

NORMAN MAFERERA
versus
SUSAN JANUARY

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 2 March 2017 and 24 May 2017

Trial

H Chitima, for the plaintiff
Defendant in person

MATANDA-MOYO J: The plaintiff instituted eviction proceedings against the defendant before this court. He claimed for the eviction of the defendant from stand no 936 Glen Norah Township Harare and holding over damages of \$330.00 per month from the date of summons to date of vacation. The plaintiff also sought an order for costs on a higher scale. The plaintiff claimed that he is the owner of Stand 936 Glen Norah Township and that the defendant is unlawfully occupying the premises.

The defendant opposed the claim on the basis that she is lawfully occupying the property, it being owned by her late father, Bafion January. The defendant claimed that the initial transfer of the property to Chabuka was done fraudulently and hence any subsequent transfer should be declared null and void. She denied that the plaintiff is entitled to any holding over damages. She prayed that the plaintiff's claim be dismissed with costs.

At the pre-trial conference the issues referred for trial were as follows;

- (a) Whether or not plaintiff is lawful owner of stand no. 936 Glen Norah Township, Harare.
- (b) Whether or not the plaintiff is entitled to holding over damages and if so the quantum thereof.

The plaintiff led evidence on his own behalf. His evidence was that he bought the property from a Mr Felix Katsvamutima Shamuyarira in 2013 for \$20 000.00. At the time of purchase the property was in the name of Bafion January. At City of Harare there were documents indicating the property had been sold by Bafion January to Felix Katsvamutima.

This witness was advised that the property had to be transferred from Bafion January to Felix Katsvamutima before any transfer to him could be done. Mr Katsvamutima had property ceded to him and thereafter it was ceded to the plaintiff. The rates and water bills were also changed to reflect the plaintiff's name. The plaintiff insisted that as the owner of the property he was entitled to vindicate his property from the defendant. The plaintiff said he wanted holding over damages in the sum of \$330 per month from date of summons. He testified that the amount was the average rentals payable by tenants in that area.

Under cross-examination the plaintiff said Katsvamutima bought the house from Bafion January in 1991. On being asked why he failed to take cession of the house for so long this witness said Katsvamutima informed him that he (Katsvamutima) had lost the documents pertaining to the property. He also mentioned that Bafion January's two children who witnessed the sale did not appear on the house card kept at council but the defendant's name appeared on the card. When questioned whether he was aware that he bought property acquired fraudulently, this witness responded that if it were so the defendant would have made a police report. This witness testified that the purchase price was only released to Mr Katsvamutima after cession had passed.

Felix Elijah Shamuyarira testified that he bought the property in question from Bafiona January in 1991. He explained that he grew up using his mother's surname Chabuka. He later changed his name to his paternal one Shamuyarira. He produced documents to that effect. When he purchased the house, he explained that Ellen Manyanga (Bafion January's ex wife) and her brothers were in occupation of the house. They indicated they wanted to buy back the house from him. Ellen and Bafion January had divorced when the house was sold to Felix Shamuyarira. This witness only changed ownership with the Council on 3 October 2013. He explained that the delay in transferring property was due to lost documents. He only recovered the documents in 2012. He admitted that he sold the property to the plaintiff before changing ownership into his name. He testified that the sale was above board. Official from City council and he even visited the house and met with the defendant, who did not raise any objections when told that the house had been sold. The defendant even assisted this witness in evicting her uncles from the property. It was only after such eviction that the defendant moved into the property.

Under cross-examination Felix Elijah Shamuyarira denied that he changed his name in order to steal the house. He insisted he bought the house and later sold it to the plaintiff who is the current owner of the house.

Susan Matanhire testified that she was a neighbour to the late Bafion January. Sometime around 2012 she was told that a letter had been received from Shamuyarira, who wanted to know the persons residing at the property. She sent word to the defendant who was then in the rural areas. The two proceeded to Shamuyarira's offices. Shamuyarira offered to assist the defendant to evict her uncles who were residing at the property. Thereafter he indicated the keys were to be brought to him. This witness testified that after the uncles were evicted the defendant moved in. Shamuyarira was not happy with the move. This witness and defendant approached Shamuyarira and requested him to assist in recovering documents from one Rashiwe. Shamuyarira retrieved documents. This witness heard from the defendant that the bills were coming in the name of Chabuka. After two months bills were in the name of the plaintiff. Under cross-examination she admitted she would not know whether property was sold or not as she was only a neighbour.

