

BUSISO MTUNZI

And

SIHLE MTUNZI

Versus

ESTATE LATE EMA MUDAWINI

And

SIPHATHISIWE MUCHIYANI MUDAWINI

And

HENRY MUCHIYANI

And

PATRICIA DARANGWA N.O.

And

MASTER OF THE HIGH COURT N.O.

**IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 23 JUNE 2020 & 21 JANUARY 2021**

Opposed Application

S. Chamunorwa for the applicants
V. J. Mpofu for the 1st, 2nd & 3rd respondents
No appearance for the 4th and 5th respondent

TAKUVA J: This is an application for summary judgment in favour of the applicants and against the respondents in the following terms:

- “1. The 2nd and 3rd respondents and all those claiming occupation through them be and are hereby ordered to vacate the property known as subdivision H of Lot 11 of Montgomery situate in the District of Bulawayo also known as number 11 Seynor Road, Montgomery, Bulawayo.
2. The 2nd and 3rd respondents be and are hereby ordered to pay holdover damages in the sum of US\$300,00 per month with effect from 1 December 2018 to date of ejection from the property.
3. The 2nd and 3rd respondents shall pay the costs of suit at an attorney and client scale.”

Background facts

These facts are largely common cause. On 3 August 2017, this court in the matter of *Muchiyani and Ors vs Estate Late Ema Mudawini and Ors* under HC 268/16 and more particularly in HH-492-17 decided that the Estate Late Wilson Muchiyani Mudawini (Wilson) should be re-opened, that subdivision H of Lot 11 of Montgomery situated in Montgomery (hereinafter referred to as the property) should not form part of the Estate of the late Ema Mudawini until such time that the estate of the late Wilson is properly wound up. It was also ordered that the Master of the High Court should appoint an independent executor to administer the estate late Wilson. The 4th respondent was then appointed by the 3rd respondent. The 2nd and 3rd respondents are the children of the late Ema Mudawini who was the 2nd wife of the late Wilson. The 2nd respondent is also the executor of the estate late Ema Mudawini who was resident at the property when Wilson passed away.

In administering the estate late Wilson, the 4th respondent obtained authority to sell the property from the 5th respondent. The property was then sold to the applicants for US\$60 000,00. The proceeds were distributed to all the children of the late Wilson together with the surviving spouses. The applicants now hold the right, title and interest in the property as shown in the Deed of transfer dated 21 September 2018 – Annexure F.

Under HC 526/19, the 1st, 2nd and 3rd respondents instituted an action before this court seeking a declaratory order to the effect that the property in dispute belongs to the Estate Late Ema Mudawini who was the surviving spouse resident at the property when Wilson passed away. Accordingly, 2nd and 3rd respondents prayed for the cancellation of the agreement of sale between applicantS and the 4th respondent so that it reverts to the Estate Late Ema Mudawini. In the alternative, the 2nd and 3rd respondents claimed payment of a sum of US\$28 000,00 for improvements to the property.

The 1st and 2nd applicants entered appearance to defend and subsequently filed a special plea and plea. Further they filed a counter claim in which they sought eviction of the 2nd and 3rd respondent and all those claiming occupation through them from the property and other relief as shown above. Also, the 4th respondent defended the matter by filing its special plea and plea. The 2nd respondent replied to the various pleas.

Applicants have now filed this application for summary judgment in their favour in respect of the counter claim. The application is opposed by the 2nd and 3rd respondents.

Applicants' case

The basis of the application according to the applicants, is that they own the immovable property as evidenced by the Deed of Transfer dated 1 September 2018. Applicants contended that they purchased the property with the consent of the 5th respondent and other beneficiaries of Estate Late Wilson. There was no appeal against the Master's decision granting consent to the sale. Therefore, applicants' title to the property is enforceable against the whole world. On the other hand, 2nd and 3rd respondent occupy the property without a court order or applicants' consent. Accordingly, they do not have any lawful right of retention.

Further, applicants submitted that in their plea to the counter claim the 2nd and 3rd respondents did not advance any recognizable defence except to aver that there are entitled to

retain occupation of the property pending the determination of their summons action. However, this cannot defeat the applicants' rights to the property. As regards prejudice, applicants contended that they obtained a mortgage loan from CABS to finance the purchase of the property and 2nd and 3rd respondents have refused to shoulder the levies and other charges due on the property. Applicants will thus suffer financial prejudice if they do not obtain immediate full occupation of the property.

Applicants further sought support in the decision in *Graham Muchiyani & Ors v Estate Late Ema Mudhawini & Anor* HH-492-17 where according to the applicants, this court ruled that the property "shall not be considered as part of the Estate of the Late Ema Mudhawini..." In light of this judgment, applicants contend that it is incompetent for the three respondents to now seek an order declaring the same property to be that of the late Ema Mudhawini as this court is now *functus officio* regarding that matter.

