

GOLSON MANONOSE
versus
QUEENSTAR TSANDUKWA
and
IVHU INHAKA HOUSING CO-OPERATIVE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 20 & 21 February 2017 & 8 March 2017

Civil trial

Plaintiff in person
N Mupure, for the defendants

MUREMBA J: The plaintiff issued summons against the defendants claiming the following.

- a. The setting aside of the unlawful allocation of Stand No. 579 Arcon Township, Harare by the 2nd defendant to the 1st defendant.
- b. The eviction or ejection of the 1st defendant from Stand No. 579 Arcon Township, Harare within 7 days of the date of granting of this order.
- c. The 1st defendant to be ordered to demolish the structures she erected on Stand no. 579 Arcon Township, Harare, upon her eviction, failure of which the plaintiff or the Sheriff of the High Court shall demolish the structures.
- d. Costs of suit on a higher scale.

In his declaration the plaintiff averred that he was allocated Stand no. 579 Arcon Township, Harare in 2009 by the department of State Land in the Ministry of Local Government, Public Works and National Housing (the Ministry). He averred that he entered into a lease to buy agreement with the Ministry which agreement is still valid. From nowhere the first defendant invaded and occupied his stand and alleged that she was also allocated the same stand by the second defendant. She has refused to vacate the stand thereby making it impossible for the plaintiff to comply with the terms of the lease to buy agreement which require him to have erected buildings worth US\$50 000.00 by 30 January 2018.

In opposing the plaintiff's claim the defendants raised a special plea in bar to the effect that the plaintiff has no *locus standi* to bring the claim for eviction on the strength of a lease agreement which only confers personal rights and not real rights to him as against the first defendant who was lawfully allocated the stand by the second defendant and has ownership rights over the stand.

The defendants also raised the issue of non-joinder. They averred that the non-joinder of the Minister of Local Government, Public Works and National Housing as a party to the proceedings was fatally defective as the matter cannot be resolved without the involvement of the Minister. However, this issue seems to have been abandoned at the pre-trial conference stage because it was not included in the issues referred for trial. Even during trial the defendants did not deal with the issue. Therefore, I will not deal with the issue

On the merits the defendants averred in their plea that the second defendant as a cooperative was allocated land by the Ministry of Local Government, Public Works and National Housing. It developed the land, pegged stands and as per agreement with the Ministry it surrendered 10% of the stands to the Ministry. The Ministry erroneously allocated these stands to its employees using a sitemap without consulting the second defendant. As a result, it allocated to the plaintiff Stand no. 579 which had been allocated by the second defendant to its member, the first defendant who had among other things paid the pegging fees. To ameliorate the situation the second defendant in learning of the double allocation of some of the stands, in good faith offered to the Minister and those affected by the erroneous allocation of the stands, alternative stands but the plaintiff is the only one who refused to take up the offer. The defendants averred that the first defendant has a stronger claim to the stand in dispute as opposed to the plaintiff because the allocation to her predates that of the plaintiff. They also averred that she has ownership rights over the stand whereas the plaintiff has no ownership rights as his claim is based on a mere lease agreement.

The special plea in bar

It was Mr. *Mupure's* suggestion that we deal with the special plea in bar first, but seeing that it was difficult to deal with the issue of *locus standi* without going into the merits of the matter, I directed that we deal with the special plea simultaneously with the merits. It was my considered view that I could only make a determination on the issue of *locus standi* after hearing evidence on how the stand was allocated to the plaintiff and the rights he acquired from such allocation. In light of this, I will therefore, first outline the evidence that was led by

the parties, analyse it and then make a finding on whether or not the plaintiff has *locus standi*. So the special plea in bar will be determined towards the very end of my judgment.

