the Sheriff and the plaintiff and such an issue can only be determined at trial

[*core aspects of defendant's defence highlighted*].

[4] It is on the basis of such bare allegations above that Mr *Madhuku*, for the defendant, has filed supplementary heads of argument arguing that the rights allegedly acquired by the plaintiff are non-existent because of the prior fraud that afflicted the transaction which eventually culminated in the judicial sale in execution. During submissions, it emerged that there are several proceedings that are pending before this court involving the defendant and the property, including HC 11367-15 aforesaid. Mr *Madhuku* argues that the plaintiff is not entitled to summary judgment. It was pre-mature and risky for her to have launched these proceedings before the defendant had pleaded his defence. Summary judgment is an extraordinary remedy that generally violates the sacred rule of natural justice, *audi alteram partem*. Both parties must be afforded an equal opportunity to present their cases in court, not for the plaintiff to get judgment before the defendant has even pleaded.

[5] I reserved judgment, primarily to get a chance to peruse all the records of the proceedings said to be pending in this court. I tasked the plaintiff, as the *dominus litus*, to liaise with the Registrar to ensure that those records would be brought to my Chambers within a week. That was done. I had also reserved judgment because I wanted time to consider the judgment of the Supreme Court in *Humbe v Muchina & Ors* SC 81/21 which seemed to have emphatically and permanently resolved the issue of the defendant's rights over the property. Mr *Madhuku* argued that the Supreme Court judgment is not relevant because the issue of fraud had not been before it and therefore had not been decided. He

argues that all rights that might have accrued to the plaintiff in relation to the property can be reversed once the defendant proves fraud.

[6] Plainly, there has been an unnecessary and burdensome proliferation of proceedings in relation to the property. Demonstrably, some claims have been unnecessarily duplicated and others eventually abandoned. Lawyers are largely to blame for this kind of waste and excess. Condensed, and in chronological order of dates, the numerous records pertaining to the property and the defendant are:

- HC 11367-15 in which the defendant claims transfer of the property from Munyamana, or, in the alternative, damages for breach of contract or for unjust enrichment if it is no longer possible for him to take transfer [*emphasis added*]. The matter awaits the allocation of trial dates.

- HC 11601-17 in which Muchina sues Munyamana and his *alter ego*, Sparkles, for a debt of US$352 851-30. Muchina gets a default judgment, *per* TAGU J, resulting in the eventual sale of the property by private treaty to the plaintiff herein.

- HC 7525-19, interpleader proceedings by the Sheriff at the instance of the defendant (before the sale), in which the defendant claims ownership of the property. The defendant's claim is dismissed on the merits and the property is declared executable, *per* CHINAMORA J. There is no appeal.

- HC 3805-20 in which the defendant seeks the setting aside of the writ of execution issued in HC 11601-17 aforesaid, and the transfer of the property to him. The defendant withdraws the application before CHIRAWU-MUGOMBA J.

- HC 3838-20, an urgent chamber application by the defendant for a stay of execution. The application is dismissed, *per* KWENDA J.

- SC 373-20, defendant's appeal to the Supreme Court against the dismissal of his urgent chamber application by KWENDA J in HC 3838-20. The multiple grounds of appeal include the assertion that the court *a quo* erred in finding that the dispute was *res judicata*, or in failing to realise that the property was *res litigiosa*. The Supreme Court, making reference to the numerous records above, including HC 11367-15, dismisses the appeal. The appellate court makes substantive findings crucial to the determination of the present dispute. Noting that the judgment of this court, *per* CHINAMORA J, had not been appealed against and was therefore *extant*, and following a review of the law on the effect of the registration of transfer in the Deeds Office, the appellate court holds that the defendant has no real rights in the property, but merely personal rights.

- HC 3524-21 in which the defendant seeks a declaration that a certain business investment agreement between Muchina and Munyamana and Sparkles (in respect of which Muchina had sued Munyamana and his *alter ego* in HC 11601-17 aforesaid,

> leading to a default judgment and eventual execution) was illegal and a fraudulent sham. He also seeks rescission of the judgment in HC 11601-17 on the basis of fraud. The matter awaits trial.

[7] The defendant is thoroughly ill-advised. He is barking up the wrong tree. If I had been fully apprised of the situation in the various proceedings above, I would probably have granted summary judgment *ex tempore*, instead of reserving it. I also have reason to believe that before argument, none of the counsel had bothered to study those records and the Supreme Court judgment in SC 81-21. In fact, I had to briefly stand down the proceedings to give both counsel time to read the judgment and hopefully, come back with an agreed position. They also most probably needed time to assemble all those records and peruse them, the same task I gave myself after reserving judgment. The approach was futile. There was no agreement between counsel. So, here now is my judgment.

[8] The defendant has no case. The aspect of his rights to the property has been authoritatively and permanently and finally determined by the Supreme Court. It is now issue estoppel. Issue estoppel is a species of *res judicata*: see *Munemo v Muswera* 1987 (1) ZLR 20 (SC), at p 23C. It applies where an issue that was a necessary ingredient in a previous cause of action decided upon is presented to the court again. In the English case of *Mills v Cooper* [1967] 2 ER 100, LORD DIPLOCK said of issue estoppel[1]:

> "A party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."[2] [*emphasis added*]

[9] In another English case of *Carl Zeiss Stiftung v Rayner & Keeler* [1976] 1 AC 853[3], the three requirements of issue estoppel were identified to be:

- that the same question has been decided;

[1] At p 468
[2] Quoted by KHOSA JA in *Willowvale Mazda Motor Industries v Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S), at p 423D – F
[3] Quoted by KHOSA JA in *Willowvale Mazda Motor Industries*, *supra*, at p 421 – 422

- that the judicial decision which is said to create the estoppel was final; and
- that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which estoppel is raised.

