

MARBLE T. T. MOYO

Versus

BICKELIA MAJOLA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 11 AND 17 JUNE 2010

E Dzoro for applicant
S S Mazibisa for respondent

Opposed Court Application for Rescission

KAMOCHA J: After hearing arguments from both legal practitioners I dismissed the application and indicated that my reasons would follow in due course. These are they.

The applicant in this matter seeks an order in the following terms:-

“It is hereby ordered that:-

1. The default judgment granted by this honourable court on the 13th of March 2008 be and is hereby rescinded;
2. The applicant be and is hereby given leave to file heads of argument within fourteen days from date of this order; and
3. Costs be costs in the main cause.”

The default judgment of 13 March 2008 was granted pursuant to a court order of 25 February 2008 which granted the present respondent leave to set down her matter on the unopposed roll. She then was granted the following order.

“It is ordered that:-

1. the applicant be and is hereby declared to be the legal owner of stand number 1346 Bulawayo Township also known as number 53, 15th Avenue, Bulawayo;
2. the respondent be and is hereby ordered to vacate the restaurant and flat she is occupying at stand number 1346 Bulawayo Township, also known as number 53, 15th Avenue, Bulawayo within 5 days of service of this order failing which the Deputy Sheriff, Bulawayo be and is hereby ordered to evict the respondent and all those claiming through her and give vacant possession to the applicant or her agents; and

3. the respondent be and is hereby ordered to pay costs of suit on an attorney-client scale for this application.”

When the applicant was about to execute the above default judgment the respondent applied for and was granted a provisional order staying the execution of the judgment on 17 April 2008 pending the determination of the present application for rescission for judgment which had been filed the previous day – 16 April 2008.

At the hearing it was agreed that both applications be dealt with on the same day. It was further agreed that the application for rescission of judgment be heard first as its determination would affect both applications.

The relevant background information in the matter is that during April 2005 Bickelia Majola entered into an agreement of sale of the property at the centre of the dispute with its then owners who were being represented by Ebrahim Hassen Esat. The property was transferred into Majola’s name on 5 December, 2007.

When Marble T. T. Moyo was made aware of the sale of the property to Bickelia Majola she was not prepared to accept that the property had indeed been sold to Majola. She claimed *inter alia* that the previous owners could not have sold the property without offering it to her first. She claimed to have the right of first refusal but produced no evidence to that effect.

On 11 December 2006 she addressed a letter to Majola’s legal practitioners wherein she disputed that Majola was the lawful owner of the property and would never recognize her as such. She said she would never pay rentals to her but would continue to pay rentals to the Esats like she used to do for the past 25 years.

Further she said she would not vacate the premises because she had been renting them for 25 years and employed a number of workers there. Above all, she had made significant improvements and had restaurant equipment therein. In conclusion she emphasized that she did not know Majola and did not recognize her claim to the property.

Since she felt very strongly about the sale of the property to Majola she instituted proceedings against the sellers and the purchaser wanting to assert her rights. The matter was, however, not persisted with as it was withdrawn on 23 October 2006.

I pause to observe that she must have realized that her case was devoid of any merit. The fact that Majola purchased the property and is its lawful owner admits of no doubt. The agreement of sale and title deeds were filed of record.

Marble T. T. Moyo cannot be protected by the provisions of the rent regulations as she vowed that she would never pay rentals to Majola and true to her word she never did. She cannot therefore be a statutory tenant. The fact that she had been in occupation for more than 25 years does not entitle her to do so free of charge.

Similarly her claim that she effected improvements to the property is no defence to an eviction order. If indeed any improvements were effected to the property she may institute proceedings against whoever she believes is liable if so advised.

In the light of the foregoing it is quite clear that the application for rescission is devoid of any merit and must fail.

I now turn to the question of costs. Marble T. T. Moyo conducted herself in a very stubborn way deserving punitive costs. She refused to accept the reality that the property had been purchased by Majola. It was registered in her name and yet Marble would not recognize her as the owner and refused to pay rentals for the property. Majola has been put into unnecessary expenses. Majola must recover those expenses in full.

In the result I would issue the following order.

It is ordered that:-

1. the application for rescission of the default judgment be and is hereby dismissed with costs on an attorney-client scale; and
2. the provisional order granted on 17 April 2008 be and is hereby dismissed with costs on an attorney-client scale.

Masawi & Partners, applicant's legal practitioners
Messrs Cheda & Partners respondents' legal practitioners