

BADELA J NDLOVU
versus
SPIWE POSI

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 20 January 2015 and 27 May 2015

Opposed matter

Ms *G Nyamai*, for the applicant
C Shava, for the respondent

MWAYERA J: The applicant instituted the present proceedings in a bid to evict the respondent and repossess stand number 9919 Phase 3 Kuwadzana, Harare. The respondent opposed the application on the basis that the applicant was not married to the deceased one Junerose Phosa and as such not entitled to inherit the deceased's half share in the property. The respondent further argued that the property in question stand number 9919 Phase 3 Kuwadzana was not matrimonial home and that the applicant was not residing there and such could not inherit the property in terms of s 68 F (2) of the Administration of Estates Act.

The brief background to this application has to be put into perspective. The applicant was customarily married to one Junerose Phosa in 1986 per evidence filed of record. In 2000 the applicant and deceased purchased a residential stand 9919 Phase 3 Kuwadzana Harare. The property was duly registered in both their names Annexure A refers Deed of Transfer number 3230/2000.

In April 2010 the applicant's wife passed on and the applicant was appointed the Executor of the deceased estate per Letters of Administration by the Masters of High Court. As a surviving spouse the applicant was awarded half share of his wife's share and thus registered the said property in his name per Annexure B 31/2014 transfer in terms of Deceased Estates Succession Act [*Chapter 6:02*]. The respondent is a step grand-daughter to the applicant, in that she is a daughter of the late Junerose Phosa's daughter one Violet Posi.

The applicant's claim is based on the common law remedy of *rei vindicatio*. The applicant as the owner of the property is entitled to recover his property from whoever may

possess without his consent. The applicant by virtue of being the registered owner would have *locus standi* to *vindicatio*.

Our law is settled that an applicant seeking to rely on *rei vindicatio* must prove that

1. He is the owner of the property.
2. That at the institution of proceedings, the thing or property sought to be vindicated was still in existence and the respondent was in possession.
3. That the respondent's possession is without his consent or respondent has no right to retain possession of the property.

The cases of *Unimark Distributors (Pvt) Ltd v EFR 94, Silverstonedale (Pvt) Ltd 1999 (2) SA 986* and *Stanbic Finance Zimbabwe v Chivhunga 1999 (1) ZLR 262* are instructive.

In *Stanbic Finance Zimbabwe v Chivhunga 1999 (1) ZLR 262* the court remarked

“The owner may claim his property whenever found from who so ever is holding it. It is inherent in the nature of ownership that possession of the *rei* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner. The owner in instituting a *rei vindicatio*, need, therefore, do on more than allege and prove that he is the owner and that the defendant is holding the res, the onus being on the defendant to allege and establish any right to continue to hold against the owner”.

I fully subscribe to the sentiments by the court in that case. Once the applicant establishes he is the owner and that the property exists which the respondent is holding on to or possessing without consent or trespassing then he ought to have his rights restored.

In casu it is evident the applicant has always enjoyed ownership of the property in issue with his wife through sharing as both their names were registered per the initial title deed. Upon the death of his wife following the registrations of the estate and his appointment as executor the applicant became the sole owner of the property in question per the current Title Deed.

It is not I dispute that registration of right in immovable property in terms of the Deeds Registries Act [*Chapter 20:05*] passes real rights upon the individuals in whose name property is registered *Chapenyama v Chapenyera 2000 (2) ZLR 103 (S)* under scored that registration of title conveys real rights.

The applicant in this case has the property registered in his name and that title deed is prima facie evidence of his ownership of the property. The applicant is further the surviving spouse of Junerose Phosa and as such a recognised beneficiary under the Deceased Estate Administration Act 6:01.

Even if the respondent's argument that the applicant at the time of death of his wife was not staying at the matrimonial home he cannot be stripped of his beneficiary rights. Section 68(f) 2(d) reads:

“Where the deceased person is survived by 1 spouse and 1 or more children, the surviving spouse should get ;

- (1) Ownership of or, if that is impracticable, a usufruct of the house in which the spouse lived at the time of the deceased person's death, together with all the household good in that house; and
- (2) A share in the remainder of the net estate determined in accordance with the Deceased Estate Succession Act [*Chapter 6:02*]

This section should not be read in the abstract to mean a spouse will be disinherited because he or she was not in the matrimonial house for one reason or the other at the time of death of the spouse. The legislative intention to protect surviving spouses in a polygamous situation should not be ignored and misconstrued in the manner projected by the respondent. Interestingly it should be noted the respondent is not a surviving spouse or child of the late wife of the applicant.

Further the respondent's possession of the property in question is not with the consent of the applicant. The respondent has no right to retain possession of the property for she has no legal basis for such retention. Her claims of hold over being that her grandmother the late wife of deceased claimed 50% share which should have passed on to her mother has no legal standing given the applicant as a surviving spouse is entitled to inheritance when the spouse died intestate. The fact that the respondents' mother is a daughter to the applicant's wife does not change applicant's entitlement as a surviving spouse and equally it does not clothe the respondent *in casu* with retention or contractual rights over the applicant who has real rights over the property and who further is a surviving spouse entitled to inherit from the estate of his late wife.

It is clear from the foregoing that the applicant who is the owner of property in question, is without consent being deprived of his property by the respondent which has no legal basis to claim retention of the property.

There is no merit in the respondent's opposition of the applicant's relief. It is clearly calculated with mala fides in a bid to prolong unlawful stay at the applicant's property. The applicant being the owner of the property has clearly shown that he is entitled to the relief sought.

Accordingly it is ordered that:

1. The respondent and all those claiming occupation or possession through her are hereby ordered to forthwith vacate stand number 9919 Phase 3 Kuwadzana and restore undisturbed and peaceful possession to the applicant.
2. To the extent that it becomes necessary the Deputy Sheriff is hereby authorised and empowered to attend to eviction and removal of any person claiming occupation or possession through the respondent. Pursuant thereto, the Deputy Sheriff be and is hereby authorised to enlist the assistance of Zimbabwe Republic Police who are hereby directed to provide such assistance to the Deputy Sheriff so as to ensure that provisions of this order are executed and implemented.
3. The respondent shall pay the costs of the suit.

Honey & Blanckenberg, applicant's legal practitioners
Mbizo Muchadeham & Makoni, respondent's legal practitioners