

**REPORTABLE ZLR(11)**

**BETTY KANYUCHI**  
**v**  
**DRAWING SERVICES (PVT) LTD**

**SUPREME COURT OF ZIMBABWE**  
**MALABA DCJ, GARWE JA & GOWORA JA**  
**HARARE, SEPTEMBER 11, 2012 & JUNE 19, 2013**

*S Takundwa*, for the appellant

*W B Zhangazha*, for the respondent

**MALABA DCJ:** This is an appeal from a judgment of the High Court in which it granted an application for an eviction order against the appellant on the basis that the respondent was the owner of the property known as stand number 3182 of Subdivision A of 159 of Prospect, Harare. The appellant was found not to have a right of occupation.

The appellant had challenged the vindicatory action instituted by the respondent on the basis that she had a right of occupation derived from an agreement of sale of the property entered into between her and a company called Champion Constructors (Pvt) Ltd, duly represented by one of its directors and a shareholder, Ms Elizabeth Chidavaenzi.

After hearing argument from counsel for both parties, the appeal was dismissed. It was indicated then that reasons for the decision would follow in due course.

It was not in dispute that the respondent was the registered owner of stand number 3182 of subdivision A of 159 of Prospect, Harare. The issue before the court *a quo* was whether there was a binding agreement of sale which gave the appellant the right of occupation.

The court *a quo* found against the appellant. The question before this Court is whether the decision of the court *a quo* is correct on the evidence placed before it by the parties.

The facts of this case are as follows. The respondent issued summons for the ejectment of the appellant from stand number 3182 of Subdivision A of stand 159 Prospect in Harare, on 9 June 2008. In her plea, the appellant sought the dismissal of the claim on the basis that she was a legitimate possessor and occupier of the property. The contention was that the right, title and interest in the property was lawfully transferred to her by a declaratory order issued by the High Court in case No. HC 7594A/06.

The appellant contended that she was in occupation of the property pursuant to an agreement of sale entered into between herself and a company called Champion Constructors) Pvt) Ltd. The appellant contended that, alternatively, the respondent was estopped from denying

that Champion Constructors (Pvt) Ltd was the holder of rights, title and interest in the property and was entitled to dispose of the property as it did.

The respondent, through its managing director Mrs Elizabeth Chidavaenzi, tendered various documentary exhibits in support of its position. She denied that Champion Constructors (Pvt) Ltd had ever been authorised to dispose of the property in the manner alleged or at all.

The appellant relied on her own testimony and on the evidence of two former workers of Fingold Real Estate, which had allegedly been mandated by Champion Constructors (Pvt) Ltd, to dispose of the property to her.

The court *a quo* accepted that the respondent was the registered owner of the property in question, on the basis of irrefutable evidence, the title deeds to the property. The court also accepted that Mrs Elizabeth Chidavaenzi was the managing director and controlling shareholder of the respondent. The evidence placed before the court *a quo* pertaining to the relationship between the respondent and Champion Constructors (Pvt) Ltd was that the respondent company had contracted Champion Constructors (Pvt) Ltd to service the land and develop residential houses on the subdivisions. The agreement between the parties was that Champion Constructors (Pvt) Ltd would be paid in kind for its services or in the form of

completed houses which it would in turn sell to prospective home owners in order to recoup its expenses.

Mrs Elizabeth Chidavaenzi told the court *a quo* that in the past, the respondent had mandated Fingold Real estate to sell two of its properties but it did not sanction the sale of the property in issue. She testified further, that this is the reason why the agreement of sale was not signed by the seller. Her testimony was to the effect that the appellant was involved in a fraudulent sale which had been masterminded by John Chagaresango of Finhold Real Estate, a close relative of the appellant.

Ms Chidavaenzi said that the first time she became aware of the purported agreement of sale of 26 September 2006 between the appellant and Champion Constructors (Pvt) Ltd, was in November 2006 when lawyers for the appellant began pestering her with demands that she sign the document. She also told the court *a quo* that on the two occasions that she had mandated Fingold Real Estate to sell properties on the respondent's behalf, she had given them instructions in writing, which she denied doing in this case.

