

EDMUND MAIGURIRA
versus
EVELINA MURAMBIWA

HIGH COURT OF ZIMBABWE

CHITAPI J

HARARE, 27 February, 7 March, 20 March, 3 April 2024 and 28 May 2025

Civil Trial

CHITAPI J: The plaintiff in this action matter is Mabel Thandiwe Maigurira N. O, a female adult of Harare. She instituted this action in her capacity as the *curator ad litem* for the Estate of Late Edmund Maigurira. When the summons in the matter was first issued, the plaintiff was Edmund Maigurira. He passed on before the case had been completed. Following his death, one Kurauone Keith Maigurira was appointed as the *curator ad litem* for the estate of the said Edmund Chenjerai Maigurira by order of MUSHORE J dated 8 March 2021. At the commencement of the hearing of the matter, the current plaintiff Mable Thandiwe Maigurira N.O had substituted Kurauone Keith Maigurira who had also passed on. The defendant is Evelina Murambiwa, a female adult of Harare. She is cited in her capacity as the executrix dative of Estate Late Pockery Murambiwa. Pockery Murambiwa was Evelina Murambiwa's husband during his lifetime. This action concerns a sale agreement in relation to stand 2006 Glen Norah Township Harare. That property was allegedly sold by the late Pockery Murambiwa to the late Edmund Maigurira during their lifetime. The protagonists in this matter in their capacities aforesaid are the widows of their late husbands.

The plaintiff in her summons sought the following prayer to be granted;

1. That the plaintiff is the true and rightful owner of property situated at number 2006, Glen Norah, Harare.
2. That the defendant pays the costs of suit.

The plaintiff's claim as set out in the declaration is that her late husband, Edmund Maigurira purchased stand number 2006 Glen Norah Township, Harare from the late Pockery Murambiwa in terms of an agreement of sale in 1983 for the purchase price of \$5000. In terms of the written agreement the terms of payment were to be as follows:

- i. \$2 000 upon signing of the agreement as the initial deposit
- ii. The balance of \$3 000 to be paid in monthly instalments of \$200 until full payment.

Accelerated payments could also be made at the election of the purchaser.

The purchaser, being the deceased Edmund Maigurira took possession and occupation of the premises in or about May 1983 after payment of the first instalment together with his family who included the plaintiff. The plaintiff pleaded that she has been in open, continuous and uninterrupted possession of the premises for over 37 years. She also pleaded that all payments were made as agreed by the seller and purchaser and thus she is entitled to the declaration sought.

The gravamen of the plaintiff's claim for judicial confirmation of her ownership of the property is therefore based on two grounds namely;

1. That there is a valid agreement of sale in respect of stand number 2006 Glen Norah, Harare in which the late Pockery Murambiwa sold the property to the deceased and full payment was done.
2. That the plaintiff has been in continuous and open possession of the property for over 37 years and is an owner by acquisitive prescription.

In the plea, the defendant pleaded that the plaintiff's claim had prescribed. She pleaded that since the plaintiff's claim is based on an agreement of sale allegedly entered in 2006 [sic], prescription has since extinguished all perceived rights of the plaintiff emanating from the agreement of sale. The defendant also claims that the agreement fell away because the plaintiff did not make any payments. The defendant therefore pleaded that there was no transfer of title because the agreement had fallen through. Further, the defendant also disputed that the plaintiff was in continuous possession of the property as gave rise to acquisitive prescription. In that regard the defendant pleaded that the plaintiff occupied the premises as a tenant and was evicted due to failure to pay rentals.

In the replication, the plaintiff pleaded that her claim was not for a debt as defined in the Prescription Act but it was for a declaratory order to the effect that she be declared the true owner of stand number 2006, Glen Norah, Harare. As to the rest of the defendant's averments, the plaintiff raised contest placing into issue all averments in the plea and further particulars which are inconsistent with the averments in the summons and declaration.

The parties held a PTC before BHACHI-MUZAWAZI J on 08 September 2024. The following agreed issues were referred for trial after the parties failed to resolve the dispute

- 1) Whether or not the plaintiff should be declared as the true and rightful owner of Stand No. 2006, Glen Norah, Harare.
- 2) Whether or not the plaintiff's claim has prescribed.

In support of her case the plaintiff testified that the late Edmund Maigurira had entered into an agreement of sale in 1983 in which the late Pockery Murambiwa sold him the property in question. The plaintiff produced the agreement of sale entered between Pockery Murambiwa and Edmund Maigurira. The agreement is dated 10 May 1983 and sets out the terms of sale. The plaintiff also produced proof of payments made to City of Harare in payment of owners' charges. These were admitted by the defendant. The plaintiff also testified that she was in open and uninterrupted possession of the property in question for 37 years, from 1983 to 2020.

