

Judgment No. S.C. 102/99  
Civil Appeal No. 357/98

MSUZI            MKANDA            v            CHRISTINE            CHIWOZA

SUPREME COURT OF ZIMBABWE  
GUBBAY CJ, EBRAHIM JA & SANDURA JA  
HARARE, OCTOBER 18 & 21, 1999

*J R Tsivama*, for the appellant

*D Matimba*, for the respondent

GUBBAY CJ: This is an appeal against an order of the High Court evicting the appellant, and all persons claiming the right of occupation through him, from Stand 2511 (5B Harare Road South, Mbare) Harare (“the property”).

The preliminary point taken by the appellant, and one not addressed by the learned judge, was that the respondent lacked *locus standi in judicio* to sue for an eviction order. She ought to have first obtained cession of action from Harare City Council as the owner/lessor of the property or claimed delivery of the property from it.

For the purposes of determining the correctness or otherwise of the appellant’s contention, the scenario as testified to by the respondent may be taken as having been established at the trial.

The respondent was the daughter of Mukamba Chiwoza, who was the original lessee of the property. In 1981 Mr Chiwoza left this country to reside permanently in Malawi, the country of his birth. He died there in 1996. Before departing he arranged with the appellant that the latter was to occupy the property in a caretaker capacity pending the return of the respondent from Malawi. She was to accompany him there for a short period.

The respondent was away for about two months. On her return to Harare she did not immediately take steps to obtain occupation of the property from the appellant. Instead she went back to live in the house of her husband.

It was only in about 1986 that the respondent attempted to gain possession of the property from the appellant. Initially the appellant indicated that he required three months to vacate, but thereafter he adamantly refused to do so.

On 26 August 1992 Harare City Council, and only after her protracted efforts, granted the respondent the right to lease the property in place of her father. Henceforth as far as the lessor Council was concerned, she was the legitimate lessee of the property. Notwithstanding such advice, the appellant declined to vacate and the respondent was thus not able to secure physical occupation of the property.

Now it is a well settled principle that in the absence of occupation or registration against the title deeds of the property, an agreement of lease merely creates contractual obligations to the parties to it. The lessee's rights under the lease are personal, permitting of a claim for delivery of the property let from the lessor, but

precluding the right to eject a third party from the property. It is only when put in occupation, or the lease is registered, that the lessee acquires a real right enforceable against the whole world, and so may eject anyone who has wrongfully assumed occupation of the property.

In *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S) at 451 E-G the following passage in the judgment of FANNIN J in *Bodasingh's Estate v Suleman* 1960 (1) SA 288 (N) at 290 F-H was specifically approved:

“Now it is a primary duty of a lessor to deliver to the lessee the use and occupation of the property, and in order to fulfil this duty he must give him ‘free and undisturbed possession not in contest when delivered’. He does not fulfil that duty if, when he hands over the property, it is occupied by some other person, whether that person is a trespasser or is there under colour of right. *Tshandu v City Council, Johannesburg* 1947 (1) SA 494 (W) at pp 496, 497. Where that person is a trespasser, the lessor must surely, therefore, have the right to eject him, in order to fulfil his contractual obligation. Cf. *Jadwat and Moola v Seedat's case supra* (1956 (4) SA 273 (N)) at p 274A. Furthermore, a contract of lease (without delivery of possession), as clearly appears from this last case, does no more than entitle the lessee to claim possession *from the lessor* (and those of his successors who had prior notice of the lease), and from no-one else (except under a cession of action). It is only after he has been given possession that he can protect that possession against the whole world, and in particular against all the lessor’s successors. In that case, the lessee’s rights can be described as real rights.”

I am entirely satisfied that the respondent’s personal rights under the lease with Harare City Council never became real, for the simple reason that possession of the property was at no time delivered to her. She never became the occupant. Whether as trespasser or under some colour of right it was the appellant who remained in total occupation.

Clearly the respondent should have either sought from the court an order directing the City Council, as lessor, to give her occupation, or obtained a

cession of the Council's right to evict the appellant, thereby enabling her to proceed against him.

It necessarily follows that the submission that the respondent lacked *locus standi* to obtain relief against the appellant must be upheld. The appeal is accordingly allowed with costs and the order of the trial court amended to read:

“The plaintiff's claim for eviction is dismissed with costs.”

EBRAHIM JA: I agree.

SANDURA JA: I agree.

*Sawyer & Mkushi*, appellant's legal practitioners

*Muskwe & Associates*, respondent's legal practitioners