The plaintiff's evidence

The plaintiff led evidence from two witnesses: from himself and from one Fortune Chitambo from the Ministry of Local Government, Public Works and National Housing. The plaintiff's evidence was as follows. He works for the Ministry of Local Government, Public Works and National Housing in the electrical engineering section. On 12 July 2007 he applied for a residential stand to the Ministry. He produced the application he made. The application was approved in December 2009 and on 15 January 2010 he was made to sign a lease to buy agreement. He produced the lease agreement as an exhibit. The lease was to run for 4 years commencing on 1 January 2010, the annual rental being US\$100-00. The lease agreement states in clause 20 that the plaintiff shall have the option of purchasing the property at the price of US\$1000-00. The plaintiff also produced receipts to show that he was paying annual rentals for the stand from 2010 to 2015. He said that from the time he was allocated the stand in 2010 he would visit the stand on a monthly basis and he also planted an avocado tree. He said that in July 2012 he went to China on a work related trip, but 3 weeks before he left for China he had been to the stand and noticed that all was in order. He spent 1 month in China and made some savings. He said that he decided that he was going to erect a cottage at the stand. He said that he had already paid \$100-00 to Goromonzi Rural District Council to enable his plan for the cottage to be approved. He said that Arcon falls under Goromonzi Rural District Council. He produced the receipt as an exhibit.

The plaintiff said that he went to the stand 2 weeks after his return from China only to find the first defendant in occupation of the stand. She had erected a one roomed cabin and was staying there. Upon asking her why she had occupied his stand, she said that the stand had been allocated to her by the second defendant but she failed to produce to him any documents to show that the stand had been allocated to her. The plaintiff said that he made efforts to have the matter resolved between the two of them but all was in vain. He said that in view of this, the Ministry advised him to come to the courts for the resolution of the dispute. He said that even after legal proceedings had commenced he continued to ask for the papers from the defendants' lawyers which show that the stand was lawfully allocated to the first defendant by the second defendant, but the lawyers also failed to furnish them. He said that the last time he went to the stand was in April 2015 which is the time he issued

summons. He said that he found the first defendant having erected a 3 roomed house using farm bricks and a gazebo. The stand is 2000m².

The plaintiff said that the lease agreement that he signed with Ministry expired in 2014. The lease was renewed and he was made to sign a new lease agreement on 1 February 2014 which he produced as an exhibit. The lease agreement is valid for another 4 years. He said that once he finishes paying the rental of US\$1000-00 that is when ownership will pass to him because he would have finished paying for the stand. The plaintiff said that the first defendant must be evicted from the stand because she does not have papers to show that she was allocated the stand. He said that he has the right to sue the defendants because he was allocated the stand and the facts show that the first defendant invaded or trespassed into his stand. The plaintiff disputed that he was once offered an alternative stand by the Ministry as a way of resolving this issue, but refused to accept. He said that the Ministry only advised him to approach the courts after it had failed to resolve the dispute.

Fortune Chitambo's evidence was as follows. Since April 2009 he has been working under the department of State Land in the Ministry of Local Government, Public Works and National Housing as a Principal Administrative Officer. His duties involve managing government residential schemes. He said that in other words he oversees the signing of lease agreements, payment of lease rentals and validation of cessions. He went on to explain how land is allocated to housing cooperatives and land developers. He said that when land is allocated to a cooperative, the cooperative creates a layout plan which is approved by the department of physical planning. After approval, the cooperative surrenders to the State what is known as 10% commonage which is 10% of the stands. The State as represented by the Ministry proceeds to allocate these stands to its beneficiaries. The beneficiaries are the people who make applications for stands to it directly and they are put on the waiting list.

Fortune Chitambo said that the second defendant is one of the 5 cooperatives which were allocated land at Arcon and it surrendered 10% commonage to the State. The plaintiff being on the waiting list of the Ministry benefited from the allocation of stands falling under the 10% commonage that was surrendered by the second defendant. He got allocated stand No. 579. Fortune Chitambo went on to produce the list of the stands the State got as 10% commonage from the second defendant as exh 7. Stand no. 579 is indeed on that list. The list also shows that the plaintiff was allocated that stand. The witness confirmed that the plaintiff signed a lease to buy agreement that will enable passage of ownership to him after completion of payment of the full purchase price and construction of a building. He said that

the signing of the lease agreement entitled the plaintiff to vacant possession of the stand as the lease holder and he indeed got vacant possession of the stand. He said that as the lease holder the plaintiff is entitled to sue people who trespass into his stand. He said that as it stands, the plaintiff has a valid lease agreement, the lease agreement having been renewed in 2014. The witness also explained that the risk of double allocation of stands by the Ministry on one hand and by the cooperative on another is very minimal because when the cooperative surrenders 10% commonage it gives the Ministry a list of the stands surrendered to it. The stands are indicated by way of the stand numbers. He said that if a double allocation happens it means that the cooperative would not have done its duties diligently.

