

**ANNA NCUBE**

**versus**

**BARBRA LUNGA N.O**

**(Executrix Dative of Estate Late Bima Sibanda: DRBY 359/11)**

**and**

**THE CITY OF BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO4 AND 11 SEPTEMBER 2014

Advocate *L. Nkomo* for the applicant  
*C. Nunu* for the respondent

Opposed Application

**MAKONESE J:** The Applicant seeks an order compelling the 1<sup>st</sup> Respondent to sign all documents necessary to effect transfer to her of the rights, title and interest to and in stand 44126 (027) Mzilikazi Township, Bulawayo. The 1<sup>st</sup> Respondent opposed the relief sought and raised certain preliminary issues.

Background

The Applicant avers that in the month of April 1958 she entered into a transaction with a Zambian national in terms whereof she purchased the said immovable property for an undisclosed sum of money. At the time of the transaction the Applicant was a single mother and according to the regulations and by-laws then in force at that time in the City of Bulawayo, she could not register the right, title and interest to the immovable property in her name because she was a female. Applicant contends that she sought the assistance of her brother and sibling, the late Bima Sibanda, who had a registered marriage and was eligible to have title registered in his name. The late Bima Sibanda agreed that his marriage certificate be used so that the right, title and interest to the immovable property purchased by the Applicant could be registered in the records of the City of Bulawayo as his property. The registration of the rights, title and interest in

stand 44126 (027) Mzilikazi Township, Bulawayo was effected in April 1959. A certificate of occupation was issued in the names of Bima Sibanda.

It is beyond dispute that following the registration of the right, title and interest in stand 44126 (027) Mzilikazi, Township, in the names of Bima Sibanda, the Applicant assumed full juristic occupation of the premises without force and openly occupied the immovable property in issue as if she were the owner thereof from 1959 to date, an uninterrupted period of more than fifty years. It is also not in dispute that at all material times from the year 1959 the Applicant's brother was aware of the Applicant's occupation of the immovable property and took no steps whatsoever to disturb the Applicant's occupation of the property. It has not been argued on behalf of the 1<sup>st</sup> Respondent that the late Bima Sibanda in his lifetime ever occupied the property, neither did he contest Applicant's occupancy of the property.

The Applicant's brother, Bima Sibanda died at Tsholotsho on the 13<sup>th</sup> November 1999. Following the death of the late Bima Sibanda, the Applicant registered her brother's estate with the Additional Assistant Master at the Bulawayo Magistrates Court under case number DRBY 359/11, with the intention of having the ownership of the immovable property at issue being transferred from her late brother's name into her own names. 1<sup>st</sup> Respondent who is the Executrix Dative in the estate of the late Bima Sibanda then wrote a letter to the Applicant demanding that she vacate the immovable property. The Applicant instead filed this court application *in casu* seeking relief by way of an order compelling the Respondents to effect transfer of ownership of the immovable property from the late Bima Sibanda to Applicant's name. The order sought is premised on the fact that she openly occupied the immovable property for a period exceeding 53 years without interruption. She averred that even after the death of the late Bima Sibanda she has continued to occupy the premises without any contestation and paying all the rates, taxes and service charges due to the 2<sup>nd</sup> Respondent. She contends that her occupation was open and that at all material times she possessed the immovable property as the owner thereof with the requisite *animus domini*.

1<sup>st</sup> Respondent is contesting the relief sought by the Applicant and disputes the transactions which took place in 1958 and 1959. The 1<sup>st</sup> Respondent has conceded, fairly, in my view, that the Applicant has been in open possession and occupation of the immovable property for an uninterrupted period of more than 50 years. There was however a feeble attempt, by 1<sup>st</sup> Respondent's legal practitioner to argue that Applicant could not acquire immovable property,

because at that time, African women were not allowed to own property, and that therefore meant that Applicant could not have any proprietary capacity to acquire the said property through acquisitive prescription. That argument is not founded on any solid legal principles in that acquisitive prescription relates to acquisition of property rights by occupation of property for a continuous and uninterrupted period of time.

I shall now proceed to deal with the preliminary issues that have been canvassed by the 1<sup>st</sup> Respondent.

(1) That Applicant adopted the wrong procedure

The 1<sup>st</sup> Respondent submits that there are material disputes of fact which cannot be resolved in motion proceedings. It is argued that evidence that the immovable property was purchased from a Zambian national must be presented to court by way of evidence. Once it is conceded that the Applicant has been residing in the property since 1958, with the late Bima Sibanda not showing any interest in the property up to the time of his death it becomes self evident that the court can adopt a robust approach to the matter and deal with it on the papers. There has been no evidence placed before the court by the 1<sup>st</sup> Respondent to show that the late Bima Sibanda, or following his death, his wife, the surviving spouse made any attempt to disturb the Applicant in relation to her occupancy of the property.

In the case of *Tobacco Sales Floor Limited v Swift Debt collectors (Pvt) Ltd t/a Ruby Auctions*, 2011 (1) ZLR 486 at page 481, GOWORA, J had this to say:

*“Where there is an allegation that disputes of fact exist, the court must, if possible, take a robust view and common sense approach and not take an over fastidious view of conflicts and must seek to resolve the dispute despite apparent conflict.”*

The learned judge then referred to the cases of:

*Masukusa v National Foods Ltd and Another* 1983(1) ZLR 232 and *Zimbabwe Bonded Fibreglass v Peech* 1987(2) ZLR 338(S). I am satisfied that in this matter there are no real and genuine disputes of fact which cannot be resolved on the papers without leading *viva voce* evidence. The Applicant’s claim for transfer of ownership is based on the uncontroverted contention that she has been in open and uncontested possession and occupation of the immovable property in question as if she were the owner thereof for an uninterrupted period of fifty three (53) years. Acquisitive prescription under both common law and the Prescription Act

[Chapter 8:11] confers certain rights upon the Applicant entitling her to claim ownership. The real issue for determination is therefore whether the Applicant has been in open possession for an uninterrupted period exceeding thirty (30) years as contemplated in section 4 of the Prescription Act. That issue is, in my view capable of resolution without leading oral evidence. The preliminary point raised by 1<sup>st</sup> Respondent alleging the existence of material disputes of fact which cannot be resolved on the papers is therefore devoid of merit and must be dismissed.