[10] Munyamana is the plaintiff's successor in title, or her privy. Mr *Madhuku* argues that issue estoppel does not apply because, as I think I understood him, the Supreme Court in the judgment above was not dealing with the issue of fraud and that if the defendant should be able to prove it, everything that has been wound up should be unwound, beginning with the default judgment in HC 11601-17, the writ of execution issued therein, the subsequent sale of the property, and the transfer to the plaintiff. He is wrong. Of such similar arguments, the Supreme Court, per KHOSA JA in *Willowvale Motor Industries v Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S), said[4]:

> "While the doctrine of issue estoppel may not be part of the Roman-Dutch law and may not as yet have found a berth in South African law, it seems to me that this court, in the wider application of existing law in the light of current modes of thought, has found the artificiality of limiting estoppel to the same subject to be unproductive of justice, and has embraced the doctrine of issue estoppel under the general rule of public policy that there should be finality in litigation."

[11] Mr *Madhuku* is wrong, not only on the law in regards to issue estoppel as just pointed out above, but also on the particular facts of this case. The defendant flags fraud to defeat the plaintiff's claim for eviction. That is a red herring. To begin with, nothing said by the defendant in his notice of opposition amounts to any such fraud as would impugn the plaintiff's title. Demonstrably, the submissions in Mr *Madhuku's* supplementary heads of argument do not stem from the nuts and bolts of this case. However, and most importantly, after perusing the records above, particularly HC 11367-15, I discovered that the fraud, or misrepresentation, or illicit dealings the defendant complains of, is/are ***not*** in relation to the property. They are in relation to a neighbouring property, 68 Guildford Estate Township, Borrowdale Harare. He is saying all along he owned this other property until Munyamana enticed him to dispose of it through Sparkles, his *alter ego,* but duped him of the purchase price which had been earmarked for the purchase price for the property. The defendant is flogging a dead horse. HC 11367-15 and all these other pending cases are irrelevant to this application. Even if any of them are eventually decided in his favour, the nature of the

[4] At p 423C

remedies sought therein is such that none of the decisions will impinge on the plaintiff's title to the property. Tellingly, in HC 11367-15 the defendant seeks an alternative remedy. He seeks damages in the event that transfer of the property to him is no longer possible. Indeed it is no longer possible. The Supreme Court has ruled that all he has are personal rights in the property. The judgment of this court, *per* CHINAMORA J, dismissing the defendant's claim to property, still stands. It has never been appealed. That is the end of the matter. An owner of an immovable property is the one whose title is registered in the Deeds Office: see s 2 the Deeds Registries Act, [*Chapter 20: 05*]. In *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S), at p 105 - 106 the Supreme Court[5] stated:

> "The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of 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."

[12] In the present matter, the defendant seems to be suspicious that the property was sold to the plaintiff by private treaty instead of through an auction. But that is no proof of fraud. No basis has been laid out for such a suspicion. The Sheriff *can* sell a property by private treaty: see r 71(36) and (37) of the High Court Rules, 2021. Nothing said by the defendant warrants referring this matter to trial. There is no such triable issue as will ever affect the plaintiff's right to title. Summary judgment is not such an insurmountable hurdle to a plaintiff. It may be such a drastic remedy, almost amounting to a violation of the sacred *audi alteram partem* rule. But that is the one side of the coin. The flip side is that it will be granted if the defence the defendant intends to raise is patently bogus. A plaintiff with an unassailable case should not be saddled with the costs and delays associated with a trial: see *Hales* v *Doverick Investments (Private) Limited* 1998 (2) ZLR 235 (H); *Dube* v *Medical Services International Ltd* 1998 (2) ZLR 280 (SC) and *Chindori-Chininga* v *National Council for Negro Women* 2001 (2) ZLR 305 (H). This case is being determined a staggering seven years after the defendant first issued out a summons in HC 11367-15, and also when several processes issued by, or involving him, all in respect of the property, are still pending. He can take all his time, but not at the plaintiff's cost. He must vacate the property and let the legal owner take over. The situation is quite like *Westerhof's* case above. I consider that seven days

[5] Per McNally JA at p105 - 106

should be sufficient for the defendant to move out. The plaintiff seeks costs of suit on the legal practitioner and client scale. No proper justification for it has been laid out.

[13] In the result, summary judgment is hereby granted in favour of the plaintiff in the following terms:

i/ the defendant shall vacate the property situate Stand No 67 Guildford Estate Township of Subdivision H of Guildford of Borrowdale Estate, Harare, within seven days of the date of this order, failing which the Sheriff for Zimbabwe, or any person duly authorised by her, shall evict the defendant and all those claiming rights of occupation through him, to pave way for the vacant occupation of the same by the plaintiff.

ii/ the defendant shall pay the costs of suit.

26 October 2022

T.K. Takaindisa, applicant's legal practitioners
Mapendere & Partners, respondent's legal practitioners