TSITSI VERONICA CHITAGU

and

EVERISTO CHITAGU

versus

TAPSON STANLEY TOGARASEI DZVETERO

and

ANTONIO AND DZVETERO LEGAL PRACTITIONERS

and

DAVID GARONGA

HIGH COURT OF ZIMBABWE

CHAREWA J

HARARE, 26 October & 18 November 2015, 11 & 23 March 2016

**Civil Trial**

Ms *L Rufu,* for the plaintiffs

*Mr Hashiti,* for 1st & 2nd defendants

*Mr A Chambati,* for 3rd defendant

CHAREWA J: The plaintiffs issued summons against the defendants, jointly and severally, the one paying the others to be absolved, for damages for pain, shock and suffering, embarrassment, harassment, stress, humiliation, mental anguish, *contumelia* and loss of dignity arising out of unlawful eviction of the plaintiffs from their home “on the strength of fraudulently obtained documents”.

In response, apart from pleading to the merits, the defendants raised the following points of law which were argued at the commencement of the trial:

1. That the plaintiffs’ claim was prescribed;
2. That plaintiffs’ did not have *locus standi;* and finally
3. That the Court did not have jurisdiction.

THE FACTS

Sometime prior to February 2010, the plaintiffs borrowed money from Hamilton Property Holdings (Private) Limited for which they used their property, Stand 442 Good Hope Township of Lot 4 of Goodhope as security. On 22 February 2010, Hamilton Property Holdings caused the property to be transferred to itself under Deed of Transfer 601/2010 for alleged non-payment of the loan and went on to sell the property to the third defendant herein.

It is not clear on the record, whether such transfer to Hamilton Property Holdings was from the plaintiffs, and if the plaintiffs ever held title to the property, or whether the legal services of the first and second defendants were used during the sale to third defendant.

However, it is apparent from the record that, utilising the services of the first and second defendants, the third defendant “obtained”, on 6 April 2011, a High Court order in HC 5434/11 ordering transfer of the property to himself. Transfer was duly effected to the third defendant on 24 May 2011 under Deed of Transfer 2250/11.

The Registrar has since deemed not to be genuine the “order” of the Court in HC 5434/11, advising that the case number is for a different record, and the judge who is alleged to have issued the order did not sit in motion court on that day, and further that the signature on the order is not that of a properly authorised signatory to High Court orders.

Nevertheless, armed with that order and Deed of Transfer 2250/11, the third defendant, again using the services of the first and second defendants, obtained an order of eviction against the plaintiff in the magistrates court under case number 1128/12. It is from this ensuing eviction that the plaintiffs claim damages aforesaid.

While, this is not relevant to the issues before me, note must be taken that, the plaintiffs have commenced separate legal proceedings in HC 13566/12 against the third defendant, Hamilton Property Holdings, the Registrar of Deeds and the Sheriff- Harare, for an order setting aside the transfers to Hamilton Property Holdings, and from that company to third defendant.

Further, through non-judicial processes, the plaintiffs have regained occupation, and the property in issue has since been registered back into the name of Hamilton Property Holdings.

WHETHER THE PLAINTIFFS CLAIM HAS PRESCRIBED

The defendants raised the issue whether the plaintiffs’ claim, having arisen in 2010, when Hamilton Property Holdings sold the property to the third defendant, had not prescribed. However, in their heads of argument, they did not address this issue at all, raising the presumption, which they did not discharge during the hearing on 11 March 2016, that they had abandoned this line of argument, or conceded that the claim had not prescribed.

I am therefore persuaded by the uncontroverted arguments by the plaintiffs that the cause of action arose in 2011 when the third defendant obtained a court order ordering transfer of the property in question to himself and proceeded to take such transfer. Summons in this matter having been issued in 2013, the matter had not prescribed.

WHETHER PLAINTIFF’S HAVE *LOCUS STANDI* TO SUE FOR DAMAGES FOR UNLAWFUL EVICTION AGAINST DEFENDANTS

The defendants further alleged that the plaintiffs had no rights in the property, it being registered to Hamilton Property Holdings, and as such lacked *locus standi* to claim damages for unlawful eviction. Coupled to this, the defendants averred that since Hamilton Property Holdings was the registered title holders, it ought to have been joined to the case as the plaintiffs’ eviction was merely consequential to proceedings instituted against the company and not against the plaintiffs.

In this regard, it is instructive to note that the alleged fraudulent High Court Order in HC 5434/11 was against Hamilton Property Holdings as the seller of the property. The subsequent eviction proceedings under MC 1128/12 were still against that company as the first defendant and only against the first plaintiff as the second defendant claiming rights of occupation through the company.

Further, note must be taken that the proceedings before me did not put into issue the status of the sale of the property by Hamilton Property Holdings to the third defendant. Perhaps that is the subject of the claim in HC 13566/12. What was only put in issue was the “fraudulent” order which the third defendant “obtained” from this Court and through which transfer was effected to the third defendant and upon which basis the eviction of the plaintiffs was obtained.

The inescapable conclusion is that, had the third defendant then proceeded to obtain a valid order from the High Court, there would be no question at all about the lawfulness of plaintiffs’ eviction. By extension therefore, the absence of proof of title on the plaintiffs’ part, on the record before me, renders them vulnerable to eviction by someone with a stronger claim. Their only protection would have been a guarantee against eviction by the registered title holder, Hamilton Property Holdings, who ought to have owed them a duty to peaceful and undisturbed possession.

