

THE DON MOYO FAMILY TRUST
versus
DANIEL MUKARATI
and
FORTUNATE SHEKEDE

HIGH COURT OF ZIMBABWE
CHITAPI J

HARARE, 24 October, 21 & 27 November, 1 December 2023, 9 January, 20 & 28 February, 19
March 2024 & 19 February 2025

Civil Trial

CHITAPI J: The plaintiff is the Don Moyo Family Trust. It is the registered owner under deed of transfer No 6567/19 of an immovable property called Lot 1 of Lot 15 of Makabusi measuring 4047 square metres. The property is commonly called house number 15A Ashburton Avenue, Chadcombe, Harare (hereinafter called, “the property”).

The first defendant is Daniel Mukarati a male adult of Harare. The second defendant is Fortune Shekede. The defendants are or were husband and wife. When summons was issued in this action the second defendant was not cited as a party. She joined the proceedings as the second defendant following her joinder at her instance. The joinder application was case No HC 3611/21. The joinder was granted at the pre – trial conference in this action on 18 November, 2022. Significantly, upon the grant of her joinder, the second defendant adopted the first defendant’s pleadings. She therefore did not raise a fresh defence. The first defendant’s plea filed of record on 10 December, 2020 became equally the second defendant’s plea to all intents and purposes.

The plaintiff’s cause of action is the eviction of the defendants from the property, payment of monthly holding over damages calculated at the rate of the equivalent of US \$ 500.00 per month converted to the currency in use using the prevailing interbank rate.” The plaintiff also claims costs of suit on the legal practitioner and client scale.

The claim of the plaintiff as set out in the declaration is that it purchased the property from Renias Pasipanodya. Pasipanodya had in turn purchased the property in a Sheriff's sale ref ss 123/18. The property was sold by public auction to satisfy a judgement granted by this court against the first defendant. The first defendant was then the registered owner of the property. He held the property under deed of transfer No 7675/1997. Following the purchase of the property by Pasipanodya on the auction, it was transferred to him under deed of transfer No 1265/18. The plaintiff's deed of transfer No 6567/19 devolved from deed of transfer No 1265/18. The plaintiff pleaded that it took occupation of the property in June, 2029.

The plaintiff pleaded that by judgement granted on 19 November, 2019 by CHIKOWERO J in case No HC 8664/19, the sale in execution whereat Pasipanodya purchased the property before in turn selling the property to the plaintiff was cancelled. The first defendant's deed of transfer No 7675/1997 was revived. Deed of or transfer No 1265/18 in Pasipanodya's name was cancelled. In consequence of the order of CHIKOWERO J as aforesaid, the plaintiff pleaded that it was evicted from the property following the issue of a writ of execution issued in case NO HC 518/20. The plaintiff pleaded that the writ of execution was invalid because the law firm which purported to cause its issue had been closed in January, 2020 yet the writ had been issued on 22 July, 2020. The plaintiff further pleaded that it obtained rescission of judgment granted in case No HC 8664/19 with the result that the Sheriff's sale was restored. The status *quo ante* the rescinded judgement was restored.

The plaintiff further claimed holding over damages in the sum calculated at the equivalent of USD \$500.00 per month payable in local currency using the interbank rate. The plaintiff did not plead the date from which the holding over damages were to be calculated. The plaintiff also claimed costs on the scale of legal practitioner and client.

In the plea, the defendants pleaded that the plaintiff did not have *locus stadi* to evict the defendants because the property was irregularly sold to the plaintiff who had connived with the Sheriff to buy the property. The defendants pleaded that title to the property had been restored to the first defendant in case No HC 518/20 and HC 8664/20 (the year is wrongly cited). It is common

cause that the case No is HC 8664/19. The defendants averred that the plaintiff's deed of transfer No 7675/19 which was cancelled in case No HC 8664/19 was not revived and that the defendants title deed No 7675/97 is the one which was revived. The defendants further pleaded that despite the fact that the court order in case No HC 8664/19 was rescinded, title to the property still remained with the first defendant as the rescission order did not restore the plaintiff's title which had been cancelled in case No HC 8664/19. The defendants denied that they were liable to pay any holding over damages because they remained the owners of the property with occupational rights. They did not however put the quantum of the claimed damages into issue.

In the replication, the plaintiff averred that title in the property reverted to it by virtue of the provisions of s 8 of the Deeds Registries Act, [*Chapter 20:05*] following rescission of the order granted in case No HC 8664/ 2019 on 2 September, 2020. As to the rest of the defendants averments, the plaintiff raised contest placing into issue all averments in the plea which were inconsistent with averments in the summons and declaration.

