

BARRIADE INVESTMENT (PVT) LTD
versus
TENDAI MASHAMHANDA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 23 October & 29 November 2023

Opposed Application

T M Maparanga with Sadomba, for the applicant
K Rangarirai, for the respondent

TAKUVA J: This application is for an order under the *rei vindicatio* remedy to recover possession and control of property. Put differently, the applicant seeks respondent's eviction from the property known as THE REMAINDER of SUBDIVISION C OF LOT 6 OF LOTS 190, 191, 193,194 AND 195 HIGHLANDS ESTATE OF WELMOED also known as 41 RIDGEWAY NORTH HIGHLANDS, HARARE "the property."

BACKGROUND

Applicant purchased the property at a judicial auction conducted by the Sheriff of this court in September 2017. The property was transferred to the applicant on 5 May 2022. It is not in dispute that the respondent is in occupation of the property. This was after the property had been fraudulently sold to him by the previous owner Piwayi Chiutsi. In a judgment handed down on 16 February 2022 in *Barriade Investments (Pvt) Ltd v Chiutsi & Ors* SC 24/22 the Supreme Court directed that title be registered in applicant's name. The judgment is extant and title has indeed been registered in applicant's name as a result, it is not in dispute that the applicant is the owner of the property.

The respondent herein was the second respondent in the Supreme Court matter cited above. The Supreme Court found that he was not an innocent purchaser of the property and that his title was invalid and should be cancelled with the applicant taking title. In spite of the fact that the ownership dispute has been resolved, the respondent has refused, failed and or neglected to vacate the property.

The application is opposed on the following three (3) grounds:

- “1. The pending constitutional application in the Constitutional Court by the respondent ultimately seeking the setting aside the Supreme Court judgment upon which the applicant is relying for its title to the property in question suspends the aforesaid Supreme Court judgment.
2. There are pending criminal proceedings raising fraud allegations impacting on the applicant’s title to the property. If the fraud allegations are established the applicant will lose any claim it may have to the property while the respondent’s claim to the title would be vindicated. Until the fraud allegations are determined the applicant can not evict the respondent.
3. In view of the history of the dispute relating to the [property and the respondent having effected massive improvements to it, raising the value thereof by about US\$ 1 500 000, the respondent has an interest in the property under s 71(1) of the Constitution of Zimbabwe. The respondent’s aforesaid “interest” is itself “property” within the contemplation of s 71 of the Constitution. In seeking to evict the respondent without compensating him for the USD\$ 1 500 000 improvements. The applicant is compulsorily depriving the respondent of his property contrary to s 71 of the Constitution.”

I will deal with these grounds in *seriatum*. The argument that the pending constitutional application in the Constitutional Court by the respondent has the effect of suspending the Supreme Court judgments is not only devoid of merit but also now unavailable to the respondent. The challenge under Constitutional Court of Zimbabwe 12/22 was dismissed. Respondent acknowledged this development but true to his character, he tried to down play its significance and effect. Since there is no pending case and no stay of execution of the Supreme Court judgment the respondent has no genuine and sincere defence to the applicant’s claim for eviction. The second and third grounds require an examination of legal principles governing the *rei vindicatio* action. Generally, the law requires that respondent raises a valid right to possess as against the owner.

In *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B-D it was held that:

“it is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (eg a right of retention or a contractual right). The owner, in instituting a *rei vindicatio* need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res*- the onus being on the defendant to allege and establish any right to continue to hold against the owner (c.f) *Jeena v Minister of Lands*, 1995 (2) SA 380 (AD) at pp 382E, 383). It appears to be immaterial whether in stating his claim, the owner dubs the defendant’s holding “unlawful” or “against his will” or leaves it unqualified. (*Krugersdorp Town Council v Fortuin*, 1956 (2) SA 335(T)”

See also *Jolly v Shannon & Anor* 1998 (1) ZLR 78 HC and *Stanbic Financial Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (HC).

The protection of an owner's right to vindicate his property was stated in *Mashave v Standard Bank of South Africa* 1998 (1) ZLR 436(S) at 438 in the following words:

“the Roman Dutch Law protects the right of an owner to vindicate his property, and as a matter of policy favours him as against an innocent purchaser-see for instance *Chetty v Naidoo* 1974 (3) SA (A) at 20A-C.”

As regards the fraud allegations I take the view that not only are they premised on obscure facts but also that even if they were substantial they would not grant the respondent the right to possess the property. Even Mr *Rangarirai* who appeared for the respondent could not explain fully how applicant is linked to the alleged fraud. All he could say is a third party by the name Chaza allegedly forged a power of attorney from the ‘owner’ of the property. In any event, the respondent must go by facts on record. There are no such details on record to substantiate the fraud allegations. To the extent that the criminal allegations do no amount to a right to possess the property, the respondent's defence is based on waffling and incoherent innuendos which do not suffice to prevent the applicant from recovering possession.

From the opposing affidavit to the heads of argument the respondent's defences are more of pleas for mercy than defences to the *rei vindicatio*. It has been said that the court should pay no regard to such rants. In *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 92) ZLR 236 it was held that;

“there are no equities in the application of the *rei vindicatio*. Thus, in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of the law that admits no discretion on the party of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership.”