Winnie Musendekwa testified that the defendant updated her on developments relating to the property. She admitted that the defendant advised her that (she), the defendant had been called by Shamuyarira to discuss about the property. The defendant refused to go in the absence of her older siblings. This witness testified that she advised the defendant to check with City Council on whether the property was sold. The defendant advised her that the file could not be located. This witness said she knew Bafion January divorced his wife and there was a court order which directed that the house was to be sold and money generated from the sale was to be shared between the two. However she testified that Bafion's wife was given money to pay off Bafion. She had no knowledge of how the house documents ended up with Shamuyarira. Under cross-examination she admitted she was not aware of the house being sold. She admitted the estate was not registered.

The defendant testified that the property in question belongs to her late parents. In 2012 she was shown document by Shamuyarira that property was sold to Chabuka in 1991. She first met Shamuyarira at his offices in response to a letter he had written enquiring on residents at the property. Shamuyarira was worried about the ballooned City Council bills. She said it was clear Shamuyarira was not Chabuka. They discussed and Shamuyarira indicated that he would evict the persons occupying the premises. He stressed though that the keys were to be handed to him. Those persons were later evicted and the defendant moved into the house.

In January and February 2013 this witness noticed that council bills were in the name of Chabuka. In March the bills were reflecting the plaintiff's name. Under cross-examination

she insisted that Bafion January could not sell the house without his wife's consent, hence the sale was fraudulent. She agreed that whilst the signature of Bafion appearing on the agreement of sale was similar to that on the certificate of occupancy she still believed the agreement was forged.

She admitted her parents were divorced then. She also admitted that the house was never part of her father's estate. When her mother passed on the house was also not registered as part of her mother's estate.

Analysis of Evidence

From the evidence led it is common cause that the late Bafion January and his late wife had divorced— Harare Community Court case No. 1098/90 refers. According to that order the house was to be sold with Bafion's late wife getting $\frac{2}{3}$ from the proceeds. The late Bafion January indeed sold the house to Mr Felix K Chabuka. The late Bafion instructed his lawyers Gutu and Jakachira to defend any proceedings in relationship to the sale. The late Bafion wrote a letter to that effect to his then lawyers on 23 April 1991. The lawyers had advised the late Ellen Manyanga through a letter dated 10 April 1991 to collect her share of the money amounting to \$3 333-33. On 23 April 1991 the late Bafion was responding to a letter from his lawyers that his late wife had the intention to buy the late Bafion's share of the property. This then bolsters the plaintiff's version that the said F. K Chabuka delayed getting transfer in order to allow the late Bafion's wife to buy back the property. No evidence was placed before me by the defendant to prove that the late Ellen Manyanga bought back the property.

The defendant suggested that Mr Shamuyarira was not the same F.K Chabuka appearing on the agreement of sale. She made bold assertions that the said F. K. Chabuka was deceased. To that end she suggested Mr Shamuyarira was a fraudster intending on defrauding her of the property. Mr Shamuyarira in rebuttal of such evidence produced his birth certificate which showed that his birth certificate was initially registered with the names Felix Katsvamutima Chabuka. The surname was later altered to Shamuyarira from Chabuka; birth entry HRE 6303/68 refers. I am of the view that Mr Shamuyarira did manage to show that Felix Elijah Katsvamutima Chabuka and Felix Elijah Katsvamutima Shamuyarira is one and the same person. The defendant's suggestion that Mr Shamuyarira was not the same Chabuka who bought the property falls away.

Of course the mere fact that the agreement was concluded in 1991 and transfer only taken in 2013, some twenty two years later required some explanation. Mr Shamuyarira explained that initially he could not take title to the property as the late Bafion's wife had wanted to buy back the property. As I observed above that has been corroborated by letters produced to that effect from the late Bafion's lawyers. I have no reason to disbelieve that. Mr Shamuyarira also explained that documents were lost as their offices were burnt and they had to move offices. He stumbled upon the documents later. The agreement of sale was produced before the court. I took note that the signature appearing on the agreement resemble that of the late Bafion January. In any case no plausible evidence was produced to show that the agreement was forged. The suggestion was simply an attempt by the defendant to hold on to a property she knew was sold.

I do not therefore agree with the defence by the defendant that the property belongs to her late parents. The evidence before me shows that the defendant's late father sold the house to F.K. Shamuyarira (then Chabuka). Evidence also show that the said F.K. Shamuyarira paid for the property in full. The late Ellen Manyanga's two thirds share of the proceeds was deposited into Gutu and Jakachira lawyers' trust account. That sale was lawful.