Under cross-examination he said that in 2005 that is when the 5 cooperatives were given the offer letter to Arcon Township. He said that although the plaintiff has not yet acquired title to Stand no. 579, the lease agreement that he signed gives him power over the stand. It was put to him that when the plaintiff signed the lease agreement in 2010, the first defendant was already in occupation of the stand. The witness said that he was not aware of it. He also said that if this is what happened then it was erroneous on the part of the second defendant because that stand was not available to it, but to the State as it was surrendered under the 10% commonage. The witness confirmed that the cooperative once made an offer for alternative stands to the Ministry to replace stands that had been double allocated. He however said that the Ministry rejected that offer.

The defendants' evidence

The defendants' only witness Nancy Mutyavaviri testified as follows. She has been the second defendant's chairperson since 2007. The first defendant is a member of the second defendant. She said that the first defendant was allocated stand number 579 before she (the witness) was chairperson of the second defendant in 2007. She said that the second defendant does not yet have title to the land in question and is yet to apply for title deeds. She also confirmed that the second defendant surrendered 10% commonage to the Ministry.

The witness said that when the plaintiff and the first defendant clashed over stand No. 579, the first defendant reported to her and as the chairperson of the second defendant she tried to engage the plaintiff and the Ministry officials but all was in vain. She said that she even offered the plaintiff an alternative stand but he refused to accept it. She said that it was the Ministry's fault that stand number 579 was allocated to the plaintiff because the Ministry did not do the allocation in consultation with the second defendant so as to avoid making allocations in respect of stands that had already been allocated by the second defendant. She

said that the Ministry just picked stand numbers without first checking with the second defendant if those stands were still available or vacant. She said that with the members of the second defendant they go to site to identify the stands they want first before they pay the joining fees.

Under cross examination this witness said that the defendants have the relevant documents to show that stand No. 579 was allocated to the first defendant. She however said that she had not brought them to court because when she was invited to come to court she was not told to bring them. She said that in any case those documents were in the possession of the Project Manager of the second defendant who happened to be out of the country at the time of the trial. She said that however, the papers can be availed to the court if the court needs them. When she was asked for the specific date the first defendant was allocated this stand, she said that she did not know because the allocation was done before she became chairperson in 2007. She said that it could have been any time between 2002 and 2007 because the cooperative was formed in 2002. She said that the second defendant has a list of the 10% commonage it surrendered to the Ministry. She however did not produce the list and neither did she comment on exh 7 the list that was produced by Fortune Chitambo on behalf of the Ministry. She said that the Ministry has its own list of stands which it compiled without checking with the second defendant if the said stands were vacant or available. She said that even the site map that the Ministry has is different from the one the second defendant has, but surprisingly, this was never put to Fortune Chitambo in cross examination by Mr *Mupure*. She also said that a re-pegging of the stands was done by government after some demolitions of illegal structures were done and as such the information that the Ministry has is outdated. Again this was not put to Fortune Chitambo during cross examination by Mr *Mupure*. The witness said that the second defendant's list of the 10% commonage it surrendered to the State is also in the possession of the Project Manager.

Analysis of evidence

It is clear from the evidence led by the parties that the plaintiff managed to prove on a balance of probabilities that stand No. 579 was allocated to him by the Ministry of Local Government, Public Works and National Housing in 2010 in terms of a lease to buy agreement which is still valid. He is paying annual rentals towards the purchase price. Fortune Chitambo from the Ministry gave evidence confirming the allocation of the stand to

the plaintiff. The defendants did not dispute the validity of the lease agreement and the allocation of the stand by the Ministry to the plaintiff.

