

ASTON MERDADO KUSERI
versus
MUNYARADZI KUSERI
and
JABULANI KUSERI

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 28 November, 7 & 21 December 2022

Civil Trial

Mr *B Dhlakama*, for the plaintiff
1st & 2nd defendants, in person

MUCHAWA J: In this case, the plaintiff seeks the following order;

- a. That the defendants and all those claiming occupation through them be and are hereby ejected from a certain piece of land situate in the district of Salisbury called stand 2133 Bluff Hill Township 1180 Bluff Hill Township measuring 810 square metres registered in favour of the plaintiff under deed of registration number 5553/2000 also known as 2133, Area D, Westgate, Harare.
- b. That the defendants bear costs of suit.

The background to this matter is rather sad. The plaintiff is the father to the respondents who are both adults. He now seeks a vindication order against them.

The plaintiff gave evidence in support of his claim as follows: He is the father of the defendants who are children from his first marriage. The property in issue is registered in his name as evidenced by a copy of the title deed on page 36 of record. He has however allowed the defendants out of love and affection, to stay there up until a time when they applied for a peace order against him, in terms of which they sought an order barring him from setting foot at this very property which belongs to him. He now no longer wants them to stay at the property and

seeks their eviction. He stated that he never at any time donated this property to the first and second defendants. The plaintiff denied ever having employed the defendants at his company called Premium Petroleum (Private) Limited where he is a director and shareholder. He stated however, that as his sons, the defendants would occasionally visit the company and be sent on errands. His further evidence was that all the employees of the company received a salary and had formal proof of employment which the defendants did not have. The plaintiff refuted, in his evidence, the claim by the defendants that the plaintiff was seeking to evict them from the property because they had invited their ailing mother to come and stay with them at this property. In terms of donated property, the plaintiff gave evidence that he had in fact donated a different property to the second defendant, being stand number 2238 Bluff Hill Westgate, as part of his estate planning.

Under cross examination, the plaintiff stuck to his evidence in chief and insisted that the defendants were never employed by his company and in fact spent a lot of time outside the country, in South Africa. He stated that he had records of his employees whose wage bill was done by Ernst & Young and payments to NSSA would reflect such employees. Such records would not reflect defendants as employees. He also averred that Premium Petroleum (Pvt) Ltd, is a private company which has a separate existence from him and that it has nothing to do with stand 2133 Bluff Hill, Westgate. The plaintiff stated too that the issue before the court was not a labour issue but one of an owner of property seeking vindication. Furthermore, his evidence was that he had never signed for a donation of the property in issue and it remained his. The plaintiff said that this property in issue was the family home into which they had moved when the second defendant was in primary school and he had moved out to stay in town closer to health facilities due to his medical condition which required dialysis.

The first defendant's evidence was that he had worked for his father/ Premium Petroleum from 2008 to 2017 and had been promised a donation of 2133 Bluff Hill Westgate in lieu of salaries. Such promise was alleged to have been verbal. He claimed that he had earned the donation by working for the plaintiff for a very long time. The first defendant blamed the plaintiff's current wife for influencing plaintiff not to honour his commitment to donate. The donation to the second defendant of Stand 2238, Bluff Hill, Westgate was relied on to say that that was the same route which should have been followed by plaintiff to donate to him as the

donation to the second defendant was payment for work done. According to him, he sacrificed his life working for the plaintiff and it is unfair that he is not getting the promised donation.

Under cross examination, it was clear that the first defendant was unclear as to whether he was employed by the plaintiff or Premium Petroleum (Pvt) Ltd. He questioned why there was an attempt to separate the two and said he does not understand the technicalities. When pressed to show proof of employment, the first defendant had none. When questioned about the exact date of the donation to him, all the first defendant could say is that it was during the time he was working for the plaintiff from 2008 to 2017 because the plaintiff had said it was a process. His explanation was that the plaintiff had changed his mind about donating to him. The promise to donate was said to have been made in the presence of the second defendant. When questioned about his absence from Zimbabwe in some periods between 2008 and 2017, the first defendant confirmed that he was occasionally absent but insisted that he would still be working at Premium Petroleum (Pvt) Ltd intermittently. First defendant requested to be allowed to call one Mr Bero Lawrinthu to give evidence as he was said to be someone who knew about the donation of stand 2133, Bluff Hill, Westgate, to him. Mr Bero was said to have been a security guard whom first and second defendant worked with and also a family friend. In justification of his stay in the property, the first defendant said he will stay put until the plaintiff transfers the property to him in honour of the promise to donate.

The second defendant gave evidence that he had been promised stand 2238, Bluff Hill, Westgate in lieu of salaries due to him for having worked as a security guard and gardener. He claimed that he would exchange duties with Mr Bero and worked alongside the first defendant. His counterclaim was to have property 2238, Bluff Hill Westgate, transferred to him. As such property has already been transferred to him, the second defendant requested that the title deeds be handed over to him as they have not had access to their father or spoken to him for the last five years. Under cross examination, the second defendant could not explain why his legal practitioners had not made the claim for the handover of title deeds as their plea makes clear that they were aware of the transfer to him. Second defendant said he was prepared to move out of 2133 Bluff Hill, Westgate once he received the title deeds to 2238 Bluff Hill Westgate. He also said that every other child of the plaintiff has an immovable property donated to him or her by the plaintiff.

