

RONWEN INVESTMENT
versus
NOBILITY DIMBI

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 25 March, 30 March and 18 May 2011

FAMILY LAW COURT

Opposed Application

C Kwaramba, for the applicant
F Mubangwa, for the respondent

MAWADZE J: This is an opposed application wherein the applicant seeks the following relief:

“IT IS ORDERED THAT:

1. The respondent and all those claiming occupation through her shall vacate stand number 3414 Mainway Meadows, Waterfalls, Harare within (7) days of this order, failing which the Deputy Sheriff is authorised and directed to evict the respondent and all those claiming occupation through him (*sic*).
2. The respondent shall pay for the costs of this application on a higher scale of legal practitioner and client scale”.

The applicant is a limited liability company incorporated in terms of the laws of Zimbabwe and is the registered owner of the house in issue number 3414 Mainway Meadows, Waterfalls, Harare. The respondent is married in terms of the Marriages Act [*Cap 5:11*] to one of the directors and shareholders of the applicant company one Tamuka Dimbi.

According to the founding affidavit by one of the directors and shareholders of the applicant company one Kingsly Dumba the applicant company in May 2006 purchased stand number 3414 Mainway Meadows, Waterfalls, Harare from Waymak Investments. The agreement of the sale is attached as annexure D to the founding affidavit. The purchase price was paid in full and proof of payment is attached as annexure E. The Harare City Council as per annexure F1 and F2 attached to the founding affidavit granted the applicant company authority to develop the stand number 3414 Mainway Meadows, Waterfalls, Harare. As per the founding affidavit the development of the stand was done using financial resources of the

applicant company and various documents which include *inter alia* receipts, quotations and money transfers are attached to the founding affidavit as annexures G1 – G45. Annexure A is proof of registration of the applicant company and annexure B are the CR 14 forms which indicate the shareholders and directors of the applicant company as Kingsly Dumba with 40 shares, Tamuka Dimbi with 40 shares, Admire Meze with 10 shares and Susan Dimbi with 10 shares.

According to the founding affidavit by Kingsly Dumba in November 2009 the respondent's husband Tamuka Dimbi left the matrimonial residence he was sharing with the respondent Flat 12 Burlington House, 40 Fife Avenue, Harare which belonged to the respondent's employers due to matrimonial problems between the respondent and her husband Tamuka Dimbi. The respondent's husband was allowed by the applicant company to occupy the house in issue number 3414 Mainway Meadows, Waterfalls, Harare. Apparently the respondent was not amused by the development and she followed her husband Tamuka Dimbi and forcefully joined him thus occupying the house in issue. The matrimonial problems between the respondent and her husband Tamuka Dimbi continued and Tamuka Dimbi moved out of the house in issue and is now staying at number 1 91 Cheviat Road, Waterfalls Harare. The respondent has remained in occupation of house number 3414 Mainway Meadows Waterfalls Harare.

According to the applicant company house number 3414 Mainway Meadows Harare belongs to the applicant company and not the respondent or her husband. It is upon that basis that the applicant company seeks the eviction of the respondent from the said house which she has been occupying since February 2010.

Tamuka Dimbi in his supporting affidavit contends that the house in issue is not matrimonial property but belongs to the applicant company in which he is just one of the four directors and shareholders. According to him he did not personally contribute anything to the acquisition and development of house number 3414 Mainway Meadows, Waterfalls Harare. Further, he contends that the applicant company is not a family company and that the respondent has no right to occupy the house in issue. Tamuka Dimbi submitted that the respondent is at liberty to enforce her personal rights against him for accommodation not to forcefully occupy property belonging to the applicant company.

The respondent in her opposing affidavit contends that Kingsly Dumba had no authority to represent the applicant company and that no proof has been attached to the founding affidavit to show that he could competently represent the applicant company. As

regards the merits of the case the respondent raised a number of issues which can be summed up as follows:

