

MIKE MHLANGA

versus

IRENE MHLANGA

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

HARARE, 24 June 2020, 17, 20 and 23 July 2020

Mujaya E.T, for the plaintiff
Donga E, for the defendant

FAMILY LAW COURT – CIVIL TRIAL

CHIRAWU-MUGOMBA J: This matter falls squarely in the realm of the law of succession in Zimbabwe. The background is as follows. On the 24th of January 2014, the plaintiff issued summons against the defendant seeking the following relief:

- a. Eviction of the defendant and all those claiming through her from House number 1138 Section 3, Kambuzuma, Harare.
- b. Payment of arrear rentals amounting to \$17 280 for four rooms over a period of six years.
- c. Holding-over damages at \$240 *per* month from date of summons to date of eviction.
- d. Costs on a higher scale if defendant opposes, otherwise normal costs.

In his summons and declaration, the plaintiff made the following averments. He is the owner of the Kambuzuma house (the property) by virtue of Deed of Transfer no. 3302/94. The defendant was a wife to the plaintiff's late father and she is staying at the property despite having her own house as provided to her by her late husband. The plaintiff's father had three wives who include plaintiff's mother, the defendant and another wife who stays in section 5 Kambuzuma. The plaintiff's late father had a plan to provide all his wives with their own houses. The property in issue was for the first wife. The third wife had a house provided for her in Kambuzuma and to the defendant, he arranged that she joins a housing co-operative in Mabvuku and as a result she was allocated stand number 10700 in New Mabvuku. The plaintiff's father passed on before he could build a house in Mabvuku for the defendant.

Nonetheless, the cooperative has since built a house for her which she is renting out. She has refused to move out of the Kambuzuma property. She is occupying four out of six rooms.

In her plea, the defendant averred as follows. The plaintiff inherited the house from the deceased estate of his late father as an heir and thus he has an obligation to provide her with alternative accommodation. No house was acquired for her in Mabvuku. That house belongs to the Cooperative and payments were made since 2002 by the defendant's daughter. The defendant only uses three rooms and this arrangement has been sanctioned by the Master of the High Court. At an edict meeting held in 1994, it was ruled that the defendant and the plaintiff's mother should continue staying at the house. As a surviving spouse, defendant can continue staying at the property. If the plaintiff wants the defendant to leave, he has to provide the defendant with alternative accommodation. The defendant's stay is legal and she has is not liable to pay damages to the plaintiff.

The joint pre-trial conference minute reflects the following as the issues:

1. Whether or not the plaintiff still has an obligation to provide the defendant with accommodation, when the defendant now has her own house?
2. Whether or not the defendant joined the housing cooperative in Mabvuku at the instigation of the plaintiff's father?
3. Should the defendant pay arrear rentals, holding over damages and costs on a higher scale?

The admissions were recorded as follows:

1. The plaintiff inherited House number 1138 Section 3 Kambuzuma in his own right in May 1994.
2. The plaintiff provided defendant with accommodation from 1994 to date, a period of 21 years.
3. The defendant joined a housing co-operative in Mabvuku, while her husband was still alive.
4. The defendant was allocated House no. 10700 in New Mabvuku in 2005 and is now a landlady.

The trial itself was very short. The plaintiff's evidence-in-chief was through his mother Efradia Mhlanga acting through a power-of attorney since the plaintiff is based in the United Kingdom. She told the court that the plaintiff is her son. When her husband passed away in 1997 the plaintiff was appointed heir to the deceased estate. In support, she produced

letters of administration dated the 15th of November 1994. The letters indicate that one Richard Chimbari was appointed Executor dative in the estate of the late Mwaoneka Isaac Mhlanga. The defendant was married to the late Mwaoneka but she was never at any point chased away. The plaintiff now sought eviction of the defendant since he was a registered owner. In support, a copy of title deeds of the property in the name of the plaintiff were produced. The defendant now stays in Seke and if the court authorises her eviction, she can leave end of August. Under cross examination, the plaintiff's Efradia stated that the defendant has a house in Seke that she built on her own though she did not have any proof. She also stated that the defendant started staying at the Kambuzuma property when their husband was still alive though she did not know the exact date but it was in the 1990s. The plaintiff's legal practitioner confirmed that the claim for arrear rentals and holding over damages was no longer being pursued.

