

ZANOREMBA HOUSING COMPANY (PVT) LTD
and
CHIGUMBA PROPERTY HOLDINGS (PVT) LTD
versus
ZANOREMBA HOUSING CO-OPERATIVE SOCIETY LIMITED
and
KALISTO MASANGO
and
HASTANCIA MUNETWA
and
TAURAI ZIKWENDE
and
ERIFA CHIVAVAYA
and
CLEMENCE CHITSANGA
and
TENDAI NYANGANDE
and
ELWIN TSONGORO
and
CHITUNGWIZA MUNUCIPALITY

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 6, 7, 17 July and 20 September 2017

Civil Trial

J Koto, for the plaintiff
A Nyikadzino, for the 1st to 8th defendants

TAGU J: This matter came as a court application for an interdict and declaratory order. The initial court found that there was a material dispute of facts and the matter was referred to trial so that viva voce evidence can be led. The plaintiffs are petitioning the Honourable Court seeking an interdict in the following terms:

1. The defendants be and are hereby interdicted from interfering with the plaintiffs' Housing project situated at Unit L Extension, Seke, Chitungwiza.

2. The defendants be and are hereby interdicted from selling, advertising, disposing of or in any way encumbering any of the Housing stands under Zanoremba Housing Company Private Limited Project.
3. Plaintiffs be and are hereby declared the sole, lawful and legitimate owners of rights, title and interests in Zanoremba Housing project situate in Unit L Extension, Seke, Chitungwiza on land which lies between Manyame, Nyatsime River south of Duri Stream, to the boundary of Chitungwiza Municipality as described in the letter from the Ministry of Local Government, Public works and National Housing dated 25th of November 2004.
4. The 9th Defendant be and is hereby barred from transacting with any of the other eight (8) defendants in the administration of Zanoremba Housing Project situate in Unit L Extension, Seke, Chitungwiza by opening files and entering into contracts with members of the first defendant or any person who comes from or through the first defendant.
5. Any contracts of lease signed between members of the first defendant and 9th defendant be declared null and void and occupants of stands on the land in question shall only do so as members of the plaintiffs' project and on terms and conditions agreed to with the plaintiffs.
6. Any defendant who shall contest this matter to bear costs of suit on a higher scale.

At the pre-trial conference the following were agreed as the issues.

- 1) (a) whether or not the land at Unit L, Seke, Chitungwiza where the housing project in question is located was allocated to the first defendant.
- 2) Whether or not the first defendant was ever allocated any land. If so where and when?
- 3) Whether or not the first to 8th defendants have any valid claims against the first and second plaintiffs which claim has not yet prescribed at law.
- 4) Whether or not plaintiffs are entitled to the relief that they are seeking.

It was agreed that the defendants had the onus to prove issue number 1 and 2 while the plaintiffs bore the onus to prove issue number 3 and 4. However, at the commencement of the trial parties agreed that issue number 3 did not arise as the defendants were not claiming anything from the plaintiffs leaving the plaintiff with the simple task of proving issue number 4 only. Although the plaintiffs were to prove the last issue only, the duty to begin fell on the plaintiffs who gave evidence first before the defendants did so later. Before I analyse the evidence led before the court, it is necessary that I give a brief background to this case.

THE BACKGROUND

In the year 2004 there was a bye-election in Zengeza Constituency. That bye-election was heavily contested because ZANU PF had been beaten in all towns by MDC and that bye-

election brought back ZANU PF win. The deponent to the founding affidavit of the plaintiffs Christopher Chikavanga Chigumba won in that bye-election on a ZANU PF ticket by a wide margin and became a duly elected Member of Parliament. When he won tenants lodging in MDC houses were chased away for voting ZANU PF back. The tenants who were mostly suspected to be ZANU PF supporters came to Christopher Chikavanga Chigumba pleading for assistance. He then approached the Chairman of the Province a Mr Reuben Rusere since he was then the Vice Chairman and told him that he had decided to build houses for the tenants. Together with the Chairman they approached the then Governor for Harare Province the late Honourable Mr Witness Mangwende to whom they sold the idea. The Governor then told them to go and check if there was land for that purpose. Christopher Chikavanga Chigumba then sent Engineer Vengesai to go and survey for land in Chitungwiza. Engineer Vengesai then reported back that there was a vacant State land on the west of Chitungwiza between Duri and Nyatsime River. The Engineer gave him a plan which he took back to the Governor. The Governor then told him to go and assist the people at the beginning of October 2004. He then called a meeting which was chaired by Mr Reuben Rusere. It was at that meeting where he told the residence of the idea and Zanoremba Housing Project/Scheme was made, leading to several people including some of the defendants to pay money to Christopher Chikavanga Chigumba at Zengeza 4 Makumbomana Building to quick start the project. He also supplied his own funds from the second plaintiff Chigumba Property Holdings (Pvt) Ltd whose offices were at number 37/39 Leopold Takawira and Cnr Bute Street Harare. A dispute involving the plaintiffs and some of the members on the ownership of the land which I will deal with later arose leading to various court applications in which the plaintiffs emerged the winner. Those court applications did not put the matter to rest hence the present application.

