

SIMBARASHE KAMBAMURA
versus
RACHEL KWASHIRA
and
MINISTER OF NATIONAL HOUSING
AND SOCIAL AMENITIES

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 10 October and 21 December 2022

Civil Appeal

S Mapanje, for the appellant
H S Tsara, for the respondent

MAXWELL J:

This is an appeal against the decision of the Magistrates Court sitting at Harare on 12 July 2022 under case number 5010/20.

BACKGROUND

Plaintiff (Appellant herein) issued out summons in the lower court seeking an order of eviction of the first respondent and all those claiming occupation through her from stand number 1341 Whitecliff Harare, and costs of suit. Plaintiff cited the two respondents as well as the Ministry of Local Government. The dispute was an ownership wrangle. Plaintiff argued that he bought the stand in question from the second respondent in 2011 and paid a deposit of USD 1000.00 and the balance of USD 4000.00 by way of instalments was garnished from his salary monthly. First respondent stated that she was given vacant possession by the third respondent and that she was allowed to pay by instalment. She, however, did not have funds and therefore did not make any meaningful payments.

Two issues were referred to trial. The first was whether or not the eviction was warranted and the second was whether or not Plaintiff was entitled to pay compensation for improvements if the court found in his favour.

THE JUDGMENT OF THE LOWER COURT

The lower court was of the view the third respondent caused the confusion as there is no proper documentation. It was also its view that the appellant and the first respondent were in similar predicaments and that the resolution of the matter required a declaratur as to who is the legal owner of the stand in question. It pointed out that the remedy for both parties lay in the superior courts with power to grant declaratory orders. As it was not empowered by statute to issue declaratory orders, it indicated that it lacked jurisdiction and therefore dismissed the matter.

GROUND OF APPEAL

The following are the grounds upon which Appellant noted this appeal.

- “1. The court *a quo* erred in law and misdirected itself in holding that the matter placed before it was that of a declaratory order as they were two owners to the property when in fact there was nothing placed by the 1st respondent to prove ownership.
2. The magistrate erred and misdirected herself in disregarding the evidence by the Ministry of National Housing which illustrated that the lawful owner was the Appellant herein and had a right to evict the 1st respondent.
3. The magistrate failed to appreciate that the appellant is the owner of the property as proof of payments were produced as evidence, thus on the evidence presented she ought to have found that the appellant had on a balance of probabilities established a case for the ejection of the 1st respondent from the property in dispute.”

Appellant prayed for the setting aside of the judgment of the lower court and its substitution with an order for the eviction of first respondent and all those claiming occupation through her from the property in question.

SUBMISSIONS BY THE PARTIES

Appellant argued that the claim before the lower court was that of rei vindication and the court should have focused on that claim. He submitted that first respondent does not have any defence to prove ownership of the stand. He also submitted that the stand belongs to the second respondent whose representative testified that appellant is the true owner of the stand. Appellant argued that he had real rights to the property and that he had satisfied the standard of proof therefore the lower court ought to have granted his claim.

First respondent raised a point *in limine* that the grounds of appeal are defective as they are argumentative, lack precision and are vague generalisations which do not point specifically to what misdirections of facts or law were committed by the court. She prayed that the appeal be struck off with costs on a higher scale. On the merits she submitted that the lower court did not err as there are two parties claiming ownership of the stand in question despite the fact that none of them had title deeds or a valid Agreement of Sale in respect of the stand. In her view the appellant wanted the court a quo to give a Declaratory Order to the effect that he was the rightful owner and had the right to evict her. She pointed out that the representative of the second respondent confirmed that she was already in authorized occupation of the stand in question when the same stand was offered to appellant. She submitted that the appeal has no merit and should be dismissed with costs on a legal practitioner and client scale. At the hearing of the matter, Ms Tsara abandoned the point *in limine* and submitted that no one should be unjustly enriched. In her view the lower court did not err as it was required to make a declaration as to who was the rightful owner of the property in question.

ANALYSIS

Where there is an ownership wrangle as in this case, there is need for a declaration of who the rightful owner is. Appellant sought the eviction of the first respondent and all those claiming occupation through her from the property in question. Had the court acceded to that request, it would have been tantamount to declaring appellant as the rightful occupant. It is trite that the Magistrates' Court is not empowered to issue declaraturus. Owen Nhoru who testified on behalf of the second respondent confirmed that first respondent might have a legitimate claim when he was asked how the dispute should be resolved. On p 43 he stated; -

“1st defendant should be given an alternative stand. It is the government it cannot fail [to] accommodate its citizens.”

This is against a background where first respondent testified that she paid a deposit for a stand and was promised a lease. After she failed to get the lease, she was given the stand in question and produced a letter authored by Owen Nhoru authorizing her stay at the stand in question. Considering that first respondent made improvements that she said are valued at USD 40 000.00, there was no error in the lower court's decision that what it was being called upon to do was to issue a declarator.

The lower court cannot be faulted for disregarding the evidence of Owen Nhoru. The record shows that his credibility was doubtful. On p 22, first respondent on being asked why she had reported the matter to the Anti-Corruption Commission stated; -

"We went to Local Government and 3rd defendant would say he does not know (sic) Simbarashe Kambamura and in 2022 he changed saying he knew the plaintiff. His sudden change showed he was lying."

This was corroborated by Dubekile Sileba, first respondent's mother. On p 34 the following is recorded; -

"Q Today Mr Nhoru is in support of the plaintiff he is saying the stand belongs to the plaintiff and not first defendant what is your comment?

A He was on our side saying he did not know Simbarashe Kambamura.

Q At what point did Mr Nhoru turn to support the plaintiff?

A When we went to Mr Nhoru's (sic) office.

Q Did he give you the reason why he changed goal posts?

A He did not tell us any reason."

The picture painted is of a double-dealing government official who blew hot and cold. He admitted authoring the letter that allowed first respondent to stay at the stand in question and stated that staying is not allocating. The lower court cannot be faulted for disregarding his evidence. The second ground of appeal has no merit.

In the third ground of appeal. Appellant criticizes the lower court for not finding on a balance of probabilities that he had established a case for the ejection of the first respondent. He argued that he was the owner of the property as proof of payments were produced as evidence. Clearly he was seeking a declaration that he was the owner of the property on the basis of the payments he made. Appellant was inviting the lower court to exceed its jurisdiction. His criticism is not warranted. The third ground of appeal also lacks merit.

DISPOSITION

The appeal lacks merit and is hereby dismissed with costs.

TSANGA J:.....AGREES

Lunga Attorneys, appellant's legal practitioners.
Tsara And Associates, respondent's legal practitioners.