

SENELANE NDLOVU
versus
CHAPMAN ANOPA MUFUDZI MARUFU

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 27 January 2015, 25 March 2015 and 27 May 2015

Special Plea in Bar/ Abatement

TM Kanengoni, for the applicant
I Goneso, for the respondent

MWAYERA J: The defendant entered an appearance to defend and filed a special plea in bar/abatement in terms of Order 21 rule 137 of the High Court Rules. The special plea was in relation to a claim by the plaintiff for eviction of the defendant and all those who claim through her occupation of Stand No 11 355 Joseph Msika Housing Cooperative Hatcliffe, Harare.

As discerned from the plaintiff's declaration the basis of the claim is as follows; that on or about November 2006, the plaintiff was allocated Stand No 11355, Joseph Msika Housing Cooperative Ltd, as a member of Harare North Housing Cooperatives Union Ltd. That the plaintiff paid for the land, road, sewer and water reticulation services in respect of the allocated stand. The plaintiff after being authorised by the cooperative proceeded to effect improvement on the property. Sometime in September 2012, the defendant unlawfully and violently evicted the plaintiff together with his family and took occupation of the property together with the improvements. That the stand is registered in the name of the plaintiff in the City of Harare and Joseph Msika Housing Cooperative Ltd records. That there being no contractual relationship between the defendant and either the plaintiff or Joseph Msika Housing Cooperative Ltd Harare North Housing Cooperative Union, the plaintiff therefore seek an order divesting the defendant of possessing and use of the property and vesting the same with the plaintiff.

The defendant has despite demand by the plaintiff refused and or neglected to vacate the property. Upon hearing the opposed application the plaintiff sought for the upliftment of

bar to file heads of arguments which were not timeously filed. The defendant opposed the application. It emerged in that preliminary hearing that the plaintiff inadvertently omitted to file heads for the present case. It was agreed by both counsel for the plaintiff and the respondent that but for the names of the parties the same lawyers were engaged in two other similar cases on similar facts and that some line of arguments were advanced as in heads of the present case. Counsel for the defendant was fully aware and appreciative of the heads but objected in principle that the plaintiff was not in compliance with rules of this court.

It was apparent the mistake of not placing heads of arguments in all three different files in which the same lawyers were appearing arguing along the same line albeit for different clients was not farfetched. The era appeared genuine and the explanation given cannot be described as not credible. In fact counsel for the defendant although opposed the upliftment of bar advanced no grounds of prejudice that would be occasioned. In fact he was fully aware of the nature of heads and argument advanced and was further in a position to comment on them and argue his case. It is with this background and consideration of interest of administration of justice that we acceded to the application. We are alive to the very essential need for the rules of this court to be followed and complied with. However, given the central desire of administration of justice where there is a credible explanation for none compliance and also where there is no prejudice to the other party it is my considered view that none compliance which does not fall in the ambit of wanton total disregard (for which there is no credible explanation) should in exceptional circumstances in the interest of fully ventilating a matter to achieve the interest of administration of justice, be condoned. The circumstances of each case of course have to come into play.

Having made a finding that there is no prejudice which will be occasioned and that the explanation given is not only credible but genuine, it was ruled that it is the interest of justice that the bar be uplifted. The matter then fell for ventilation as earlier outlined on plea in bar or abetment against a claim brought against the defendants by the plaintiff. The defendant filed the special plea in terms of Order 21 rule 137 of the High Court on the basis that the plaintiff does not have:-

1. *locus standi*;
2. that the plaintiff has not exhausted domestic remedies;
3. that the order is difficult to comply with since the stand number cited does not exist at law.

I propose to deal with the issue of locus standi first. It is trite *locus standi* exists when there is direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has *locus standi* has a right to sue which is derived from the legal interest recognised by the law. In the case of *Stevenson v Minister of Local Government and National Housing and Ors* SC 38-02, the court in outlining *locus standi* in judicio stated in many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as “a real and substantial interest” or as a direct and substantial interest. Given this legal position the plaintiff being a member of the Joseph Msika Housing Cooperative Ltd, which cooperative allocated the stand to the plaintiff, the plaintiff is clothed with *locus standi*. The plaintiff’s interest in the circumstances is real and substantial. The applicant sought to rely on the argument that the land in question is alienated state land yet the land was not only surveyed and marked on general plan DC 3843 but also that there is correspondence from the Ministry of Local Government, Public Works and Urban Development confirming allocation of stands including that of the plaintiff to cooperatives. The plaintiff having been allocated a stand by the Joseph Msika Cooperative which she is a member and further that the plaintiff possessed the stand and constructed a four bedroomed house to slab or foundation level proves her rights. The plaintiff has not only substantial interest in the matter but has *locus standi in judicio* in so much as to protect their interest in the property. The case of *Pedzisai v Chikonyora* 1992 (2) ZLR 445 Gubbay CJ clearly outlined how an individual upon being given occupation is added with *locus standi*. The honourable judge remarked “consequently upon being given occupation for lease being registered, the lessee would be entitled to evict anyone who wrongfully assumes occupation of the property for example a trespasser.”

In *casu*, the plaintiff as a member of the Joseph Msika Cooperative was allocated land and indeed made developments thereon and thus clearly has locus standi in judicio in so much as to protect the interest in the property.

The second ground in the special plea that the plaintiff has not exhausted domestic remedies has no merit. It is common cause that the plaintiff and the defendant are members of two distinct cooperatives Joseph Msika Housing Cooperative Ltd and Casa Nova Housing Cooperative respectively. The dispute is between the members of the cooperatives and not the cooperatives. The dispute between the parties is anchored on spoliation and recourse would be to seek redress by the court and not referral of the matter to arbitration. Section 115 of the Cooperatives Societies Act [*Chapter 24:05*] which Mr Goneso sought to rely on relates

to disputes between a society and its members or between registered societies. The scenario in *casu* is a dispute between members of two distinct cooperatives and it does not fall for dispute resolution as provided in the Cooperatives Societies Act [Chapter 24:05]. Equally s 116 of the Act has nothing to do with the present matter on hand where the plaintiff's claim is anchored on alleged unlawful conduct by the defendants necessitating a spoliation relief.

The last issue that the order is difficult to comply with since the stand number 11355 cited does not exist at law is absurd to say the least. The stand is outlined in general plan number DC 3843 and it is registered at the City of Harare. In an event the land in question ceased to be unalienated state land the moment it was surveyed and reflected on a general plan. Given such dimensions and allocations confirmation and stand number with the local authority there is no basis for arguing that the stand in dispute does not exist. It is apparent from the foregoing discussion that all the three issues raised by the defendant in the special plea lack merit. The lengthy and meandering plea in bar by the defendant is not only controversial and argumentative but does not conform with rule 137 1 (a) under which it has been occasioned. Rule 137 reads:-

“A party may take a plea in bar or abatement where the matter is one of substance which does not involve going into the merits of the case and which if allowed will dispose of the case.”

Clearly the wording of the rule rings warning bells that controversial argumentative and disputed allegations which cannot be resolved without resort to evidence should not be raised under the umbrella of special plea.

The plaintiff was allocated the stand in question as a member of a cooperative. An existing stand was allocated and the nature of relief sought requires redress by court. Clearly the defendant appears to have raised or taken the special plea for dilatory purposes. I conclude that there is no merit in the special plea filed by the defendants.

In the result the plea in bar is accordingly dismissed with costs.

Nyika Kanengoni & Partners, Applicant's Legal Practitioners
Magodora and Partners, Respondent's Legal Practitioners