

LEONARD USAYI
versus
FADZAI USAYI

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 12 September, 2022 & 18 January 2023

Opposed Application

Advocate *S Banda & T Gurira*, for applicant
G Ndlovu, for Respondent

MAXWELL J

This is an application for *rei vindicatio pendente lite*.

BACKGROUND

Applicant and respondent are husband and wife having married in terms of the Marriage Act [*Chapter 5:11*] on 27 September 1997. The marriage was blessed with two children who are now adults. During the subsistence of the marriage, they acquired a property known as Lot 4 of Chimwemwe of subdivision A Kingsmead of Borrowdale Estate measuring 4212 square metres (the property). Applicant says the property was acquired by his optional shares from his previous employment. The property was subdivided and stand 916 Borrowdale Township of Lot 4 of Chimwemwe of Subdivision A of Kingsmead Extension of Borrowdale Estate measuring 2000 square metres was donated to the Respondent. Applicant retained title in the remaining extent as the sole exclusive owner. The relationship of the parties deteriorated. Applicant left the property in September 2021. He alleges that he was left in a mental institution on or about 18 September 2021 and has been homeless ever since, having been locked out and denied access to the property by the respondent. He has approached this court seeking exclusive occupation and dominion over the remaining extent of the property. He averred that respondent will not suffer prejudice as she has title to a vacant and developed stand with a fully furnished property. Further, that no transport costs will be incurred by the respondent if she is ordered to move as her property is a few meters

away from his. In his view, respondent ought to be granted exclusive dominion, occupation and discretion over the subdivision registered in her name. He prayed for the application to be granted with costs on a higher scale.

Respondent acknowledged that the property was acquired after applicant secured a loan from his employer, Trust Bank. The property was registered in applicant's name as he was the borrower. At the time the parties were living in a house in Westgate which she had acquired and which was registered in her name. Before substantial repayments of the loan were made, applicant was dismissed from employment. As a consequence, the loan became immediately due and payable in full. In order to avoid foreclosure on the loan and repossession of the property, applicant pleaded with her to sell her house in Westgate and utilize the proceeds to pay off the loan facility. She agreed and the loan was paid off. In 2017 the property was subdivided to facilitate the building of a cottage with a view to set up a bed and breakfast facility to supplement their income. She paid for the subdivision and related costs, and obtained a loan from her employer in order to develop the smaller subdivision and build the bed and breakfast cottage. She was still paying off the loan at the time of deposing to the opposing affidavit. She stated that applicant was removed from the matrimonial home by his relatives to stay with them in order to protect her and the children from his violent behavior. She mentioned the relatives who took him from the matrimonial home. She indicated that in October 2021 she instituted divorce proceedings in which she is claiming both of the properties.

Respondent pointed out two preliminary issues. The first one is that there are material disputes of fact over the ownership of the property which cannot be resolved by way of application. The second is that applicant cannot claim a right of *rei vindicatio* over a property whose ownership is disputed and such dispute is currently pending before the Court. Respondent conceded that she locked applicant out of the property and goes on to explain that she changed the locks on the doors and gates to protect herself and the children after the police had refused to assist her. She disputed the propriety of residing in the manner suggested by applicant citing his history of violence. She pointed out that the properties are in one yard without a fence or wall and that she fears harm to her and the children from the applicant. She further pointed out that the cottage is too small to accommodate her and the children as it is a single room with a bed. In her view, applicant is

attempting to evict her and the children from the matrimonial home through this application. She prayed for its dismissal with costs.

In the answering affidavit, applicant disputed that respondent made any contribution to the acquisition of the property. He disputed being dismissed from employment and alleged that he acquired the Westgate house which he subsequently transferred to the respondent to enable her to secure a loan from the bank using it as security. He pointed out that the house was sold way before his resignation and the proceeds therefrom were not utilized to pay off the loan. He pointed out that the property was not up for foreclosure as it was never burdened by a mortgage bond. He disputed that respondent paid for the subdivision. To him the issue of ownership is clear and there is no material dispute of fact which might need the parties to go for trial. He submitted that the guest house has two bedrooms and can accommodate a small family. He pointed out that their son is now working in Germany and respondent's reasons for not moving to her property are artificial, inconsiderate and malicious. He disputed being removed from the house by his relatives. He insisted that the application ought to succeed.

