

REPORTABLE (116)

EASTLEA HOSPITAL (PRIVATE) LIMITED
v
(1) MARTHA NDORO (2) WADZANAYI MUTOMBWERA (3)
LEWIS HORNE (4) SAMANTHA MOYO (5) PRINCE
NDONGWE (6) LUCIA CHAPERUKA (7) ALMA CHORNE
(8) NOMSA STOLE (9) JANE MASHAKADA (10)
NYIKADZINO MUTATI

SUPREME COURT OF ZIMBABWE
BHUNU JA, KUDYA JA & MWAYERA JA
HARARE, 6 FEBRUARY 2023 & 3 NOVEMBER 2023

S. M. Hashiti, for the appellant

V. C. Maramba for the respondents

Judgment No. SC 116/23
Civil Appeal No. SC 563/22

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MWAYERA JA: This is an appeal against the whole judgment of the High Court, (“the court *a quo*”) handed down on 6 October 2022. The court *a quo* dismissed the appellant’s appeal against refusal of summary judgment by the Magistrates’ Court.

FACTUAL BACKGROUND

The appellant is a company duly registered in terms of the laws of Zimbabwe and it operates various Medical facilities in Harare. The appellant is the owner of Stand No. 3057 Salisbury Township known as Killarney Court Eastlea, Harare (“the property”).

The property was sold to the appellant by the Executor of Estate Late Farida Hettana. Prior to the sale of the property the respondents were tenants residing at the

property. The respondents were thus, upon purchase of the property, inherited as statutory tenants. Pursuant to the purchase of the property, the appellant intended to convert it into a private hospital. The conversion required extensive renovations for the flats to undergo a rebuilding scheme. This would in turn, make the property unsuitable for residential use during the renovations. The appellant gave the respondents three months' notice to vacate the premises. The notice expired on 12 April 2022 after which date the respondents failed and or neglected to vacate the premises.

Consequently, the appellant instituted eviction proceedings in the Magistrates' Court. The appellant sought an order for the cancellation of the lease agreements as well as eviction of the respondents.

The respondents respectively entered appearance to defend the summons. Their defence was premised on the fact that there was a pending matter under HC 2317/22 involving same parties and that the resolution of that matter would determine who had title over the property.

The appellant then made an application for summary judgment before the Magistrates' Court averring that the respondents had no legal basis to stay at the property and that they did not have a *bona fide* defence. It contended that the defence was filed solely as a delaying tactic to the imminent eviction. Further, the appellant contended that the matters pending in the High Court had no bearing on the eviction matter as ownership of the property was clear. In the pending case, the respondents had made an application to reopen the Late Farida Hettana's deceased Estate.

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In deciding the matter, the Magistrates' Court held that, there were material disputes of facts that needed to be resolved by way of trial. The Magistrates' Court found that it was difficult to ascertain and resolve the dispute before it without a full trial. It consequently dismissed the application for summary judgment.

Dissatisfied with the refusal to grant summary judgment, the appellant noted an appeal to the court *a quo* on the following grounds:

1. The court *a quo* erred at law and thus misdirected itself by dismissing the application for summary judgment when the respondent had not managed to prove an arguable defence.
2. The court further erred in fact and law by making a finding that there were material disputes of fact when none existed and had been pleaded by the parties.
3. The court erred at law in dismissing the application having found that there were material disputes of facts when none existed.
4. The court erred at law in dismissing the application for summary judgment on the basis of a pending High Court matter. (*sic*)

The issue that was placed before the court *a quo* for determination was whether or not the Magistrates' Court erred in dismissing the application for summary judgment. The court *a quo* upon assessing the matter before it agreed with the Magistrates' Court and thus found against the appellant.

It found that the appellant's first ground of appeal lacked merit because the respondents' defence, that there was a pending case which could affect ownership, constituted a *prima facie* defence sufficient to vitiate the application for summary judgment.

The third ground of appeal was struck out by consent on the basis that it was repetitive of the second ground of appeal. As regards, the second ground of appeal, the court *a quo* held that the material disputes of facts which required to be ventilated would emerge more fully in the trial of eviction proceedings. Consequently, it held that the second ground of appeal had merit. The court *a quo* further upheld the fourth ground of appeal when it found that the matter pending before the High Court had not yet been disposed of. The court *a quo* thus upheld the decision of the Magistrates' Court and dismissed the appeal.

Irrked, by the determination of the court *a quo* the appellant noted the present appeal on the following grounds:

GROUND OF APPEAL

1. The court *a quo* erred in failing to hold that the appellant was entitled to summary judgment as his right to vindicate cannot be defeated at law by a pending application challenging his acquisition of the property.
2. The court *a quo* further erred at law by upholding the decision of the Magistrates' Court in instances where no material disputes of fact existed so as to constitute a *bona fide* defence to summary judgment.

