

ERENIUS KUFAKUNESU MAKWANYA
versus
ELIZABETH MAJONDO

HIGH COURT OF ZIMBABWE
HLATSHWAYO and CHITAKUNYE JJ
HARARE, July 17, 2012

Civil Appeal

CHITAKUNYE J. This is an appeal against a judgement of the Magistrate court sitting at Harare in which the appellant's claim for the eviction of respondent from stand 3357 New Mabvuku also known as 44 Mubanga Street New Mabvuku Harare was dismissed by the court *a quo*.

The facts are as follows:

On 27 January 2010 the appellant purchased rights title and interests in Stand 3357 New Mabvuku also known as 44 Mubanga Street New Mabvuku, Harare from John Efremu.

The respondent and John Efremu had been married and were granted a decree of divorce on 15 June 1995. The property in question was the matrimonial home and was registered in the husband's name. Clause 4 of the divorce order provided that-

“That the property, 44 Mubanga Street, Mabvuku be sold and proceeds be divided equally between the plaintiff and the defendant provided that such a sale shall be executed only:-

- (a) When the defendant dies or remarries; or
- (b) When the defendant finds alternative comparable accommodation; or
- (c) When the plaintiff finds her and the minor children alternative comparable accommodation; or
- (d) When the youngest minor child (Rodgers) becomes 18 years old.”

At the time John Efremu sold the property to the appellant the youngest child of the couple had long attained the age of 18 years.

After paying the purchase price in full and meeting all other terms and conditions of the Agreement of Sale, the appellant sought transfer of the rights title and interest into his name.

On 7 June 2010 he obtained a High Court order for the transfer of the rights title and interests in the said property to him. This was in case number HC 894/10. The respondents in that case were John Efremu, Elizabeth Majondo and the City of Harare. That order was apparently granted in default. As a consequence of this order the property in question was registered in the appellant's name.

On 20 January 2011, the appellant sued the respondent for eviction at the magistrates' court. The respondent opposed the claim. The trial magistrate after hearing evidence dismissed the claim. In dismissing the claim the trial magistrate opined that:-

- (a) all the conditions set in clause 4 of the decree of divorce in HC 4323/93 had to be satisfied before the property could be sold;
- (b) that after the sale the first respondent was not paid her share;
- (c) that the respondent's defence counsel were in the process of making an application for rescission of the default judgment in HC 894/10; and
- (d) In her view, the High Court was likely to grant the application.

Based on all these factors the trial court concluded that the respondent has a right to remain in occupation of the property since she was not given her share on the sale of the house.

The appellant being dissatisfied appealed to this court against the trial magistrate's judgement'

The grounds of appeal included that:-

1. The learned magistrate erred and misdirected herself by failing to stick to the determination of issues placed before her and venturing into determining issues which were not for her to decide. More particularly the learned magistrate ought to have simply determined whether on evidence placed before her the appellant had established a case for the eviction of the respondent from the property in dispute and there was no point in the learned magistrate interpreting the High Court Order issued under case number HC 4323/93 as she did.
2. The learned Magistrate misinterpreted the High Court Order case number HC 4323/93 and arrived at a wrong conclusion which caused her to make a wrong

finding that the appellant had no right to evict the respondent from the property in dispute since, according to the Magistrate, the respondent had not received her share of the proceeds of the sale of the property.

More particularly the learned Magistrate failed to appreciate that:-

- (a) Appellant as the owner of rights title and interest within the disputed property has no legal obligation to provide accommodation to the respondent.
 - (b) The issue of the respondent receiving her share of the sale proceeds rested with the respondent and her former husband who was not party to the proceedings before Court; and
 - (c) The respondent conceded that she has not made steps to recover her share of the sale of the property from her former husband.
3. On the evidence presented the learned magistrate ought to have made a finding that the appellant had on a balance of probabilities established a case for the ejectment of the respondent from the property in dispute.
 4. The learned magistrate erred and misdirected herself by dismissing with costs the Appellant's claim for ejectment.

The appeal is opposed. The respondent contended that clause 4 of the Decree of divorce was peremptory to the effect that the property was to be sold and proceeds divided equally. Since the proceeds have not been shared with the respondent the purported sale by the respondent's former husband is null and void.

The issue before the trial court was whether the respondent had a right to remain in occupation of the property.

In an effort to answer that the trial magistrate made effort to interpret clause 4 of the decree of divorce in HC 4323/93 in his view that clause gave the respondent a foothold in the property till such time her ex-husband John Efremu paid her her half share of the purchase price.

From the submissions made it was not disputed that the respondent's ex-husband sold the property to the appellant as a result of which the appellant is now the registered holder of rights, title and interests in the property. That sale has not been challenged. It is also clear that this court's order in HC 894/10 dated 7 June 2010 authorising the appellant to obtain transfer/cession of the property into his name has not been set aside or challenged.

Though the respondent's counsel expressed intention to apply for a rescission of the default judgement to the trial magistrate, this appears not to have been done. The trial

magistrate's judgment was delivered on 26 October 2011 and by 17 July 2012 when this appeal was heard no such application was evident.

Faced with a scenario whereby the Agreement of Sale and the Default judgment authorising transfer were not being challenged before the courts of law, it is our view that the trial magistrate misdirected herself in not appreciating that the appellant's rights, title and interests in the property were unassailable. It is important to note that the registration of rights and interests in a person's name gives that person dominion over that property.

The respondent's case was in the main that her ex-husband had sold the property at a low price and had not given her her half share of the purchase price.

The argument that the property was sold at a low price was without basis as no credible evidence was adduced on what was the reasonable value of the property at the time of the sale.

The contention that she cannot be evicted by the purchaser because the seller has not given her her share could not invalidate a valid agreement of sale. That is an issue between the respondent and her ex-husband. The circumstances in which a court may intervene where a husband has sold property were alluded to in *Muzanhenamo and Anor v Katanga and Ors* 1991(1) ZLR 182 (S). At p 187 G-H McNALLY JA stated that-

“It is a matter of equity. The courts will intervene where, for instance, the husband sells the house as part of a policy of harassment arising out of divorce proceedings.”

In *casu*, it was not seriously contended that the appellant colluded with the respondent's ex-husband to prejudice her. If anything the belated attempt to raise such issues in the heads of argument was an afterthought bereft of any basis.

It is our view that what the respondent presented to the trial magistrate as reasons why she should not be evicted were in fact issues of her personal rights against her ex-husband. Our law is clear that:-

“ where there is a genuine transfer there is no reason why the wife's personal rights against her husband which are derived from her status, should enter the field of real property law as to clog the title of an owner.”. See *Muganga v Sakupwanyanya* 1996(1) ZLR 217 (S)

It was thus our view that the trial magistrate erred in deciding that the respondent had a right to remain on the property in spite of the appellant having acquired rights, title and interests in the property.

For the foregoing reasons we allowed the appeal and ordered that the judgment of the court *a quo* be set aside and it be substituted by an order authorising the ejection of the respondent and all those claiming occupation through her from Stand 3357 New Mabvuku, also known as 44 Mubanga street New Mabvuku, Harare within 30 days from the date of this order.

HLATSHWAYO J agrees