Looking at the evidence led by the defendants, it is a fact that they were not able to produce not even a single document in support of their averment that the same stand was allocated to the first defendant by the second defendant. This is surprising because if an allocation was indeed done as they say, why would they both fail to produce documents to that effect? The wrangle over the stand between the plaintiff and the first defendant commenced around September 2012, and since that time up to the time the summons was issued in April 2015, the plaintiff had always been asking the defendants to produce the documents, but they never produced them. In their discovery schedule the defendants stated that they were going to produce receipts, forms and related documents but none were ever presented to the plaintiff for inspection despite repeated requests according to the plaintiff. During trial none were produced. The explanation that was given by their witness that she did not bring them to court for trial because she did not know that they were required is without merit. The defendants are legally represented and their legal counsel knew that the witness was required at court for purposes of a trial. The defendants had even effected discovery in preparation for the trial, so they knew that the documents would be required at trial. However, the documents were not produced. There is no reason why the documents were not availed to the plaintiff since September 2012 when he requested for them. There is therefore nothing to confirm or support the averment made by the defendants that the second defendant allocated the stand in dispute to the first defendant. This weakens the defendants' case.

What further weakens the defendants' case is that although they made averments that the first defendant was the first to be allocated stand number 579 by the second defendant before the ministry allocated it to the plaintiff, the defendants' witness was unable to tell the court when exactly the allocation was made to the first defendant. She had no date and all she said was that it could have been anytime between 2002 and 2007 before she became chairperson of the second defendant. Clearly, that evidence is not sufficient considering that the court is supposed to determine who between the plaintiff and the first defendant was allocated the stand first. This is even worsened by the fact that the plaintiff gave evidence to the effect that when he was allocated the stand in 2010 it was vacant. He also said that from January 2010 to July 2012 he would go to the stand monthly and there was no-one in occupation. He said that it was only after his return from China around September 2012 that he found the first defendant in occupation and having erected a cabin. This evidence by the

plaintiff was not controverted by the defendants. In the absence of any other evidence to the contrary, I, therefore, have no reason to doubt that the first defendant only occupied the stand between July and September 2012 and not before 2007. If it was true that the first defendant got allocated the stand before 2007 and took occupation of it back then, then it would not have been possible for the plaintiff to have been visiting the same stand from 2010 to July 2012 and not seeing anyone on it. The first defendant could not have been invisible at the stand. Again, this wrangle over the stand would have started right at the time the plaintiff was allocated the stand in January 2010. Put differently, the wrangle would not have started more than 1½ years after the plaintiff had been allocated the stand. That the wrangle between the parties started around September 2012 is not in dispute. Nancy Mutyavaviri, the defendants' witness confirmed it. If we go by the defendants' version that the first defendant was allocated the stand before 2007, one then wonders why the two only started to fight for the stand long after they had both been allocated it. The only logical explanation why the wrangle began around September 2012 is that, as the plaintiff explained, that is when he found the first defendant having occupied the stand, otherwise all along the first defendant had not been in occupation.

A further blow to the defendants' case is that, evidence from Nancy Mutyavaviri was poorly led by Mr *Mupure*. She was never made to comment on exh 7 which is the list of stands which Fortune Chitambo said was surrendered to the State as 10% commonage by the second defendant. Fortune Chitambo said that the Ministry got this list from the second defendant which he said compiled it. It was therefore necessary for Nancy Mutyavaviri to comment on who prepared the list since it is on the basis of this list that the Ministry allocated stands to its beneficiaries. The failure by the defendants to challenge this list leaves me to conclude that the list was prepared by the second defendant as was said by Fortune Chitambo. The explanation that Nancy Mutyavaviri gave to the effect that the Ministry has a wrong list and out-dated information left the court unconvinced. If the Ministry has a wrong list and out-dated information then questions to this effect should have been put to Fortune Chitambo, the Ministry's representative during cross examination by Mr. *Mupure*. Fortune Chitambo should have been shown the list which the defendants say is the correct one. It was not even put to him that a re-pegging of the stands was done after the demolitions of illegal structures had been done by government. The failure by the defendants' counsel to cross examine Fortune Chitambo on these issues leaves me with the conclusion that the defendants were not being truthful with the court. Contrary to what Fortune Chitambo said, Nancy

Mutyavaviri said that the Ministry compiled its own list of the 10% commonage without first checking with the second defendant if the stands were available. It was also necessary for that to be put to Fortune Chitambo during cross examination for him to comment.

