

MAGGIE MUNJANJA
versus
ONIAS NJOLOMOLE
and
ENERST KADUNGURE HOUSING
COOPERATIVE

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
HARARE, 30 March 2022 & 1 June 2022

Opposed Application

Ms Kofi Phiri, for the applicant
J B Matandire, for the 1st respondent
No appearance, for the 2nd respondent

BACHI-MZAWAZI J: On 30 March 2022, I presided over this application wherein the applicant sought an order for the eviction of the first respondent and all those who occupied through him from stand number 9783 Green Valley, Hatcliff Township. In the event that the first respondent failed to comply with the order, applicant sought an order directing the Sheriff of this court to eject him and all those who claim occupation through him from the premises in issue.

After hearing submissions and taking into account, concessions made by both parties, I struck off the matter from the roll. Interestingly, the first respondent has written seeking reasons for that decision. What is striking is that the first respondent was legally represented. It is her counsel who made concessions. One wonders whether the request for reasons is genuine or simply an abuse of court process. This is the decision. In the present case, applicant was seeking relief based on the doctrine of *rei vindicatio*. This principle entails that individual rights to property must be legally protected. Thus, an owner has the right to recover his property from any third party who will be in possession of the property without his consent.

Authority abound have succinctly outlined the essential elements of the action of *rei vindicatio*. The Appellate court citing several decisions, stated in the case of *SAVANHU v Hwange Colliery Company SC 8/15 SC 473/13*, that

“The owner in instituting a *re vindication* need therefore, do no more than allege and prove that he is the owner and that the defendant is holding the property without his or the consent.”

The action *rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent *Chetty v Naidoo* 1974(3) SA13.

For her application to succeed, the onus was on the applicant to prove that she was the owner of the property and that she had been unlawfully deprived of the same without her consent. See *Chikumbindi v Chivaura and Anor* HH 551/21.

On the other hand, the respondent has a defence open to him of the right of retention amongst others in order to rebut the applicant's claim. See *Savanhu v Hwange Colliery Company* SC8/2015.

In the present case, the two litigants were doubly allocated the piece of land in dispute by two different housing cooperatives. Applicant by virtue of a memorandum of agreement on residential stand allocation between herself and the second respondent claims to have been allocated stand number 9783 Green valley Hatcliffe in 2007. The agreement is silent on both the purchase price, the monthly instalments and the duration upon which the whole amount was supposed to be paid. Several receipts to support sporadic payments have been attached to the applicants founding affidavit. A letter, from the second respondent dated 1 November 2021 is also attached stating and confirming allocation to the Applicant.

What is clear from the record and submissions made in court is that applicant never took possession of the property in question. In addition, there is no lease agreement in existence.

The first respondent, in turn, has no lease agreement from the Ministry of Local Government Public works and Urban Development but a fleet of receipts of payments made to Kukura Kurerwa Cooperative and the Urban Development Corporation. He also has a letter dated 5 June 2011 supporting the allocation of the contentious stand to him. It is the first respondent's argument that, it is common cause that Government through the Urban Development Corporation, terminated all the powers vested in cooperatives to allocate land and stands. He submits that the Corporation was mandated to take stock of all the stands against their occupiers and documents presented before them. He further asserts that the Urban Development Corporation in 2016 carried an audit certifying that stand 9783 Green Valley Hatcliff belonged to the respondent by subsequent registration. Evidence has also been placed on record that the respondent took vacant possession of the property and constructed a house.

Applicant sought to rely on the case of *Manonose v Tsakundwa and Anor* HH 156/2017. She claimed that she had the right to evict the respondent on the basis of the papers she had produced in the absence of a lease agreement.

A distinguishing feature in the *Manonose* case above and her situation is that *Manonose* was confirming a position established in the Gwarada case.

Gwarada v Johnson and ors HH 91/2009, recognised that a valid lease holder acquires rights that can be exercised against a trespasser on the leased property. This case revised the previous stance that a lease holder holds only personal rights exercisable against the lessor.

The applicant in *Manonose* case above had a valid lease agreement whereas the applicant *in casu* does not.

In *Manonose* above, it was noted,

“A lessee -to-buy who has been given vacant possession of the property has *locus standi* in *judicio* to sue to evict an occupant who does not have better title than him or a trespasser.”

The first respondent argued that the applicant had no better title than him as both had no lease agreements, coupled by the fact that, the applicant had not taken possession, she had no right of ownership, nor right to vindicate the property from him. The first Respondent further argued that the applicant made several admissions but she did not challenge the fact that Urban Development Cooperation had taken charge of the allocation of all stands from the cooperatives. As such the summarized admissions from the applicant are as follows:

1. Applicant did not challenge her allocation status with the Corporation during the audit and regularization of the stand.
2. She did not have a lease agreement with the relevant Ministry therefore title and ownership vested with the Ministry.
3. She should have cited and joined the Minister of Local Government, Public Works and Urban Development who is the owner of the land

In light of the above the Applicant conceded that she had no cause of action. Instead of throwing in the towel and withdrawing the matter at that stage both counsels agreed to have the matter struck off.

The court felt the concession had been correctly made as the dismissal of the matter would have closed the door on the applicant's chance of pursuing the matter with the relevant authorities as indicated in her oral submissions.

Accordingly, the matter is struck off roll.

Maja and Associates, for the first respondent
Mangezi Nleya and Partners, for the Applicant