

STELLA MASUNGA
versus
FORWARD KAPIYA

HIGH COURT OF ZIMBABWE
MWAYERA & MUZENDA JJ
MUTARE, 13 February 2019 and 7 March 2019

Civil Appeal

B Majamanda, for the Appellant
Respondent in person

MUZENDA J: On 23 July 2018 Mr Forward Kapiya (the respondent) of Stand 254 Headlands Location issued summons at Rusape Magistrate's Court against the appellant, Stella Masunga where he was seeking eviction of the appellant from a commercial stand No193, Headlands known as Kapiya General Dealer. In the summons he averred that the appellant was his ex-wife and he had since separated with her and since she was then co-habiting with other men, she ought to move out of the property.

The defendant filed her appearance to defend and on 3 August 2018 she filed her plea. In her plea she contended that the respondent herein, was not the owner of the property. She is the one who bought Stand 193 in 2004 and started constructing it alone before customarily marrying respondent in 2006. When she married respondent in 2006 the shop was about to be roofed. In 2010 she admitted changing the name from her name to that of the respondent since respondent was going to marry her. When appellant changed the names she did not know that the respondent wanted to grab her shop.

On 12 September 2018 the matter proceeded to trial and both parties led evidence to prove their cases and called witnesses. After hearing the court granted eviction against the appellant and ordered her to vacate the premises by 31 December 2018. The order was granted on 19 November 2018. On 30 November 2018, the appellant noted an appeal against the whole judgment of the magistrate and outlined the rounds of Appeal as follows:

- “1. The learned Magistrate erred in ordering the eviction of the appellant by 31 December 2018 on Stand No. 193 Headlands, despite the following:

- (a) the stand in question belongs to the appellant
 - (b) that responsible authority which is in Makoni Rural District Council through its representative Fungai Misi, having been given subpoena, confirmed that appellant is the one who had purchased the said stand.
2. The learned Magistrate misdirected herself by failing to appreciate the evidence of the responsible authority to the effect that the stand is registered in appellant's name.
 3. The learned magistrate erred and misdirected herself by failing to consider the evidence of the responsible authority to the effect that indeed there was an attempt to do a cession but that was not done because there were issues which needed to be ironed out first.
 4. The court failed to appreciate that indeed appellant has a clear right over the stand hence could not be evicted.
 5. The court failed to appreciate that respondent was lying and sought to rely on his evidence.
 6. The court erred and misdirected itself in relying with the evidence of a brick moulder.
 7. The judgment imposed by the trial magistrate is shocking and should be set aside.

WHEREFORE appellant prays that an order for eviction imposed by the trial magistrate be set aside with costs that she be allowed to carry out her business as the owner of Stand 193 Headlands."

I have cited the prayer of the appellant to show that it is defective. However we condoned that defect in the interests of justice and allowed the appellant to argue its appeal. For the record, the prayer in an appeal should be framed as follows:

- “(a) the appeal is upheld with costs.
- (b) the judgment of the court *a quo* is set aside and substituted by the following, the claim for eviction of the defendant from Stand 193 Headlands is dismissed with costs.”

The appellant's legal practitioner, Mr *B Majamanda*, on the date of hearing sought the leave of the court to consolidate grounds of appeal 1, 2 and 3 to be represented by ground 1. Effectively appellant chose to abandon ground 2 and 3. Appellant also abandoned ground of appeal 7 though in counsel's submission he smuggled it back whilst seeking an order allowing the court to take into account the proprietary right of the appellant over Stand 193 Headlands. We allowed the consolidation and refinement of the grounds of appeal for there was no prejudice on the respondent. The grounds of appeal to be dealt with by this court were then 1, 4, 5 and 6.

WHETHER THE MAGISTRATE ERRED IN ORDERING EVICTION OF THE APPELLANT?

Appellant submitted that stand No. 193 Headlands belonged to her because it is still registered in her name on the papers held by Makoni Rural District Council. In appellant's own pleadings filed of record, she unreservedly and voluntarily contend that although she is the one who bought the stand (a fact which is disputed by the respondent herein) she changed ownership in 2010 when she was about to wed the respondent. To consolidate that commitment towards change of ownership there are copies of affidavits signed by both appellant and respondent and submitted at Headlands District office. Whether those papers were forwarded to Makoni Rural District Council offices for cession remains in our view academic.