SUBMISSIONS BEFORE THIS COURT

Mr *Hashiti*, for the appellant submitted that the court *a quo* erred at law by upholding the decision of the Magistrates' Court when the appellant had satisfied the requirements for granting of a summary judgment. He submitted that the defence raised by the respondents that there was a pending High Court matter and that there existed supposed

material disputes of fact which would only emerge upon ventilation at a trial, was not a sufficient and valid defence to the application for summary judgment.

Counsel contended that the case pending in the High Court had no bearing on the application for eviction based on *rei vindicatio*. He contended that the appellant was the registered owner of the property and that after giving due notice it sought to evict the respondents. It was counsel's further submission that the existence of a separate pending matter in which the respondents sought the reopening of a deceased estate did not constitute a material dispute of fact. Moreso, considering that the pending matter had no bearing on ownership. He averred that the respondents had no *bona fide* defence to the claim and as such, summary judgment ought to have been granted.

Per contra, Ms Maramba for the respondents, submitted that there were issues which required to be ventilated through *viva voce* evidence. She submitted that the respondents had *locus standi* to challenge the administration of the estate of the seller since they were tenants on the property in question. She contended that the fact that respondents were tenants and that there was a pending case was sufficient defence to the *rei vindicatio* as their tenancy had a bearing on ownership.

ISSUE FOR DETERMINATION

The sole issue that falls for determination in this case is whether or not the court *a quo* erred in upholding the Magistrates' Court's decision dismissing of the appellant's application for summary judgment.

THE LAW

The law on summary judgement is settled. This Court has clearly set out the requirements that have to be justified for summary judgement to be granted. In *Tavenhave & Machingauta Legal Practitioners v The Messenger of Court* SC 53/14 this Court elucidated the requirements when it made the following pronouncement at p. 4:

“Summary judgement is a drastic remedy which will only be granted where it is clear that the defendant has no *bona fide* defence and has entered appearance to defend solely for purposes of delay. Because of the drastic nature of the remedy a court will not grant it if there is any possibility that the defence raised on papers might succeed. Thus it has been held that a mere possibility of success will suffice to avoid an order for summary judgment and that;

‘all that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that “there is a mere possibility of his success;” “he has a plausible case;” “there is a triable issue;” or, “there is a reasonable possibility that an injustice may be done if summary judgment is granted.’”

See also *Kingstons Limited v L D Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) at 458 F-G and *Bastin v Madzima* SC 37/20 in which this Court made the following remarks at p. 11. **Judgment No. SC 116/23**
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“There can be no doubt that the appellant did not point to any *bona fide* defence to the respondent’s claim or to any triable issue as would dissuade the court *a quo* to grant summary judgement. **While summary judgement is an extra ordinary remedy given that it deprives a litigant, desirous of defending an action, the opportunity to do so without regard to the *audi alteram partem* rule, it has always been granted by the courts to an applicant possessing an unassailable case. It is trite that such an applicant should not be delayed by resort to a trial, whose outcome is a forgone conclusion.**

It is also trite that in order to defeat an application for summary judgment, a respondent must set out a *bona fide* defence with sufficient clarity and completeness to enable the court to decide whether the opposing affidavit discloses facts which, if proved at the trial, would entitle the respondent to succeed”. (my emphasis)

It is apparent from the cited cases that in an application for summary judgment the applicant must show that the respondent does not have a *bona fide* defence and that the

defence is ill founded. In other words, for the applicant in a summary judgement to succeed his claim must be unassailable.

The appellant's claim is anchored on *rei vindicatio*. What constitutes *rei vindicatio* has been ably set out in a number of cases in this Court. The case of *Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd & Ors* SC 40/15 at p 10 is apposite. This Court illustrated what constitutes the principle of *rei vindicatio* as follows:

“The nub of the *actio rei vindicatio* is that an owner is entitled to reclaim possession of his property from whosoever is in possession thereof. As was stated in *Chetty v Naidoo* 1974 (3) SA 3 at p 13:

‘It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council v Raid Townships Registrar & Ors* 1910 TS 1314 at 1319), but there can be little doubt that one of its incidents is the right to exclusive possession of the res, with the necessary corollary that the owner may claim his property whenever found, from whomsoever holding it. 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 enforceable rights against the owner (e.g. a right of retention or a contractual right)’.

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This Court set forth the remedy of *rei vindicatio* in *Chenga v Chikadaya & Ors* SC 7/13 at p.7 when it stated the following:

“The *rei vindicatio* is a common law remedy that is available to the owner of property for its recovery from the possession of any other person. In such an action there are **two essential elements of the remedy that require to be proved. These are firstly, proof of ownership and secondly, possession of property by another person. Once the two requirements are met, the onus shifts to the respondent to justify his occupation** (my emphasis).