The parties held their a trial conference before KWENDA J on 18 November, 2022. The following agreed issues were referred for trial after the parties failed to resolve the dispute.

- (1) "Whether or not the plaintiff was the owner of the property at the time of issuing summons.
- (2) Whether or not plaintiff is entitled to damages.
- (3) Whether or not plaintiff is entitled to costs on a higher scale."

The manner in which the issues were settled is confusing because the plaintiff issued summons for recovery of its property through seeking an order of eviction of the defendants and those claiming occupation through them. The second claim was for holding over damages and lastly for punitive costs. The issues should realistically have been settled as (a) whether or not the plaintiff is entitled to an order of eviction as sought (ii) whether or not the plaintiff is entitled to holding over damages as sought and lastly (ii) whether or not the defendant should be ordered to pay costs of suit, and if yes, the scale of the costs. Be that as it may, issues for determination must arise or derive from the pleaded claim and pleaded defence. It is difficult to appreciate why the first issue would require resolution through a trial. No real dispute can arise in relation to who the owner of a registered property with title deeds at any particular

time is. The Registrar of Deeds certifies who the title holder of a registered property is on a particular date. It is that simple. So if the first issue is answered in the plaintiff's favour and the answer is that the plaintiff was the owner of the property according to official records in the Deeds Registry as at 2 November, 2020 when summons was issued, the next issue then be causes a finding justify an order " whether or not the plaintiff as the registered owner of the property at the time of issue of summons is entitled to an order of eviction against the defendant and those clamming occupation through them.

The court will therefore proceed to determine the matter on the pleadings. At the trial the plaintiff gave evidence of title movement of the property through Donovan Moyo a trustee of the plaintiff. His evidence was straight forward and not seriously disputed if at all. He testified that the plaintiff purchased the property from Renias Pasipanodya who had purchased it in turn in a Sheriff's auction sale. The property was transferred to the plaintiff on 7 November 2019 under deed of transfer No 6567/2019. The witness produced the copy of the deed of transfer. The deed has an endorsement by the Registrar which reads as follows:

" REVIVAL OF TITLE IN TERMS OF SECTION 8 OF THE DEEDS REGISTRIES ACT [Chapter 20:05]. IN TERMS OF THE ABOVE SECTION THIS TRANSFER DEED IS REVIVED IN LIEU OF THE CANCELLATION OF DEED OF TRANSFER NO 7675/1997 DATED 18 SEPTEMBER 1997 BY ORDER OF THE HIGH COURT CASE NO HC 4110/2020. DATED 02/09/2020. THE TRANSFER ENDORSED THEREON IS HEREBY CANCELLED.
DATE 26.02.2021
CONSENT 222/2021"

Registrar

The witness testified that the revived deed of transfer is still valid. The witness gave the history of the sale of the property being that the property was sold by the Sherif to satisfy a judgement made in favour of CBZ Bank against the first defendant. The first defendant successfully applied for the setting aside of the sale under case No HC 8664/19. The plaintiff which had already purchased the property and obtained title under deed of transfer No 6567/19 was not a party. A perusal of the court order in case No HC 8664/19 showed that the defendant's were; The Sheriff of Zimbabwe; Renias Pasipanodya CBZ Bank Ltd and Registrar of Deeds. The order of the court set aside the sale to Renias Pasipanodya, cancelled deed of transfer No 1265/18 in

the name of Renias Pasipanodya and revived deed of transfer No 7675/97 in the first defendant's name. The court order in case No HC 8664/19 was granted on 19 November, 2020.

The first defendant then issued process under case No HC 518/20 against the plaintiff; Renias Pasipanodya and Registrar of Deeds. The cause of action was to seek the cancellation of the plaintiff's deed of transfer No 6567/2019 and to revive the first defendant's deed of transfer No 7675/97. By default, judgment dated 19 February, 2020 MUNANGATI – MANONGWA J cancelled deed of transfer no 6567/2019 and revived deed of transfer No 7675/97. An order for the eviction of the plaintiff was also issued and costs were awarded against the plaintiff and Renias Pasipanodya.

The witness testified that the plaintiff applied for rescission of the default judgment. The witness produced a court order issued in the rescission application, case No HC 4110/20. It was issued by Phiri J on 2 September 2020. The court order was couched as follows:

“IT IS ORDERED THAT

1. The default judgment entered against the applicant on the 19th February, 2020 in case no HC 518/2020 and the writ of execution be and are hereby set aside.
2. The applicant shall file its notice of opposition within ten (10) days of the issuing of this writ.
3. The costs shall be in the cause.”