The plaintiff was cross examined. She admitted that she was not a signatory to the sale agreement. When asked why there was no transfer of title she responded that the seller said he was broke and that the estate agent who brokered the sale was out of the country. When it was put to her that the full balance was not paid, she responded that it was paid and that for 30 years her possession of the property was never challenged because full payment has been effected. She admitted that there was a case for her eviction made against her and that there was an extant judgment from the Magistrates Court where eviction was granted. She also admitted that she did not file a claim to the master because she was outside the country. She however testified that her late husband before his death was pursuing the issue of transfer of the house to him. In relation to payment of the balance of the purchase price she testified that the late Pockery Murambiwa always collected the outstanding instalments at the end of each month.

In relation to the plaintiff's credibility as a witness she was consistent in her testimony and gave a straightforward account of events which were supported by the agreement of sale and proof of payments of owner's charges to City of Harare. Her cross examination was uneventful and did not alter her testimony. She was a credible witness. The plaintiff did not call any witnesses and closed her case.

After the close of the plaintiff's case, the defendant's legal practitioner gave notice of an application for absolution from the instance. However, after exchanges with the court, the defendant's legal practitioner abandoned the application and opened the defendant's case.

The defendant's legal practitioner sought leave to make further discovery and to introduce a supplementary bundle of documents. These were pleadings in Harare Magistrates

Court case numbers 37214/14 and 21426/15. The application for leave was vehemently contested by the plaintiff. It was submitted that the parties had exchanged bundles of documents and appeared before a judge for a pre-trial conference and that the documents sought to be produced were never referred to. It was also submitted that the plaintiff was not cross examined on them during the plaintiff's case and that there was no reference to them. It was submitted that parties are bound to their pleadings and that no notice to make further discovery was filed or given by the defendant. The plaintiff's counsel submitted that it was highly prejudicial to the plaintiff's case if the defendant was to be allowed to create a new defence based on documents which were always available but not produced, used or referred to by the defendant until she opened the defense case. After hearing submissions, the court dismissed that application.

The defendant then opened her case. In support of her case, the defendant gave evidence that she was not aware of the agreement of sale. She however did not deny it. She then stated that she knew about the agreement after the death of her husband. The defendant testified that the plaintiff was renting out the premises as a tenant and paid rentals. She testified that her husband never told her about the sale agreement. She testified that no claim was lodged with the Master. When the agreement was shown to her, she then said she knew about it but that the agreement fell through because the buyer did not pay the purchase price as per the agreement and that Harare City Council refused to sanction the sale. When counsel asked her to reconcile that fact with her evidence that the plaintiff husband was simply a tenant, she then responded that she sometimes suffers from amnesia because of head injuries that she experienced. She said that she relied on her son sometimes for help. She then stated that the plaintiff's husband was a tenant initially before he executed the agreement of sale with her husband.

In cross examination, the defendant confirmed that indeed there was a sale agreement. When asked whether the deposit of \$2 000 was paid she responded that the transaction was between the two deceased persons who were friends. She could not deny that the amount was paid. When asked whether she could deny the payment of \$200 monthly instalments she responded that she could not deny them because the two deceased persons apart from being friends did not disclose how they conducted their business. When asked why she testified that the instalments were not paid she responded that she could not confirm or deny the payments because "if men do their own thing, can you deny? I cannot say "yes" or no". She then said that she did not see the money because she was not there, she then said her husband was a person of many shenanigans. She lastly said that she could not say what happened because she

was involved in an accident and did not know much about the case. In re-examination she was asked whether she was changing her testimony in regards the existence of the agreement of sale, she responded that she was not sure. The defendant then closed her case.

In relation to the credibility of the witness, the defendant gave different accounts on the plaintiffs' occupancy of the property. She first denied the existence of the agreement before stating that she knew about it and that the plaintiff had breached it by not paying instalments. She then changed and said that the plaintiff was a mere tenant before stating that he started as a tenant before he entered into the agreement of sale. She then took another position and said that the agreement was made but that her husband was a person of shenanigans and that she could not confirm or deny that instalments were paid. She then stated that she was not sure of the correct position because she had suffered some injuries in an accident. In cross examination, she failed to show that the plaintiff averments were incorrect. The court formed the impression that she had little knowledge of how her husband dealt in the house and did not impress the court as a credible witness who could testify with knowledge in the sale transaction.

Counsel requested for leave to file written closing submissions and they did so. The submissions have been considered.