The appellant admitted before the court *a quo* that John Chagaresango of Fingold Real estate was a close relation of hers, her elder sister's son. She testified that she signed the agreement of sale before John Chagaresango, Mr Phiri and Faith Muzungu on 26 September 2006. Thereafter she paid Z\$32 500 000-00 on 28 September 2006, 9 October 2006 and 3 November 2006. The appellant's evidence before the court *a quo* was that the terms of the

agreement of sale were not fully explained to her. She admitted that Ms Chidavaenzi had never authorised her to make improvements to the property.

The court *a quo* found that, despite being a major shareholder in both the respondent and Champion Constructors, Ms Chidavaenzi was a “focused, confident and convincing” witness whose “evidence proclaimed loudly and boldly that there was no contract to talk about between Champion Constructors and the appellant”.

The court found, further, that, Fingold Real Estate could not possibly have been mandated to sell the property in question to the appellant by Champion Constructors (Pvt) Ltd or anyone else. The Estate agent failed to produce proof of its mandate to sell that particular property.

On the effect of the High court order relied upon by the appellant as bestowing or confirming that the appellant had acquired the rights, title and interest in the property, the court *a quo* found that the order was made in default and was against Champion Constructors (Pvt) Ltd and Elizabeth Chidavaenzi. The court’s view was that the order was not binding on Drawing Services (Pvt) Ltd, or enforceable against it, because despite being the registered owner of the property, it had also not been cited as a party to the proceedings.

According to the appellant's testimony before the court *a quo*, John Chagaresango who worked for Fingold Real Estate advised her that the property in question was for sale. Accompanied by Chagaresango, she went to view the property. The property was in the care of Champion Constructors (Pvt) Ltd, which together with Drawing Services (Pvt) Ltd, the respondent, were under the directorship and shareholding of Elizabeth Chidavaenzi and Keroni Tevera (according to form CR 14 produced before the court *a quo*).

Elizabeth Chidavaenzi testified that Keroni Tevera was a passive participant in the management of the affairs of Champion Constructors (Pvt) Ltd. According to the evidence before the court *a quo*, after the visit to the stand John Chagaresango contacted Elizabeth Chidavaenzi and advised her that the appellant wished to purchase the stand. It would appear that upon instruction, Fingold Real Estate drew up a draft agreement, in terms of which, the seller, Champion Constructors (Pvt) Ltd held itself out as being the holder of the rights, title and interest in the property, and as agreeing to sell to the purchaser, the appellant, its right, title and interest on some of the following conditions:

1. The purchase price of the property of Z\$32 000 000-00 (thirty two million Zimbabwe dollars) plus 15% Value added tax be paid.
2. A deposit of Z\$21 000 000-00 (twenty one million Zimbabwe dollars) to be paid in full within 48 hours of signing the agreement of sale, failing which the seller shall be entitled to cancel the agreement without further notice.

3. A cash deposit was to be paid by bank cash transfer to Champion Constructors (Pvt) Ltd.

Clause 8 of the document of sale provided that there would be no variation of the conditions of the agreement unless the variation was in writing and signed by the parties. In Clause 14 the parties acknowledged that the written agreement between them would be the only agreement and that no other conditions, stipulations, warranties or guarantees would be valid unless included in the agreement.

The appellant signed the proposed agreement on 26 September 2006 before two witnesses. The respondent did not sign. Champion Constructors (Pvt) Ltd did not sign. Elizabeth Chidavaenzi alleges that the estate agents drafted the document without her knowledge and consent. The appellant paid the deposit, before the respondent signed the agreement of sale.

Her first instalment was paid on 28 September 2006. It took her up to 3 November to pay the deposit in full, contrary to the provisions of clause 1 of the alleged agreement of sale which stipulated that the deposit must be paid in full, within 48 hours of the date of the signature of the agreement. If the appellant signed the alleged agreement on 26 September, and assumed that the seller had done the same, the deposit ought to have been fully paid by 28 September 2006.