ANALYSIS OF THE EVIDENCE

Mr Christopher Chikavanga Chigumba and Mr Reuben Rusere testified on behalf of the plaintiffs while Mr Calisto Masango, Mrs Gaudiosa Muchereti and Mr Nyasha Marimo testified on behalf of the defendants.

In summary the witnesses for the plaintiffs told the court of how the land in question was allocated to Mr Christopher Chikavanga Chigumba in the year 2004 and how he later gave the project to the first plaintiff in the year 2013. On the other hand the evidence of the first to the eighth defendants was to the effect that they were defrauded by Honourable MP

Chigumba whom they had made their patron for the Housing Project in question which Housing Project at all material times they believed to be a Housing Co-operative under the patronage or tutelage of Honourable MP Chigumba. They told the Court that little did they know that Honourable MP Christopher Chigumba had intended the Housing Project to be his personal property yet they were paying monthly subscriptions and were being issued after paying such subscriptions with receipts clearly inscribed ZANO REMBA HOUSING CO-OPERATIVE and the receipts were stamped with a stamp inscribed ZANO REMBA HOUSING CO-OPERATIVE CHITUNGWIZA. They therefore alleged fraudulent misrepresentation by their patron Christopher Chigumba. It was their assertion that the two plaintiff companies in this matter in which Christopher Chigumba is the Managing Director cannot assert right over the Housing Project by means of fraud. Finally they said it was only after they realised that Chigumba was claiming that the Housing Project was his and that they discovered that he had not registered the Co-operative despite using the name Zano Remba Housing Co-operative and having designed the receipts and stamp in the name of Zanoremba Housing Co-operative. A conflict then arose between Christopher Chigumba and the defendants, particularly the first defendant since it was not formally registered. In 2011 the first defendant was then provisionally registered and was issued with a provisional certificate with its registration certificate coming in 2013.

My analysis of the evidence is that before the housing project was embarked upon in 2004 people were made aware of the impending project by the political leadership of ZANU PF with CHRISTOPHER CHIKAVANGA CHIGUMBA being the then recently elected Member of Parliament for the area and the second plaintiffs' witness REUBEN RUSERE being the ZANU PF DCC Chairman for the area. People who wanted to join the housing project were made to pay Z\$20 000.00 as monthly subscription to Mr Chigumba at Makumbomana building in Zengeza 4 Chitungwiza. The money was being receipted by Mr Chigumba's children and his daughter -in- law. My further analysis is that the letter of 25th November 2004 addressed to Honourable Chigumba by the late Governor Honourable Witness Mangwende indicated the government's willingness to make available the land which Honourable Chigumba had requested. The letter goes on to ask on how Honourable Chigumba wished to exploit the land, whether Housing cooperatives were the medium or one of the methods he intended to use to realise his objectives. This letter clearly shows that it was not a condition for the allocation of the land to Honourable Chigumba that there must be

cooperatives or a cooperative. No certificate of incorporation of a cooperative was forwarded to the Government because there was no cooperative in existence.

The second letter produced by plaintiffs in my view, put to rest all uncertainties on whether the government was misled into believing that Honourable Chigumba was using the land for cooperative purposes or not. The letter is on the second plaintiff's groceries Wholesale Division Gumbas Wholesalers' letterhead. This letter was written by the Honourable Chigumba requesting for additional land because in his view the demand for housing units was ballooning and the land already allocated to him was not enough. If the government or anyone for that matter had wanted the land to benefit cooperatives and not a private company or an individual an objection would have been made upon receipt of this letter. No evidence of any objection as the government continued to deal with the second plaintiff and its director was shown by the defendants.