The defendant pleaded prescription generally without giving specifics, she pleaded that the plaintiff was out of time to make the claim against the estate despite the estate account having been advertised for creditors to make claims. The allegation was left at that without further ado, the defendant did not lead any evidence on prescription. It is safe to assume that that defense was implicitly abandoned and in any event, the defense was not established which leaves the court to deal with the first issue of the disputed ownership of the property.

The plaintiff whose evidence was found by the court to be credible produced the sale agreement which provided for a deposit of \$2000 upon signing the agreement and subsequent instalments of \$200 per month in payment of the balance of \$3000. Although there was no documentary proof of the payment of the instalments and the balance, the plaintiff testified that at the end of each month the defendant's late husband would collect the monthly instalment. The defendant did not deny that payments were made. She however averred that the payments were for rentals. She did not give any details of the landlord tenancy relationship which would have given rise to payment of rentals. The probabilities favour the evidence of the plaintiff that payments made to the defendant's late husband were house purchase instalments. It is unlikely that had there be no sale and payment in terms of the sale agreement, the defendant would have taken steps to recover the property from the possession of the plaintiff. There was an allegation

in the declaration that the defendant had obtained an eviction order from the magistrate's court in default and that a rescission of judgment application had been filed. The defendant's answer in the plea was quite rightly stated as that the allegation was irrelevant. A declaration of ownership is a different issue from eviction since eviction does not necessarily depend on ownership. In any event attempts to introduce court references on the Magistrates Court matters were futile and would have contradicted the plea pleaded by the defendant.

From the consideration of all the evidence led in the matter, the defendant did not have or produce any evidence to refute the plaintiffs claimed rights to the property save by word of mouth. She clearly did not have details of the transaction between her late husband and the plaintiff's late husband. In the end she conceded that she could not admit or deny the plaintiff's claims to ownership of rights in the property because her late husband was coy or secretive with information of his dealings in the property. She also averred that the plaintiff's late husband and her late husband were friends who engaged in their transactions as men without disclosure to her. The defendant also claimed that she suffered from amnesia and could not recall much. The plea of amnesia only came about in the course of trial and was never spoken of before. It did not take the defense case any further.

As far as claims for declaratory order are concerned, the renowned law writers *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa/Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa/ 5th Ed 2009, Ch 5 p196-197* explained the legal remedy of a declaratory order in the following terms:

"A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. The right or obligation can be existing, prospective or contingent and no specific performance need be claimed".

In simpler terms, a declaratur aims to explain the position of the law where there is question or uncertainty about the position of the law in relation to a certain set of facts or circumstances.

In the case of *Newton Elliot v Joy Tindra Nutverial Naik and 4 ors* SC 52/20 GWAUNZA DCJ set out the requirements for the grant of a declaratur which is sought by an applicant in para 11 to 13 of the cyclostyled judgment as follows:

[11] The appellant's application for a declaratur in the court a quo was made interms of s 14 of the Act which states as follows: -

"The High Court may, in its discretion at the instance of any interested person enquire into and determine any existing, future or contingent right or obligation,

notwithstanding that such person cannot claim any relief consequential upon such determination”.

Implicit from a reading of the provision is that a declaratur is sought by a person with an interest in the subject matter of the dispute, inquiring or seeking a determination of an existing, future or contingent right. In *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (S) GUBBAY CJ had occasion to consider when a declaratur should be granted. The learned Chief Justice remarked as follows at 72E-F: -

“The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an ‘interested person’, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a pre-requisite to the exercise of jurisdiction.”

See also *Family Benefit Friendly Society v Commissioner for Inland Revenue and Anor* 1995 (4) SA 120 (T).

[12] On the basis of this authority, before a court can exercise its discretion to grant a declaratur, it must satisfy itself that the person seeking such relief has a real interest in the matter and that there is an existing, contingent or future right to protect. Cilliers AC, Loots C and Nel HC in their book *Herbstein and Van Winsen, The Civil Practice of the High Courts of South Africa* (5th edn, Juta and Co. Ltd, Cape Town 2009) state as follows in this regard at p 1433 to 1434:

“It is a trite principle of the common law that an applicant seeking a declaratur must have a direct interest in the right to which the order will relate. The right must attach to the applicant and not be a declaration of someone else’s right. It is essential for a prospective litigant to have the necessary locus standi in law when commencing proceedings....’ This requires that a litigant should be both endowed with the necessary capacity to sue and have a legally recognised interest in the relevant action to seek relief.”