It is not in dispute that the appellant subsequently paid the purchase price in full to Champion Constructors (Pvt) Ltd. When she sought to take occupation she was prevented from doing so by the respondent. The appellant applied to the High Court seeking an order declaring that the document she signed on 26 September 2006 constituted a valid and binding agreement of sale between herself and Champion Constructors (Pvt) Ltd. On 19 September 2007, the High court issued an order on the following terms:

1. The provisional order in case number HC7594A/06 be and is hereby confirmed on the following terms:
  - (a) That the agreement of sale between the applicant and the first respondent signed on 26 September 2006 in respect of stand 3182 of Subdivision A of 159 Prospect be and is hereby declared to be legally binding and enforceable against the first respondent.

Armed with the order, the appellant took occupation of the property against protestation by Elizabeth Chidavaenzi. On 9 June 2008 the respondent issued summons out of the High Court claiming, by vindicatory action, ejectment of the appellant from stand 3182 of Subdivision A of stand 159 of Prospect Harare. It alleged that it was the owner of the property in terms of Deed of Transfer DT5668/72.

The respondent alleged that the appellant had no right to occupy the property as she had not entered into an agreement of sale with the registered owner of the property. The



respondent alleged that there was no privity of contract between the appellant and the respondent. In resisting the action, the appellant raised three points:

1. She denied that the respondent was the owner of the property and argued that the right, title, and interest in the property had been lawfully transferred to her by virtue of the declaratory order issued in her favour by the High Court order of 19 September 2007.
2. The appellant alleged that she had a right of occupation to the property by virtue of the agreement of sale with Champion Constructors (Pvt) Ltd.
3. The appellant denied that there was no privity of contract between the respondent and Champion Constructors (Pvt) Ltd as they were both under the directorship of Ms Chidavaenzi, who according to the appellant, knew about the agreement of sale.

After hearing the evidence of the parties relating to the issues, the court *a quo* found that the appellant was not a credible witness. The court was not assisted by the evidence of the witnesses called by the appellant to bolster her case. It found Evis Monica Mutodi, to have given “a hopelessly confusing piece of evidence”, which under cross examination was not consistent with that of the appellant even on the purchase price.

The court found that the appellant said that the purchase price was pegged at \$32 000 000-00 while Mutodi said the purchase price was \$32 000 500-00. While Mutodi told the

court that she had discussed the clauses of the alleged agreement of sale with her, the alleged appellant denied this and testified that she only discussed the agreement of sale with John Chagaresango.

On the veracity of the evidence of John Chagaresango, the court found that he testified to being given a mandate by Elizabeth Chidavaenzi to sell certain of her properties, including what he constantly referred to as stand 1382, which in reality was stand 3182. The court found his evidence at variance with that of Mutodi, when he said that Ms Chidavaenzi had visited the site prior to the appellant doing so. The court also found that when directed to clauses that the appellant had not complied with, all Chagaresango could say was that the agreement was not based on what the appellant and the witnesses had signed, but other verbal assurances by Ms Chidavaenzi.

In contrast, the court found the evidence of Ms Chidavaenzi to be precise and to the point. It found that the evidence was consistent with her plea and summary of evidence and in her evidence-in-chief, and under cross-examination she maintained the denial that she gave Fingold or anyone a mandate to dispose of the property.

Having dismissed the defence by the appellant the court granted the eviction order. It is against the order that the appeal was instituted on the following grounds:

1. The court misdirected itself in concluding that Elizabeth Chidavaenzi was a credible witness, yet her demeanour and the inconsistencies and improbabilities in her evidence justified a finding that she lacked credibility.
2. The Judge misdirected himself by relying on what he considered as not having been put to Plaintiff's witness in cross examination, yet those matters related to areas where the evidence of the witnesses was mutually destructive.
3. The court misdirected itself by failing to determine that Elizabeth Chidavaenzi represented both the Plaintiff and Champion Constructors (Pvt) Ltd when she sold the property in dispute to the defendant.
4. The Judge misdirected himself in his conclusion that Evis Monica Mutodi's evidence was "hopelessly confusing".
5. The court misdirected itself in accepting without criticism the evidence of Elizabeth Chidavaenzi to the effect that she did not mandate Fingold Real Estate to sell the property in dispute.
6. The court misdirected itself by coming to a contrary conclusion in respect of a fact which was issue estoppel.
7. The court misdirected itself by relying on principles applicable to a lessee to conclude that the defendant, a *bona fide* possessor, had no right of retention pending compensation for improvements.