Therefore no equitable considerations should be put in the scales. In an attempt to justify his claim to ownership of the property, the respondent alleged that he was an innocent purchaser of the property. Clearly, this is unavailing for the simple reason that the Supreme Court in *Barriade Investments (Pvt) Ltd v Chiutsi & Ors* SC 24/22 held that:

“The court *a quo* therefore erred in finding that the second respondent was an innocent purchaser who had no knowledge of any irregularities attaching to the purchase and registration of the property into his name.”

The second respondent referred to above is the respondent *in casu*.

In a futile attempt to rope in s 71 of the Constitution of Zimbabwe, it was argued on respondent’ behalf that failure to compensate him for the “massive improvements” amounts to compulsorily depriving the respondent of his property contrary to s 71 of the Constitution. This argument has no merit in that, on the evidence, any improvements made were actions done in violation of the order by CHAREWA J.

In *Cecil Enterprises v Sithole* SC 87/10, it was held that:

“There is cogent authority to the effect that where the transfer of property is done in defiance of an order of court the transferee obtains defective title thereto. In *Gong v Mayor Logistics (Pvt) Ltd* SC 2/17, the court state as follows at pp 6-7;

“At this juncture, it does not seem to matter to me whether or not the applicant was the first purchaser as he alleges. What is material at this stage is that he obtained defective invalid title in defiance of a valid court order and caveat. It is an established principle of our law that anything done contrary to the law is a nullity. For that reason, no fault can be ascribed to the learned judge’s finding in the court *a quo* that the conduct of the appellant and his lawyer in obtaining registration of the disputed property in the face of a court order and caveat to the contrary was reprehensible. On the basis of such finding the appeal can only fail.”

The respondent’s claim for improvements is based on a nullity. A nullity is an event that never happened in the eyes of the law. See *Mefoy v United Africa Company Ltd* 1961 (3) ALL ER 1169 wherein Lord Denning said;

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court for it to be set aside, it is automatically null and void without more ado although it is sometimes convenient to have a court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You can not put something on nothing and expect it to stay there. It will collapse.”

It must be noted that applicant purchased this property in a Sheriff’s auction. It has been said that the courts should not lightly set aside sales in execution in terms of rules of this court. In *Makoni v CBZ Bank & Ors* HH 81/19, it was held that:

“it is regrettable that the institution of judicial sales in execution as a procedure available to a judgment creditor to recover what has been awarded to him or her by a court of law and as an

institution by which *bona fide* purchases of the property and indeed investors in real estates acquire property is fast losing its lustre and credibility as a result of debtors who presently appear unwilling to respect that process. What has gained currency at the moment is the undesirable habit by judgment debtors to do anything and everything to contest every sale in execution with whatever means possible which quite often are thin on substance but not lacking in noise and fury signifying absolutely nothing. There is therefore a pressing need if the institution of judicial sales is to be protected from extinction, that the courts should purposely discourage frivolous and vexatious contestation of these sales.....

Looking at this application in totality, it lends credence to the view that the institution of sales is under threat from debtors who have no respect both for their commitment's to pay debts and the process of the law available to creditors to seek recourse from the courts. Quite often stubborn resistance to execution is pursued by defaulters for no tangible reason than to frustrate legitimate claims. It has been stated that courts of law should not lightly set aside sales in execution under r 359 as that may have a profound effect upon the efficacy of this type of sales, as would be purchasers would be deterred from attending and bidding if they consider that their efforts might be frustrated by an application like the present. See *Lalla v Bhira* 1973 RLR 28 (G). In my view, these unscrupulous defaulters' should know that the courts will not come to their rescue for no apparent reason. They should simply service their debts or face the consequences of losing their homes."

Disposition

In terms of the law, the respondent was required to raise a valid right to possess as against the owner. This he has failed to do and there is therefore nothing to prevent the applicant from recovering possession.

In the result, **IT IS HEREBY ORDERED THAT:**

1. The respondent and all his subtenants, assignees, invitees and all persons claiming occupation through him be and are hereby ordered to vacate the applicant's property being THE REMAINDER of SUBDIVISION C, OF LOT 6, OF LOTS 190, 191, 193,194 AND 195 HIGHLANDS ESTATE OF WELMOED also known as 41 RIDGEWAY NORTH, HARARE, immediately upon service of this order on the respondent.
2. In the event of the respondent failing to vacate as provided for in para1 above, the Sheriff or his lawful Deputy be and is hereby authorized and empowered to evict the respondent and all persons claiming occupation through him from applicant's premises, being THE REMAINDER of SUBDIVISION C, OF LOT 6, OF LOTS 190, 191, 193,194 AND 195 HIGHLANDS ESTATE OF WELMOED also known as 41 RIDGEWAY NORTH, HARARE.

3. The respondent shall pay costs of suit on a scale as between Legal Practitioner and Client.
4. This order shall remain operational notwithstanding any appeal that may be filed by the respondent.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Rangarirai & Company Legal Practitioners, respondent's legal practitioners