

NOBILITY DIMBI v RONWEN INVESTMENT (PVT) LTD

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & OMERJEE AJA
HARARE, OCTOBER 8, 2012**

L Uriri, for the appellant

C Kwaramba, for the respondent

MALABA DCJ: At the end of hearing argument for both parties the court dismissed the appeal with costs. It was indicated at the time that reasons for the decision to dismiss the appeal would follow in due course. These are they.

The appellant is married in terms of the Marriages Act [*Cap 5:11*] to Tamuka Dimbi who is one of the directors and shareholders of the respondent company. In May 2006, the respondent company purchased stand number 3414 Mainway Meadows, Waterfalls, Harare from Way Mark Investments. The purchase price was paid in full. Development on the stand was done using the financial resources of the respondent company. The respondent company has four Directors, namely Kingsley Dumba, Tamuka Dimbi, Admire Meze and Susan Dimbi. Their shares are 40%, 40%, 10% and 10% respectively.

In November 2009, the appellant's husband was allowed by the respondent company to take occupation of house no. 3414 Mainway Meadows, Waterfalls, Harare, after a marital dispute with the appellant. The appellant followed her husband and joined him in the occupation of the house. The husband moved out after the marital problems persisted. He is now residing at number 191 Cheviet Road, Waterfalls. The appellant remained in occupation of the respondent company's house.

On 10 May 2010 the respondent company sued the appellant in the High Court, for an order of ejection. Although the appellant opposed the application the court *a quo* upheld the contention by the respondent company that she had no right to remain in occupation of the house. In a well reasoned judgment it held that the marital status gave her no right to occupy company property after vacation of the same by the husband under whose right of occupation she enjoyed residence. The allegation by the appellant that the respondent company was a façade created by her husband to place the property in question beyond her reach was dismissed.

The appellant attacked the decision of the court *a quo* on three grounds. The first ground is that the case had material disputes of fact which could not be resolved without *viva voce* evidence. The second ground is that the respondent is a façade and an alter ego of Tamuka Dimbi. The third ground is that stand number 3414 Mainway Meadows, Waterfalls is matrimonial property.

The first issue for consideration is whether there exist material disputes of facts which could not be resolved without *viva voce* evidence being led. The respondent applied to

the High Court for the ejectment of the appellant from the house on the basis of a claim of ownership. It produced a copy of the Title Deed Number 6/2011 to prove ownership of the house. The appellant did not contest the respondent's title to the property. The Court had to take judicial notice of the uncontested evidence of the Title Deed. Validity of the deed was not attacked.

In *Sumbereru v Chirunda* 1992(1) ZLR 240 (H) it is stated that opposition to an application on notice of motion is a shield of defence not a sword of attack. A respondent who has an attack must mount a counter application in terms of rule 229A of the High Court Rules. The court *a quo* correctly concluded that the respondent company had an uncontested title. The appellant conceded in the court *a quo* that the property is registered in the name of the respondent. It cannot be said that there was a material dispute of fact which was put in issue by the appellant.

Mr *Mubangwa* who represented the appellant in the court *a quo* made a concession to the effect that the appellant's case was weak. He accepted that she had no defence to the application. It has not been contended that the concession was wrongly made. That concession still binds the appellant.

On the question whether the respondent company is a façade and an alter ego of Tamuka Dimbi, the court *a quo* said:

“In my view lifting or piercing the corporate veil would not take the respondent's case any further. What is clear is that the respondent's husband owns 40 shares in the

Applicant company and the balance is held by other three shareholders. Her husband is not even a majority shareholder and is one of the four directors of the company. The respondent's husband cannot be deemed to be the alter ego of the Applicant Company.”

The appellant argued that although the property is registered in the name of the respondent, it belongs to her husband. She asked the court *a quo* to lift the corporate veil to see that the company is an alter ego of her husband. In the court's view whether or not the respondent is *alter ego* of her husband, it still has a right to eject the appellant from the house. A holding that the respondent company is Tamuka Dimbi's alter ego would show the husband as the owner of the property. She would not be the owner. The appellant claims a right of occupation on the basis that she is a wife of Tamuka Dimbi. That does not give her a right to remain in occupation of the house especially when the husband has offered her alternative accommodation. In *Dhlembeu v Dhlembeu* 1996 (1) ZLR 105 (SC) GUBBAY CJ said at p 108A in similar circumstances:

“I agree entirely with the learned judge that at this juncture the appellant has no legal interest in the property. There is, therefore, no valid basis upon which she may continue in occupation.”

The third issue is whether stand number 3414 Mainway Meadows, Waterfalls, is matrimonial property. In the heads of argument, the appellant alleges that the property in question is matrimonial property within the meaning of the Matrimonial Causes Act [*Cap. 5:13*].

In the court *a quo* the respondent company showed that the appellant's husband was not the sole shareholder. The argument that the appellant's husband, is the sole shareholder

of the respondent company is not supported by any evidence. There is no evidence that the appellant's husband used his resources to finance the purchase of the property by the respondent. The appellant did not place any evidence before the court to show that at any other time, her husband exercised sole and complete control over the respondent company. The papers show that he was never a sole shareholder or only an active director of the respondent company.

Proof of ownership of the property by the respondent company in the form of a copy of the Title Deed produced in the court *a quo* disproved the claim that the house is matrimonial property.

It was for these reasons that the Court held that the appeal was devoid of merit.

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

Kantor & Immerman, appellant's legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners