

CITY OF HARARE
versus
GEORGE MUSANHU

HIGH COURT OF ZIMBABWE
MHURI & MUCHAWA JJ
HARARE, 19 September 2023 & 29 January 2024

Civil Appeal

Ms *P Nkomo*, for the appellant
Respondent in person

MUCHAWA J: We heard the above appeal on 19 September 2023 and granted it on the following terms:

1. The appeal succeeds with costs.
2. The order of the court *a quo* be and is hereby set aside and is substituted with the following order:
 - a. That the plaintiff’s claim for eviction is hereby upheld
 - b. That the defendant and all those claiming occupation through him are hereby ordered to give vacant possession to plaintiff, failing which they are to be evicted from Shop Number 16, Samora Machel Parkade, Harare, being plaintiff’s premises.

The respondent has filed an appeal under SC 559/23 and reasons for our order have been requested. These are they.

Factual Background

The appellant, being the plaintiff in the court *a quo* issued eviction summons against the respondent, who was defendant then. The relief sought was to have the respondent and all those claiming occupation through him of Shop No. 16, Samora Machel Parkade, Harare evicted. The basis was that the respondent was an illegal sub-tenant of one Mr Sigauke who had held a lease with the appellant. Such lease agreement was said to have been terminated in 2018 for non-payment of rentals following service of a notice of termination on Mr Sigauke in January 2018. Mr Sigauke is said to have heeded the notice and vacated the premises, but

the respondent is alleged to have refused to leave despite not having any lease agreement with the appellant. This illegal occupation is said to have continued at a loss to the appellant as no rentals were being paid. This prompted the issuance of summons for eviction.

On his part, the respondent averred that he had an agreement of sale of the lease with Mr Sigauke to inherit Mr Sigauke's lease agreement. He claimed too that he had entered into an agreement with the appellant to repair the premises and have the amount expended on repairs going towards rentals. He claimed to have been paying rentals but produced only one proof of payment for August 2022. Another claim was that he was a statutory tenant, but the appellant had not given him a lease agreement. He was therefore unable to produce any lease agreement between him and the appellant. There were letters which he produced claiming they had been written by the appellant's representatives which recognised him as a tenant, but the appellant dismissed these as forged.

The court *a quo* accepted the letter which was allegedly written by the appellant's town clerk as acknowledging the sales agreement between Mr Sigauke, the holder of the lease agreement and appellant. Such letter was said to have promised the respondent that his own lease would be signed once a full council meeting had been convened. This is the letter which appellant claimed was forged on account of the town clerk not dealing with these kinds of issues. It was concluded that the respondent had proved a right to be in occupation of the premises hence the claim for eviction was dismissed.

Before us an appeal was lodged on the following grounds:

1. The court *a quo* grossly erred in fact amounting to a misdirection in law by concluding that the Appellant failed to prove its case on a balance of probabilities, yet the respondent had no valid lease agreement with the appellant which is the owner of the property. Such factual misdirection was so gross that no reasonable person applying his mind would have arrived at such a conclusion as the court *a quo*.
2. The court *a quo* grossly erred in fact and consequently in law such that no sensible person applying his mind would have arrived at such a conclusion by relying on a forged document to establish that the respondent had a right to lease appellant's premises.

The relief sought is that which we granted as spelt out above.

At the hearing, we dismissed the respondent application for postponement of the matter as we found that there was no good cause shown for this. This appeal had been initially set down for hearing on 13 July 2023 and the respondent claimed that he was sick,

and he sent his cousin to seek a postponement. He said that he had wanted to instruct lawyers to represent him, but he did not as he then intended to represent himself. His explanation that he did not have time to prepare for the hearing from 13 July to 19 September was unreasonable. It was at this point that he wanted to file heads of argument, yet he was aware from July of the need to file these. As a self-actor he had no obligation to file heads of argument but if he so chose, then he had to file same in terms of the rules. The impression created was that he simply wanted to buy time and continue to prejudice the appellant as he was not paying any rentals.

Appellant’s submissions before us

Ms *Nkomo* submitted that there are two arising issues as eviction was sought on the basis that the respondent was an illegal tenant. The court’s reliance on the letter appearing on page 80 of the record was impugned. The letter was allegedly written to the respondent by the Town Clerk. I will reproduce it for completeness.

“24 June 2010

Dear Mr Musanhu

Ref: Cession of lease for shop No 16, Samora Machel Parkade, Harare

I refer to the sales agreement between yourself and Mr P.S. P Sigauke seeking the cession of his lease into your name.

I am glad to advise that the cession has been accepted since the agreement complies with clause 16 of Mr Sigauke’s lease agreement. Further, the repair charges of USD15 500.00 you undertook after authorisation by this office will be credited to your rent account.

As council is facing numerous challenges to convene a full council meeting to pass resolutions regarding your lease and other matters, the council hereby temporarily awards you the position of statutory tenant in view of the extensive repairs you undertook at the council premises. Once the council has conducted a full meeting, your lease will be duly signed off.

