

FRANK CHEMUCHEMU
versus
JEFIAS HAVADI
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
TAKUVA & WAMAMBO JJ
HARARE; 13 November 2023 & 21 March 2025

Civil Appeal

N.K. Mufunda, for the appellant
1st respondent in person
No appearance for the second respondent

WAMAMBO J: This matter is an appeal against the judgement of the Magistrates Court sitting at Harare Magistrates Court.

The dispute between the parties centres upon a piece of land namely Stand 13420 Mabvuku, Harare. In the court *a quo* the respondent herein was the plaintiff while the appellant herein was the defendant.

Plaintiff sought the eviction of the defendant and the court *a quo* found for the plaintiff and ordered the eviction of the defendant.

Summarily the reasons for the eviction were that defendant was allocated the stand in question by Ruvheneko Housing Cooperative while plaintiff has an agreement of sale and allocation letter with the second defendant. The court *a quo* found that plaintiff had a real right and so could evict defendant on that basis. Appellant was irked by the court *a quo*'s decision and appealed to this court. This is the matter before us.

The appellant raised four grounds of appeal as follows:-

1. The court *a quo* erred at law by finding that the first respondent has a real right over the property in question by reason of an agreement of sale.
2. The court *a quo* grossly misdirected itself on the law by finding that the first respondent's rights over the property in question trumped those of the appellant who

- has an earlier agreement of sale over the same property without qualifying special circumstances.
3. The court *a quo* grossly erred at law when it found that the appellant could not legally acquire the property in question via a housing cooperative.
 4. The Court *a quo* grossly misdirected itself on the facts and the law in not recognizing that residential stands at that particular planned area were offered to housing cooperatives and not to individuals.

The City of Harare, the second respondent chose not to participate in the proceedings. The second respondent owns and offers land to individuals and entities. Their participation would have assisted in the resolution of this matter. In fact it would appear that once a dispute between the parties was brought to their attention they should and could resolve the issue and preempt the parties from approaching the courts.

I note that this matter is one for eviction. The matter is still open for one of the parties to seek a declaratory order on who is the owner of the stand in question. That having been said, we will resolve the matter on the four corners of the record.

The crux of the matter broadly given is, should appellant have been evicted in the circumstances of the case?

Two competing versions and interests were placed before the court *a quo*. First respondent presented documents to support his case. He presented an agreement of sale between himself and second respondent for stand 13420 with a diagram number and a purchase price among other clauses. The agreement is dated 28 May 2019.

Further to the agreement of sale, first respondent presented an allocation letter for the said stand. The allocation letter confirms that first respondent paid \$920.00 towards the land intrinsic value.

First respondent invited a witness, one Peter Rutivi whose evidence was to the effect that he was a witness to the first respondent entering into an agreement of sale with second respondent and being awarded an allocation letter.

On the other side appellant produced a letter reflecting that Ruvheneko Housing Cooperative of which he is a member was allocated 25 residential stands by second respondent.

See p46 (of the record). He also produced an allocation letter by Ruvheneko 2 Housing Cooperative Society Limited.

He also produced a membership list of Ruvheneko Housing Cooperative Society Limited wherein he appears as a member. His stand is reflected as stand 13420 and the list reflects that he paid \$920.00.

At pages 49 to 52 are payments reflecting Ruvheneko Cooperative, stand no 13420. He also produced a plan approved by the second respondent.

Appellant invited a witness one Major Masawi who spoke to the history of the formation of a consortium of 41 cooperatives. Wonder testified to the effect that appellant occupied the stand first before respondent after it had been allocated to him.

The appellant and respondent clearly both produced documents in support of their cases. None of them however produced documents proving to be the owner of the stand. In *National Housing Construction and Takemore Zibonda v Tsaneho Moyo* HB 179/21 KABASA J at page 7 said the following:

“In *Lafarge Cement (Zimbabwe) Limited v Mugove Chatizemtwa* HH 413 – 2015 a case where an ex – employee was resisting eviction from a house he occupied by virtue of his now terminated employment MATHONSI J (as he then was) had this to say –

“The principles of the *actio rei vindicatio* are settled in our law. The owner of the property has a vindicating right against the whole world. It is a remedy available to the owner whose property is in the possession of another without his or her consent. Roman Dutch law has always protected the right of an owner of property to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser where the property would have been sold.”

Dealing with issues closely mirroring the issues at hand the court in the case of *National Housing Construction and Takemore Zibonda v Tsaneho Moyo (supra)* proceeded as follows at page 8.

“The documents relied on by the respondent did not prove ownership. It is worthwhile to point out that the respondent’s use of “legal owner” is telling. Ownership can only be legal where the one claiming such has title to the property. There was no evidence that the respondent obtained title to this property. The agreement of lease with option to purchase and the confirmation of ownership from the Municipal of Gwanda do not amount to transfer of the property which only occurs upon registration of such transfer. Ownership can also be through a cession agreement wherein the owner transfers the right, title and interest to the immovable property to the purchaser.”

It is important to emphasize that the case is for eviction and respondent had to prove a case for the relief she sought. The question of what first respondent proved or did not prove is largely

irrelevant, for the first respondent firstly had to prove a case for eviction I find that the court a *quo* misdirected itself by finding that first respondent had a real right in the circumstances.

To that end the appeal is upheld and the judgment of the court a *quo* is vacated.

It is ordered as follows:

1. The appeal be and is hereby upheld with costs.
2. The order by the court a *quo* be and is hereby set aside and substituted with following:
 - 2.1. The plaintiff's claim be and is hereby dismissed with costs.

WAMAMBO J:

TAKUVA J: **Agrees**

Mufunda & Partners, appellant's legal practitioners
Respondent in person