

REPORTABLE (11)

SUSAN JANUARY
v
NORMAN MAFEREFU

**SUPREME COURT OF ZIMBABWE
GOWORA JA, MAVANGIRA JA & UCHENA JA
HARARE: JULY 28, 2019 & FEBRUARY 4, 2020**

S. January, in person

H. Chitima, for the respondent

UCHENA JA: This is an appeal against the whole judgment of the High Court, upholding the respondent's claim for eviction against the appellant.

The detailed facts of the case can be summarised as follows;

The respondent issued summons for the eviction of the appellant from Stand No. 936 Glen Norah Township, Harare (the property) and holding over damages at the rate of US\$ 330.00 per month. The respondent claimed that he was the owner of the property and that the appellant was unlawfully occupying it. The appellant opposed the respondent's claim alleging that she was lawfully occupying the property because it was owned by Bafion January her late father. She further claimed that the property had been fraudulently acquired by the respondent. The following issues were referred for trial:

1. Whether or not the plaintiff (respondent) is the lawful owner of Stand No. 936 Glen Norah Township, Harare.
2. Whether or not plaintiff (respondent) is entitled to damages for unlawful holding over against defendant (appellant) and the quantum thereof.

At the trial, the respondent testified that he bought the property in 2013 for US\$20 000.00 from Felix Katsvamutima Shamuyarira (Shamuyarira) even though the property was still in the name of one Bafion January. Upon attempting to register the cession of the property from Shamuyarira's name into his name, the respondent was advised by the City of Harare that the property had to first be ceded from Bafion January's name to Shamuyarira's name through the registration of a cession of the property at its offices, after which the property could thereafter be ceded to him by Shamuyarira. According to documents in the record this process was followed and the registration of the cession of the property from Shamuyarira's name to the respondent was recorded by the City of Harare.

Shamuyarira, who testified on behalf of the respondent, told the court *a quo* that he bought the property from Bafion January in 1991. Bafion had acquired the property from the City of Harare in 1983 through a deed of sale. He further testified that he grew up using his mother's surname, Chabuka which he later changed to Shamuyarira and in support of this he produced his birth certificate. It was also contended that whilst the property was bought in 1991, ownership was only changed into Shamuyarira's name in 2013 because Ellen Manyanga (Bafion's ex-wife) was in occupation of the house and had indicated that she wanted to buy back the house from him. Shamuyarira further explained that the delayed change of ownership was also due to the documents relating to the property having been lost but were found in 2012. The respondent denied any allegations of fraud.

In support of her case, the appellant called two witnesses who did not give any meaningful testimony in support of her case. They had no direct involvement in the matter and could not dispute the agreement which had been concluded between Bafion January and Shamuyarira in 1991 and the subsequent agreement between Shamuyarira and the respondent. The appellant herself testified and alleged that the property could not be sold because Bafion January's wife had not given her consent to such sale and further that she had the right to occupy the property since it was part of her father's estate. She also alleged fraud in the transfer of the house to the respondent.

In analysing the evidence, the court *a quo* found Shamuyarira's explanation that the transfer had taken long because Bafion's ex-wife wanted to buy back the property believable as it was supported by evidence. The issue of whether or not Chabuka and Shamuyarira was the same person was resolved in favour of the respondent as Shamuyarira's birth certificate was produced. It proved that his mother's surname was Chabuka thereby confirming that Chabuka was his mother's surname. This evidence confirms Chabuka's change of surname from Chabuka to Shamuyarira. The court *a quo* believed the respondent's explanation as to why the property bought in 1991 was transferred 22 years later in 2013. In the same vein, the court *a quo* did not believe the appellant's evidence that the property had been fraudulently sold to the respondent.

The court *a quo* held that the sale was lawful and that the appellant's witnesses' evidence did not deal with the determinant issues of the matter. The appellant's allegations of fraud were dismissed because there was no evidence to prove it and the alleged complaint to the City Council was contradicted by the City Council processing the cession of the property from Bafion January to Shamuyarira and from Shamuyarira to the respondent. It is also

surprising that if fraud had occurred the appellant would not have pursued her alleged report to the police. Consequently, the court *a quo* held that the respondent had proved his claim for eviction and was thus entitled to vacant possession of the property. It however held that the claim for holding over damages had not been proved.

Aggrieved by this decision, the appellant noted an appeal to this Court on four grounds of appeal which raised the issue of “whether or not the court *a quo* erred by granting the respondent’s claim of eviction against the appellant”.

Whether or not the court *a quo* erred by granting the respondent’s claim for eviction against the appellant.

The appellant submitted that Shamuyarira’s evidence was contradictory in that what he said and what appeared on his birth certificate was different. She further contended that when her parents died, they were still staying in the property and that she was told that the sale of the property never materialised. She argued that the sale of the property was fraudulent which explained why it took more than 20 years to go through. She stated that she did report the allegations of fraud to the police but Shamuyarira seemed to have influence over everything. The appellant argued that the transfer of the property ought to be set aside as it was premised on fraud and that the issue was still under investigation at the City Council.