 In the absence of title, or an agreement of sale in favour of the plaintiffs, which created an implied warranty against eviction, I do not see how joinder of Hamilton Property Holdings was not crucial to the plaintiffs’ claim for damages for unlawful eviction by a third party with an apparently stronger claim.

Since this is not a spoliatory claim where mere possession is enough, I am not persuaded by the plaintiff’s argument that their mere possession of the property in question protected them from eviction. Nor am I convinced that such possession adequately grounded their *locus standi,* thus rendering joinder unnecessary.

However, in view of the fact that the High Court Rules provide that non-joinder or mis-joinder shall not defeat a cause or matter, I am not willing to rule that the plaintiffs’ cause was fatally defeated merely by failing to join Hamilton Property Holdings to this suit. I will rather hold my decision in abeyance pending the more grave challenge that this court lacks jurisdiction.

WHETHER THE COURT HAS JURISDICTION TO HEAR THE MATTER

 The defendants argued that the court lacked jurisdiction, firstly because a court of competent jurisdiction (the magistrate’s court), had rendered a judgment which is still extant. Thus, the defendants aver, firstly that there is no cause of action before this court, and secondly that the matter is therefore *res judicata.*

For their part, the plaintiffs argued that the Court does have jurisdiction because the High Court order grounding the Deed of Transfer 2250/11, under which authority the third defendant obtained the eviction order in MC 1128/12 was a nullity, thus rendering every other document and process based thereon null and void. For this they relied primarily on the case of *McFoy* v *United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1172 L.

 While *McFoy (supra)* is correctly cited by the plaintiffs to the extent that a void act is a nullity and incurably bad, thus not requiring a court order to set it aside, Lord Diplock, in the subsequent Privy Council case of *Isaacs* v *Robertson* [1984] 3 All ER 140 at 143c, qualified the statement in *McFoy* when he stated that the exception to the statement of the law in *McFoy* is that an order of a court of unlimited jurisdiction must stand until it is set aside.

Consequently, McNally JA, in *Manning* v *Manning* 1986 (2) ZLR (1) SC at 3F–Gaccepted the words of Romer LJ in *Hadkinson* v *Hadkinson* [1952] 2 All ER 567 at 569 that:

“….it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a **court of competent jurisdiction** (his emphasis) to obey it unless and until that order is discharged.”

 McNally J went on to say, at 3 G-4A,

“The fact remains that the village court was not a court of unlimited jurisdiction. It was not…..a court of competent jurisdiction. Its position was governed by the rule “that judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are certain exceptions, one of them being that, where a decision is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside” - per Fannin J in *Mkhize* v *Swemmer & Ors* 1967 (1) SA 186 (D) at 197 C-D”.

See also *Dube* v *Maphepa Sindicate & Ors* HB5 2009 at 3 where, relying on *Manning (supra)*, the Court held that when a magistrate court does what is not within its jurisdiction, the result of what it purports to do is void and a nullity in law with no force or effect.

It would seem therefore that the general principle in our jurisdiction is that judicial decisions of courts with competent jurisdiction will stand until set aside by way of appeal, review or other methods. However, the exception is that where a court acts without jurisdiction, then its decision may be disregarded without the necessity of a formal order setting it aside.

*Ergo,* an order of a court of competent jurisdiction must be respected whether or not it is void, a nullity or issued under fraud or in error. It is only where the court acts without competent jurisdiction that its proceedings are rendered *void ab initio* and a nullity thus making the case of *McFoy (supra)* relevant.

In the present case therefore, it has not been alleged that the magistrate court was not competent to deal with the claim for eviction before it. While admittedly, the court might have been deceived by the fraudulent documents placed before it, its judgment was within its jurisdiction and remains extant. No attempt has been made to set it aside on grounds of fraud. To request this court therefore to order damages for unlawful eviction in these circumstances is tantamount to requiring this court to set aside the judgment of the magistrates’ court by the back door, for I would have to make a finding that, based on fraud, the order of eviction was wrongful and unlawful, and thus set it aside. Yet, on the papers before me, such a relief is not being claimed.

Consequently, while I abhor the conduct of the defendants, I cannot but agree with them that as long as the order of the magistrate’s court is extant, there can be no cause of action for damages for unlawful eviction by the plaintiffs, regardless of the fact that the order may have been obtained on the basis of fraudulent documents, since the magistrates court was well within its jurisdiction to order such eviction, however erroneously.

Further, I also agree that as long as the judgment of the magistrate’s court remains extant, the matter of the eviction of the plaintiffs is *res judicata.*

On this basis alone, I find that the plaintiffs claim is not sustainable.

COSTS

With regard to costs on the higher scale claimed by the third defendant, I do not believe that these are warranted. The conduct of the defendants, in obtaining and using apparently fraudulent documents, raises a lot of questions about their integrity and ethics. Had plaintiffs followed the developments in the case law emanating from *McFoy (supra)* and followed proper procedures to set aside the judgment of the magistrates’ court, there is no doubt that their claim would have been decided on the merits. In the premises, I do not believe that the third defendant is entitled to costs on the higher scale.

DISPOSITION

Consequently, it is ordered that the plaintiffs’ claim is dismissed with costs on the ordinary scale.

*Dzimba Jaravaza & Associates*, plaintiff’s legal practitioners

*Dzvetero & Associates*, 1st and 2nd defendant’s legal practitioners

*Chambati Mataka,* 3rd defendant legal practitioners