

CHRISTINE MUSANHU  
versus  
GEORGE MUSANHU

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 24 January 2017

**Opposed matter**

*T. Bvekwa*, for the applicant  
*N. Goro*, for the respondent

MUNANGATI-MANONGWA J: The applicant and respondent were husband and wife until 30 July 2015 when divorce was granted in favour of the wife through a default judgment. The divorce order also dealt with distribution of the matrimonial assets. One of the immovable properties awarded to the applicant is described as “the remaining extent of Lot 361 Highlands Estate of Welmoed measuring 5 202m<sup>2</sup> registered under deed No. 3476/96 also known as No 18 Knightsbridge Road Highlands (hereinafter called “the property”). It is this property which is the subject of this application.

The applicant is among other things applying for eviction of the respondent and all those claiming occupation through him from the property on the basis that she is the owner of the property by virtue of the award by the court. Below is her prayer:

“IT IS ORDERED THAT:

1. The respondent and all those claiming rights of occupation through him be and are hereby evicted from certain piece of land called lot 361 Highlands Estate of Wemoed measuring 5 202m<sup>2</sup> registered Number 3476/96 dated 17 may 1996 also known as 18 Knightbridge Road, Highlands, Harare.
2. The respondent surrenders deed of transfer Number 3476/96 dated 17 May 1996 to the applicant’s legal practitioners within forty-eight (48) hours of service of this order upon him.
3. Should the respondent fail, refuse and/or neglect to comply with (2) above it be and is hereby declared that the said deed of transfer is lost.
4. In the event of (3) above, the applicant be and is hereby entitled through the Sheriff to make any necessary application for its replacement.
5. Respondent pays costs of suit at the level of legal practitioner and client.”

It was submitted on behalf of the applicant that the default judgment which was granted in her favour remains extant. The award of the property to her conferred rights to her as the owner hence her claim for surrender of the title deed to facilitate transfer of rights and indeed her prayer for defendant's eviction. Mr *Bvekwa* for the applicant sought to rely on the principles of *rei vindicatio*. He argued that applicant only had to prove two aspects: that she is the owner of the property and that the respondent is in possession thereof without her consent. For that, Mr *Bvekwa* relied on *Savanhu v Hwange Colliery Company*<sup>1</sup> and *Stanbic Finance Zimbabwe Ltd v Chivhungwa*<sup>2</sup>. He submitted that the applicant had satisfied those requirements as she had proved that she is the owner of the property by virtue of the court order and it was not disputed that the respondent is in possession of the property. In the absence of an order staying execution she is entitled to execute upon the order. Apparently the respondent had fraudulently obtained a stay of execution but this court upon application by the applicant set aside the order in HC 8962/15 on the 29<sup>th</sup> November 2015. Mr *Bvekwa* submitted that due to these reasons there is no bar for her to obtain the relief she sought.

Costs on a higher scale were being sought against the respondent on the pretext that the respondent had frustrated the applicant's efforts to realise what she had been awarded. Mr *Bvekwa* sought to buttress this by providing information on other cases which information was not in the papers and therefore could not be admitted.

The respondent initially raised points *in limine* which were abandoned at the commencement of the hearing. Mr *Goro* for the respondent submitted that there is a pending application for rescission of judgment in case number HC 7712/11 so the applicant could not seek such relief at this juncture. He argued that parties had appeared before CHITAKUNYE J on 7 January 2016 and agreed to stay proceedings until the application for rescission of default judgment had been determined. Reliance was placed on the following order

“IT IS ORDERED THAT

Parties have agreed that having conceded rescission of order in HC 8962/15 the application for rescission of default judgment HC 7712/11 must proceed to its logical conclusion/determination.”

In light of the above, respondent argued that the application should be postponed *sine die* pending the determination of the application for rescission of the default judgment. Mr *Goro*, further submitted that if the application is granted this will mean parties will be

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<sup>1</sup> SC 8/2015

<sup>2</sup> 1991 (1) ZLR 262

prejudiced in terms of legal fees should the application for rescission of judgment be granted. The transfer to the applicant will then be reversed and there might be a court application to then compel transfer back to the respondent. Given that scenario, it was argued that it is proper to postpone the application. On the issue of costs, Mr *Goro* submitted that there is no need for the court to award the applicant costs on a higher scale because the respondent has not argued the matter on the merits. He advocated for ordinary costs.

The applicant's counter –argument to this submission was that no stay of execution was ever agreed to and there is no order to stop applicant from proceeding with execution having satisfied the requirements of *rei vindicatio*.

Clearly the order by Chitakunye J of the 7<sup>th</sup> January 2016 does not show that the parties agreed on stay of execution. It simply stated that the parties had agreed that the application for rescission of default judgment had to proceed to its logical conclusion. That has not happened and the default judgment remains extant. The court finds that the respondent has not established any right to continue to hold to the title deed. The only defence proffered is that there is an application for rescission of judgment. That in itself cannot be a defence to the applicant's claim. The applicant had rights to the property bestowed upon her by the court, the order remains extant and she is well within her rights to seek transfer of the property which she can only do when in possession of the title deed. In the absence of an order for stay of execution there is no legal impediment for the applicant to execute upon the court order, in seeking surrender of the title deed to enable transfer.

However the applicant's claim for eviction cannot be sustained as the applicant does not hold real rights to the property until transfer is effected. She is not an owner but holds potential rights to the property duly sanctioned by a court order. Until there is transfer of rights of ownership from the existing owner, the respondent in this case, applicant cannot be the owner.<sup>3</sup> Mr *Bvekwa* for the applicant wrongly sought to rely on the principles of *rei actio vindicatio* in this matter. The principles are not applicable because the applicant is not a registered owner yet with the right to vindicate an item in possession of another party. She has personal rights. In that regard she cannot evict the respondent until she acquires real rights to the property hence ownership thereof. The cases cited by Mr *Bvekwa* being *Savanhu v Hwange Colliery Company* and *Stanbic Finance Zimbabwe Ltd v Chivhungwa* (cited supra) are on point on *actio rei vindicatio* but certainly do not apply in this matter. As there

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<sup>3</sup> See Principles of the Law of Sale and lease by Bradfield & Lehmann 3<sup>rd</sup> edition at page 16

was no evidence on record that the respondent frustrated applicant's claim to great lengths coupled by the fact that it is always difficult for some parties in divorce proceedings to let go, the court does not find it necessary to award costs on a higher scale as prayed for by the applicant. Accordingly, it is ordered as follows:

1. The respondent shall surrender deed of transfer No. 3476/96 dated 17 May 1996 to the applicant's legal practitioners within forty-eight (48) hours of service of this order.
2. Should the respondent fail, refuse and/or neglect to comply with paragraph 1 above, the Sheriff of the High Court and the Registrar of Deeds be and are hereby ordered to facilitate the replacement of Deed No 3476/96.
3. Respondent to pay costs of suit.

*Bvekwa Legal Practice*, applicant's legal practitioners  
*Kadzere, Hungwe & Mandevera*, respondent's legal practitioners