The biggest error that the defendants made is that they chose not to lead evidence from the first defendant herself yet her evidence was very crucial in the resolution of this matter. She needed to tell the court when exactly she got allocated the stand by the second defendant, when she took occupation of the stand and to produce the documents to do with the allocation of the stand to her by the second defendant. The absence of such evidence is fatal to the defendants' case.

In view of the foregoing, the court is satisfied that the plaintiff managed to adduce evidence that shows that he was lawfully allocated the stand by the Ministry. On the other hand, the defendants failed to prove that the same stand was allocated to the first defendant by the second defendant. It was just their word and nothing else. It is not in dispute that the plaintiff in the present matter is not a holder of the title to stand number 579 as he is yet to obtain title to the stand after buying the stand.

The question that the court now needs to answer is whether or not the plaintiff as a lessee to buy has *locus standi* to sue the first defendant for her eviction from the stand. At law when a lease agreement is entered into, the lessee obtains personal rights that are enforceable against the lessor. The lessor has a duty to give vacant possession of the property to the lessee¹. Although the lessee only acquires a personal right in the property upon entering into a lease agreement, upon taking vacant possession of the property he or she acquires a limited real right to the property for the duration of the lease². After possession of the property has been taken by the lessee, the lessor is not required by the law to protect the lessee against unlawful disturbances i.e. disturbances by persons who do not have a better title than him (the lessee)³. In instances of such disturbances the lessee is entitled to protect himself by virtue of the limited real rights he would have acquired and at law he has various remedies. If he has been deprived of the thing let, he can sue for a *mandament van spolie*. If there is interference with the use and enjoyment of the thing, the lessee is entitled to an interdict. See G Bradfield & K Lehmann *Principles of the Law of Sale and Lease* 3rd ed p 154. The cases of *Gwarada v Johnson & Others* HH 91/2009 and *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (S) show that

¹ G Bradfield & K Lehmann *Principles of the Law of Sale and Lease* 3rd ed p 143.

² Silberberg and Schoeam's *The Law of Property* 5th ed p 432.

³ *Baum v Rode* 1905 TS 66.

a lessee-to-buy who has been given vacant possession of the property has *locus standi in judicio* to sue to evict an occupant who does not have a better title than him or a trespasser.

In the case of *Pedzisa v Chikonyora supra* the respondent entered into a lease to buy agreement with the owner of a plot of land with an incomplete dwelling. The owner was Chitungwiza Urban Council. Passage of ownership was going to pass to the respondent after certain conditions had been met. In terms of the lease to buy agreement the lessee was prohibited from sub-leasing the property or assigning it to a third party without the written consent of the owner- lessor. However, as the respondent (lessee) had somewhere to live, he did not move into the house but sublet the property or assigned it to the appellant upon signing of the lease agreement with Chitungwiza Urban Council. He did so without first obtaining the consent of the owner-lessor. The respondent and the appellant later had a fall out resulting in the respondent suing the appellant in this court for eviction. This court granted the eviction order. On appeal in the Supreme Court the main issue was whether the lessee- to-buy had *locus standi* to sue to evict the appellant without having obtained a cession of action from the owner-lessor. It was

“ *Held*, that the terms of the lease-to-buy agreement were such that the lessee initially acquired only a personal right exercisable against the owner-lessor and not against third parties without recourse to the owner-lessor.

Held, This personal right entitled him to delivery of vacant possession of the property from the owner-lessor. But once the lessee had been given vacant possession of the property and had assumed physical control over it, he then acquired a real right entitling him to evict anyone who wrongfully occupied the property such as a trespasser. Although the respondent had not actually moved into the house, he had acquired control over the unoccupied property. He had thus acquired a real right over the property.