Further, exh 3 which is another letter from Chitungwiza Municipality and clearly addressed to the second plaintiff in respect of the inspection of the housing project confirms the knowledge by all who mattered then that this was a Chigumba Property Holdings project. Surely Chitungwiza Municipality could not have addressed the letter to Chigumba Property Holdings (Pvt) Ltd if it thought that the project belonged to a cooperative. Even the letters from exhibits 4 (Ministry of local Government, Public Works and Urban Development) to exhibit 8 (District Administrator and or Chitungwiza Municipality) dealing with the issue of regularisation of the project were all addressed to a Mr R. Nyandoro who was an employee of Chigumba Property Holdings (Pvt) Ltd and these were not disputed by the defendants. It must be noted as a fact that the Leopold Takawira address used in most of the correspondences clearly shows that it was known that the project belonged to the second plaintiff who was operating from that address as its Head Office apart from the Chitungwiza Makumbomana building address which is on the receipts issued. Lastly another factor pointing to the effect that the project belonged to the plaintiffs is that exh(s) 9a-c which are Inter Account Funds Transfers and RTGS for various stands which were acknowledged by the Chitungwiza Municipality show that payments were made by the plaintiffs for the land from their own account as far back as July 2007. How the plaintiffs or their director could have made such payments on behalf of a non-existent first defendant ZANOREMBA HOUSING CO-OPERATIVE SOCIETY LIMITED as the defendants want this court to believe was not explained in evidence.

What made this court doubt the veracity of the evidence of the defendants can best be summarised as follows. Kalisto Masango told the court during cross examination that he had no position in the administration of the project as everything was being handled by Honourable Chigumba. He conceded that there was no management committee or supervisory committee but claimed that in 2004 he was the spokesperson of the cooperative. He further confused himself by saying it was a one man band and there was no management committee to run the affairs of the project. He confirmed the evidence of Mr Chigumba that the administration in place had been recruited by Mr Chigumba single handily and he appointed mainly his children and members of his campaign team. I also found that the name on the receipts could have been nothing else other than the trading name of the second plaintiff because the first defendant was not in existence in 2004 as this witness wanted this court to believe. In my view it was not possible for the first defendant to have been allocated the land in question in 2004 when it only came into existence in 2013 as per the certificate of its registration.

Further, the defendants relied on an extract purportedly from an audit report carried out by the Ministry of Lands on the project in question. This document cannot advance the defendants' case because it stated in the first paragraph that the cooperative was formed in 2004 and was operating as Chigumba Property Holdings trading as Zanoremba Housing Cooperative. This document clearly stated that the land in question which it referred to was allocated to Mr Chigumba which the team needed clarity on. It never said the land had been allocated to a group of people. All the documentary evidence produced pointed to Mr Chigumba having been allocated land which he decided to exploit in the name of his company the second plaintiff. This position is cemented by a ZANU PF Investigation report produced by the plaintiffs. The conclusion of the ZANU PF Investigation report on p 7 of the supplementary bundle of the plaintiffs stated that the project was specifically given to Honourable C. Chigumba for purposes of campaigning. On this point it is worth to note that the second to the eighth defendants are all members of ZANU PF. Surely the party would not have favoured one person at the expense of thousands of its members if the land had been allocated to a party cooperative. The claim by Mr Chigumba that the existence of the first defendant was an afterthought by disgruntled beneficiaries made in 2011 makes sense. The evidence that people knew from the start that this was not a cooperative can be best shown by the following factors:

1. Defendants confirmed that the amounts of money that they were paying were dictated by Mr Chigumba himself and they were not consulted.
2. There was no cooperative Bank account opened and operated, and left over money was banked into Mr Chigumba's personal account.
3. They were not being consulted on how the money was being used.
4. There were no books of accounts being audited and reported to members at a general meeting as is the case with a cooperative.
5. There was no management committee or supervisory committee for the project with over 8000 subscribers.
6. If it was a cooperative it would not have allocated some houses to other cooperatives who came and buy houses from Mr Chigumba.
7. Some houses were allocated to members of the Central Intelligent Organization, Police, members of the army and teachers. It would not have taken all these professionals more than a month to figure out that they were dealing with a private entity and not a cooperative. The way the project was being administered should have told them that something was wrong if they thought they were in a cooperative.

