WILLARD MAZHAWIDZA
and
DORNICA MAZHAWIDZA
versus
ISAYA MASHAYAKARARA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 30 September 2010 & 12 January 2011

Opposed Matter

T Mpofu, for the applicant
C Chikore, for the respondent

CHATUKUTA J: This is an application for execution pending appeal.

On 7 October 2009 this court granted judgment in case No HC 677/09 in favour of the applicants. The court ordered the ejectment of the respondent from a property known as Stand Number 628 Marlborough Township also known as No. 33 Taormina Avenue, New Marlborough, Harare (the property). Dissatisfied with the judgment, the respondent appealed against the decision.

Applicant contended that the appeal is frivolous and vexatious and has been noted solely to delay finality. The appeal was noted on 27 October 2009 and only served 30 days later on 27 November 2009. Respondent had, before filing the notice of appeal, issued summons in case No HC 4922/09 on 14 October 2009 seeking a declarator that agreement of sale was valid and that he is the owner of the property. He claimed in the alternative a refund of the market value of the property.

The factors that this court need to take into account in determining whether or not to grant leave to execute are set in *South Cape Corporation (Pty) Ltd v Engineering*

Management Services (Pty) Ltd 1977 (3) SA 534 (A). CORBETT JA observed at page 545 D-F that:

> "In exercising this discretion (to grant leave to execute pending appeal), the court should, in my view, determine what is just and equitable in all the circumstances, and in doing so, would normally have regard, *inter alia*, to the following factors:
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute was refused;
> (3) the prospects of success on appeal, including more particularly the question of whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg to gain time or harass the other party; and
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be." (See *Arches (Pvt) Ltd v Guthrie Holdings Pvt) Ltd* 1989 (1) ZLR 152 (HC); *ANZ (Pvt) Ltd* v *Minister for Information & Anor* S-111-04.)

The applicants submitted that they are already suffering irreparable harm in that they are behind schedule with the development of their property and the delay is causing them financial loss. The respondent contended that he will suffer irreparable harm because he has been in occupation of the property since the conclusion of the agreement of sale of the property and has commenced development of the property.

One suffers irreparable harm where there is no other practical remedy available. It appears to me that neither the applicant nor the respondent is likely to suffer irreparable harm. Both parties do have recourse under the law for compensation for any harm that they may suffer. As rightly submitted by the applicants, the respondent has already instituted proceedings to have the agreement declared valid or in the alternative be awarded damages. The applicants can equally claim damages for the financial loss that they are suffering by not developing their property. It appears therefore that the determination of this matter rests on whether or not the respondent has any prospects of success on appeal and the balance of convenience.

I perceive that the respondent raised two main grounds of appeal in the notice of appeal. He contended that the court had misdirected itself in finding that the

applicants had established the requirements for *rei vindicatio* and on that basis alone were entitled to the order for ejectment. The court should also have considered that he had proved that he was justified to remain in occupation because he had lawfully purchased the property. The second ground was that there were material disputes of fact apparent in the matter which could only be resolved after the hearing of *viva voce* evidence. The court had therefore erred by adopting a robust approach and determining the disputes of fact on the papers.

In case No. HC 677/09 the applicants brought an application for the ejectment of the respondent from the property on the basis that they are the registered joint owners of the property. They argued that the respondent was in illegal occupation of the property because they had not entered into an agreement of sale with him. In other words they disowned the agreement that the respondent alleged they had entered into.

The respondent opposed the application contending that he had purchased the property from the applicants and was therefore entitled to remain in occupation. He raised a point *in limine* that there were material disputes of fact that could not be resolved on the papers. There was need to establish how he came to be in possession of the original title deeds of the property. There was also need to establish the validity agreement of sale and whether or it was invalid by reasons of fraud.

The court acknowledged there were indeed disputes of fact but adopted a robust approach and resolved the dispute on the papers. It found that the applicants' identification documents produced by the respondent reflected totally different persons from the documents produced by the applicants. The applicants had produced their passports and visa for their stay in America and a copy of their marriage certificate. The second applicant produced her American driver's licence and her Zimbabwean identity card. The court made a finding that the details on the documents relating to the second applicant were different from those on the documents produced by the respondent. The only difference she noted on the documents produced in relation to the first applicant were the facial features of the

applicants. Apart from that all the other details matched. Thereafter she concluded that the respondent did not enter into an agreement with the respondents.

It appears that the agreement of sale was brokered by High Rise Estate Agents. I do not believe that the dispute as to whether or not the applicants had authorized the estate agents to sell the property could have been resolved on the papers. It was also necessary in my view to hear evidence as to how the respondent came into possession of the original title deeds. The evidence would in my view have disposed of the issues raised in the application as to the authenticity of the identity documents and the validity of the agreement. It appears there was no evidence on record (from the travel documents) whether or not the applicants were in the country when the contract was concluded. *Viva voce* evidence would in my view have clarified the issues. It is therefore my view that the respondent has prospects of success.

It is not in issue that the respondent has been in occupation of the property since October 2008. The applicants are in the United States of America, and have not been in occupation of the property. The balance of convenience under the circumstances weighs in favour of the respondent.

The right of appeal is recognized to be a fundamental right and critical to our justice system and should be protected where necessary. It is my view that it is just and equitable in the circumstances that the respondent's right be protected and that he remain in occupation until he has prosecuted his appeal.

In the result the application is dismissed with costs

Sinyoro & Partners, applicant's legal practitioners
Messrs C Mutsahuni Chikore & Partners, respondent's legal practitioners