

FREDA REBECCA MINE HOLDINGS LIMITED  
verses  
AJASI WALA

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 7 March 2014 & 13 March 2014

**Opposed Matter**

*C. Kwirira*, for the applicant  
*G. Manyurureni*, for the respondent

MATANDA-MOYO J: At the date of hearing I dismissed the applicant's application for summary judgment and indicated that reasons would follow. These are they:-

This is an application for summary judgment for an order directing the respondent and all those claiming through him the right of occupation, to vacate the premises known as House number 593 Waterberry Bindura. The applicant also sought holding over damages in the sum of \$500-00 per month calculated from date of summons to date of eviction together with interest at the prescribed rate.

The background to this case is that the applicant issued summons against the respondent in this court on 30 May 2012 claiming the eviction of the respondent and all those claiming through him to vacate House Number 593 Waterberry Road, Bindura, as well as holding over damages in the sum of \$500 per month from date of summons. The respondent duly entered appearance to defend and filed his plea on 17 June 2013. The respondent's plea is to the effect that he has a right to occupy House number 593 Waterberry Road until the applicant has given him vacant possession of House number 1295 Chiwaridzo, Bindura. His defence is that he bought house number 1295 Chiwaridzo, Mutufu Crescent from the applicant. The respondent claim to have since paid for the house in full. He denied occupying House number 593 Waterberry Road Bindura as a benefit of his employment contract. He moved to 593 Waterberry in exchange for 1295 Chiwaridzo Mutufu crescent road. He denied that simply because his contract, of employment was terminated, he should vacate the premises.

The applicant applied for summary judgment after the filing of such plea. The applicant argued that the respondent has failed to tender a *bona fide* defence to its claim and that judgment should be entered in its favour immediately. The respondent opposed the application for summary judgment. The respondent argued that in his plea he denied that he was allocated House number 593 Waterberry Road in terms of his contract of employment. He only moved to that house as a swap arrangement with the property he purchased from the applicant, that is, number 1295 Chiwaridzo. The respondent in his plea denies that his occupation of number 593 Waterberry was conditional upon the continued subsistence of his contract of employment. The respondent claimed he has a right to occupy 593 Waterberry as long as the applicant is holding on to his property number 1295 Mutufu Crescent, Chiwaridzo. The respondent attached an agreement between the applicant and the respondent for the sale of 1295 Mutufu Crescent. He also attached payslips showing the deductions termed “rent to buy”. The respondent showed that he has since finished paying the sale price. The respondent argued that he proffered a defence to applicant’s claim and that the application for summary judgment should fail.

In *Kingstons Ltd v L D Ineson (Pvt) Ltd* 2006(1) ZLR 451 (5) @ 458 the court said:-

“Not every defence raised by a defendant will succeed in defeating a plaintiff’s claim for summary judgment. Thus what the defendant must do is to raise a *bona fide* defence – a ‘plausible case’ – with sufficient clarity and completeness to enable the court to determine whether the affidavit discloses a *bona fide* defence. He must allege facts which, if established “would entitle him to succeed” See *Jera v Nechipote* 1986(1) ZLR 29(5) *Mbuyiwa v Eastern Highlands Motel (Pvt) Ltd* S- 139-86; *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 R & N 723 (SR)”.

In the case of *Stationery Box (Pvt) Ltd v Natcon (Pvt) Ltd & Anor* 2010 (1) ZLR 227 (H) the court found that “the onus resting on a defendant resisting summary judgment was amongst the lightest that the rules of procedure casts on the litigants” At this juncture all that is required is for the defendant to raise facts which if proved during the hearing would entitle him to succeed in his defence. The defendant herein filed receipts and agreements showing his entitlement to house number 1295 Chiwaridzo. He denied that house number 593 Waterberry was allocated to him as a benefit of employment. Whilst acknowledging that the house belonged to the plaintiff, he submitted that the two litigants swapped houses. The plaintiff cannot claim vacant possession of its property without affording the defendant vacant possession of his property.

It is common cause that the defendant instituted proceedings against the plaintiff claiming ownership of house number 1293 Mutufu Crescent – HC 1139/10 refers. The plaintiff opposed the summons and the matter is at Pre-Trial Conference stage. The parties agreed to put the matter in abeyance until determination of similar matters taken on appeal to the Supreme Court. Case number 1139/10 and the present case are interlinked. Determining the present matter before conclusion of case number 1139/10 might create an injustice to the defendant. From the evidence before this court the defendant is highly likely to succeed in getting ownership of house number 1295 Chiwaridzo. This court should ventilate the issues raised by the defendant in his plea that house number 593 Waterberry was not an employment benefit but a swop with 1295 Chiwaridzo. The defendant has raised triable issues in his plea which amounts to a defence in law. From his defence I do not read the defendant to be raising the defence of lien and I shall ignore submissions made by the plaintiff relating to the defence of lien.

The plaintiff's cause of action is based on termination of the contract of employment. The plaintiff's case is that the defendant was allocated house no 593 Waterberry Road as part of his employment benefits. This has been denied by the defendant.

On the issue of holding over damages in the sum of \$500-00 per month, the defendant raised the defence of set off. The plaintiff is said to be enjoying possession of house number 1295 whose rentals are more or less the same as the \$500-00 claimed by the plaintiff. This is a *bona fide* and plausible defence to the plaintiff's claim. See *Majoni v Minister of Local Government* 2001 (1) ZLR 149(S) *Niri v Coleman and Ors* 2002(2) ZLR 580 (H).

In the result, I find that the plaintiff's claim is not clearly unanswerable. The defendant has raised a plausible and *bona fide* defence and the application for summary judgment must fail.

In the result, I make the following order:-

1. The application for summary judgment be and is hereby dismissed.
2. The plaintiff shall bear the costs of suit.

*Manyurureni & Company*, plaintiff's legal practitioners  
*Magwaliba & Kwirira*, defendant's legal practitioners