

MISHECK HONAMOMBE
versus
FLORENCE CHUKURUWO

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 1 March and 18 May 2016

Civil Appeal

P Chiutsi, for the appellant
E Samukange, for the respondent

MUNANGATI-MANONGWA J: This appeal challenges the court *a quo*'s decision of absolution from the instance at the close of the plaintiff's case. The appellant sued for the eviction of the respondent and all those claiming through her from Stand Number 85B Muguta Epworth and for costs of suit.

The brief background of the matter is as follows: in 2001 the appellant bought from the respondent's husband land that was stated as stand 85C on the agreement of sale. The stand which is a subdivision was not properly demarcated by the seller and over the years the issue of boundaries remained in dispute. The respondent's husband built cottages in 2004 on what has turned out to be part of the appellant's land. The dispute was escalated to Epworth local board. It is only in 2013 that the Epworth Local Board using the site plan and maps correctly demarcated the appellant's stand showing the boundaries and further indicated that the proper description of the subdivision was stand 85B. As a result, it turned out that structures built by the respondent's husband are on the appellant's stand. Meanwhile the respondent's husband died in 2012. The respondent administers and collects rentals from tenants in those structures although she seems not resident in any one of the structures. The appellant sought her eviction and those claiming through her. Upon the granting of absolution from the instance by the court *a quo* he filed an appeal on the following grounds:

- “1. The learned magistrate made a serious misdirection on the facts amounting to a misdirection in law when she concluded on the basis of the Respondents Absolution from the instance in case number MC 27026/13 that the Appellant’s claim had prescribed.
2. the learned Magistrate made a serious misdirection on the facts amounting to a misdirection in law when she concluded on the basis of the Respondents Application for Absolution from the instance in case number MC 27026/13 that the Appellant had proceeded against the wrong party, that is against the Respondent and instead ought to have proceeded against the Respondent’s late husband’s Estate.
3. The Learned Magistrate erred and misdirected herself seriously in law when she failed to realize that the unlawful encroachment by the Respondent against the Appellant’s property, which is the subject matter of the dispute, is still on going and on that basis the Appellant’s Claim cannot be deemed to have prescribed.
4. The Learned magistrate misdirected herself in failing to arrive at a just and fair decision in the circumstances.

Mr *E Samkange* for the respondent raised a preliminary point that the appeal is fatally defective as it did not comply with the Supreme Court (Miscellaneous appeals and Reference) Rules 1975 r 7 (d) which provides that a notice instituting an appeal shall state:

“The exact nature of the relief sought.”

In *casu* the relief sought by the appellant reads:

- i) “The decision by the magistrates court handed down on the 8th of October 2014 be overturned.”
- ii) The respondents to pay the costs of suit on an attorney client scale.

To this court, it is clear that the appellant seeks the setting aside of the court *a quo*’s decision which relief is not ambiguous. Certainly it would have been desirable to then further add that “trial proceedings to resume” or “matter to proceed to defence case.” This court did not find it to be fatal as it follows that where the granting of absolution from the instance is granted at the close of the plaintiff’s case, the setting aside of the decision thereof means a resumption of the proceedings. In that regard the preliminary point is dismissed.

On the merits of the case, the court has to consider whether the court *a quo* was correct in finding that:

- a) The appellant's claim had prescribed and
- b) The estate should have been cited and not the respondent.

Prescription

It is common cause that the appellant bought stand 85B in 2001 and took occupation in about 2004. The respondent's husband built structures in what has turned out to be part of the appellant's land. There has always been a dispute regarding boundaries. It is only in 2014 after the defendant's husband death that the local authority, looking at the site plans and on a visit to the stands pointed to the official demarcations. This has been accepted by both parties.

Given the above scenario, to decide on prescription one needs to consider when the cause of action arose. In the matter of *Chiwawa v Mutzuris and Others* 2009 (1) ZLR 72 (H) Makarau JP (as she then was) in defining cause of action in a matter where prescription was at issue found as follows:

"It is now settled position in our law, in my view, that the term refers to when the plaintiff is aware of every fact which it would be necessary for him or her to prove in order to support his or her prayer for judgment. It is the entire set of facts that the plaintiff has to allege in his or her declaration in order to disclose a cause of action but does not include the evidence that is necessary to support such cause of action." See also *Shinga v General Accident Insurance Co. (Zimbabwe) Ltd* 1989 (2) ZLR 265 H at 278 A-C

Put simply, a cause of action pertains to a combination of facts which are material for the plaintiff to prove in order to succeed in his or its action. ¹

In *casu* although the stand was bought in 2001 and the appellant took occupation, both seller and buyer were mistaken on

- a) The correct legal description of the stand stating it as 85 C when according to subdivision records it is 85 B.
- b) The exact demarcation of the stand, hence the dispute.

