

NYASHA MWATSIKA  
versus  
MARGARET NDUNA

HIGH COURT OF ZIMBABWE  
MWAYERA & MUNANGATI -MANONGWA JJ  
HARARE, 21 January 2016 and 30 March 2016

### **Civil appeal**

Appellant in person  
*T G Kuchenga*, for the respondent

MWAYERA J: The appeal was occasioned by an order for summary judgement granted by the court *a quo*.

The appellant raised the following grounds of appeal:

1. The learned magistrate erred in granting the application for summary judgement against the appellant to vacate house number 6256 Bloomingdale, Harare without taking into consideration that the property was undervalued and the money given to the appellant as her share of the purchase price is not what she is entitled to hence she cannot be evicted without getting her proper share and had agreed with her husband that she will get US\$42 700.00.
2. The learned magistrate erred in not taking into consideration that the agreement of sale for the property which was signed on 13 May 2013 is null and void because by then the parties had not yet agreed to have the property sold and such agreement was then made on 24 October 2013 after the agreement was drawn meaning to say when the property was sold by George Nsinganu he had no right to do so since George Nsinganu and the appellant had not yet agreed to have the property sold and agree the purchase price for the property.
3. The learned magistrate erred in not taking into consideration that the property was undervalued and there was need for parties to agree on the selling price of the property and on the evaluator to evaluate the property before the property is sold

since the order of the court dated 24 October 2013 stipulates that the property is to be sold to the best advantage of the parties.

4. The learned magistrate erred in not finding out that the sale which gave ownership of the house to the respondent is null and void because the house was sold without the consent of the appellant as co-owner hence the appellant was supposed to be part of the sale and the amount of \$55 000.00 which the property is alleged to have been sold is in dispute.
5. The learned magistrate erred in not finding out that there were material disputes of facts and the matter should have been referred to trial and also that the appellant's husband's legal practitioner fraudulently uplifted the caveat which the appellant had placed on the property.

The brief background to the matter has to be put into perspective. The respondent purchased immovable property from the appellant's former husband in May 2013. The appellant and her husband were to share proceeds of the sale. The appellant's share was remitted to her through her legal practitioners Messrs Nyamushaya, Kasuso and Rubaya. The same payment was confirmed by Messrs FG Gijima and Associates legal practitioners who took over from the former legal practitioners in representing the appellant. The property in question having been fully paid for was transferred to the respondent on 4 March 2014. In terms of the sale agreement, the appellant was given 3 months' notice to vacate. The appellant did not oblige thus occasioning issuance of summons for eviction by the respondent in the court *a quo* on 9 June 2014. The appellant entered an appearance to defend the summons for eviction. The respondent successfully applied for summary judgement since the appellant had no defence to the eviction claim. The court *a quo* made a finding that the appellant received her share of the proceeds of sale of the house in question and thus had no valid good defence to the application for eviction. The court *a quo* then granted the summary judgement which forms the basis of the present appeal.

In coming up with the decision, the court *a quo* considered the requirements of summary judgement which can be summarised as

- (1) the existence of a *bona fide* defence and
- (2) no prospects of success because the applicant's claim is unanswerable. In other words, the defence has been solely entered for purposes of delay.

The cases of *Intermarket Stock Brokers (Pvt) Ltd v Chikonyora* HH 44/07 and

*Shamutete v Mycraft Engineering (Pvt) Ltd* HH 196/14 are instructive on the requirements to be satisfied for summary judgment to be granted. The court stated, “for the applicant to succeed in an application of this nature, he must show that he has a clear and definitive claim against the respondent. Applicant must show that the defendant has no valid defence to the claim. Once the plaintiff has discharged his onus the onus shifts to the defendant to show that he has a *bona fide* defence to the claim”

In an application for summary judgment the defendant must show that he has a good *prima facie* defence to the action and there is a triable issue for the dismissal of the application for summary judgment. The defendant must raise a defence failing which the application for summary judgment ought to be granted. I subscribe to the sentiments echoed by Takuva J in *NRZ Contribution Funds v Safari Gift and Kitchenware and Ors* HB 122/15 whereby he said:

“Quite evident, summary judgment ought to be granted where the facts alleged do not amount to a *bona fide* defence or where the applicant’s case is unanswerable or where it would not result in an injustice”.

See also *Stationary Box (Pvt) Ltd v Natcorn (Pvt) Ltd and Anor* 2010 (1) ZLR 227 (H).

In the present case it is clear the respondent purchased the immovable property in question, 6256 Bloomingdale from the appellant and her former husband. The respondent paid for the property and the property was then transferred to him. The appellant acknowledges receiving her share of the proceeds. She seems to suggest she should have received more from the sale. Her expectation and reality given the sale was by agreement does not amount to a genuine defence to the eviction claim. This is moreso when we consider that the respondent as the owner of the property had a right to seek to evict the appellant who had been paid her share of the proceeds from the sale of the house. The appellant’s argument that the property was undervalued cannot be sustained given the sale of property was by agreement between the appellant and husband on the one part, and the respondent as the buyer. The appellant confirmed receiving her share of the sale proceeds. In any event even if the property was undervalued that would not amount to a genuine defence for the appellant in respect of the respondent’s eviction claim. The sale of the property to the respondent was by agreement of the appellant and her husband. The respondent was not part and parcel of the decision to sale. The respondent appears as an innocent purchaser who bought property which was up for sale. Basing on his acquired right he then rightfully sought to evict the appellant.

In the absence of a genuine defence to the claim for eviction the magistrate’s court

correctly granted summary judgment for eviction. It appears from the record that the court *a quo* made a finding that there were no triable issues. Further that there was no possibility of success on the part of the appellant given the property was sold by the appellant and her husband and that the appellant got her share of the selling price. The defence raised was just raised to delay the respondent's claim in otherwise clear and undisputed circumstances.

The appeal has no merit and it must fail.

Accordingly it is ordered that:

1. The appeal be and is hereby dismissed
2. The appellant shall bear the costs of suit.

MUNANGATI-MANONGWA J agrees .....

*Karuwa & Associates*, respondent's legal practitioners