

VISION SITHOLE

Versus

LESLIE KHUMALO

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 30 JUNE AND 8 JULY 2010

Applicant in person
V. Ruombwa for 1st respondent
No appearance from 2nd respondent

Opposed Court Application

KAMOCHA J: The applicant was seeking to interdict the respondents from executing a default judgment granted against him by this court on 1 June 2009. The court order was in the following terms:-

“It is ordered that:-

- (1) defendant and all those claiming through him vacate garage number G6 Montrose Mansions immediately after this judgment;
- (2) failing which the Deputy Sheriff is authorized and ordered to remove, by force if necessary, the defendant and all those claiming through him from garage number G6 Montrose Mansions; and
- (3) defendant to pay costs at the attorney-client sale (*sic*)”

The applicant received the default judgment the following day i.e. 2 June 2009 and filed an application for rescission that same day.

Three days later he, on a certificate of urgency, filed this application seeking to interdict the respondents from evicting him from the garage being number 6 Napier Flats, Bulawayo. In the event that he would have been already evicted, he sought to be re-instated into the premises forthwith.

The final order sought to permanently interdict the respondents from evicting him from the said garage pending the finalization of case number HC 848/09.

Due to some technical reasons the matter ceased being regarded urgent and the parties seemed to have agreed that it did not deserve to jump the queue. Hence its enrolment on the opposed court applications roll.

There can be no doubt that the applicant timeously filed his two applications. The sticking point, however, is whether or not he has met the requirements for the interdict that he seeks.

Has he got a *prima facie* or a clear right over the property that is at the centre of this dispute? His story was that some time in 2004, he purchased flat number 7 Napier Flats, Bulawayo from one Nkosana Ncube through a registered estate agent known as Bulawayo Real Estate. When he bought the flat, it came together with garage number 6 which was under the same Napier Flats.

Before he bought the flat, Nkosana Ncube who at that stage was living in South Africa had allegedly allowed his garage under the flat to be used by one Sebby Nyoni. Sebby Nyoni was renting flat 8 Montrose Flats, Fife Street and 12th Avenue, Bulawayo from Leslie Khumalo the first respondent. Just because Nkosana Ncube allowed Sebby Nyoni to use the garage the first respondent and Sebby Nyoni assumed that the garage was being rented to them.

Trouble, allegedly, started when the applicant began to park his vehicle in the garage as he then believed to be the owner. The first respondent allegedly started to harass him claiming that he owned the garage but never produced any proof.

The above allegations by the applicant do not stand up to scrutiny. According to the agreement of sale between Nkosana Ncube and applicant which he signed on 11 March 2004 he allegedly purchased the following:-

“Certain piece of land situate in the district of Bulawayo an undivided 4.23% share being share No. 17 also known as stand 13921 Bulawayo Township measuring 2082 square metres together with all permanent improvements thereon comprising a 2 bedrooms, a kitchen, lounge, toilet and balcony.”

The agreement of sale between Nkosana Ncube and the applicant does not include the sale of the garage designated as G6 on the plan which was part of share number 14.

According to the deed of transfer signed and sealed at Bulawayo on 19 January 2009, Nkosana Ncube transferred to Vision Sithole – the applicant an undivided 4.23% share being share number 17, in a piece of land situate in the district of Bulawayo being stand 13921 Bulawayo Township measuring 2082 square metres. The piece of land had been held under deed of transfer number 2497/03 dated 28 October 2003 made in favour of Nkosana Ncube. It was held subject *inter alia* to the provisions of Notarial Deed M.A. 519/89 relating to an undivided share in it with the exclusive right of occupation.

According to notarial deed M.A. 519/89 registered at the Deeds Registry in Bulawayo on 13 March 1989 Nkosana Ncube owned an undivided 4.23% share being share number 17 which comprised one bed-roomed flat situate above a section of the garages designated as flat 17 on the plan and known as flat 7 Napier House.

Leslie Khumalo on the other hand owned an undivided 6.17% share being share number 14 comprising of a two bed-roomed flat with private balcony on the first floor designated as flat 14 and a garage designated as G6 on the plan and known as flat 8 Montrose Mansions.

It is clear from all official documents in the deeds registry that the garage has always belonged to Leslie Khumalo. Nkosana Ncube never owned it. His agreement of sale with the applicant does not include the sale of the said garage. It is not true that the deed of transfer shows that the flat and garage were transferred to the applicant as they both formed part of 4.32% being share number 17 in stand 13921 Bulawayo Township, Bulawayo. Share 17 does not have a garage. It belongs to share 14.

The applicant changed his stance in his answering affidavit and began to allege that Nkosana Ncube had purchased the garage from Leslie Khumalo who flatly denied ever selling the garage to Nkosana Ncube. The agreement of sale between the applicant and Nkosana Ncube belies the applicant's story that he bought the garage from Nkosana Ncube. There is no mention of the sale of the garage in the agreement. It was an afterthought which must be rejected. Further, the applicant's suggestion that Leslie Khumalo did not dispute the allegation that he had sold the garage to Nkosana Ncube is clearly false because that had always been hotly disputed by Leslie Khumalo.

Applicant was also being untruthful when he stated in paragraph 4 of his founding affidavit that what was surprising in this whole matter was that the 1st respondent had not attached any proof that he owned the garage. Nothing can be further from the truth because the deed of transfer filed of record dated 14 April 1989 which was subject to Notarial Deed M.A. 519/89 shows that the garage is part of Leslie Khumalo's flat. Notarial deed M.A. 519/89

filed of record also established that the garage is part of the flat owned by Leslie Khumalo. The applicant's allegation that Leslie Khumalo never produced proof to show that he owned the flat is clearly false.

What is true is that there is no evidence whatsoever to show that Leslie Khumalo sold the garage to Nkosana Ncube. Nkosana Ncube had no right to sell the garage to the applicant. He therefore could not transfer a right which he did not have.

Consequently, the applicant has no right whatsoever not even a prima facie right let alone a clear right over the garage. He would suffer no harm when evicted therefrom. After all he, according to the first respondent's then tenant Mr Sebbie Nyoni, had requested to use the garage for a short while as he was building in Kensington. When asked to stop using the garage after six months he caused endless problems culminating in these proceedings.

The 1st respondent has been put into unnecessary expenses trying to eject the applicant from the garage to which he has no legal right whatsoever. He is entitled to recover his full costs.

In the light of the foregoing I would dismiss the applicant with costs on an attorney and client scale.

Bulawayo Legal Projects Centre, 1st respondent's legal practitioners