The appellant’s evidence and allegations are contradicted by the following evidence in the record:

1. That her parents had divorced and the sale of the house was part of the divorce order.
2. The Agreement of Sale between Bafion January and Chabuka.

3. Letters from Bafion January and his Lawyers Gutu and Jakachira, inviting January's former wife to come and collect 2/3 of the purchase price as had been ordered by the court in the divorce order, her refusal to accept the money and her opting to buy back the house from Chabuka. and
4. The partial processing of the cession of the house to Chabuka from Bafion January of 1993.

On the other hand, Mr *Chitima* for the respondent submitted that the court *a quo* was aware of the fraud allegations but held that they had not been substantiated. He submitted that if the appellant was serious about the fraud allegations, she ought to have made a police report and pursued the issue to its logical conclusion. Mr *Chitima* further argued that the appellant failed to challenge the documentary evidence presented by the respondent which established that the sale of the property was above board and lawful. He submitted that the appellant had failed to establish a greater right to entitle her to continue staying in the property. In concluding his submissions Mr *Chitima* submitted that as the allegations of fraud had not been proved the appeal ought to be dismissed as it has no merit.

The Court *a quo*'s analysis of the evidence is unassailable. It correctly analysed the evidence led before it and concluded that Bafion January had lawfully sold his house to Felix Katsvamutima Chabuka who later changed his surname to Shamuyarira. It further correctly held that Shamuyarira subsequently sold the house to the respondent.

It is common cause that the respondent's claim for eviction was granted on the basis of the *rei vindicatio*. The *rei vindicatio* is a common law action in terms of which an owner of a thing is entitled to claim possession of his property from whoever is in possession.

of it without his consent. In *Savanhu v Hwange Colliery Company* SC 8/15, this Court held as follows:

“The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in *Chetty v Naidoo* 1974 3 SA 13 (A):

It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right).”

According to *Gibson JTR Willes Principles of South African Law* (7th ed, Juta & Co Ltd, Cape Town, 1977) at p 203, it makes no difference whether the possessor is *bona fide* or *mala fide*, the owner of a movable may recover it from any possessor without having to compensate him, even from a possessor in good faith who gave value for it. The author further states as follows regarding the vindication of immovable property:

“In the case of land, the absolute owner of the land may claim the ejectment of any person in possession of it, and also an interdict restraining persons from continuing to trespass on it, as well as damages for loss or destruction caused by trespassers.”

In light of the above, the requirements of the common law action of *rei vindicatio* are two fold, that is, the plaintiff must prove ownership of the property and that the defendant was in possession of the thing when the action was instituted. *In casu*, the respondent proved that he was the owner of the immovable property and he did this through the cession agreement in terms of which Felix Katsvamutima Chabuka Shamuyarira transferred his rights in the immovable property to him. The cession was done pursuant to an agreement of sale dated 17 December 2013 in terms of which the respondent bought the property from Shamuyarira for US\$ 20 000. Consequently, the element of ownership of the immovable property was proved. That the appellant was in possession of the property is not in dispute. Therefore, the second requirement of the *actio rei vindicatio* was established. The appellant, on the other hand failed

to establish any defence to the respondent's claim. There are basically four main defences to a claim of *rei vindicatio* which are:

- (i) that the applicant is not the owner of the property in question.
- (ii) that the property in question no longer exists and can no longer be identified
- (iii) that the respondent's possession of such property is lawful
- (iv) that the respondent is no longer in physical control of the property – See the cases of *Chetty v Naidoo (supra)* and *Residents of Joe Slovo Community v Thabetsisha Homes* 2010 (3) SA 454 (CC).

The appellant seemed to rely on the first and third defences as she alleged that her possession of the property was lawful because the property was part of her father's estate and further, that the respondent had acquired the property fraudulently. In view of the evidence the court *a quo* believed and relied on, it correctly disbelieved the appellant's version and held that the property had been sold before her father's death. As regards the fraud allegations, it is clear that the alleged fraud was not substantiated and that the appellant's conduct since 2012 was not consistent with a person who believed that a fraud was being committed against her father's estate. I am satisfied that the court *a quo* correctly made these factual findings. It is trite that this Court will not lightly interfere with factual findings of a lower court. In *ZINWA v Mwoyounotsva* SC 28/15 this Court held that:

"It is settled that an appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it, or that the decision was clearly wrong."

In this case, the appellant failed to establish the basis upon which the court *a quo*'s factual findings can be impugned. The appellant failed to prove her defence of lawful occupation of the respondent's property and the alleged fraudulent purchase of the property from her late father. As was held in *Nyahondo v Hokonya & Ors* 1997 (2) ZLR (S) 457 at 459

it is trite that he who makes an affirmative assertion, whether plaintiff or respondent, bears the onus of proving the facts so asserted.

In view of the appellant's failure to prove any defence to the respondent's claim, she and all those claiming occupation of the property through her should be evicted from the respondent's property.

The appeal has no merit. It is therefore dismissed with costs.

GOWORA JA:

I agree

MAVANGIRA JA:

I agree

Mutandiro, Chitsanga & Chitima Attorneys, respondent's legal practitioners