SUBMISSIONS BY THE PARTIES

In his heads of argument, applicant stated the requirements for *rei vindicatio* which are that a party is the owner of the property, that the property is in possession of another and that as the owner, he is being deprived of the property without his consent. He referred to case law including *Lafarge Cement Zimbabwe Ltd v Chayizambura* HH 413/18, *Jolly v Shannon and Anor* 1998 (1) ZLR 78, *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999(1) ZLR 262, and *Zavazava and Anor v Tendere* 2015(2) ZLR 394. He pointed out the rationale of the principle of *rei vindicatio* which is that one cannot be deprived of his or her own property against his or her will. He referred to *Ishemunyoro (nee Mandidehwa) v Ishemunyoro* SC 14/19 for the position that the right of ownership in immovable property must be registered with the Registrar of Deeds and that the contention that one solely purchased the property and effected its registration in the parties joint names does not affect their ownership and entitlement to the enjoyment and use of real rights. He submitted that Respondent has no right of retention to the property and that the dispute of fact alleged by the respondent is straightforward and capable of resolution on paper. Applicant seemed to have accepted that the matter is *lis pendens* but argued that the court has a discretion to hear the

matter in the interest of justice. He argued that it will be a travesty of justice if he is denied possession of his property solely because there is a matter pending before the courts.

Respondent argued in her heads of argument that she has a valid legal right of retention and occupation of the matrimonial home. She pointed out that the fact that applicant holds a title deed is neither here nor there given that in divorce proceedings the Court is guided by contribution to the acquisition of the property. She made reference to s 7 (1) of the Matrimonial Causes Act [*Chapter 5:07*] which empowers a court, in granting a decree of divorce, to make an order with regard to the distribution of the assets of the spouses, including that any asset be transferred from one spouse to the other. She argued that applicant cannot prove his ownership of the property and therefore failed to satisfy the first requirement for a *rei vindicatio*. She also pointed out that the court cannot decide on this application without making a pronouncement on ownership, which pronouncement would pre-empt the divorce trial. Respondent argued that a wife at law does not require the husband's consent to stay in the matrimonial home. She referred to the case of *National Provincial Bank, Ltd v Ainsworth* (1965) 2 All E.R. 472 wherein it was stated that a wife does not remain lawfully in the matrimonial home by leave or license of her husband as the owner of the property but remains there as it is her right and duty to do so as a result of the status of marriage. Further that in accordance with *B v B* [2020] ZAKZDHC 67, the right ceases to exist upon termination of the marriage. Respondent submitted that applicant constructively deserted the matrimonial home by making cohabitation impossible and dangerous for her and the children and is now approaching the court on false basis alleging that he was kicked out and unlawfully dispossessed. According to her, the application is an abuse of court process and should be dismissed with costs on a higher scale.

THE LAW

An action based on the *rei vindicatio* is available to an owner who has been deprived of his or her property without consent and who wishes to recover it from the one who retains possession. It derives from the principle that an owner cannot be deprived of his property without his consent. In *Chetty v Naidoo* 1974 3 SA 13 (A) it was stated 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 (e.g., 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... (cf. *Jeena v Minister of Lands*, 1955 (2) SA 380 (AD) at pp 382E, 383)...”

See *Tendai Savanhu v Hwange Colliery Company* SC 8/15; *Van Der Merwe and Another v Taylor NO and Other* 2008 (1) SA 1. Once ownership has been proved its continuation is presumed. The *onus* is on the defendant to prove a right of retention. The action is based on the factual situation that prevailed at the time of the commencement of the legal proceedings. See: *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H).

Where matrimonial property is involved, a spouse has a *sui generis* right to remain at the matrimonial home while the parties are married. The right arises from the marriage relationship, which means that it ceases to exist upon termination of the marriage. In *Cattle Breeders Farm (Pvt) Ltd v Veldman* [1974] 1 All SA 289 (RA) the court recognized that a spouse occupying the matrimonial home may be ejected from the matrimonial home provided that an offer of ‘suitable alternative accommodation’ or ‘a means of acquiring such suitable accommodation is made. In *Badenhorst v Badenhorst* 1964 (2) SA 676 it was stated that a spouse’s right to eject the other must flow from considerations which to a great extent must depend on the merits of the matrimonial dispute.

