

JACOB NYAKUDYA N.O
versus
GOROMONZI RURAL DISTRICT COUNCIL
and
TIMOTHY MUTIZA DZORWA N.O

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 30 November 2021, 21 July 2022 & 17 November 2023

Counter Application

T Magwaliba with Mabhaudhi, for the applicant
T Govera, for the 2nd respondent

KATIYO J: The second respondent approached the court seeking a declaratory order and the application was dismissed. On appeal the Supreme Court remitted the matter to the court *a quo* for it to issue a full judgment incorporating the counter application that was before it which sought declaration of rights for the Estate of the Late Rabson Mutuna Nyakudya in relation to stand TT23204 measuring 840 square meters inclusive of Nyakudya Grinding Mill. The applicant also seeks cession of the said immovable property to the beneficiaries of the deceased Estate of the late Rabson Mutuna.

Brief Background

The second respondent in the main, now the applicant sought a declaratory order of the rights of his late father's estate over stand TT23204, inclusive of Nyakudya Grill Mills. This court will not dwell on the main application as this has been taken care of in the main. The court will only consider the counter application.

It is common cause that the respondent's late father was granted a lease by Goromonzi Rural District Council over a certain commercial premise, measuring 2023 square meters comprising of a butchery, bottle store, grinding mill and general dealer. The second respondent successfully evicted one, Chirandu Mbanje who was leasing the property in question from the applicant in 2017. The second respondent in this matter then sought eviction of the applicant before the Magistrate's Court, under case no. 17690/19 from the

property in question, however the application was dismissed. The second respondent then proceeded to file an appeal against the order granted in case 17690/90, under CIV 'A' 79/19 and the appeal was struck off the roll. The second respondent then applied for condonation for the late noting of an appeal and extension of time under HC4999/20, however, the application was withdrawn as it was fatally defective. The second respondent went on to seek a declaratory order concerning rights over the property in question, which application was dismissed before this Honourable Court.

In casu , the applicant is seeking a declaratory order as he believes that his father, the late Rabson Mutuna Nyakudya, purchased stand TT23204 measuring 840 square metres from the second respondent's father, the late Kizito Dzorwa in 1977 and therefore has title to it. The second respondent is opposed to the relief sought and argues that the late Robson Mutuna Nyakudya did not purchase and acquire cession of the said property from Respondent's father, the late Kizito Dzorwa. The respondent is also of the view that the counter application is a disguised review application and/or appeal. The respondent further argues that the applicant has not acquired the property through prescription.

Prescription

The applicant in the counter application avers that the title vests in the estate of his late father Rabson Nyakudya , through the operation of prescription. Section 4 of the Prescription Act [*Chapter 8:11*] states that;

“a person shall by prescription become an owner of a thing he has possessed openly and as if he were the owner thereof for
a) an uninterrupted period of thirty years; or
b) a period which, together with any periods for which such thing was so possessed by his predecessors in the title, constitutes an uninterrupted period of thirty years.”

The applicant argues that the second respondent has lost its right over the immoveable property in question as he had uninterrupted possession of it for 40 years, that is to say from 1977 up to 2017. It is only in 2017 that the second respondent moved to evict the applicant's tenant from the property, however he failed and/or neglected to cite the applicant in the application itself. There was ample time for the second respondent to show interest in the property and by the time he acted, he was already out of time. Therefore, the argument of prescription holds water in the current scenario. The point has merit.

In the case of Bulgarian Limited v Government of the Republic of Bulgaria and Ors HH7132/15 CHIGUMBA J commented as follows:

“any person who acquires full juristic possession, without force and peaceably, so openly and patiently to the owner or another or both, and without recognizing the title of the owner becomes the true owner thereof after the passage of a period of 30 years. The court also observed that the possessor seeking transfer on the basis of acquisitive prescription must show that its possession was adverse to the rights of the owner and that open possession was exercised without recognizing the title of the owner.”

Also, in the case of *Ex parte Puppli* 1975 (3) SA 461 (D) at 463, it was stated that: -

“The rationale of our law of acquisitive prescription is that an owner who negligently fails to protect his interests against a stranger in possession of his property should forfeit the property to the possessor.”

It is on this premise that the court has determined that the second respondent’s conduct was indicative of an individual who has no interest in the property, in that the second respondent was passive for 30 years whilst the applicant enjoyed peaceful use of the property. The judgment handed down at the Magistrates Court under Case Number 415/07 was not issued against the applicant hence it did not disturb prescription. Furthermore, the judgment was only affected 10 years later, in 2017. The court believes that the second respondent’s right to the property is prescribed and it is now belonging to the Applicant.

Declaratory Order

As far as the declaratory order is concerned the court is guided by Section 14 of the High Court Act [*Chapter 7:06*].

