SANUDI MASUDI
versus
DAVID JERA

HIGH COURT OF ZIMBABWE
MAKARAU JP and MUSAKWA J
HARARE, 7 and 12 September 2007

Civil Appeal

Advocate C Phiri for appellant
Ms S Njerere for respondent

MAKARAU JP: In 1998, the appellant moved onto stand number 1957 Chinamano Extension in Epworth, with the blessings of one Sophia Jera ("Sophia"), the then registered tenant in respect of the property. Subject to the land being subdivided with the consent of the local authority, he would purchase a portion of the land. He paid a certain sum of money to Sophia for such purchase. The exact amount that he paid was in dispute during the trial and it is not important for the purposes of this appeal that we determine its quantum. In making the payment, the appellant believed that he had purchased a portion of the land from Sophia. After taking occupation, he developed the land by erecting a four roomed residence and a three roomed cottage.

In 1999, Sophia ceded her rights in the land to the respondent.

In November 2005, the respondent caused a letter to be addressed to the appellant, giving him 14 days notice to vacate the land. The appellant did not vacate and proceedings for his eviction were commenced in the magistrates' court.

In his particulars of claim filed in the lower court, the respondent alleged that he had received cession of rights in the land from Sophia and was the owner of the land on which the appellant was a tenant. He further alleged that in his capacity as owner of the land, he had given the appellant notice to vacate the land and despite such notice, the appellant was refusing to vacate.

In response, the appellant pleaded that the property had been sold to him by Sophia before it was ceded to the respondent and that his occupation of the land was lawful in terms of the agreement of sale. Thus, at the trial of the matter, the issues that fell for determination were

settled as including the questions whether the appellant had purchased rights in the land from Sophia and whether the respondent had the right to evict the appellant.

After hearing evidence from the parties and from Sophia, the trial court found that the respondent was the owner of the land and granted him the right to evict the appellant therefrom. It also found that there was no valid sale of rights in the land between the appellant and Sophia and advised the appellant to seek his remedy in damages or in a claim for unjust enrichment for the value of the improvements he had effected on the land.

Aggrieved by the decision of the trial court, the appellant noted an appeal to this court. In the notice of appeal, he averred that the trial court had erred in finding that the agreement of sale between him and Sophia was null and void. He further averred that the trial court erred in holding that the land was not capable of subdivision and that therefore a subdivision of the land could not be validly sold. In the alternative, the appellant averred that he has an improvement lien on the land and should not have been evicted therefrom, a defence that was not pleaded and is being raised for the first time on appeal. In view of the decision that we reach after hearing this appeal, it is not necessary that we make a finding whether an improvement lien is a defence that can be raised for the first time on appeal.

As correctly put by the appellant in his heads, the issue that falls for determination in this appeal is relatively simple. It is whether the trial court erred in granting the order evicting the appellant from the property on the basis of the pleadings that were filed in that court.

It is not in dispute that the respondent is the holder of rights, title and interest in the property in dispute that entitles him to exclusive occupation of the property by virtue of the agreement that he has with the owner of the property. He is however not the owner of the property as correctly conceded by his counsel.

In my view, the trial court fell into a grave error by finding that the respondent is the owner of the property and is thus entitled to vindicate it from the appellant. It is this error on the part of the trial court that in my view, led to a muddling of the legal principles applicable to resolve an otherwise simple dispute between the parties.

Based on the authorities, it appears to me settled at law that the *rei vindicatio*, being an action in *rem*, is only available to owners of the property in issue, which at the time of the commencement of the action, is in the possession of the defendant and the defendant fails to prove a right to retain the property as against the owner.

In *Stanbic Finance Zimbabwe LTD v Chivhungwa* 1999 (1) ZLR 262 (HC) MALABA J (as he then was), applied the principle of the *rei vindicatio* in respect of a motor vehicle owned by the plaintiff and leased to a buyer under a suspensive agreement of sale. In that matter, he referred to his decision a year earlier in *Jolly v A Shannon & Anor* 1998 (1) ZLR 78 (HC) where he had this to say at page 88.

> "The principle on which the *actio rei vindicatio* is based is that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent. The plaintiff in such a case must allege and prove that he is the owner of a clearly identifiable movable or immovable asset and that the defendant was in possession of it at the commencement of the action. Once ownership has been proved its continuation is presumed. The onus is on the defendant to prove a right of retention*: Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga v Marini* S-130-95 p 2. It follows that the action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings."

Remarks to a similar effect had been made by the Supreme Court in *Musanhi v Mount Darwin Rushinga Co-Operative Union* 1997 (1) ZLR 120 (SC) and in *Sibanda v The Church of Christ* 1994 (1) ZLR 74 (SC) where KOSAH JA referred to the locus classicus on the *actio rei vindicatio* of *Chetty v Naidoo* 1974 (3) SA 13.