ANALYSIS

The first issue to consider is whether or not the preliminary points raised by the Respondent are merited. The first is whether or not there are material disputes of fact. In *Prorand Enterprises (Pvt) Ltd v Firoza Moosa* GARWE JA outlined the approach to be taken where there are disputes of fact on the papers in the following manner,

“The headnote in the case of *Masukusa v National Foods Ltd & Another* 1983 (1) ZLR 232 (H) reads as follows:

“Proceedings should not be initiated by notice of motion when there is likely to be a conflict in the evidence or where the claim is illiquid, as in a claim for damages. Nevertheless, even if notice of motion proceedings are wrongly used, the courts will take a robust view of conflicts of fact, where they think they can solve the issue despite apparent conflicts in evidence. They will also seek to save further wasting of costs by referring the matter for oral evidence, or ordering the application to stand as a summons or ordering the papers to stand as pleadings. They will not, however, allow oral evidence to prove facts which the affidavits themselves

should have presented, nor will they automatically and *mero motu* allow a matter to go to evidence where counsel advocates the procedure as a fall-back position in the event that an application is granted. Where the facts are in dispute, the court has a discretion as to whether to dismiss the application or allow the matter to go to evidence. The first course is appropriate when an applicant should, when launching his application, have realised that a serious dispute of fact was inevitable.”

The above case is authority for the proposition that an application can be dismissed where an applicant should have realised that a serious dispute of fact was inevitable. In the *locus classicus* of *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S), this Court stated as follows;

“It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over - fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact.”

There are a number of disputed facts in this matter. The first is that Respondent alleged that in 2002, Applicant obtained a loan of about \$50 million Zimbabwean Dollars (ZW\$) from his employer which was used to acquire the property. Applicant disputed the amount of the loan and indicated that it was ZW\$ 102 320 242.50. He relied on a letter from his employer accepting his resignation in January 2004. The letter stated the amount owing as at 8 January 2004 but does not state what the initial amount was.

The second is that respondent alleged that she sold her property, House number 1524 Fame Lilly Drive, Westgate in order to pay off the loan secured to acquire the property in question. This was disputed by the applicant who submitted that he was the one who had acquired House number 1524 Bluff Hill Township and subsequently transferred it to the respondent. The record of proceedings however has a letter from Standard Chartered Bank Zimbabwe authorising respondent to dispose of the house in Westgate. If a applicant was the one who purchased the house as he alleged, the question as to why it was necessary for respondent to be authorised by her employer to dispose of it is not answered on the papers.

Thirdly, respondent submitted that the proceeds from the sale of the house were invested in an investment vehicle with ABC Bank in applicant’s name. She attached investment statements as Annexures BI-B3. According to her, the investments were liquidated and the proceeds

therefrom were used to pay off the loan that was owed by the applicant. Applicant disputed this and alleged that the proceeds from the sale of the house were used for respondent's personal business in Zambia. Applicant did not explain the existence of the investment statements in his name that were attached by respondent.

Fourthly, respondent alleged that applicant was taken from the matrimonial home by his named relatives. Though applicant disputed this, he did not attach any statement from the named persons confirming his version of events.

The reason for the subdivision of the property is also in dispute. The first point *in limine* therefore succeeds.

The second *point in limine* is that applicant cannot claim a right of *rei vindicatio* over a property whose ownership is disputed and such dispute is currently pending before the Court. This point goes to the merits of the case as respondent is raising a legally recognized right of occupation as a defence. The averment that the ownership of the property is subject of a dispute that is pending before the Court is confirmed by the plaintiff's declaration and defendant's plea in HC 5260/21. In that case, respondent who is the plaintiff prayed that she retains as her sole and exclusive property both subdivisions of the property. Applicant, as the defendant in that matter pleaded that he be awarded the property as his sole and exclusive property. Applicant did not dispute that the property in question is the parties' matrimonial home. It will be amiss for this Court to order the eviction of a spouse from a matrimonial property that is the subject of proceedings that are still pending. The status of the cottage that applicant said respondent should occupy is in dispute. One cannot therefore say alternative accommodation has been availed. As stated in *National Provincial Bank, Ltd v Ainsworth (supra)* marriage gives a spouse the right to occupy a matrimonial home. The second point *in limine* also succeeds.

Both points raised by respondent *in limine* are merited. The application is improperly before the court.

I make the following order.

The application be and is hereby struck off the roll with costs.

Sinyoro and Partners, applicant's legal practitioners.

Messrs Gill, Godlonton and Gerrans, respondent's legal practitioners.