Yours faithfully,
Town clerk”

This letter is disputed and labelled fraudulent. The first criticism is that statutory tenancy can not be granted to the respondent who is not paying rent. The record was said to bear witness of the respondent’s failure to pay rent. The law on statutory tenancy was set out by reference to the case of *Total Zimbabwe (Pvt) Ltd v Appreciative Investments (Pvt) Ltd* HH 268/2010.

The second criticism is that the letter which was relied on and accepted by the court a quo was signed by the town clerk who is not authorized to grant such tenancy and that there was need to follow the provisions of s 152 of the Urban Councils Act [*Chapter 29:15*]. For this argument, reliance was placed on the case of *City of Harare v Wonder Munzara & 3 ORS*

SC 1/23. It was contended therefore, that the purported lease agreement was a nullity, and the respondent was an illegal tenant.

Respondent’s submissions before us

The respondent submitted that the appellant was aware that he was in occupation since 2010 on account of the sale with the previous lessee. The letter from the town clerk which I have reproduced above is what the respondent leaned on to claim that he was a lawful tenant. He also argued that Sigauke’s lease agreement allowed for such cession of the lease and that appellant was aware of his occupancy and even issued licences. He further pointed to earlier attempts to evict him in 2014 which had failed.

Ms *Nkomo* countered that and said that the 2014 eviction was against its tenant Sigauke and not the respondent as the appellant was not aware that there was a new occupant. The respondent prayed that the appeal be dismissed.

Analysis

The matter of *City of Harare v Munzara & 3 ORS supra*, easily disposes of this matter for us. We can do no better than quote from it.

“In addition to the above legislative provisions, s 152 (2) of the Urban Councils Act [*Chapter 29:15*] applies to the sale or alienation of municipal land. It provides:

“(2) Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it the council shall, by notice published in two issues of a newspaper and posted at the office of the council, give notice-

- (a) of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, exchange, lease, donation, disposition or grant of permission of use; and
- (b) that a copy of the proposal is open for inspection during office hours at the office of the council for a period of twenty-one days from the date of the last publication of the notice in a newspaper; and
- (c) that any person who objects to the proposal may lodge his objection with the town clerk within the period of twenty-one days referred to in paragraph (b).”
(The underlining is for emphasis)

There is therefore an elaborate process that has to be undertaken by a municipal authority before it may lawfully dispose of its land. It is a process provided for by statute.”

Further, this was the conclusion:

“The question whether or not the appellant’s Town Clerk and Director of Housing and Community Services had authority to allocate the stands to the respondents pales to insignificance regard being had to the non-compliance with both s 49 (2) and (3) and s 39 of the Regional Town and Country Planning Act and s 152 (2) of the Urban Councils Act [*Chapter 29:15*]. Whatever it is that those officials agreed with the respondents was of no legal consequence. It is a nullity and does not bind anyone. The appeal has merit and ought to succeed.”

Though the *Harare City Council v Munzara supra* case related to sale of land, the requirements to be followed in s 152 (2) of the Urban Councils Act are the same for any alienation of municipal land, including leasing. The respondent did not provide any evidence of the due process having been followed such as publication of the intention to lease, opening the proposal for inspection and then inviting any objections. Whatever was agreed to purportedly with the town clerk is of no consequence. He was not authorized to act as he did, and the appellant cannot be bound by such actions. In any event, the letter itself says the cession has been approved outside a full council resolution.

The circumstances of this case do not fall under the exemption in s 153 of the Urban Councils Act which provides as follows:

“Subject to subsection (2), a council may lease or permit the use of any land owned by it for a period garage referred not exceeding twelve months without compliance with section one hundred and fifty-two.(2)A municipal council may lease or permit the use of any particular shop or other premises in a parking to in section one hundred and ninety without compliance with section one hundred and fifty-two if it publishes a notice in two issues of a newspaper inviting applications for the lease or use of that shop or other premises within such period as the council may determine, being not less than twenty-one days from the date of the first publication of that notice in the newspaper.”

Since this was a lease of a shop, it still required publication in two issues of a newspaper inviting applications for the lease. This was not done.

The statutory tenancy argument does not hold water as the tenancy is premised on a nullity. Even if this was to be entertained for a moment, the respondent falls short of a key requirement to claim statutory tenancy. One must continue to pay rent due, within seven days of due date and perform the other conditions of the lease. I already observed that the respondent did not produce proof of payment of rent except for one payment made in August 2022.

The respondent’s defence was consequently found to have no leg to stand on. It was our finding that the respondent had no valid lease agreement with the appellant, the owner of the property. The letter alleged to have emanated from the town clerk’s office could not stand scrutiny as shown above. For the above reasons we gave the following order:

1. The appeal succeeds with costs.
2. The order of the court a quo be and is hereby set aside and is substituted with the following order:
 - a. That the plaintiff’s claim for eviction is hereby upheld

- b. That the defendant and all those claiming occupation through him are hereby ordered to give vacant possession to plaintiff, failing which they are to be evicted from Shop Number 16, Samora Machel Parkade, Harare, being plaintiff's premises.

MUCHAWA J-----

MHURI J-----

Gambe Law Group, appellant's legal practitioners