“High Court may determine future or contingent rights, The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination”

In the case of *RK Footware Manufactures Pvt Ltd v Boka Book Sales* 1986 (2) ZRL 209 SANDURA JP as he was then held and commented as follows:

“The court has to identify two considerations that the court has to look at when determining whether or not to issue a declaratory order. He stated that the court had to consider whether the applicant was an interested person in an existing future of contingent right of obligation and secondly whether the case was a proper one for the court to exercise its discretion.”

In the case of *Recay Investments (Pvt) Ltd v Tarcon* 2011(2) 2LR 65(H) the court held that;

“For a declaratory order to succeed there are certain conditions to be met. This means that if the applicant fails to meet one or both of the conditions the court has to use its discretion to either grant or dismiss this order.”

The conditions that the applicant has to meet are that Applicant should be and interested party. The applicant has interests in the property in that he continued to be in uninterrupted possession and occupation of the property for 40 years. Meanwhile, it seems the second respondent has no interest in realizing his rights in the property in question as demonstrated by his conduct despite the fact his property is on close proximity with the applicant's property. The second respondent saw the use of this property over the years and decided not to exercise his rights over the property. The fact that the second respondent failed to even collect rent or claim occupation of his property shows that he has no existing interest in the property. Rather he waited 10 years to evict the applicant's tenant, which means that any rights which he held over the property no longer exist by operation of law, s 4 of the Prescription Act to be precise.

The 2nd Respondent relied on the case of *Kwete v Africa Community Publishing and Development Trust & Others HH-226/98* where the Court stated that –

“It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation as a declaratory order is sought. A declaratory order is after all merely one species of relief available on review, one can imagine the case of a litigant who institutes an application for review and reinstatement well out of time. He applies for condonation which is refused. All then he has to do is to institute a fresh application for review, but instead of seeking reinstatement, he wants a declaratory order. Should he be able to get round provisions of order 33 of the High Court Rules 1971 that easily? I think not.”

However, although similar, it is not on all fours with the current matter. The applicant in this instance was dragged to court by the second respondent and only filed a counter application in response to the second respondent's main application. The applicant's futile attempts at both the Magistrate and the High Court to evict the respondent do not affect his claim. The position still stands that he has real and tangible rights over the immovable property. The second respondent's eviction of Chirandu Mbanje was therefore premature in the circumstances as the second respondent did not have actual rights over the premises. He jumped the gun by filing such an application whilst he was not the official owner of the rights over the property. In this case, the second respondent cannot rely on the order of eviction granted in the lower court as the court granted the order whilst oblivious to the fact that ownership over the premises was in contention. Also, a declaration of the applicant's rights in this Court will not be permitted to be the premise upon which the decision of the court *a quo* is set aside, it is irregular and procedurally unacceptable.

Ancillary Relief

According to *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa/Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa/ 5th Ed 2009, Ch 5 p196-197.*

“A High Court has the power 'in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination'.”

In casu it is clear that the applicant has been seeking consequential relief in the form of eviction of the second respondent, from the said property and has not succeeded. The applicant in his draft order, on p 101 of his counter application, seeks that the first and second respondent be ordered to do all such things necessary to effect cession of said immovable property to the beneficiaries of the deceased Estate of the Late Rabson Mutuna. He is obviously opposed to the Magistrates judgement in which he sought to evict the second respondent from the property in question, however, he dismally failed to properly mount his application before the Court . It is trite that the second respondent notes that he ought to follow the proper procedure for the intended relief if he intends on evicting the second respondent. As stated in *Herbsten and Van Winsen* (see above) and also s 14 of the High Court Act, an applicant for a declaratory order cannot claim any relief consequential upon the determination of the order, hence it is on this premise that the Applicants request for ancillary relief will not be entertained any further by this court.

Although, the court is not satisfied that the Applicant adduced sufficient documentation to prove that there was indeed a sale, the court is satisfied that prescription has taken place hence the applicant has acquired rights as the lawful lessee over the land through prescription. Also, the second respondent has failed to show that he has existing future or contingent rights in this matter. It however goes without saying that the applicant's counter application is not without merit and hence it ought to be granted with the exception that the ancillary relief consequential to the courts declaration of rights cannot be granted as is prohibited by statute.

In the result the court orders as follows;

1. The applicant's counter application for a Declaratory Order be and is hereby granted
2. The applicant is hereby declared the lawful lessee of the immovable property measuring 840 square metres, situated at Mungate Business Centre, Domboshava, under Chief Chinamora in District of Goromonzi under Lease Number Stand TT 23204.

3. There will be no order as to costs.

Hove and Associates , applicant's legal practitioners
Govera Chambers , second respondent's legal practitioners