CHRISTOPHER HLABATHI SIPHAMBILI
and
MGCINI SIPHAMBILI
versus
NQOBILE SIPHAMBILI

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO, 10 July & 19 October 2023

Opposed application

L V Nkomo for the applicants
Respondent in person

TAKUVA J: This is an application for summary judgment for the eviction of the respondent and any other person claiming occupation or use through him, together with their goods, possessions and chatels from the premises known as sub-division 4 of "Fresnaye" situate in the District of Umzingwane, also known as plot 4 Worringham, Umguza being an immovable property that the applicants own and that the respondent occupied at the applicants' benevolence which benevolence defendant has spurned.

Background facts

The first and second applicants are legally married to each other and they jointly hold tittle to the immovable property described above. The defendant is the first and second appellants' biological son. Sometime in 2009 the applicants through their sheer benevolence, let the respondent reside and build at the aforementioned property. Respondent has since spurned and abused the first and second applicant's benevolence. He had on numerous occasion accused both applicants of witchcraft and as a result, their relationship has since broken down and they have not been on talking terms for over a year.

Due to the breakdown of the relationship, the applicants have expressed their wish that the respondent should move out of the property. The respondent did not heed the request for him to move out of the property. Consequently applicants issued summons for respondent's eviction together with those claiming occupation through him. When the

defendant defended the claim, the applicants filed a summary judgment application for the eviction of the respondent as set out in the summons. Respondent has opposed the summary judgment application.

Issues for determination

The issues are the following:

(1) Whether or not the applicants are entitled to the relief sought?

(2) Whether or not respondent has a valid defence to the applicant's summons?

In order to resolve the first issue, there is need to examine the legal principle guiding the grant of summary judgment. These were dealt with in the following cases; *Jena* v *Nechipote* 1986 (1) ZLR 29 (SC); *Pitchford Investments (Pvt) Ltd* v *Muzari* 2005 (1) ZLR (H) and *Christimas Stutchburgh & Anor* 1973 (1) RLR 279.

According to these cases, all the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that;

"(a) There is a mere possibility of success.

(b) Respondent has a plausible case

(c) There is a triable issue

(d) There is a reasonable possibility that an injustice may be done if summary judgment is granted."

In *Niri* v *Coleman & Ors* 2002 (2) ZLR 580 (H) at 585, the phrase "a mere possibility of success" was defined in the following terms;

> "These phrases merely mean that the defendant has to depose to a defence which, if proved at the trial would constitute a good defence to the plaintiff's claim. The defence itself must be *bona fide*. Even though the rule is not concerned with the defendant's *bona fides*, if he is not *bona fide* then his defence too cannot be *bona fide*. See *Erasmus Superior Court Practice a*t p31-224. A defence raised against the grant of summary judgment application must also be valid at law."

Essentially, a respondent seeking to succeed against an application for summary judgment has to raise a defence which if proved at the trial will constitute a good defence to the plaintiff's claim. Secondly, the defendant has to raise a defence which is valid at law. The law in an action for *rei vindicatio* is now fairly established that it admits no doubt.

In *Alspite Investmens (Pvt) Ltd* v *Westerhof* 2009 ZLR 226 (H) at 236D-E, the law was stated thus;

> "The *rei vindicatio* is an action that is founded in property law. It is aimed at protecting ownership. It is based on the principles that an owner shall not be deprived of his property without his consent. So exclusive is the right of the owner to possess his or her property that at law, he or she is entitled to recover it from wherever found from whomsoever is holding it, without alleging anything further than that he or she is the owner and that the defendant is in possession of the property. Thus it is an action *in rem* enforceable against the world at large. This is settled law in the jurisdiction that hardly requires authority."

In casu, it is common cause that the applicants own the land and that defendant is in occupation of it. Therefore, applicants are entitled to relief sought through summary judgment.

The second issue is whether or not the respondent has a *prima facie* defence? Respondent's defence is that the applicants donated the property to him in 1977. However, the respondent has not provided any proof of such donation. He alleges such agreement was verbal. Verbal agreements involving immovable property are forbidden by the law. Any donation or purchase of immovable property should be reduced to writing for it to be valid.

See section 14 of the Deeds Registries Act [*Chapter 20:05*] states;

> "Subject to this Act or any other law;
> (a) The ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by a registrar.
> (b) Other real rights in land may be conveyed from one person to another only by means of deed of cession attested by a notary public and registered by a registrar."

To the extent that the respondent has not produced a deed of transfer or deed of cession, he can therefore not claim that the property was donated to him. In *Chedgelaw Tobacco Co (Pvt) Ltd and Peacey Estates (Pvt) Ltd* v *George Makanga Daka* HH-385-20, the court said;

> "The law forbids verbal agreements where immovable property is concerned. That is why sales of immovable property require written agreements of sale. Similarly a donation of immovable property has to be in writing. The term deed of donation means a written document … There can be no valid verbal donation."

In the present matter since the respondent has not placed any tangible proof of a donation before me, my view is that in the contemplation of law, the donation he speaks of is a nullity. The defence cannot stand – see *Benjamin Leonard Macfay* v *United Africa Co. Ltd*

1962 AC 152 at 160, where it was stated *inter alia* that "… you cannot put something on nothing and expect it to stand, it will collapse."

It is also clear that even if the donation had been done in terms of the law, the application on the basis of gross ingratitude. The respondent's act of accusing his parents of witchcraft amounts in my view to gross ingratitude which is a justifiable circumstance for revoking a donation. In the result, I find that the respondent has no *bona fide* defence to the claim by the applicants. The defence is not permissible to defeat the applicants' claim.

As regards costs, the applicants prayed that upon the application being granted, costs on an attorney and client scale be awarded against the respondent. In *Engineering Management Services* v *South Cape Corp* 1979 (3) SA 1341 at p 1344-45, NICHOLAS J had this to say;

> "In almost every defended action the successful litigant is put to expense, which, in the result is seen to be unnecessary. But it is only where such unnecessary expense is something which in the result is seen to be unnecessary. But it is only where such unnecessary expense is something which he "ought not to bear" that a special order for costs will be made. It seems to me that generally speaking a situation will exist where the unsuccessful party has acted unreasonably in his conduct of the litigation or where his conduct is some way reprehensible."

See also *T M Supermarket (Pvt) Ltd* v *Chadcombe Properties (Pvt) Ltd* 2010 (1) ZLR 196 (H).

There is no doubt that applicants have been compelled to incur legal costs in pursuing their rights in this matter. It does not appear to me that there are compelling reasons why the applicants should be put out of pocket as a result of this litigation. However, as regards the scale, I am of the view that the respondent's conduct cannot be described as reprehensible in light of his erroneous belief that he was entitled to compensation for the improvements he made on the property over the years. The error he made was to fail to file a counter claim against his parents. Further during the hearing defendant did not put up a spirited fight.

Disposition

In the result, it is ordered that summary judgment be and is hereby entered against the respondent as follows;

1. An order for the eviction of respondent and all those who claim occupation through him together with their chatels, goods and possessions from sub-division 4 of Fresnaye situate in the District of Umzingwane also known as

plot 4, Worringham, Umguza being an immovable property that the applicants own and that the respondent occupied at the applicants' benevolence which benevolence respondent has spurned or abused.

2. Respondent to pay applicants' costs of suit at the ordinary scale.

Ncube Attorneys, applicants' legal practitioners