See also *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H) in which the principle of *rei vindicatio* was clearly propagated, as a principle based on the fact that an owner cannot be deprived of his property against his will and that he is entitled to recover it from any person who retains possession of it without his consent.

The common thread running through the cases cited above is that title holders are protected by the law. Once ownership is proven the vindication and protection of the right to ownership should prevail. In *rei vindictio* matters once ownership has been proved, its continuation is presumed. The owner simply has to prove ownership of an identified movable or immovable asset which the respondent is in possession of without his or her or its consent. See also *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236 (H) and *Nzara & Ors v Kashumba & Ors* SC 18/18.

APPLICATION OF THE LAW TO THE FACTS

What is to be determined in this case is whether or not the court *a quo* erred in upholding the dismissal of the application for summary judgment. The appellant's main contention is that having established the requirements of summary judgment, the court ought not to have dismissed its appeal against the Magistrates' Court judgment. The appellant further sought to vindicate its right to the property for which it had title. The property was transferred to the appellant after it purchased the same. After acquiring the property, the appellant gave the requisite three months' notice to the respondents. This was on the basis that it required the property for its own use. It is trite both at common law and statute that a property owner has the right of use of that property and that the courts have a duty to restore that right when it is unjustifiably denied. The appellant having shown that it is the owner *per* title and that the respondents were refusing to vacate and thus holding onto possession of the property without its consent, satisfied the requirements of vindicatory relief. The principle that an owner cannot be deprived of his property without his consent is settled. Once established that the appellant is the owner and that the respondent is holding on without the consent of the appellant, the onus shifts to the respondent to allege and establish that he or

she has a legal right of retention of the property in question or that he or she has an enforceable right against the owner.

The respondents in this case had no legal basis to justify their continued occupation of the property. The respondents in this case have not alleged facts which would entitle them to succeed. A vague and generalised assertion that there are unspecified material disputes of facts to emerge at the trial as alleged by the respondents does not go close to demonstrating a *bona fide* defence. The respondents did not spell out with clarity any triable issues. That there is a pending case at the High Court in which the respondents, who are not beneficiaries are challenging the appointment of an executor in the Estate Late Farida Hettena is not a *bona fide* defence. It does not warrant the deprivation of the appellant, as the property owner, of its right to successfully vindicate its property. Further, that there was a pending case was not a sufficient defence considering that correspondence contained in the record that was addressed to the respondents, shows the executor's intention to sell the property. There is also a letter from the Estate Farida Hettena informing the respondents that the sale had been concluded, and that ownership had been passed to the appellant. Lastly, the deed of transfer established that the the appellant is the new owner of the disputed property. The respondents in this case had no defence that could entitle them to succeed against the application for summary judgment. The existence of a pending case did not amount to a material dispute of fact neither did it clothe the respondents with a *bona fide* defence.

The remarks of this Court in *Boka Enterprises (Pvt) Ltd v Joowalay & Anor* 1988 (1) ZLR 107 (SC) at 114C are instructive:

“In cases such as this care must be taken not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejection is sought to raise fictitious issues

of fact thereby delaying the resolution of the matter to the detriment of the lessor” (My emphasis)

In *casu* the lessor was the appellant who is the owner and holder of title. It sought vacant possession of its property which the respondents held onto without its consent after notice of ejectment had been properly and adequately given. The respondents had no real triable issues. They had no recognizable defence and as such had no legal basis to justify their continued occupation of the appellant’s property.

It is settled, as observed in case law cited above, that our law jealously protects the right of ownership and the correlative right of the owner to his property. Considering that the appellant established and met the requirements of *rei vindicatio*, that it is the owner of the property and that the respondents continue to occupy same without the appellant’s consent, its right of ownership had to be protected by the court. **Judgment No. SC 116/23** **Civil Appeal No. SC 563/22** therefore erred in upholding the judgment of the Magistrates’ Court which dismissed the application for summary judgment. The respondents had no *bona fide* defence and no legal basis to continue occupying the appellant’s property, without the owner’s consent.

DISPOSITION

The appeal has merit and it must succeed.

Regarding costs, they follow the result.

Accordingly, it is ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“i. The appeal be and is hereby allowed with costs.

ii. The judgment of the court *a quo* is set aside and substituted with the following:

“The application for summary judgment be and is hereby granted with costs.”

BHUNU JA : I agree

KUDYA JA : I agree

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Makururu & Partners, appellant’s legal practitioners

Maseko Law Chambers, respondents’ legal practitioners