

PHILIP READY
versus
BYRON READY

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 23& 24 May, 14 June
& 30 November 2022

CIVIL TRIAL

B Ngwenya, for the plaintiff
S Mushonga, for the defendant

MAXWELL J:

Background

1. On 1 November 1982, plaintiff was invited by City of Harare to submit an offer to purchase stand 7520 Salisbury Township, known as 37 Benghazi Road.
2. The purchase price was \$11074, 00 payable in monthly instalments approximately equal to the net rental. The purchaser was responsible for payment of rates, sewerage, refuse removal and any other municipal charges in addition to the purchase instalment.
3. On 12 May 1983, plaintiff signed a memorandum of agreement of sale for the property with the Municipality of Harare.
4. A decree of divorce was granted in the matter between plaintiff and one Winnie Ready (born Gunda) on 27 November 1985. The consent paper governing custody, maintenance for minor children and proprietary rights had the following provisions:

“3. The defendant and the minor children shall be entitled to occupy the matrimonial home being no 37 Benghezi Road, Braeside, and Harare until the youngest child attains the age of 18 years or becomes self-supporting, whichever event should first occur. Provided that should the Defendant re-marry this right will lapse and the Defendant shall not permit any male friend to live permanently in the said home. The Plaintiff shall be entitled to remain in the matrimonial home until he can find alternate accommodation.

4. It is confirmed that the Plaintiff is the sole owner of the immovable property known as no 37 Benghezi Road, Braeside, Harare and will continue to pay the monthly instalments for the purchase of the property.”
5. On 25 September 1990, the Director of Housing and Community Services wrote a letter to the Plaintiff advising him of the cancellation of the agreement of sale for the property. The letter advised Plaintiff to appear in person to appeal against the cancellation before 31 October, 1990.
 6. The agreement of sale was re-instated by a letter dated 16 May 2021 which acknowledged payment of all the arrears.
 7. On 11 September 2003, The District Officer for Sunningdale advised the Director of Housing and Community Services that the property had been fully paid for and that Council’s conveyancers should be instructed to proceed with the transfer of the property.
 8. The property was transferred to the Plaintiff and the Deed of Transfer was issued on 9 December 2004.
 9. On 23 of October, 2018, plaintiff issued out summons seeking an order directing the defendant and all those claiming occupation through him to vacate the immovable property and premises situated at 37 Benghazi Road, Braeside, Harare (the property) forthwith and costs on a legal practitioner-client scale.
 10. Defendant is plaintiff’s son. Plaintiff gave a power of attorney to his other son, Eric Ready, to represent him as he is now living in Australia.
 11. In his declaration, plaintiff stated that he is the owner of the property whereupon defendant currently resides. On 7 November 2003, he deposed to an affidavit granting Eric the power and authority to sign papers on his behalf in relation to the property, and authorizing his children, Richard, Daphne, Eric and Michellina to occupy the house at the property.
 12. On 6 December 2004, plaintiff deposed to an affidavit stating that the defendant should not carry out any extensions to the property in question, and prohibited him from building any dwelling on the property. He also prohibited defendant from living on the property with his then three wives. At the time of writing the declaration, defendant had a fourth wife.

13. Defendant continued in occupation of the property notwithstanding the express wishes of the plaintiff. Further, defendant was accused of causing nuisance and continuously disturbing the peaceful occupation of the other occupants of the property.
14. Plaintiff accused defendant of wreaking havoc and verbally assaulting his siblings who are also occupying the property. On 29 July 2014, plaintiff once again attested to an affidavit prohibiting defendant from residing on the property, carrying out any extensions to the property and building any dwelling on it.
15. Despite demands, defendant has failed, neglected and refused to vacate the said property. Plaintiff prayed for an order directing the defendant and all those claiming occupation through him to vacate the immovable property and premises situated at 37 Benghazi Road, Braeside, Harare (the property) forthwith and costs on a legal practitioner-client scale.
16. In his plea, defendant disputed that his occupation of the property was unlawful. He indicated that he contributed to the purchase of the property and as such is a stakeholder entitled to stay thereon.
17. He stated that plaintiff left Zimbabwe in 1985 and the property was in arrears of \$809, 90 which arrears he paid between 1991 and 2002. He stated further that allowing plaintiff to evict him amounts to unjust enrichment as defendant contributed towards the purchase of the property. He prayed for the dismissal of the claim with costs on an attorney and client scale.
18. Defendant filed a counter claim in which he stated that he is the oldest son who assumed the responsibility of taking care of his ill mother and his siblings after plaintiff left Zimbabwe without notice.
19. He stated further that they received summons from the Municipality of Harare calling for the Plaintiff to pay the outstanding amount of \$809.90 failing which the property would be repossessed. He advised the Municipality that plaintiff's whereabouts were unknown.
20. He asked to be allowed to pay the arrears in instalments and was allowed. He paid the instalments until the arrears were cleared. He submitted that he is a half owner of the property by virtue of his direct payments towards its acquisition. He prayed for an order that the Deputy Sheriff registers him as a 50-50 joint owner of the property.

