

NOMSA CHIKWEZVERO
versus
TENDAI CHINAMORA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 26 February 2014 & 26 June 2014

Civil Trial

Adv. C. Damise, for the plaintiff
S. Mushonga, for the defendant

MWAYERA J: Central to the action before the court is stand number 6130 Dzivarasekwa Phase 1. The plaintiff issued summons commencing action in the magistrate court and the court ruled that the Magistrate Court had no jurisdiction in view of the value of the property. Summons were then issued in this court on 31/01/11. The defendant defended the matter and also counter claimed which counter claim was opposed by the plaintiff.

At pre-trial conference stage the parties agreed on the issues for referral to trial. The following issues were agreed parameters for ventilation and determination during the trial.

1. (a) whether or not the plaintiff claim has prescribed under the prescription Act [*Cap 8:11*].
(b) whether the allocation to the plaintiff by the Ministry of National Housing Social Amenities was valid.
(c) whether the Ministry of National Housing and Social Amenities allocated stand 6130 Phase 1 Dzivarasekwa Township to the defendant as well.
(d) whether the Ministry of National Housing and Social Amenities ceded its rights of action to the plaintiff.
2. Whether the plaintiff can proceed with the claim without citing the Master of High Court, Executor of Estate late Edgar Chikwezvero, Ministry of National Housing and Social Amenities and City of Harare.
3. (a) whether stand 6130 Phase 1 Dzivarasekwa was registered under the Estate of the late Edgar Chikwezvero
(b) If not whether or not it is procedural to proceed with the claim of an unregistered

estate.

4. (a) whether the defendant is occupying stand 6130 Phase 1 Dzivarasekwa Township illegally or not.
(b) If not whether the Ministry of National Housing and Social Amenities can have a pronouncement on allocation of the said stand.
5. (a) whether or not there was a double sale of stand 6130 Phase 1 Dzivarasekwa Township
(b) If so who is to suffer for actions of officers in the Ministry of National Housing and Social Amenities
6. (a) whether the defendant legally acquired stand 6130 Phase 1 Dzivarasekwa Township.
(b) whether the defendant paid for the stand to Ministry of National Housing and Social Amenities.
7. (a) whether the defendant is entitled to compensation for developments he effected.
(b) If so how much is the defendant is entitled to?

A close reading of the issues clearly shows most of the issues are interlinked and were unnecessarily split to come up with a multiplicity of issues as will be unravelled in disposition of the matter. I propose to deal with legal issues raised from the issues guiding parameters of the trial and from the totality of evidence adduced before the court. The question of *locus standi in judicio*. This can be looked at when viewed in conjunction with the background of stand in question number 6130 Phase 1 Dzivarasekwa hereafter referred to as the stand. The stand was allocated to the plaintiff's husband one Edgar Chikwezvero in 1995 and the said Edgar passed away in 2003. The evidence of the plaintiff and the relevant Ministry official one Mr Tshuma clearly shows Edgar Chikwezvero died before taking transfer of the property. The stand was then allocated by the relevant Ministry to the complainant Nomusa Chikwezvero. The stand was one of the many under a government programme "Start paying for your house scheme", spear headed by the relevant Ministry to assist with low cost houses for government employees. The plaintiff was allocated the stand and as a legal allocatee obtained personal title to the stand as the leasee. The plaintiff's evidence in so far as the allocation of the stand was firmly buttressed by the Ministry official. It was apparent from the evidence that the plaintiff has the *locus standi* to bring the action in her own right. The none Joinder of the Ministry is not fatal to the plaintiff's case as the

property was ceded to her and her action is based on her personal right not that she is bringing an action on behalf of a Principal. In an event even if it were to be accepted the property that is the stand had accrued to Edgar Chikwezvero her husband's estate (which is not the position because the stand in question is State land being administered by the relevant Ministry when the Mr Edgar Chikwezvero died. No title had passed so the stand is not part of the estate) the plaintiff was appointed executrix of that Estate and is entitled to bring action in that capacity. I have already pointed out that the stand did not accrue to the estate of Edgar Chikwezvero as title had not passed. This factor brings us to the other legal aspect raised that the none citation of the Master of High Court would be fatal to the plaintiff's action. If the central issue that is the stand is not part of a deceased estate then there is no need for the Master to have been joined in the proceeding for the obvious reason the office is not on interested part.

The fourth legal issue raised is pertaining to whether or not the plaintiff's claim has prescribed in terms of the Prescription Act [*Cap 8:11*]. It is important to look at the relevant Act and see if the claim falls under it. Section (2) of the Act defines a debt thus "debt without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, or delict otherwise" section 15(d) provides that any other debt shall prescribe after a period of 3 years. From the evidence and nature of claim the plaintiff brought the action in her capacity as a cessionary in a cession of right of action by the owner of the property (The State) with the plaintiff as the creditor. The action is a vindicatory action in respect of which the period of prescription is 30 years as given in section 4 of the Prescription Act. In an event it is clear from section 15 of the Act that Prescription begins to run as soon as the debt is due that is when the creditor became aware of the facts from which the debt arises and becomes aware of the creditor. In the case of *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 ZLR 498 it was spelt out that a cession places the cessionary in the shoes of the cedent. The evidence presented before the court can be briefly outlined as follows. The plaintiff was allocated the stand in 2005 and signed a lease agreement with the Ministry. It was after the husband Edgar Chikwezvero had died in 2003 and the Ministry saw it appropriate to allocate the plaintiff with the same stand. The scheme clearly spelt out that developing was to be effected after servicing of stands before any construction occurred. In 2010 when the plaintiff noticed construction on the piece of land she instituted action in the Magistrate Court then 2011 High Court for want of jurisdiction in the Magistrate Court. Given Mr Tshuma's evidence the plaintiff's evidence that construction

was to begin after serving of stands and Mr Tshuma's evidence that some Ministry officials at some stage used under hand means to sell stands to other parties not on the list of beneficiaries of the scheme, the plaintiff's position that she was not aware of developments and identity of the defendant until 2010 when there was a structure cannot be said to be farfetched or improbable. The defendant's evidence is that the plaintiff ought to have known earlier. That position, in the wake of the purported under hand and fraudulent manner the stand was allegedly sold cannot cloud the position that the plaintiff sprout to action when she got to know of the facts from which the debt arose and identified the debtor. The claim can therefore not be held to have prescribed.

