

EDNA MUKURAZHIZHA
versus
FARAI NDEMERA

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 13 March 2014

Opposed application

J Mandara, for the plaintiff
T Machiridza, for the respondent

MAKONI J: On 13 March I granted an order for summary judgement in favour of the plaintiff. This was in view of the concession that was made by the Mr *Machiridza*. The defendant has now appealed against my decision and requested for reasons for my judgement. These are they.

The background to the matter is that the plaintiff, at a public auction conducted by GMP Real Estate, on the instructions of the Sheriff, bidded for stands number 419 and 420 Borrowdale Brooke Township, Harare. These properties were registered in the defendant's names. She was declared the highest bidder. For reasons which are not clear, the Sheriff delayed in confirming the plaintiff as the highest bidder. The judgement creditor, had to obtain a court order to compel the sheriff to confirm the sale. The order was granted on 21 August 2013. The properties were transferred to the plaintiff on 3 October 2013. The proceeds were deposited into the High Court Temporal Deposit Account by the plaintiff on 10 October 2013. On 19 October 2013, the plaintiff gave the defendant notice to vacate the properties on or before 25 October 2013. The defendant did not vacate the properties. The plaintiff then instituted action proceedings for the eviction of the defendant in HC 9527/13. The defendant entered an appearance to defend. The plaintiff then made the present application for summary judgement. It is the plaintiff's belief that the defendant has no *bona fide* defence to the claim and has filed an appearance to defend for the sole purpose of delaying the eviction day.

The defendant opposes the application on the basis that he is disputing the confirmation of the sale in other platforms. He is also challenging the order giving rise to the

execution which was granted in his default. He further averred that he believes he is entitled to ownership of the said properties. He is entitled to occupy the properties pending the determination of litigation in cases number HC6985/13, HC 7778/13, HC 4971/13, HC 7966/12, HC 9527/13, HC 8082/13 and other matters relating to the property in dispute. He therefore avers that he has a plausible defence with good prospects of success.

Summary judgement procedure is a procedure designed to enable a plaintiff whose claim falls within certain defined categories to obtain judgement without the necessity of going to trial. The objective is to enable a plaintiff with a clear case to obtain swift enforcement of a claim against a defendant who has no real defence.

A number of cases in our jurisdiction and in South Africa have stressed the facts which that the remedy provided by this rule is of an extraordinary and drastic nature which is very stringent in that it closes the door for the defendant. The basis for granting the claim is that the plaintiff's case is unimpeachable and that the defendant's defence is bogus or bad at law. See *Herbestein van Winsen* 4th ed p 434.

The defendant must only establish a *prima facie* defence and must allege facts if he can succeed in establishing them at trial would entitle him to succeed in his defence at the trial. See *Rex v Rhodian Investment (Pvt) Ltd* 1957 R & N 723, *Kingstone Ltd v L.D. Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S).

In casu, the defendant's defence is that he is entitled to ownership and that he is entitled to occupy the properties pending the determination of litigation relating to the properties in dispute.

Mr *Mambara* submitted that there are no pending matters between the plaintiff and the defendant and that the plaintiff has taken transfer of the properties.

Mr *Machiridza* conceded the point that the pending matters were not between the plaintiff and the defendant.

In view of that concession the *prima facie* defence that the defendant had raised fell away. The plaintiff managed to establish an unimpeachable case against the defendant. She has title to the properties and is entitled to evict the defendant.

Accordingly I will make the following order:

1. The defendant and those claiming occupation through him should vacate stand numbers 419/420 Borrowdale Brooke Township, Harare within seven (7) days of granting of this order.

2. In the event that the defendant fails to vacate the said stands the Sheriff be and is hereby authorised and directed to evict the said defendant and those claiming occupation through him from stand numbers 419/420 Borrowdale Township Harare.
3. Defendant be and is hereby ordered to pay costs of suits at an attorney client scale.

J Mambara & Partners, plaintiff's legal practitioners
Antonio & Dzvetero, respondent's legal practitioners