- i) That there are serious disputes of facts in this matter which cannot be resolved by way of a court application consequently the respondent believes the applicant adopted the wrong procedure.
- ii) That the house in issue is matrimonial property and that she has a right to remain in occupation of that house. According to the respondent the house in issue was registered in the name of the company solely for purposes of convenience in order to acquire the relevant funding from the bank during the liquidity crisis where banks gave first preference to companies in cash withdrawals;
- iii) That the corporate veil should be lifted in order to expose her husband who is merely trying to hide behind the applicant company to deny her the right to matrimonial property. According to the respondent the so called applicant company is just a fraud as the so called shareholders and directors are related to her husband Tamuka Dimbi. The respondent avers that Kingsly Dumba is a friend of her husband, Admire Meza a nephew to her husband and Susan Dimbi a family relative. The respondent said all these so called shareholders have no shares in the applicant company which for all intents and purposes belongs to her husband Tamuka Dimbi and is therefore a family business. The respondent alleges that the title deed to the house, share certificates and all other documents attached to Kingsly Dumba's founding affidavit are fraudulent and doctored documents which were manufactured recently after the hearing of a case number 565/10 in the Magistrates court in which no such crucial evidence was attached. According to the respondent the purpose for such devious conduct is to mislead the court into believing the house in issue belongs to the applicant company when it is matrimonial property as shown by the ZESA bills and water bills for 2009 which are in her husband Tamuka Dimbi's name as per annexure I attached to her opposing affidavit.
- iv) That both her husband Tamuka Dimbi and herself at all material times intended the house to be matrimonial property and they developed jointly. The respondent avers that her contribution was to pay for the rentals for the flat they occupied with her husband and this enabled her husband to channel his resources to the acquisition and development of the house in issue which arrangement was presumably by mutual consent. According to the respondent there is no factual or legal basis for her to be ejected from the matrimonial property.

Let me dispose of the point in *limine* raised by the respondent which relates to lack of *locus standi* by Kingsly Dumba to represent the applicant company and depose to the founding affidavit. Annexure H a board resolution authorising Kingsly Dumba to represent the applicant company in this dispute in my view puts this argument to rest. Mr *Mubangwa* for the respondent did concede to this fact.

At the commencement of the hearing of the matter Mr *Kwaramba* sought to have this matter dealt with as an unopposed application on account of the respondent's failure to file heads of argument within the prescribed period. I allowed the respondents to make an

application for the upliftment of the bar and granted the application. I propose to give brief reasons for making that order.

In terms of Order 32 R 238 (2 a) of the High Court Rules 1971 heads of argument referred to in subrule (2) should be filed by the respondent's legal practitioner not more than 10 days after heads of argument of the applicant are served upon the respondent in terms of r 238 (1). The exception to this provision excludes the period during which the court would be on vacation and allows for the respondent's heads of argument to be filed at least two days before the hearing date. In terms of r 238 (2b) failure to comply with r 238 (2a) results in the respondent being barred and the court may proceed to deal with the matter on the merits or direct that the matter be set down for hearing on the unopposed roll unless the bar has been lifted as provided for in r 239.

In *casu* the applicant's heads of argument were served upon the respondent on 3 September 2010. The respondent therefore had 10 days from 3 September 2010 to file heads of argument. No such heads of argument were filed within 10 days. The matter was set down for hearing on 24 January 2011 and the respondent was served with the notice for hearing on 18 January 2011. Again the respondent did not file the heads of arguments. On the date of the hearing on 24 January 2011 the respondent was therefore barred. The matter was dealt with by MTSHIYA J. The respondent was in default. MTSHIYA J was of the view that this matter should be referred to the Family Court division of the High Court. The learned judge declined to grant a default judgment and instead referred the matter to the Family Court. The matter was re set in the Family Court for 25 March 2011 and the respondent was served with a notice of set down on 10 March 2011. Again no heads of argument had been filed by the respondent. The respondent only "filed" heads of arguments on 21 March 2011 two days before the hearing on 25 March 2011. It is clear that by that date the respondent was barred and no upliftment of the bar had been granted.

Mr *Mubangwa* conceded that the respondent flagrantly disregarded the requirements of r 238 (2a) and was unable to give a reasonable explanation for such conduct except to plead for the court's leniency. I allowed him to apply for the upliftment of the bar but still it was clear that the respondent's counsel did not handle this aspect with due diligence and had no compelling reasons for non-compliance with the mandatory provision of the rules of the court.

The court has wide discretion in deciding whether to grant the upliftment of the bar and has to consider a number of factors. See *Nyakabango v Jaggars Traders (Pvt) Ltd* HH

146-03. I do not believe that I should consider in detail all the requirements to be satisfied. Suffice to say that the respondent's counsel showed reckless disregard of the court rules. Such conduct deserves censure and all things equal an appropriate order of costs would be in order to express the court's displeasure. I am however of the view that it is in the interests of justice to grant the upliftment of the bar and allow the matter to be resolved on the merits in order to bring it to finality. It would appear this dispute has been raging on for a while and even spilled into the magistrates' court. The nature of the dispute which involves rights of the wife and possibly children should be dealt with expeditiously and be brought to finality preferably on the merits rather than technicalities. It is on that basis that I granted the order to uplift the bar.