21. In the event that his counter claim is disputed, defendant prayed for costs on an attorney and client scale.
22. In the plea to the counter claim, plaintiff disputed that he deserted his wife and that defendant paid for the property. He submitted that if any payments were made, they were for administrative costs such as rates which should be paid by the person using the property.
23. He disputed that defendant is a stakeholder and averred that he is not entitled to be registered as a joint owner of the property.
24. He stated that the property is matrimonial property and defendant's stay thereon is subject to his approval.
25. The following issues were referred to trial.
 - a) Whether or not the defendant paid off the balance of the purchase of the property to City of Harare.
 - b) Whether or not the defendant should be registered as co-owner with plaintiff.
 - c) Whether or not the plaintiff is entitled to an order for eviction against the defendant.

Plaintiff's Evidence

26. Eric testified for the plaintiff. He was given a power of attorney by the plaintiff and instructions to evict defendant. He advised the court that plaintiff has title to the property and there is no reason why defendant should not leave the property as requested by Plaintiff.
27. Under cross examination he confirmed that plaintiff went to Australia in 1985 prior to which he had divorced their mum. Defendant is the first born. His and defendant's occupation of the property originated from the consent paper signed by their parents on divorce.
28. He stated that plaintiff kept sending money to them part of which was used by their mother to pay off the property in question. He disputed that plaintiff issued summons because of misunderstandings between him and the defendant.

Defendant's Evidence

29. Defendant testified that plaintiff neglected them when he left for Australia and his mother had to run around to get money to pay the debt on the house. He was 17 turning 18 when City of Harare cancelled the lease agreement for the property due to non-payment of rentals.
30. He went with his mother to negotiate for the reinstatement of the lease and for permission to continue paying for the property. When the City Council agreed, he raised money through part time jobs as a plumber and vending.
31. He also sold his car, a morris minor, to pay for the property. The veranda of the house on the property was closed to create a room.
32. The title deeds were obtained behind his back. He should not be ejected because he paid for the property. He stated that the property's cost was \$9000.00 and plaintiff paid \$2000.00.
33. Under cross examination he stated that he paid over \$9000.00 towards the property but did not have proof of payment.

The issues referred to trial are considered in the light of the evidence given by the parties.

A. Whether or not the Defendant paid off the balance of the purchase of the property to City of Harare.

34. Defendant testified that he was advised to clear the arrears that were on the property in his father's name. Eric's testimony was that the plaintiff would send money to his mother which was used to clear the arrears.
35. None of them had any document to substantiate their evidence.
36. Defendant submitted ecocash statements as proof that he made payments towards the property. However the statements were for the period 2012 to 2018.
37. Under cross examination defendant admitted that the ecocash payments were toward rates, levies and water bills. It is common cause that such expenses are paid by the occupier of premises.
38. It is settled in our jurisdiction that the standard of proof in civil matters is "a balance of probabilities." In *ZESA v Dera* 1998(1) ZLR 500, the court held that in a civil case the standard of proof is on the balance of probabilities. It stated that the reason for the difference in onus between civil and criminal cases is that in the former the dispute is

between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. MCNALLY JA stated at 504B:

“So in a criminal case one is primarily concerned with doing justice to the accused. In a civil case one is concerned to do justice to each party. Each party has a right to justice, and so the test for that justice has to balance their competing claims. Hence the ‘balance of probability’ test.”

39. Also in *Bruce N. O. v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 (R), proof on a balance of probabilities was explained in the following manner:

“It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.”

40. Considering the age of the defendant at the time the arrears needed to be paid, it is most probable that defendant’s mother paid them.

41. The source of such money remains unsubstantiated. Eric said the plaintiff would sent it to his mother, whilst defendant said it was from him and his mother’s efforts. The mother is now late and cannot clarify the issue.

42. Defendant testified that he sold his car to raise part of the money. Apart from mentioning that it was a morris minor, no further particulars were given. He did not say what the registration number of the car was, He did not say what the year the car was manufactured was. He did not say for how much he sold the car and to whom. None of his siblings confirmed his allegations.

43. The bare allegation does not take his case anywhere. In the circumstances, defendant did not discharge the onus upon him of proving that he paid off the balance of the purchase price for the property to City of Harare.