The witness testified that it was this order which entitled the Registrar to revive the plaintiff's deed of transfer No 6567/2019. This point as will be discussed became a contentious one. It informed the second defendant's defence as set out in the plea.

The witness testified that since the plaintiff's deed was revived there was no basis for the defendant to remain in occupation of the property. The witness testified that there were no current court challenges to the validity of the plaintiff's deed of transfer. On damages the witness stated that the USD \$ 500.00 was agreed to by the parties. The witness produced a letter dated 15 October 2020 in which an undertaking was made that should the first defendant lose the case he will pay the holding over damages.

The cross examination of the witness was eventless. It was put to the witness that the rescission judgment order did not have the effect of reviving the deed. The witness answered that the rescission order cancelled the plaintiff's deed of transfer and that the first defendant could not hold hanging title. In relation to the claim for costs, the witness testified that the defendants caused postponements by their none attendance on previous set downs. The first defendant was in default on 9 January , 2024. He had defaulted on previous set downs with his legal practitioner appearing without him and on other occasions, the legal practitioner not also appearing. The plaintiff prayed for default judgment against the first defendant but acceded to postponements to allow that the matter is heard on merits in respect of the second defendant as there was no proof that she was aware of the set down. The court granted default judgment against the first defendant as prayed for in the summons after striking out the defendants defence.

The second defendant elected to give evidence. The second defendant testified that she was divorced by the first defendant in 2018/2019 although the two had lived on separation since 2016. She knew very little about the details which led to the property being auctioned in a Sheriff sale, save that the sale was done pursuant to a judgment in favour of "the bank". She stated that although the property was registered in the joint names of the first defendant and herself, she was not party to the judgment which led to the sale . She did not state that she challenged the judgment nor the sale.

On the merits of the matter she testified that she abided by the pleadings filed on behalf of the first defendant. When asked why she did not accept that the plaintiff was the owner of the property, she stated that it was because she never received any documents from the Sheriff to advise her that the house was being sold. When asked to comment on the revival of the plaintiffs deed transfer, she responded that she knew noting about the ownership changes. Asked to comment on what she did when she heard that the property had been sold, she replied that the first defendant is the one who knew about the matter. When asked to comment on the holding over damages claim, she respondent that she could not pay rental for her own property. She nonetheless queried the quantum of holding over damages and averred that the reasonable rental amount for the area was between USD \$ 200 and USD \$ 300, per month. She also stated that the house was old. She

professed not to know the law she started that the whole process which led to the sale of the house was not known to her.

Under cross examination very little of note came out. She was asked about various prior cases but knew little about them save that she hired a legal practitioner and was consequently joined as a second defendant in this matter. She denied that she acceded to the claim for holding over damages and disagreed that she instructed her legal practitioner to agree. She stated that she was not aware of the dismissed case No HC 2176/21 wherein the challenge by the defendant to the revival of the plaintiff deed of transfer was dismissed. There was no re-examination. The second defendant closed her case.

Counsel requested to and were granted leave to file written closing submissions. Counsel subsequently did so and also appeared before the court on 19 March, 2024 and spoke to their submissions. Counsel for the plaintiff submitted that there were no impediments to the plaintiff's title. He submitted that the single issue arising in the matter was whether or not the plaintiff title deed was revived by the order in case No HC 4110/20 which rescinded the order in case No HC 518/20. Counsel for the second defendant took the view that the revival was not authorized by the order in case No HC4110/20 because the order only granted the plaintiff leave to file opposing papers.

In determining this matter I first comment that the two witnesses who testified were both honest and their demeanour was good. There were few controversial facts between them. The plaintiff's witness had all relevant facts on his finger tips regarding the devolution of the property to the plaintiff and all intervening snags. The second defendant understandably knew very little about the matter because the first defendant was the person on the frontline so to speak. Fortunately the determination of this matter does not depend upon an assessment of disputed facts or evidence. This is so because the resolution lies in the consideration of the paper trial of judgments of this court and to answer the question whether or not the revival of the plaintiff's deed of transfer is valid. If yes whether the plaintiff is entitled to evict the second defendant and those claiming occupation through her.

This matter is not difficult to resolve at all. It is a surprise to the court that this matter had to be resolved at trial. I say so because issues of law like what at the end of the day anchors this

matter are resolved by counsel giving parties they represent correct advice. If counsel are not agreed then a stated case should be considered. There really was no need for the plaintiffs witness to be called to go through judgments of the court as such judgments are this courts judgments with the court being the interpreter of its judgements.