In my view the change of mind by some members only came with the introduction of the United States Dollar when the plaintiffs demanded US\$5000.00 and subscribers felt that the price was too high for a two roomed cottage. To prove that the formation of the first defendant was an afterthought by some greedy people the court was shown an agreement of sale between second plaintiff and the fourth defendant Taurayi Zikwende. Taurayi Zikwende bought a two roomed core house from the second plaintiff trading as Zanoremba Housing cooperative in 2008 but became a problem in 2011 two years later after signing the agreement. Nyasha Marimo claimed to have discovered that the project was being run under a company and not a cooperative in 2008 but continued to pay up to 2010 to the plaintiffs. He discontinued and became the vice chairman of the first defendant upon its registration in 2013. The same applied to Gaudiosa Muchereti who said she discovered it in 2008 but continued paying to plaintiffs up to 2009 having signed agreement with second plaintiff in 2006 well before the formation of the first defendant. The other striking feature about the evidence of the defendants who testified is that they knew the plaintiffs to be operating their project at Makumbomana building since 2004 but they do not know the offices of their knew cooperative.

What emerged from the evidence is that all the witnesses for the defendants were allocated the houses they now claim to be theirs by the plaintiffs but later on decided to discontinue with the terms and conditions under which they acquired the stands from the plaintiffs. They stopped paying to the plaintiffs and formed a cooperative with almost a

similar name with the one used by the plaintiffs. Put differently, these people rebelled and unilaterally declared themselves to be independent from the authority which had allocated them the houses they are staying in. In the process there was a problem of double allocation of stands on the land in question.

The conclusion that this court came to after carefully assessing the evidence led before it is that the land in question was allocated to the plaintiffs in 2004 and not to a cooperative by the name Zanoremba Housing Co-operative Society that was only formed and registered in 2013. The plaintiffs therefore managed to prove ownership of the land in question on a balance of probabilities. See *Zimbabwe Electricity Supply Authority v Dera* 1998 (1) ZLR 500 (SC) where the court stated that:

“...in a civil case the standard of proof is never anything other than proof on the balance of probabilities. 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. In a criminal matter, on the other hand, the trial is an attack by the State, representing society, on the integrity of an individual. The main concern is to do justice to the accused. If the prosecution fails, the State does not lose.”

THE LAW

In this case the plaintiffs are seeking for a final interdict against the defendants in terms stated earlier on. The principles which have to be established for the granting of a final interdict were enunciated in various cases. In the case of *Rowland Electro Engineering (Pvt) Ltd v Zim Bank Cooperation Ltd* 2003 (1) ZLR 223 at p 230 the principles were repeated as follows:

- “1. Whether the applicant has established a clear right. See *Phillips Electrical (Pvt) Ltd v Gwanzura* 1988 (2) ZLR 117 (H).
2. Whether Applicant has an alternative remedy,
3. whether the Applicant will suffer irreparable harm; and; and
4. whether the balance of convenience lies with the Applicant.”

In *casu*, the applicants have managed to prove that they are the rightful owners of the land in question. On that basis they have managed to establish a clear right. As to the alternative remedy, as I stated earlier on in this judgment the plaintiffs and the defendants have been to this court several times trying to resolve the problem without success. They no longer have any other remedy other than to seek for a final order for an interdict against the

defendants. Clearly if final order is not given they will suffer irreparable harm in that the respondents are now parcelling out pieces of the land in question and refusing to pay to the plaintiffs. The balance of convenience therefore favours the granting of an order in favour of the plaintiffs.

In the result the following orders are made:

IT IS ORDERED THAT

1. The respondents be and are hereby interdicted from interfering with applicants' housing project situated at Unit L Extension, Suburbs, Chitungwiza.
2. The respondents be and are hereby interdicted from selling, advertising, disposing of or in any way encumbering any of the Housing stands under Zanoremba Housing Company Private Limited housing Project.
3. First Applicant be and is hereby declared the sole, lawful and legitimate owner of rights, title and interest in Zanoremba Housing project situate in Unit "L" extension suburbs, Seke, Chitungwiza.
4. The 9th respondent be and is hereby barred from transacting with any of the other 8 respondents in the administration of Zanoremba Housing Project situate in Unit "L", Extension suburb, Seke, Chitungwiza.
5. Respondents to bear costs of this suit on a higher scale.

Koto And Company, applicants' legal practitioners
Nyikadzino, Simango & Associates, respondents' legal practitioners