8. The Judge misdirected himself by failing to consider that the right of retention arises by operation of law upon the defendant showing that she is a *bona fide* possessor, and not upon the defendant instituting proceedings to enforce the agreement of sale.

The question whether the respondent, Drawing Services (Private) Limited, was a party to the proposed agreement of sale with the appellant, must be answered in the negative. This means that there was simply no privity of contract between the appellant and the respondent. The appellant purported to contract with Champion Constructors (Pvt) Limited, a separate legal entity from the respondent.

The appellant's submission that the matter before the court *a quo* was *res judicata* must be rejected for the same reason. The respondent was not a party to the proceedings in which the High court issued a declaratory order, that the appellant could enforce her agreement of sale with Champion Constructors (Pvt) Limited.

There was no agreement between the appellant and the respondent in this case, as evidenced by the fact that the respondent did not sign the proposed agreement of sale. In fact, the respondent denies offering the property for sale to the appellant.

Clause 14 of the proposed agreement of sale signed by appellant stipulated that the agreement between the parties would only be valid and binding if reduced to writing and signed by both parties. This is intrinsic evidence of the intention of the parties. There was no binding contract between appellant and Champion Constructors (Pvt) Ltd. If there was to be an agreement of sale as alleged by the appellant, it would have to be evidenced by production of a written document signed by both parties.

We are of the view that there was no misdirection on the part of the court *a quo* for the following reasons:

1. There was no contract of sale between the appellant and the respondent.
2. The registered owner of the property, the respondent, had a right to vindicate its property against a person in occupation without its authority.
3. The appellant could not claim a right of occupation against the respondent on the basis that she was granted the right by an agreement that it entered into with another company which was not acting as an agent of the respondent to enter into the agreement on its behalf.
4. The High Court order on which it was sought to found the right of occupation did not grant appellant such a right. That order, if it is correct, declared the validity and bindingness of the agreement purportedly entered into between appellant and a Champion Constructors (Pvt) Ltd. Unfortunately the order granted has no legal force

or effect in the sense in which appellant interprets it. It purports to declare the validity and bindingness of a written agreement which was signed by both parties on 26 September 2006. In fact no such agreement exists. The proposed agreement was never signed by both parties. Only the appellant signed it. No reliance can therefore be placed on that order of the High court.

Mr *Takundwa* for the appellant, having noticed the difficulty appellant's case was meeting on appeal, argued that the parties entered into an oral agreement. With respect, this was never alleged before the court *a quo* when the parties actually gave evidence, and it is not alleged as a ground of appeal. It is also contrary to the clear intention of the parties as expressed in the document signed by the appellant on 26 September 2006.

For instance in clause 14, the document declares itself to contain all the conditions and representations by which the parties wish to be bound. It goes on to exclude anything else not contained therein, which is not in writing, and signed by the parties. It expressly denies force to oral evidence as proof of a valid contract of sale between the parties. The appellant accordingly paid her cash deposit when there was no obligation on her to pay. Only one party had signed the document on the dates that she paid.

In light of the evidence that there was no agreement of sale between the appellant and the respondent, the fact that both companies are under the directorship of Elizabeth Chidavaenzi does not assist the appellant's case.

It was for these reasons that the appeal was dismissed with costs.

**GARWE JA:** I agree

**GOWORA JA:** I agree

*Takundwa & Co.*, appellant's legal practitioners

*Chinogwenya & Zhangazha*, respondent's legal practitioners