Held, therefore, that the respondent had *locus standi* to sue for the eviction of the appellant, even though he had not obtained a cession of action from the registered owner-lessor.”

The Supreme Court upheld the eviction of the appellant. In the circumstances of the present case, as has already been discussed above, I am satisfied that the lessor, the Ministry of Local Government, Public Works and National Housing gave vacant possession of Stand number 579 to the plaintiff. That enabled the plaintiff to plant an avocado tree at the property. That is why when he visited the stand from January 2010 to July 2012 he saw no one in occupation of the stand. This means that the Ministry as the lessor fulfilled its duty or obligation to deliver to the lessee, the plaintiff vacant possession of the stand. The defendants having failed to prove that the same stand was allocated to the first defendant what it means is that the first defendant is in unlawful occupation of the said stand. He is in such occupation

without the consent of the plaintiff who is the lease holder of the stand and she is in occupation thereof without any other right in law to do so.

The plaintiff having obtained vacant possession of the stand in January 2010 therefore has *locus standi in judicio* to institute eviction proceedings against the first defendant. In terms of the lease agreement title deeds will only be issued to the plaintiff upon the fulfilment of two conditions. The first condition is that the purchase price should have been paid off. The second condition is that the plaintiff should have erected buildings worth US\$ 50 000-00 on the stand. If the plaintiff is not allowed to evict the first defendant when he was given vacant possession of the stand, then it means that he is disabled from complying with his obligations under the lease to buy agreement. He will therefore be prevented from fulfilling his obligations and will be said to be in breach of the lease agreement resulting in the cancelation of the agreement with the Ministry. In view of the foregoing, the special plea in bar with regards to lack of *locus standi* by the plaintiff is dismissed.

The evidence that was given by Fortune Chitambo shows that Stand number 579 was surrendered by the second defendant to the State under the 10% commonage. The second defendant cannot therefore allocate this stand to any of its members as it no longer falls under its jurisdiction. So the allocation which it says it made to the first defendant is unlawful. It should therefore be set aside. Evidence by the plaintiff also shows that well after the wrangle over the stand had started, the first defendant went on to erect a 3 roomed house and a gazebo. There is no evidence to show that the house was erected pursuant to an approved plan. No reasons were advanced by the defendants for these structures not to be demolished. I will order that they be demolished as requested by the plaintiff.

The plaintiff asked for costs on a higher scale. Mr *Mupure* for the defendants did not, in his closing submissions, address the issue of costs. Looking at the circumstances of this case, I am inclined to grant the requested costs. From 2012 to date, the defendants have remained defiant that the stand in dispute was allocated to the first defendant when they have absolutely nothing to show for it except their word. The plaintiff made numerous requests for proof of such allocation before he instituted legal proceedings, but they did not furnish him. Even their lawyer failed to furnish the document to him before trial commenced. The defendants had the audacity to proceed to trial knowing fully well that they did not have any such documents. Such stubbornness by the defendants warrants the imposition of punitive costs. It is most likely that if such proof had been tendered to the plaintiff, the parties would have found an amicable way of resolving the dispute without coming to court. The plaintiff

might have taken up the offer of an alternative stand instead of instituting legal proceedings. The other possibility is that the matter would have been resolved at pre-trial conference stage.

In the result, It be and is hereby ordered that:

1. The allocation of Stand No. 579 Arcon Township, Harare by the 2nd defendant to the 1st defendant is set aside.
2. The 1st defendant and all those claiming occupation through her are evicted from Stand No. 579 Arcon Township, Harare within 7 days of the date of the granting of this order.
3. The 1st defendant demolishes the structures she erected on Stand no. 579 Arcon Township, Harare, upon her vacation, failure of which the plaintiff or the Sheriff of the High Court shall demolish the structures.
4. The defendants pay to the plaintiff costs of suit on a higher scale, jointly and severally, the one paying the other to be absolved.

Antonio & Dzvettero, defendants' legal practitioners