It is common cause that the dispute between the parties arises from the administration of a deceased estate and the property thereunder. The condition precedent is therefore that the appellant must be an interested person in the sense of having a direct and substantial interest in the subject matter of the litigation. In casu, the Plaintiff must demonstrate a right in the property or the administration of the estate as a whole, which interest could be prejudicially affected by a court’s judgment.

[13] The nature of the right that an applicant for a declaratur seeks to protect must clearly be articulated. This was stressed in *Electrical Contractors' Association (South Africa) and Another v Building Industries Federation (South Africa)* (2) 1980 (2) SA 516 (T) at 519H-520B in the following words: -

“A person seeking a declaration of rights must set forth his contention as to what the alleged right is. (See *O'Neill v Kruger's Executrix and Others*) 1906 TS 342 at 344-5; *Smit v Roussow and Ors* 1913 CPD 436 at 441.).” (emphasis added).

Following on the quoted authority the plaintiff satisfies the requirements for the grant of a declaratur. The plaintiff is an interested person who has a direct and substantial interest in the property which interest could be prejudicially affected by the judgment of the court. She derives her rights to the property as a surviving spouse of her late husband who purchased the property from the late husband of the defendant. She is entitled to vindicate her rights in the property and to rely on the agreement of sale of the property which the defendant failed to sufficiently challenge. A case for the grant of a declaratur was sufficiently established and proved by the plaintiff.

The second rung of the plaintiff's claim was that apart from the confirmation of validity of the sale agreement, reliance for relief could also be placed upon acquisitive prescription. Acquisitive prescription is a right provided in section 4 of the Prescription Act [*Chapter 8:11*]. Section 4 of the Prescription Act [*Chapter 8:11*] states that;

“a person shall by prescription become an owner of a thing he has possessed openly and as if he were the owner thereof for

a) an uninterrupted period of thirty years; or

b) a period which, together with any periods for which such thing was so possessed by his predecessors in the title, constitutes an uninterrupted period of thirty years.”.

Acquisitive prescription is the acquisition of a right by lapse of time. DUBE-BANDA J in the case of *Chimbetete v Bako* HH 36/25 stated as follows of acquisitive prescription as defined in s 4 of the Prescription Act in para 17 of the cyclostyled judgment

“the law requires that a party claiming acquisitive prescription of movable or immovable property must allege and prove civil possession- that possession with the intention to possess and control as if he or she were the owner; possession for an uninterrupted period of 30 years and that possession was exercised openly....”

see also *Jacob Nyakudya N.O v Goromonzi RDC and Anor* HH 620/23. The other side of the coin is that an owner of a property who fails to protect his rights against a stranger in possession of his property will forfeit his property to the possessor. The Supreme Court in the

case of *James and Others v Sikariyoti and Others* SC 29 of 2005 CHIDYAUSIKU CJ said the following in relation to party who procrastinates vindicating his rights in a property

“...in this regard he placed reliance in the case of *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 (2) SA 464 (W) at p 477- 478 where it was held that:- “It is the idle and slovenly owner, and not one who is alert but incapable of acting, who may lose his property by prescription.”

The learned judge also relied on *Ex parte Puppli* 1975(3) SA 461(D) at 463 where it was stated that:-

“The rationale of our law of acquisitive prescription is that an owner who negligently fails to protect his interests against a stranger in possession of his property should forfeit the property to the possessor.”

See also the dicta of SMITH J in the same case of *James and Others v Sikariyoti and Others* which is subject of the above quoted judgment on appeal wherein the learned judge stated as follows

“Our law expects those who have rights to ensure that they protect their rights. *Lex subvenit vigilantibus non dormientibus* - the law helps those who are awake and not those who are asleep”.

In *casu* the defendant failed to show that she took any action to assert her rights from 1983. She only acted to evict the plaintiff in 2020, when she obtained a default judgment t which however stands to be challenged. She did not plead any ground for not so acting. Under the circumstances the prayer for acquisition of rights in the property through acquisitive prescription should succeed as the right was established. It is noteworthy that the defendant despite testifying that her son had more details of the transaction, did not call the son to give evidence. That left the defense bare and contradictory.

In all the circumstances, the plaintiff is entitled to the relief sought. That leaves the question of costs which are in the discretion of the court. In the exercise of its discretion, the court will normally order that costs follow the event unless the losing party pleads factors which make such an order inequitable. The defendant did not plead any such factors and accordingly costs will follow the event.

The following order shall issue

IT BE AND IS ORDERED THAT

- 1) That the plaintiff is the true and rightful owner of property called stand number 2006, Glen Norah Township, Harare.

- 2) That the defendant pays the costs of suit.

CHITAPI J:.....