The real focus must be on case No HC 518/20 whose terms were quoted hereinbefore in full. The order was clear that:

- “(1) Registration of title deed number 6567/19 be and is hereby cancelled.
- (2) Deed of Transfer Registration Number 7675/97 is hereby revived.
- 3
- 4
- 5

The above order was rescinded by case No HC 4110/20. The rescission was granted on 2 September, 2020. The terms of the order which affects the order in case No HC 518/20 read

- “ 1. The default judgment entered against the applicant on 19 February, 2020 in case No HC 518/20 and the writ of execution be and are hereby set aside.
- 2. The applicant shall file its Notice of opposition within ten(10) days of the issuing of this order.
- 3. The costa shall be in the cause.”

Counsel were pre- occupied with the meaning and effect of the rescission of judgment order. The court listened in amusement because I could not appreciate where the disagreement between counsel was. When a judgment is rescinded, the rescinded order is no longer there in effect. The situation that prevails is the *status quo ante* the judgement. The order of cancellation of deed of transfer No 6567/19 and revival of deed of transfer No 7675/97 which had been granted were rescinded without qualification. Rule 27(1) of the High Court Rules is instructive and applies to case nos 518/20 and 4110/20. The rule provides as follows:

- 1. Court may set aside judgment given in default
- 27.(1) A party against who judgment has been given in default whether under these rules or under any other law, may make a court application , not later than one month after he has had knowledge of the judgment for the judgment to be set aside and thereafter the rules of court relating to the filling of apportion heads of argument and set down of opposed matters if opposed shall apply”.

It is clear that the application made by the affected person is for the setting aside of the default judgement. If the judgment is set aside, it is no longer there. The position that obtains is as if there was never a default judgment. The judgment which has been set aside gives no rights or obligations. The situation reverts to what it was prior to the judgement. *In casu*, the situation before the default judgment was that deed of transfer No 7675/97 was cancelled and deed of transfer No 6567/19 was the holding deed. The Registrar of Deeds was correct to endorse a revival of the plaintiffs deed of transfer on the strength of court order HC 518/20 read together with court order HC 4110/20. Summons was issued for the eviction of the defendants on 2 November, 2020. This was two months after the court had rescinded the order which cancelled the plaintiff's deed of transfer. The plaintiffs were from 2 September, 2020 when judgement in case No HC 4110/20 was granted, entitled to vindicate its property from the defendants or whosoever occupied it without the consent of the plaintiff. The second defendant's defence if one could say there was any failed.

In relation to holding over damages, these were agreed upon as per correspondence between the first defendant's legal practitioner and the plaintiff's legal practitioners. The second defendant is bound to the second defendant's pleadings and that would include admissions and concessions made. The second defendant's defence has no legal ground to remain on the plaintiff's property and must vacate or be evicted by law. In relation to costs, I have agonized on whether to order the second defendant to pay the costs of suit. I have considered that she found herself having to desperately defend her occupancy of the property as a divorced wife who appeared to have had no knowledge of the transactions which the first defendant had entered into relating to the property. The first defendant was ordered in the default judgment entered against him to pay the plaintiff's costs. There is no prejudice to be suffered by the plaintiff if no costs are ordered against the second defendant. As far as holding over damages are concerned, they must be calculated from the date that the court rescinded judgment No HC 518/20 because plaintiff's title reverted to it. The rescission order was granted under case No HC 4110/20 on 2 September, 2020. A party is presumed to know about a judgment against it within 48 hours of the date that the judgment is delivered. The holding over damages are therefore due from 5 September, 2020 to date of ejectment of the second defendant. The

second defendant has enjoyed free tenancy on the property and must pay for her enjoyment and use.

For the avoidance of doubt, both the first and second defendants' defence fail. The application for default judgment made against the first defendant succeeds.

The following order is therefore made:

1. Judgment for plaintiff.
2. The first and second defendants and all those claiming occupation through them of the property called 15 A Asliburton Avenue, Chadcombe, Harare shall vacate the premises within seven (7) days of service of this order being served upon them.
3. The first and second defendants jointly and severally the one paying the other to be absolved shall pay holding over damages to the plaintiff at the rate in ZIG, equivalent to \$ 500 USD per month calculated at the interbank rate prevailing on the date of payment from 5 September, 2020 to the date of the property.
4. Costs on the legal practitioner and client scale shall be paid by the first defendant.

Moyo Chikono & Gumiro, applicant's legal practitioner
Tsara & Associates, 2nd defendants' legal practitioner