The evidence of Fungai Misi was of no effect because the appellant in her own papers concedes that in 2010 she changed ownership of the stand to that of the respondent. The affidavits of cession signed by the appellant were not revoked nor set aside, they remain extant up to this date. In any case the court *a quo* dealt extensively on the evidence of the appellant, more particularly on the aspect of the purchase price.

Appellant in her pleadings contended that she bought the stand for ZW\$800-00. She later on changed the purchase price to ZW\$8 000-00. The purchase price of ZW\$800,000-00 through a cheque paid by the respondent was the one confirmed by the Rural Council employee and the court *a quo* justifiably impugned appellant's evidence on that aspect questioning how and why appellant conflicted herself on the price if she was the one who purchased the stand? This aspect was based on the credibility and the trial court believed the respondent.

There is no basis for this court to interfere with that finding of credibility and we find no misdirection on the part of the learned Magistrate. That element of the purchase price only added weight to the fact that the issue of ownership was resolved by the appellant herself on the date she deposed to an affidavit ceding her rights to that of the respondent. Ground of appeal number 6 denigrates the evidence of the brick moulder.

We fail to see the legal basis for criticising the learned Magistrate in placing probative value on that witness's evidence. The brick moulder Mr John Rwapungu was contracted to mould bricks (usually called "home-made") by the respondent. He agreed and did the work. He also ferried the bricks to the site using an animal drawn cart. There were no developments at the site. The moulder's bricks were the ones which were used by the respondent's builder to construct development at stand 193 Headlands.

The court *a quo* accepted the moulder's evidence and also respondent's evidence to the effect that the developments at stand 193 Headlands were effected by the respondent and belongs to him. We find no misdirection by the learned Magistrate. When all these aspects are considered cumulatively the finding by the court *a quo* that stand 193 Headlands was bought by the respondent and developed by him is unimpeachable and in fact belongs to the respondent. The appellant had to be evicted from that stand since she is not occupying it with the permission of the owner, hence the appellant was an unlawful occupier.

WHETHER THE COURT FAILED TO APPRECIATE THAT APPELLANT HAD A CLEAR RIGHT OVER THE STAND AND HENCE COULD NOT BE EVICTED

The appellant contends that she found a clear right and focuses her argument on the issue of registration of that with the local authority Makoni Rural District Council. As already ruled, if the appellant had not pleaded change of ownership in her papers as well as signing affidavits ceding such rights to the respondent, the interpretation of the situation might have been different. In our view, the intention to cede those rights by the appellant was done voluntarily and had not been reversed. The respondent's evidence that the property is now in his name has not been challenged in cross examination.

The application before the court *a quo* was that of eviction and not sharing of property. The appellant did not counter claim the stand ownership and does not raise fraud preceding her cession of rights. We are unable to agree with appellant's submissions that the court *a quo* failed to appreciate that appellant had a clear right. On the date, the appellant agreed to cede her rights to the respondent in 2010, the respondent acquired real rights over the stand. This ground of appeal has equally no merit.

WHETHER THE RESPONDENT WAS LYING AND WHETHER THE COURT ERRED IN RELYING ON HIS EVIDENCE

An examination of the record reflect that the appellant experienced difficulties to prove her case. She contradicted herself on the aspect of price of the commercial stand. Whether she bought it for ZW\$800-00 or any other price. Whether she agreed to cede her rights over stand 193 or still claims same. Whether she developed the subject stand from the ground. She struggled to prove and explain all these issues. It is difficult to comprehend appellant's arguments as to whom between herself and respondent could be adjudged to be misrepresenting

facts. In any case the heads of argument filed on behalf of the appellant has failed to highlight details of the respondent's lies. The pleadings of the appellant materially corroborate and substantiate the respondent's case and the trial court found respondent's evidence and testimony credible and held that the respondent on a balance of probabilities had managed to prove his case and granted the relief. We cannot fault the learned Magistrate's reasoning on credibility and the appellant has failed to lay facts to advance this ground of appeal.

What is clear from the papers is that the appellant was assigned to go and pay for the stand in her name without the approval of the respondent. Upon discovery of the situation by the respondent, the parties for whatever reason agreed to sign papers where the appellant ceded her rights over the stand to the respondent. Now that the appellant had separated from the customary union with the respondent she surreptitiously seeks to have this court redistribute the property. There is no misdirection on the trial Magistrate in dismissing appellant's defence and in our view there are no merits on the grounds of appeal.

Accordingly, the appeal is dismissed with costs.

MWAYERA J agrees _____

Khupe and Chijara Law Chambers, applicant's legal practitioners