When the respondent's husband built the cottages whence from the appellant seeks to evict the occupants, he believed that it was part of his stand. Officials from the local board clarified all the above issues in 2013 further confirming the appellant as the owner of stand 85B Muguta Epworth measuring 1680m². It is in 2013 that the appellant instituted action.

¹ At page 77 E

In that regard, it is only in 2013 that the appellant became fully aware of the material facts necessary for him to prove or to succeed in his action for eviction. It was factual and certain that cottages had been built on his land, within the 1680 square metres of his stand. There being persons or occupants on his land he is at law entitled to seek their eviction which he did and timeously so, given that he became aware of same in 2013. The appellant is therefore within the prescribed 3 (three) year period within which to sue for the relief he seeks.

Alternatively, given that it is not denied that the land belongs to the appellant who took occupation, occupation by another person becomes a continuous wrong². The defendant or any other occupant cannot want to remain on land owned by another and claim that the owner should have removed her 3 years ago. The respondent cannot raise the issue of prescription where she is an unlawful occupier and continuously in wrongful possession of part of the appellant's land. The appellant's claim thus remains extant and hence the claim has not prescribed. That being so, the court *a quo* was wrong in granting absolution from the instance in the circumstances.

Citation of the Estate

In granting absolution from the instance the court *a quo* had indicated that the appellant should have cited the estate and not the respondent. Mr *Samukange* for the respondent argued vehemently that indeed the appellant should have cited the estate or the executor thereof. In a bid to convince this court that there was such need he referred to the case of *Mary Chijaka v Fanuel Taguta* HH308/15. In that case the appellant's late husband had prior to his demise entered into an agreement of sale for the purchase of a commercial stand and paid a deposit. He passed on before the fulfilment of the contractual terms. Respondent sought eviction of the surviving spouse and further claimed from the surviving spouse in her personal capacity, payment of USD 600-00 outstanding balance from a trailer hire agreement entered into between respondent and appellant's late husband. Clearly in that instance the obligations fell on the estate hence the court found that it was imperative that the estate or the executor be sued rather than the surviving spouse.

Conscious of the provisions of s 25 of the Administration of Estates Act which provides for the representation of an estate by an executor or executrix dative duly appointed and issued

² See *African Railway & Harbours v Fisher Estate* 1954 (1) SA 337 A

with letters of administration by the Master, we find that the case at hand is patently different. In *casu*, the sale agreement entered into by the respondent's now deceased husband had been consummated or fulfilled by full payment of the purchase price, and the taking of vacant possession by the appellant. Had the demarcations been correctly done, no issues would have arisen. Even so, the subdivision was a duly authorized one officially showing the stand as 1680 square metres, clarification of the official boundaries was done.

In terms of the contract between appellant and respondent's husband there are no outstanding issues *viz* the land sold to appellant. Indeed deceased had built cottages on what has been clarified as the appellant's land. It is not being alleged by the respondent that the portion on which the cottages are built is not appellant's land. The respondent alleges prescription and that the estate should have been cited. What the appellant seeks is eviction of occupants who on record are tenants controlled by the respondent. The respondent is managing and administering the cottages. Third parties unlawfully occupy the appellant's land. What the appellant seeks in my view is not substantive relief from the estate hence he needed not sue the estate. The estate cannot have a right in a property which the deceased alienated during his lifetime and granted vacant possession to the appellant. There is therefore a basis for suing the respondent in her personal capacity as argued by Mr Chiutsi for the appellant. Hence it is within the appellant's right to proceed against persons on his property including the respondent who has *de facto* control of those people³.

It is important to put the respondent to her defence so as to ascertain what rights or in what capacity she seeks to control property on the appellant's land. The respondent cannot seek to profess ignorance of the facts when she is benefiting from rentals collected from the cottages.

We find that the court *a quo* misdirected itself in granting absolution from the instance. In the result the appeal succeeds and the following order is granted. It be and is hereby ordered that

1. The judgment of the court *a quo* is set aside.
2. The trial is to proceed to the defence case
3. The respondent is to pay costs.

³ See P&B Arnot and Son (Pvt) Ltd v Manota & Others HH 17/13

MWAYERA J agrees _____

P Chiutsi Legal Practitioners, appellant's legal practitioners
Venturas and Samkange, respondent's legal practitioners