It is applicants' case that the three respondents failed to object to the distribution account and cannot seek to challenge the distribution account outside the provisions of the prescribed time limits. Also the respondents did not object to the sale of the property but contested the amounts they were due to receive consequent to the sale. The 1st, 2nd and 3rd respondents have not in their plea disputed the claim for hold over damages of US\$300,00 per month.

For these reasons applicants argued that this court is being detained by a frivolous suit in that the 2nd and 3rd respondents simply do not have a defence to the claim for eviction and have defended the counter claim for dilatory purposes. Therefore, so the argument went, the application for summary judgment ought to be granted. Applicants relied on the following cases;

1. *Jena v Nechipote* SC-15-85
2. *Chindori-Chininga v National Council for Negro Women* 2001 (2) ZLR 305 (H) and
3. *Alspine Investments P/L v Wetsrnhoff* 2009 (2) ZLR 226 (H).

In a nutshell, applicants relied on *rei vindicatio*.

Respondents' case

The application was vehemently opposed by the 2nd and 3rd respondents. They submitted that they have a "right of retention" of the property until this court has made a final determination of the respective rights of the parties in the matter under case number HC 526/19. In this matter, respondents are challenging applicants' title to the property. Respondents further contended that applicants "~~connived with the Executor~~" and purchased the immovable property way below its market value. This value ignored the value of improvements amounting to US\$28 000,00. To obtain summary judgment, applicants must show that they have an unanswerable case and that there are no triable issues. However, this is not the case *in casu* as there is a claim for cancellation of the applicants' title, and the valuation certificate attached as annexure "R" strongly supports the allegations of fraudulent conduct made against the applicants.

In addition, respondents submitted that the property belonged to the late Ema Mudhawini in terms of section 68F of the Administration of Estates Act Chapter 6:01 as she was residing at the same property as at the deceased's death. Ema Mudhawini was the surviving spouse. It was also argued that the Executor and the Master did not consult respondents before granting the consent in terms of section 120 of the Administration of Estates Act Chapter 6:01.

As regards title, respondents submitted that ordinarily, the holder of title can enforce it against the whole world. However, *in casu*, there is a pending case before this court for cancellation of the title the applicants hold. It was further submitted that the suit for cancellation is "well founded" and supported by evidence showing that the sale was fraudulent and irregular at law. There is thus a *bona fide* defence to the claim for summary judgment.

Respondents have resided in the property since childhood to date. They feel that applicants irregularly and fraudulently obtained title through an agreement of sale that is a nullity. As regards the interpretation of the judgment in Estate Mudawini *supra*, respondents contended that applicants' interpretation is clearly wrong and out of context. The proper meaning is that the property was not the late Ema's property until the Estate of the Late Wilson Muchiyani had been administered. Reference was made to pleadings in HC 526/19. The court did not bar the award of the property to Ema's beneficiaries in future.

As regards the objection to the distribution being confirmed, respondents contended that annexure "A" filed by applicants is such an objection that has prevented the confirmation of the Distribution Account. Respondents argued that applicants are not entitled to holdover damages since the sale was fraudulent and there is a claim for the reversal of title pending before this court. It is only fair to allow the main matter to be finalized. In that sense it was contended that there is a *bona fide* defence to the claim for eviction. Therefore, the application for summary judgment should be dismissed with costs of suit on a higher scale.

Respondents relied on the following case authorities;

1. *Jena v Nechipote* 1986 (1) ZLR 29 (S)
2. *Vera v Mitsui & Co. Ltd* SC-65-04
3. *Davies v Terry* 1937 (4) SA 98 (SR)
4. *Joseph Albert S Anton v Micmas Sibanda & 63 Ors* HB-216-16

The law

The principles of summary judgment were laid down in the *locus classicus* case of *Jena v Nechipote* 1986 (1) ZLR 29 (S) at p 30 as follows;

"All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that "there is a mere possibility of his success", "he has a plausible case", or "there is a reasonable possibility that an injustice may be done if summary judgment is granted."

See also Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa* 4edat p 434 – 435.

In *Vera's* case *supra*, it was stated as follows;

“Now, the courts have always regarded summary judgment as a drastic remedy to which they will not readily resort. See *Davies v Terry* 1957 (4) SA 98 (SR); *Jena v Nechipote* 1986 (1) ZLR 29 (SC).

Thus it has been said that the objective of the rule permitting this procedure is;

“... to enable a plaintiff with a clear case to obtain swift enforcement of his claim against a defendant who has no real defence to that claim. The courts have in innumerable decisions stressed the fact that the remedy provided by this rule is an extraordinary one which is very stringent in that it closes the door to the defendant and which will thus be accorded only to a plaintiff who has in effect, an unanswerable case.” (my emphasis)

As regards vindicatory action, its nature, extent and efficacy as a right was expounded in the case of *Joseph Albert Serranco-Anton v Micmas Sibanda & 63 Others* HB-216-16 as p 5 of the cyclostyled judgment as follows;

“The owner of property has got a vindicatory right against whomsoever is in possession of their property. The *actio rei vindicatio* is available to the owner whose property is in the possession of another without his or her authority or consent. Its concept is that an owner cannot be deprived of his or her property against his will. All that the owner is required to prove is that he 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 of retention”. (my emphasis)

Application of the law to the facts

The composite issue for determination is whether the applicants’ claim for eviction of the 2nd and 3rd respondents is unanswerable and whether there are no triable issues in the case.