On her part the defendant told the court that the plaintiff is her step-son. She married her late husband in 1991 in terms of the then African Marriages Act [Chapter 238]. She however started staying with him in 1980 at the property. Since then, she has not stayed at any other place. Her husband left her at the property and she has nowhere to go. Her husband considered that at that time, their children were young. She implored the court to have mercy on her. Seke is her home where she was born. The plaintiff had a duty to provide her with alternative accommodation. Her house in Mabvuku was paid for by her child. When she joined the cooperative in 1988 she was young and was working. She denied that it was her late husband who encouraged her to join the cooperative. The house was still in the name of the cooperative. In support of her contention, the defendant produced a rates statement from the City of Harare which indicates the name of the ratepayer as Kugarika Kushinga Cooperative. Under cross examination she conceded that although one of her children is staying at the property, all payments to the cooperative and to the City of Harare are made in her name.

From the pleadings and the evidence led, the following is common cause:

1. The plaintiff has real rights in the property through registration of title in his name as the heir to the deceased estate of his late father.
2. The defendant has been resident at the property since her marriage to the deceased.
3. The defendant owns a property in Mabvuku.
4. The plaintiff has not offered the defendant alternative accommodation.

In my view, the legal issue that arises is this- does the plaintiff have the duty to provide the defendant with alternative accommodation?

The law

The legislature has made provisions for the immediate protection of the family of a deceased person upon death. The first layer of protection is through the provisions of the Deceased Persons Family Maintenance Act [Chapter 6:03] specifically section 10 that reads as follows:

“10 Protection of deceased person’s family and property

(1) Notwithstanding any law, including customary law, to the contrary, when any person dies, any surviving spouse or child of such person shall, subject to section *eleven*, have the following rights—

(a) the right to occupy any immovable property which the deceased had the right to occupy and which such surviving spouse or child was ordinarily occupying immediately before the death of the deceased;

(b) the right to use any household goods and effects, implements, tools, vehicles or other things which immediately before the death of the deceased the surviving spouse or child was using in relation to such immovable property;

(c) the right to use and employ any animals which immediately before the death of the deceased were depastured or kept on such immovable property;

(d) to an extent that is reasonable for the support of such surviving spouse or child, the right to any crops which immediately before the death of the deceased were growing or being produced on such immovable property.

(2) Any person who does an act with the intention of depriving any other person of any right, or interferes with any other person’s right, that has accrued to that other person in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(3) A court convicting a person of an offence in terms of subsection (1) may order the convicted person or any other person to restore any property or pay any money which he has unlawfully acquired to the person entitled thereto in terms of subsection (1) or to any other person specified by the court, and any such order shall have the same effect and may be executed in the same manner as if the order had been made in a civil action instituted in the court.”

In other words, at death, the salient features of the protection afforded is as follows:

- a. The protection is afforded to all persons be it under general or customary law.
- b. A surviving spouse or child is entitled to remain in occupation of an immovable property that they were staying in immediately before death provided that the deceased was staying with them or the deceased had a right to occupy such property. This means if there is another property that the deceased was not occupying but had a right to occupy, the surviving spouse or child can also occupy such property if they were staying there immediately before death of the deceased.
- c. The surviving spouse or child have a right to use tools and household goods including motor vehicles that they were using immediately before death.

- d. They also have a right to use animals and have a right to any crops that were available to them immediately before death.

These protectionist rights are taken very seriously such that any infringement is a criminal offence (s 10 (2). These rights however are not in perpetuity .They “terminate upon completion of the administration of that portion of the deceased estate to which those rights relate” – see S11 (b).

During the era of the ‘heir’, an additional duty was placed on him (given that the male primogeniture rule was predominant) to look after the dependants of the deceased. He could not evict them without providing alternative accommodation.