Mr Bero gave evidence and stated that he had worked for the plaintiff for a long time, nine years, but when he was relieved of his duties, he left empty handed with no terminal benefits. He said he worked as a security guard on the night shift whilst first and second defendants worked during the day. He refused to comment on how the first defendant would work, saying that he would not know as he left work at 5 am. He confirmed that the first defendant would occasionally come to the premises to get fuel and would have access keys.

Under cross examination, Mr Bero emphasized once more that he had not been paid any terminal benefits and when pressed, he said he was bitter. He confirmed having received all his salaries. Mr Bero professed ignorance about the arrangement between plaintiff and his sons regarding their role at the company and work. He insisted that the defendants would come to work every day but could not remember the period due to passage of time. Mr Bero confirmed the presence of two other people, one after the other, on the company premises though he said they simply occupied the premises but worked elsewhere. He confirmed too that there was a Safeguard response team which would be alerted to respond when a panic button was pressed.

The applicable law was set out in the case of *Lafarge Cement (Zimbabwe) Ltd v Chatizembwa* HH 413/18 by Honourable MATHONSI J (as he then was) as follows;

“The principles of the *actio rei vindicatio* are settled in our law. The owner of property has a vindicatory right against the whole world. It is a remedy available to the owner whose property is in the possession of another without his or her consent. Roman-Dutch law has always protected the right of an owner of property to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser, where the property would have been sold. The occupier would only have the defence of estoppel. See *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) at 438 C; *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 A-C; *Oakland F Nominees (Pty) Ltd v Gelria Mining and Investment Co Ltd* 1976 (1) SA 441 (A) at 452A.

Indeed the principle of the *actio rei vindicatio* is that an owner cannot be deprived of his or her property against his or her will. All the owner is required to prove is that he or she is the owner and that the property is in the possession of another at the commencement of the action. Proof of ownership shifts the onus to the possessor to prove a right to retention. See *Jolly v Shannon and Anor* 1998 (1) ZLR 78 (H) at 88 A-B; *Stanbic Finance Zimbabwe Ltd v Chivhungwa* 1999 (1) ZLR 262 (H); *Zavazava & Anor v Tendere* 2015 (2) ZLR 394 (H) at 398 G.”

The evidence of the plaintiff confirms that he is the owner of stand 2133, Bluff Hill, Westgate. As an owner, he now wants the defendants out of his property. He has a right to deal with such property as he wishes.

The first defendant failed to prove that the property was ever donated to him. He could not even relate to a date of donation. He failed too to prove that he was ever employed by the plaintiff and was offered the house in lieu of salaries. All that was established is that he would go to the company and carry out some duties as a son of the plaintiff, He even confirmed that he respected his father and would take orders from him. His running around with his father when he was sick, is something expected of a son and cannot be attributed to his having been an employee.

The second defendant whose refusal to vacate was premised on wanting stand 2238 transferred to him, really had no defence as it is clear that even his legal practitioners were aware that the transfer had already been effected. He too could not prove that the donation to him was in lieu of payment of salaries instead of plaintiff's estate planning. In fact, by admitting that every other child had received an immovable property, he confirmed that the plaintiff was involved in estate planning as he did not say all the other children had worked for the plaintiff or his company in order to get such properties.

Mr Bero's evidence was irrelevant to the issue at hand. He seemed focused on getting terminal benefits he says he is owed. Unfortunately this was the wrong forum for that. He could not conclusively confirm the alleged employment arrangements nor any donation having been made by the plaintiff to the defendants.

In any event, the defendants were completely lost regarding the separate legal existence of a company from its directors and shareholders. The house in issue is personal property of the plaintiff. It is his to do with as he pleases. Anyone with a claim against the company cannot lodge it successfully against the plaintiff and get relief from his personal assets as the defendants seek to do.

In the circumstances, there is no sustainable defence to the claim, raised by the defendants. Their witness did not assist their case.

In applying the law *in casu*, the plaintiff as the owner of the property 2133, Bluff Hill, Westgate, has a vindicatory right against the whole world. This extends even to his biological sons who are in possession without his consent. It has been established that the defendants are in occupation of the property. The defendants have failed to prove any right of retention to the

property. This court has to protect the right of an owner to vindicate his property as a matter of policy.

Accordingly, I make the following order;

- a. The defendants and all those claiming occupation through them be and are hereby ejected from a certain piece of land situate in the district of Salisbury called stand 2133 Bluff Hill Township 1180 Bluff Hill Township measuring 810 square metres registered in favour of the plaintiff under deed of registration number 5553/2000 also known as 2133, Area D, Westgate, Harare.
- b. The defendants to bear costs of suit.

Dhlakama B Attorneys, plaintiff's legal practitioners