B. Whether or not the Defendant should be registered as co-owner with Plaintiff.

44. Defendant submitted that he should be registered as a co-owner of the property because he contributed to its acquisition.

45. In *Takafuma v Takafuma* 1994 (2) ZLR 103, the court said:

“The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere matter of form. Nor is it simply a device to confound creditors or tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of ‘real rights’ in s 2 of the Act. The real right of ownership, or *jus in re propria*, is the ‘sum total of all the possible rights in a thing.’”

46. In *Lungisani Moyo v Musiyiwa Nyamukonda and Another* HB 41/18, it is stated that:

“It is settled in our jurisdiction that ownership in immovable property is held by way of a Deed of Transfer in the name of the person who owns the immovable property as provided for in the Deeds Registries Act [Chapter 20:05]. Registration of rights in immovable property is a matter of substance as it conveys real rights upon those in whose names the property is registered, which rights have been described as “the sum total of all the possible rights in a thing.”

47. As states above, defendant failed to discharge the onus on him to prove that he paid any amount towards the purchase of the property. No basis has therefore been laid for him to acquire real rights in the property. His quest for being registered as a co-owner therefore fails.

C. Whether or not the Plaintiff is entitled to an order for eviction against the Defendant.

48. The *rei vindicatio* is a common law action in terms of which an owner of a thing is entitled to claim possession of his property from whoever is in possession of it without his consent.

49. The requirements thereof are two fold, that is, the plaintiff must prove ownership of the property and that the defendant was in possession of the thing when the action was instituted.

50. In *Savanhu v Hwange Colliery Company* SC 8/15, it was held that:

“The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent. As it was put in *Chetty v Naidoo* 1974 3 SA 13 (A):

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).”

51. In *Gibson JTR Willes Principles of South African Law (7th ed, Juta & Co Ltd, Cape Town, 1977)*, the author states as follows regarding the vindication of immovable property:

“In the case of land, the absolute owner of the land may claim the ejectment of any person in possession of it, and also an interdict restraining persons from continuing to trespass on it, as well as damages for loss or destruction caused by trespassers.”

52. *In casu*, Plaintiff proved that he is the owner of the immovable property through production of the Deed of Transfer dated 9 December 2004. The element of ownership of the immovable property was thus proved. That the defendant was in possession of the property is not in dispute. Therefore, the second requirement of the *actio rei vindicatio* was established.

53. The defendant, on the other hand, failed to establish any defence to the plaintiff’s claim. There are basically four main defences to a claim of *rei vindicatio* which are:

- (i) that the applicant is not the owner of the property in question.
- (ii) that the property in question no longer exists and can no longer be identified
- (iii) that the respondent’s possession of such property is lawful
- (iv) that the respondent is no longer in physical control of the property – See the cases of *Chetty v Naidoo* 1974 (3) SA 13, and *Residents of Joe Slovo Community v Thabelisha Homes* 2010 (3) SA 454.

54. The plaintiff is the registered owner of the property. The title of an owner is so respected that the *rei vindicatio* operates against a third party who innocently purchases the property even where improvements or developments were made. The owner remains entitled to his property. In *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236, MAKARAU JP, as she then was, said:

“There are no equities in the application of the *rei vindicatio*. Thus in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership. The application of the principle conjures up in my mind the most uncomfortable image of a stern mother standing over two children fighting over a lollipop. If the child holding and licking the lollipop is not the rightful owner of the prized possession and the rightful owner cries to the mother for intervention, the mother

must pluck the lollipop from the holder and restore it forthwith to the other child notwithstanding the age and size of the owner-child or the number of lollipops that the owner child may be clutching at the time. It matters not that the possessor child may not have had a lollipop in a long time or is unlikely to have one in the foreseeable future. If the lollipop is not his or hers, he or she cannot have it.” [My emphasis]

55. The plaintiff has shown that the defendant is occupying the property against his will. He is entitled to the relief sought. However, considering the facts of this case, even though Plaintiff wanted defendant to vacate forthwith, he will be given seven days within which to vacate the premises.

56. Having found for the plaintiff it naturally follows that the counterclaim must be dismissed. I am however not persuaded to award costs against the defendant.

DISPOSITION

In the result, I make the following order.

1. The defendant and all those claiming occupation through him shall vacate the immovable property and premises situated at 37 Benghazi Road, Braeside, Harare within 7 days of this order, failing which, the deputy Sheriff be and is hereby authorized to evict the defendant from the said property.
2. The defendant’s counter claim is dismissed.
3. Each party is to bear its costs.

B Ngwenya Legal Practice, plaintiff’s legal practitioners
Mushonga, Mutsvairo & Associates, defendant’s legal practitioners.