Although a dependant was not defined, guidance could be gleaned from the definition in s2 as follows:

“dependant”, in relation to a deceased, means—

- (a) a surviving spouse;
- (b) a divorced spouse who at the time of the deceased’s death was entitled to the payment of maintenance by the deceased in terms of an order of court;
- (c) a minor child;
- (d) a major child who is, by reason of some mental or physical disability, incapable of maintaining himself and who was being maintained by the deceased at the time of his death;
- (e) parent who was being maintained by the deceased at the time of his death;
- (f) any other person who
- (i) was being maintained by the deceased at the time of his death.”

Registration of property bestows real rights that are enforceable against the whole world. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 105H-106A, McNALLY JA had this to say:

‘The registration of rights in immovable property in terms of the Deeds and Registries Act [Chapter 139] (now [Chapter 20:05]) is not a mere form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered.’

In my view, the acquisition of real rights and the expected duty of the heir reveals the tension between general law and customary law of inheritance. The immediate question is does the duty to provide alternative accommodation end upon the acquisition of title and does it apply to even those dependants who have accommodation already?

Application of the law to the facts

The two witnesses that is the plaintiff’s mother and the defendant in person appeared to be very simple women who did not appreciate the legal nature of the dispute. The plaintiff’s mother is also very elderly and it did not help matters that the legal practitioner also seemed unsure of what evidence to elicit from her. The defendant’s legal practitioner

also seemed to be unsure of what questions to put to her. As a result, the entire trial took about one and a half hours. The saving grace is that the question before the court was more legal than factual.

In *casu*, the plaintiff has acquired real rights in the property. The *causa* of the title is reflected in the title deeds as, “...*the undermentionend property has been awarded to MIKE MHLANGA heir in terms of the African Customary Law*”. Whilst it is accepted that as heir, the plaintiff has a duty to look after his late father’s dependants (the defendant is one such dependant), in my view that duty only applies in instances in which the defendant has no other suitable accommodation. In the *Masango* case (*supra*), the court considered that there was no other accommodation available for the widow and the dependants. The property in Mupururu has been gutted by fire and the house in Kambuzuma that was the deceased’s was the only available property. The court also rejected the submission that the widow and the dependants move to Rusape to live with the deceased’s senior wife and other relatives that they had never lived with before. The atmosphere in Rusape was one of animosity and that place could not qualify as alternative accommodation. In *casu*, the facts are distinguishable in that the defendant does have alternative accommodation in Mabvuku. Whether she acquired this property through the assistance of her deceased husband is neither here nor there. The fact also that her child paid for the property does not assist her case since she admitted that the house is in her name at the cooperative and that all payments are made in her name. If she moves to stay there, the atmosphere is not likely to be one of animosity since it will be with her own child. In my view, insisting as the defendant did that she be provided with alternative accommodation when she clearly has her own accommodation will result in an absurd situation in which she will remain at the property whilst interfering with the plaintiff’s real rights. It will mean that for pre 1st of November 1997 estates under customary law of which there are still many when the law of inheritance was changed to do away with the all-powerful heir, even those dependants who have a house of their own or houses, will still insist that the heir should still provide alternative accommodation. The plaintiff has been prevented since the 23rd of May 1994 when he acquired title to deal with the property as he sees fit. I am fortified in my view that even in terms of the Deceased Persons Family Maintenance Act, particularly s 11 (b) any protectionist rights must come to an end. The defendant did not show that the estate is still active. If anything, the *causa* again in the title deeds refers to a first and final liquidation and distribution account. This means that the estate of the late Isaac Mwaoneka Mhlanga was fully wound up and consequently the defendant

cannot insist on staying at the property for good. Having abandoned the claim for arrear rentals and holding over damages, the plaintiff is entitled to an order for eviction of the defendant from the property.

Costs are at the discretion of the court. In my view, the defendant has unnecessarily put the plaintiff out of pocket by clinging on to a defence that is not legally sustainable.

DISPOSITION

It is ordered that:

1. Judgment with costs is granted in favour of the plaintiff for the eviction of the defendant and all those claiming title through her from House number 1138 Section 3, Kambuzuma, and Harare.
2. The defendant and all those claiming title through her are ordered to vacate the premises described in paragraph (1) above within 14 days of the date of this order failure of which the Sheriff of the High Court be and is hereby empowered to effect the eviction.

Pundu and Company, plaintiff's legal practitioners

Legal Resources Foundation, defendant's legal practitioners