The starting point is applicants’ claim that their *rei indicatio* claim is unanswerable. It is trite that for one to succeed in a vindicatory claim, it is not enough to merely allege and prove ownership and the fact that defendant is in possession or occupation. Once these facts are established, the onus shifts to the defendant to prove the right of retention and if he or she succeeds, the vindicatory action must fail. *In casu* it is common cause that the 2nd and 3rd respondents are beneficiaries of the Estate Ema Mudhawini. The 2nd respondent is the Executor of the same estate. Also, if Wilson Machiyani’s estate was administered in terms of s68F of the Administration of Estate Act and Ema was resident at the property at the time of the passing away of the late Wilson Muchiyani, she was entitled to the property. In my view if these facts are proven at trial applicants’ title to the property may fall foul to the law in favour of the property reverting to the late Ema Mudhawini’s estate as stipulated by the requirements of section 68F *supra*.

This fact coupled with the rest of the factual averments relating to the improvements done to the property, the illegality of the sale, the alleged connivance with the Executor, the fact that 2nd and 3rd respondents are beneficiaries who have lived at the property all their lives

persuade me to conclude that 2nd and 3rd respondents have a “right of retention” to the disputed property.

R. H. Christie, *Business Law in Zimbabwe*, second edition, Juta & Co 1998 at p 347 defines a right of retention as;

“A right of retention (sometimes called a lien as in English Law) is the right to retain possession of another’s property until he pays a debt. If the right extends to debts unconnected with the property, the right is known as a general right of retention; if only to debts, accorded in respect of the property, a particular right of retention”.

See *Hotel Victoria (Rhodesia) Ltd v Alexander* 1952 SR 35 1952 (2) SA 637.

For these reasons I take the view that an injustice may be done if summary judgment is granted. It will not be in the interests of justice to separate the main claim by the respondents from the applicants’ counter claim as the issues in both claims are interwoven and deserve to be dealt with and disposed of together so as to avoid contradictory findings by this court if the claims are adjudicated by different judges. This arises because the right to evict flows from the right of ownership which right is challenged by the respondents under HC 526/19. In that regard, respondents’ claim for cancellation of the applicants’ title, including the reversal of the agreement of sale should be heard simultaneously with applicants’ counter claim.

As regards the requirements of summary judgment, it should be pointed out from the onset that summary judgment is a drastic remedy that takes away another party’s right to be heard before the matter is finalized and as such it should be granted under exceptional circumstances where it is apparent that the defendant has entirely no valid defence at law and where there are untriable issues.

I am not persuaded by applicants’ contention that this court is *functus officio* in relation to the estate at hand in that in HH-492-17 the judgment thereof particularly page 7 para 5 reads in full as follows;

“For the avoidance of doubt, the immovable property cited above shall not be considered as part of the estate of the late Ema Mudawini till such time the estate of the late Wilson Mudawini is properly wound up.” (my emphasis)

It is clear that applicants’ case excludes the underlined words. Whether this was an error or was a deliberate ploy to mislead the court is not apparent. What is clear is that the property was not to be part of the said estate until the estate is wound up.

Since 4th respondent has wound up the estate and sold the property to the applicants, the later can no longer keep hiding under this part of the judgment and purport to use it as a permanent and perpetual bar to the claim for such property by the executor of the estate late Ema Mudawini. Such a reading would amount to a glaring misinterpretation of the judgment.


Applicants’ argument that a challenge to the sale is not a defence to eviction has no merit in that this only applies to sales in execution of judgment debts and not in matters of this nature where applicants’ title is being challenged on the grounds that it was obtained contrary

to the law relating to inheritance. See *Twin Wire Agencies (Pvt) Ltd v CABS* 2005 (2) ZLR 34 (S).

I take the view that where a claim on title is disputed or challenged on reasonable grounds, summary judgment should not be granted as there will be a mere possibility of defendant's success – see *Mheresi v Mcnaught Wickmar* 1997(2) ZLR 386 (S).

Accordingly, I find that there are triable issues in this matter. I find also that there is a plausible defence to applicants' counter claim for eviction.

In the circumstances, the application for summary judgment in respect of applicants' counter claim is hereby dismissed with costs.


21/01/21

Calderwood, Bryce Hendrie & Partners, applicants' legal practitioners
Messrs V. J. Mpofu & Associates, 1st, 2nd & 3rd respondents' legal practitioners