I now turn to the merits of the application.

I am not persuaded by the point taken in argument by the respondent that there are serious disputes of facts which cannot be resolved on papers without calling *viva voce* evidence. I am rather inclined to adopt the approach enunciated by GUBBAY JA (as he then was) in *Zimbabwe Bonded Fibreglass 1981 (Pvt) Ltd v Peech 1987 (2) ZLR 338 (S)* wherein the learned judge of appeal said:

“A court should endeavour to resolve disputes of fact raised in affidavits without hearing of evidence. It must take a robust and common sense approach, and not an over fastidious one, always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned”.

The main dispute between the parties relates as to whether the property in issue is matrimonial property. In my view proof of ownership of the property has been provided by the title deed – Deed of Transfer (Reg 0623/2011) in the name of the applicant company. Indeed the respondent concedes that the property in issue is registered in the name of the applicant company. I therefore find no dispute of fact in that regard.

The applicant company has painstakingly explained the history on how the property in issue was purchased, the relevant agreement of sale and how and who paid for the development of the property by attaching receipts and bank statements. I have already alluded to annexures attached to the founding affidavit. All this evidence has not been controverted. In fact there is no evidence placed before the court to support the respondent's assertion that she contributed to the acquisition and development of the property. There is therefore no discernable dispute of fact in this regard which is beyond resolution on the papers filed of

record. All what the respondent points out as her contribution was the payment of rentals for the flat she occupied with her husband before he moved out. No proof of such payments were made and even if such proof was availed it cannot by any stretch of imagination be deemed to be contribution to the acquisition and development of number 3414 Mainway Meadows Waterfalls, Harare.

The respondent has made a bold allegation that the applicant company is a façade simply created by her husband to place the property in issue beyond her reach. The applicant has placed before the court the directorship and shareholding of the applicant company as shown in the CR 14 forms as way back as in 2006. There is absolutely no evidence to support the contention that the applicant company is family business. In my view lifting or piercing of 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.

It is my considered view that on the evidence placed before the court the applicant company is entitled to repossess the property in issue. While it is correct that the respondent is married to one of the shareholders and directors of the applicant company, that claim alone, as a wife would not give her the right to occupy property registered in the name of a third party. The exception to this general principle would be where the wife is able to show that the transfer of the property in the third party's name is fraudulent. See *Cattle Breeders Farm (Pvt) Ltd v Veldman (2) 1973 RLR 261* wherein BEADLE CJ quoted LORD HODSON in *National Provincial Bank Ltd v Ainsworth (1965) ALL ER 472 at 479* which quotation is at p 266 F:

“Where there is genuine transfer there is no reason why the wife's personal rights against her husband which are derived from her status, should enter the field of real property law so as to clog title of an owner”.

In *casu* there is no evidence to show that the transfer is not genuine. The respondent has personal rights against her husband. In specific terms she can sue her husband for proper accommodation for her and the children. Such a right should not clogg title of the applicant company.

I am of the view that there are no disputes of facts in this matter and that even if there were such disputes they are not of such a nature as to warrant referral of the matter to trial. Even if the matter is referred to trial the respondent's case would still be hopeless. The respondent would still be faced with the untainted title deed in the applicant's company's name, the agreement of sale relating to the property in issue, documents showing payments for the acquisition and development of the property by the applicant company. Such hard core evidence cannot be rebutted by the respondent's bold and unsubstantiated allegation that the property is matrimonial property, that she contributed to its development and that her husband in his personal capacity bought and developed the property. The respondent's husband is not even fighting from her corner. It is therefore not surprising that Mr *Mubangwa* for the respondent's conceded during the hearing that the respondent's case was not only weak but that the respondent had no defence at all to this application. It was on that basis that Mr *Kwaramba* for the applicant decided not to rub salt into an open and fresh wound as it were and indicated that the applicant no longer seeks an award of costs as earlier on prayed for but would rather have each party to bear own costs.

In the result, I make the following order:

1. It is ordered that the respondent and all those claiming occupation through her shall vacate stand number 3414 Mainway Meadows Waterfalls, Harare within (7) days of this order being served upon them failing which the Deputy Sheriff is authorised and directed to evict the respondent and all those claiming occupation through her.
2. Each party is to bear their own costs.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Chingeya-Mandizira, respondent's legal practitioners