The rights that a party acquires in property owned by a local authority and leased to a tenant on a rent to buy basis were adequately detailed in *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S). In that case, the Supreme Court opined that what the purchaser-lessee acquires from a suspensive agreement of sale in respect of 'township' houses is a personal right against the local authority and not a real right that he can enforce against the world at large. The court went on further to opine that after being given occupation, the lessee can evict from the premises anyone who wrongfully assumes occupation of the property, for instance, a trespasser.

While the Supreme Court recognized the rights that a lessee- purchaser acquires in the property against persons in wrongful occupation of the property, it did not equate these rights to ownership of the land.

Due to the debate that ensued after this decision, it is pertinent in my view to mention at this stage that the dictum in *Pedzisa v Chikonyora* as to the rights that a lessee-purchaser of "township houses" acquires against the seller and the owner of the property has never been doubted. It is only to the extent that the dictum purports to declare null and void the agreement underlying the transfer of rights between the purchaser and a sub-purchaser that the decision has been departed from in subsequent decisions of the Supreme and of this court. (See

Magwenzi v Chamunorwa and Another 1995 (2) ZLR 332 (S); and *Jangara v Nyakuyamba and Others* 1998 (2) ZLR 475 (H).

In my view, what occurred in the lower court was in my view an accumulation of errors in pleadings. The respondent pleaded that he was the owner of the property when he clearly is not. Even if we accept what *Ms Njerere* pressed on us that the respondent was merely alleging that he had received cession of rights in respect of the property from Sophia, in y view, that will not assist the respondent as the rights that he has in the property are not in *rem* and are thus not enforceable against the world at large.

On the other hand, the appellant pleaded a purchase of a subdivision of the property without citing the seller of the property to the proceedings and making a counterclaim for the cession of rights in favour of the respondent to be set aside and for cession in his favour to be compelled. His alleged purchase of the property, even if he had been able to prove it, would not have been a defence against anyone with better rights than his in the property.

It appears to me that this was a case where the appellant set up his personal rights against Sophia against the world at large and likewise, the appellant attempted to set up his own personal rights to defeat the claim by the respondent. Both parties did not cite Sophia to the proceedings to enforce their respective personal rights against her.

As stated somewhere above and with respect, the trial court fell into the error of treating the respondent as an owner of the property and extended to him relief under an inapplicable cause of action. It viewed the cession of rights in the property in dispute as equaling transfer of ownership and thus creating a real right in respect of the property that is enforceable against the world at large.

While it was common cause between the parties that the appellant had improved the land considerably and could have relied on the lien created by the improvements, a lien which is ranked as a real right and would thus have defeated the eviction claim, this was not pleaded but was belatedly stumbled upon when the appeal was noted.

It is my further view that this is a matter where the pleadings and the evidence tendered were at cross purposes and no attempt was made during the trial to reconcile the two for judgment to be given on the correct facts and on the appropriate cause of action. In the result, the trial court made an erroneous finding of fact that the respondent was the owner of the property and by inference, that he could vindicate his property from anyone possessing it.

Much was made during the trial of whether or not the appellant had purchased a subdivision from Sophia. In my view, in the absence of joining Sophia to the proceedings, this was a red herring that was pursued by all but whose ultimate capture, would not have taken the matter any further. In my view, such an averrement could only have been the basis of a claim for specific performance against Sophia and would have given rise to the classical "double sale" situation that were routinely deal with in this court.

To his credit, *Advocate Phiri* for the appellant abandoned the alleged sale of the subdivision to the appellant as a defence to the claim for eviction. He pleaded with us to take into account the fact that the appellant had been allowed for years to develop and reside on the property and that his eviction therefrom should have been stayed until he had been compensated. That argument would have won the day were we a court of equity. We are but a court of law and as correctly advanced by both counsel, we are to be restricted by the pleadings filed by the parties to establish the cause of action that was before the trial court and the defense that was raised to meet that cause of action.

In passing I may mention that with respect, the standard of pleading and of application by the legal practitioners representing the parties in the lower court left much to be desired.

Regarding costs of this appeal, it is our view that since the appeal succeeds on a legal point that was not raised by the appellant in his notice of appeal or in his heads, we see no basis for making an order of costs in his favour.

In the result, we make the following order:

1. The appeal is allowed.
2. The decision of the magistrates' court is set aside and substituted with the following: "the plaintiff's claim is dismissed with costs".
3. Each party shall bear its costs of this appeal.

Musakwa J agrees……..

Uriri Attorneys-at-Law, appellant's legal practitioners.

Honey & Blankenberg, respondent's legal practitioners.