2. The Applicant ought to have asserted her rights in terms of the Administration of Estates Act [Chapter 6:01].

The 1<sup>st</sup> Respondent sought to argue that in terms of section 52 of the Administration of Estates Act the Applicant ought to have lodged her claims against the estate of the late Bima Sibanda. The 1<sup>st</sup> Respondent contends that the claim is not properly before the court in that Applicant ought to have exhausted the remedies provided for in the Act before approaching this court. I find no merit in this argument. There is nothing in the Administration of Estates Act which precludes the Applicant from approaching this Honourable Court because this court has full original jurisdiction over all civil and criminal matters throughout Zimbabwe. Section 171(1)(a) of the Constitution of Zimbabwe provides as follows:-

*“171 Jurisdiction of the High Court*

- (1) The High Court –*
- (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe.”*

This Honourable Court has the original or unfettered power to hear and determine the dispute that has been brought before it *in casu*. There is no provision in the Administration of Estates Act which purports to oust the original jurisdiction of the High Court in respect of the claims before the court. In any event, the remedy of acquisitive prescription is part of our law and is not by any stretch of imagination predicated upon the provisions of the Administration of Estates Act. The preliminary point raised by 1<sup>st</sup> Respondent in this regard is therefore clearly devoid of any merit and ought to be dismissed.

I will now turn to the merits of this application. The Applicant's claim for the transfer of ownership of the immovable property from the names of the late Bima Sibanda to her names is based on acquisitive prescription. This is apparent from paragraph 17 of the Applicant's Founding Affidavit where the Applicant contends that:

*"I have occupied the contested property ever since April 18, 1959 a period of 53 years. No person has ever contested my occupation and openly declared ownership of the property in all this time. It was only when I took steps to take registered ownership that Jestina Ncube made objections."*

The basis of Applicant's claims are further repeated in more detail in paragraph 5 of the Applicant's Answering Affidavit where Applicant states as follows:

*"I have been advised that if a person is in possession of an immovable property for a period of time, that person can, in certain circumstance, claim the property as her own by prescription of time. I have been in occupation of the contested property for more than fifty years. I have openly told all and sundry that I own this property. I have held the property without any other person challenging my ownership including my late brother Bima Sibanda. In terms of the law of prescription I am entitled to own the property."*

The Respondents have not rebutted or controverted the Applicant's claim that she openly possessed and occupied the immovable property as if she were the owner thereof for an uninterrupted period of fifty three (53) years. The Applicant's brother died on the 13<sup>th</sup> November 1999. There was no indication from the surviving spouse that she had any intention to evict the Applicant. The Applicant continued with her use and enjoyment of the property. In 2011 when she sought to regularise the ownership of the immovable property, the 1<sup>st</sup> Respondent in her capacity as Executrix Dative in the one who raised an objection.

The position at common law is that any person who acquires full juristic possession, without force or peaceably, so openly and patently to the owner or another or both, and without recognising the title of the owner, becomes the true owner thereof after the passage of thirty years.

The Latin expression *is nec vi, nec clam, nec precario* (see *Welgemoed v Kotzer* 1946 TPD 701 at page 710).

The statutory provision as contained in Prescription Act [Chapter 8:11] provides as follows:

*"Section 4 Acquisition of things by Prescription*

*Subject to this Part... and Part V, a person shall by prescription become the owner of a*

*property which he has possessed openly and as if he were the owner thereof for –*

*(a) an uninterrupted period of thirty years*

*or*

*(b) a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.”*

In the case of *Msasa Lodge (Pvt) Ltd v Lightfoot* 2000 (2) ZLR at page 6, GWAUNZA J had this to say:

*“It is evident that “open possession” of the property in question by the applicant and his predecessors in title, “as if he were the owner” and “for thirty years” are the prerequisite elements for acquisitive prescription , both at common law and in terms of the Prescription Act.”*

In applying the law to the facts of the present matter it is clear that the Applicant was in “open possession” of the property since 1958. It is also self evident that the Applicant’s occupation of the property was for a period in excess of thirty years. The Applicant exercised physical control over the property without challenge from the late Bima Sibanda. Her occupation of the property was adverse to the interests of Bima Sibanda. It is my view that the Applicant has satisfied the requirements of acquisitive prescription. She occupied the property with the requisite *animus domni*. In the result the Applicant is entitled to transfer of ownership of the immovable property on the basis of acquisitive prescription.

I will, accordingly issue an order in the following terms:-

1. 1<sup>st</sup> Respondent be and is hereby directed to sign all documents and take necessary steps to effect transfer of stand 44126 (0.27) Mzilikazi, Bulawayo into the names of the Applicant within 7 days of the date of this order, failing which the Deputy Sheriff be and is hereby authorised to sign all necessary documents on behalf of 1<sup>st</sup> Respondent.
2. The 2<sup>nd</sup> Respondent is directed to give effect to this order.
3. 1<sup>st</sup> Respondent is ordered to pay the costs of suit.

*Moyo and Nyoni*, applicant’s legal practitioner

*Messrs Calderwood, Bryce-Hendrie and partners*, respondent’s legal practitioners