Having disposed of legal issues above it remains for the outstanding issues to be disposed off regard being paid to the totality of the evidence presented before the court.

It was apparent from the plaintiff Nomsa Chikwezvero that after her husband late Edgar Chikwezvero joined the housing scheme in 1995 and that after his demise in 2003 the Ministry made a decision that she be allocated the same stand. The plaintiff was subsequently issued with a letter confirming the status as the legal allocatee or beneficiary and this letter was annexed to the bundle of the plaintiff and tendered as exhibit. The plaintiff's status as the legal lessee was confirmed by Mr Tshuma the legal officer of the Ministry.

Mr Tshuma confirmed that the plaintiff entered into a lease agreement with the ministry in 2005. He also pointed out that in 1998 the defendant was unlawfully allocated the same stand through same fraudulent scheme which the Ministry discovered was perpetuated by some rouge officers of the Ministry acting together with some members of the public. He pointed out that some of the Ministry officials were prosecuted and or fired. In a bid to rectify to the anomaly the Ministry publicised in the local press the list of the rightful owners and invited them to attend the Ministry offices for verification. It was then that the plaintiff's status was confirmed by issuance of a confirmation letter. The witnesses highlighted that the Ministry did not expressly or impliedly rectify the illegal allocations and that the defendant was not issued with a confirmation letter of the stand. Mr Tshuma explained the possession of the defendant of undated government documents such as receipts as emanating from the illegal underhand dealings and he drew the attention of the court to features on some of the documents which were issued genuinely from the relevant Ministry which were missing on the fake documents. It was clear from Mr Tshuma that the Ministry never sanctioned the illegal allocations and that the plaintiff is the legal allottee of the stand in question. The defendant Tendai Chinhomora in turn recounted how he went to the Ministry's offices in

1998 and then he bought the stand in 1999. He referred the court to his bundle of documents which was produced as exhibits for purposes of showing he bought the stand. It was clear from his evidence oral and documentary that when the advertisement by Ministry was done in press pertaining to the scheme for stands he did not get a confirmation letter but that he saw one Mr Gahadzikwa and Mrs Mollen at Ministry offices and they advise him to go back home without any queries being raised. He proceeded from 2004 to put up a structure and connected water and electricity. The defendant claimed for compensation pointing out the improvement effected to the stand totalled US\$16 000 and this included a dural wall erected. In support of the claim the defendant tendered before the court an Evaluation report.

I propose to deal with the aspect of possession of the stand by the defendant first and then revisit the issue of whether or not there is unjust enrichment occasioned. As clearly pointed out by Mr Tshuma whose evidence was clear and straightforward living the court with no reason to disbelieve him the plaintiff, is the legal allottee of the land. There was no double sale by the Ministry but the defendant obtained the stand through the conduct of some rogue and unscrupulous Ministry official who sold the land on their own behalf and not Ministry. Whether it was to the defendant's knowledge or with his participation that is acting in cahoots with the rogue official or not the fact that is clearly spelt out from evidence is that the defendant obtained the stand through illegal means. The court cannot perpetuate on an illegality by imputing liability on the legal allottee whose lease was confirmed by confirmation letter and who signed a genuine lease agreement with the Ministry. The plaintiff was clearly not part and parcel of the acquisition project by the defendant and as such there is no basis for ordering her to compensate the defendant. In an event there is no unjust enrichment occasioned to the plaintiff as clearly connection of water and electricity is by other authorities but approval is Ministry's prerogative. That renders the structure put up an illegal structure. Even if the structure was legally put up the plaintiff is not responsible for she was not part and parcel of the chain leading to the defendant's possession. Further no evidence has been placed before the court on quantification of expenditure and how it came up to 16 000 US dollars considering that the building or the construction was in the Zim dollar era. There has not been laid before the court proof or extent of expenditure. The case of *Tumatemore (Pvt) Limited vs Oragplale Limited* HH 114/11 is instructive. Further the circumstances of the case do not portray the defendant as a *bona fide* possessor who innocently engaged in construction but rather he continued with construction despite knowing the plaintiff's claim. The defendant cannot seek redress in compensation when he continued

to effect construction after being given notice of competing claim in the property more so given his name was not on the beneficiary list issued by the Ministry. The case of *Reza v Nyangoni* 2001 (1) ZLR 202 is relevant..

In the face of evidence that the plaintiff is the genuine and legal allottee whom Ministry signed lease agreement with and that she by virtue of the cession had authority to sue and be sued in respect of the stand the counter claim by the illegal possessor has no firm ground on which to stand..

Accordingly it is ordered that

1. The defendant and all those who claim right of occupation through him of stand 6130 Phase 1 Dzivarasekwa extension be ejected from the stand
2. The counter claim by the defendant be and is hereby dismissed
3. The defendant shall pay the costs of suit.

Zimbabwe Women Lawyers Association, plaintiff's legal practitioners
Mushonga Mutsvairo & Associates, respondent's legal practitioners