The plaintiff gave his evidence well. His evidence was simple and straight forward. He testified that he bought the property from F. K Shamuyarira. F. K. Shamuyarira agreed that he sold the property to the plaintiff. Both parties agreed that the purchase price was paid in full. It is also common cause that cession was done to the plaintiff. The plaintiff is the owner of the property.

On the other had the defendant's witnesses were not very useful. Their evidence did not deal with the crux of the matter; that is, that the late Bafion January did not sell the property. The defendant's first witness admitted she had no knowledge of whether the property was sold or not. Equally, the defendant's second witness's testimony was speculative. She only said if the house was sold she would have known. She never said she had information that the house was not sold. It also baffles one's mind why the defendant would not have reported to the police if she had evidence of fraud. The defendant's evidence was also fraught with inconsistencies. For example when she was called by Shamuyarira to his office where she admitted Shamuyarira was concerned with the ballooned bills from City Council, she failed to explain why Shamuyarira would want to assist her and why he would be concerned with the high bill if he was not the owner. She never alleged she knew Shamuyarira before. She also failed to explain why she was supposed to surrender the keys to

Shamuyarira. The probable conclusion is that the plaintiff's version of events is the correct one. Shamuyarira called her to explain that he had bought the property and needed vacant possession of the same. The defendant's conduct from 2012 to date is not consistent with that of a person who believed there was a fraud.

From the evidence I am of the view that the facts are that the property was sold to F. K. Chabuka in 1991 and F. K. Chabuka now F. K. Shamuyarira sold the property to the plaintiff.

The Law

The plaintiff seeks the eviction of the defendant in an action of *actio rei vindicatio*.

The *rei vindicatio* is a remedy available to the owner of a property to reclaim it from whoever is found and from whosoever is unlawfully holding it. As enunciated by Silberberg and Schoeman in *The Law of Property*, 5th ed pp 242-243;

“The principle that owners cannot be deprived of their property against their will means that an owner is entitled to recover property from any person who retains possession of it without his or her consent. This rule was considered in *Chetty v Naindoo* 1974 (3) SA 13 (A) at 20B where Jansen JA explained that one of the incidents of ownership is the entitlement to “exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whosoever is holding it”. According to the court it is inherent in the nature of ownership that possession of the thing should normally be with the owner, and it follows that no other person may withhold it from the owner unless he or she is vested with some right enforceable against the owner (for example, a right of retention or a contractual right ...”

It is therefore trite that a plaintiff who institutes the *rei vindicatio* action must allege and prove that;

- 1) he/she is the owner of the thing
- 2) that the thing was in possession of the defendant at the time of instituting the proceedings and
- 3) that the thing is still in existence and easily identifiable.

Once the plaintiff proves the above the defendant, in order to succeed must show that;

- a) the plaintiff is not the owner of the thing
- b) the plaintiff is no longer in possession of the thing
- c) the thing is no longer in existence or
- d) he or she has same legally recognizable right which entitles him or her to hold on to the property or thing. See *Grey and Another v A Carridale Investments* HC 6961/15, *Stanbic Finance Zimbabwe v Chivhunga* 1999 (1) ZLR 262 (H).

Applying the above legal principles to the present matter, I am satisfied that the plaintiff has proved that he is the owner of the property in question. The cession documents are in the name of the plaintiff. The plaintiff has shown that the property is in existence and that the defendant is in possession of the property. The defendant has on the other hand failed to show that the plaintiff is not the owner of the property. She also failed to show any legal entitlement to continue holding onto the property. The defendant has failed to prove the alleged fraud in the purchase of property.

In any case even if the plaintiff had proved fraud against Mr Shamuyarira, the plaintiff was going to succeed on the basis of being an innocent purchaser. There has been no allegations of bad faith or knowledge of prior irregularities in the sale of the property nor fraud, by the plaintiff. Our law protects innocent third parties in commercial transactions. See *Manzombe v Masuku and Others* HB 134/15 and *Mpofu v Mpofu* HB 129/15.

However, no proof of holding over damages was produced and that part of the claim fails.

In the result, I order as follows;

- 1) That the defendant and all those who are claiming occupation through her vacate Stand Number 936 Glen Norah Township also known as House Number 936 Glen Norah A Harare forthwith.
- 2) In the event that the defendant fails to vacate the premises, the Sheriff or his deputy be and is hereby authorised to remove the defendants therefrom.
- 3) That the defendant pays costs of suit.

Mbizo, Muchadehama & Makoni, plaintiff's legal practitioners