

SIMON CHIGUMBURA
versus
ANGELA CHIGUMBURA

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 24 July & 29 October 2024

Civil Trial – Point *in Limine*

R Gasa, for the plaintiff
L C Ndoro, for the defendant

MUCHAWA J: A brief background of this matter is a good place to start. The parties are half siblings. Their dispute revolves around the estate of their late father Wise Kambaurayi Guti who died intestate on 10 February 1996. In his estate was an immovable property, Stand Number 3096 Highfield Township, Harare. The plaintiff was appointed heir to his father's estate by operation of s 6(2) of the Administration of Estates Act [*Chapter 6:01*]. Resultantly, the plaintiff inherited the property in his personal capacity and it is now registered in his name under Deed of Transfer Number 7493/2000.

Despite being the holder of title to the property, it is the defendant who is in occupation. Under case HC 7489/20, the plaintiff issued summons to evict the defendant and all those claiming occupation through her. A judgment of this court held that the defendant was entitled to a salvage and improvement lien to ensure there was no unjust enrichment as the defendant had developed the property from a two roomed house to a nine roomed house and had erected a perimeter wall.

Additionally the court ruled that the parties need to agree on a compensation amount or the defendant comes up with the actual expenses reflecting the extent to which the plaintiff has been enriched. It turns out that the parties have failed, refused or neglected to negotiate and the parties are not in agreement on the respective entitlement of each of them. On the one hand, the plaintiff claims that the defendant is only entitled to the improvements exclusive of the land/ground, two rooms which were there when their father died and a box for a nine roomed house. The defendant, per contra claims entitlement to all the improvements on the property and states that the plaintiff's entitlement is only the land/ground.

In this current action, the plaintiff issued summons for a declaratory order that the property be sold to the best advantage and the net proceeds be shared between the parties at a ratio of 65.8 per cent (being the value of 332 square metres of land plus the value of the two roomed house with seven rooms at slab level) in favour of the plaintiff. The defendant is offered 34.2 per cent being the depreciated market value of the improvements allegedly made by the defendant. In support of his claim, the plaintiff has attached three quotations for consideration by the court.

A further declaratory order sought is that the defendant pays US\$3 600 from her share, being the value of 36 months rental which was collected from the two roomed house at the value of US\$50 per room, per month which the defendant has allegedly been collecting and converting to her own use.

The defendant raised a point *in limine* which was put as the first issue in the joint pre-trial conference minute. It is stated as follows:

“Whether or not the plaintiff’s claim for a declaratory order is properly before the court?”

At the hearing on 24 July 2024, the parties agreed to proceed by way of written submissions which were duly filed. In this judgment I resolved whether the matter seeking a declaratory order is properly before me.

The defendant’s submissions

The defendant submits that the suit instituted by the plaintiff does not meet the requirements of a declaratory order as set out in s 14 of the High Court Act.

The first criticism is that, it does not set out in clear terms the disputed rights and obligations of the parties which the court is being called upon to inquire into and make a definite declaration. It is averred that the earlier judgment of the court in HC 7489/20 clearly sets out such rights and is extant. The defendant’s take on the judgment is that the court affirmed the defendant’s right to remain in occupation until she is compensated for improvements made. At the same time, the plaintiff is acknowledged as the rightful owner of the land/ground. It is argued that as none appealed against these findings, the rights and obligations of the parties are clear and do not require the further intervention of the court.

What the plaintiff is seeking is alleged to fall outside a declaratory order therefore.

In support of her position, the defendant relies on the provisions of s 14 of the High Court Act and case authority. The case of *Dongo v Naik & Ors* SC 52/20 is cited which cites the case of *Johnsen v Agricultural Finance Corp* 1995 (1) |ZLR 65(S) with approval.

It is contended that the plaintiff has not laid out in his claim the right which he wants protected via s 14 of the High Court Act. The suit is alleged not to be inviting the court to determine the rights and obligations of the parties in respect to Stand Number 3096, Highfield Harare. The provision in the draft order declaring that the property be sold is said not to be a declaration of a right or obligation. Equally the order for deduction of US\$3 600 from the defendant's share is said not to be a declaration of a right or obligation.

The remedy available because the parties failed to agree on the amount of compensation and payment modalities is alleged not to be a declaratory order. This is said to be a disguised claim for quantification of the total amount of compensation payable to the defendant.

It is prayed that as this claim does not meet the requirement of a declaratur as provided for in terms of s 14 of the High Court Act, it be dismissed with costs on a higher scale.

The Plaintiff's Submissions

The plaintiff also points the court to s 14 of the High Court Act and the case of *Dongo v Naik & Ors (supra)*.

It is contended that as the owner of the property, the plaintiff who has not enjoyed his rights in respect to the property, including collection of rentals, has the necessary capacity to sue as he has done.

By reliance on the case of *Electrical Contractors Association (South Africa) & Anor v Building Industries Federation (South Africa) (2) 1980 (2) SA 516* the plaintiff avers that he has clearly articulated the right he seeks to be declared, which is the quantum of compensation payable to the defendant and his entitlement to collect rentals.

A new dispute is said to have arisen regarding the existence of the two roomed structure which the defendant initially admitted to be in existence but is now saying that it was a temporary structure which has since collapsed and she made all the improvements currently in existence.

It is contended that the plaintiff has a real live dispute which is crying out for resolution so as to bring an end to litigation between the parties and that this is not a hypothetical or academic question meant to waste the court's time.

The plaintiff says that the granting of the declaratur will have practical consequences and advantage to him as the defendant who is benefiting from the *status quo ante* does not want a definitive conclusion to the matter.

The court is urged to hear the merits of the matter before declining to issue the declaratory order and thus proceed to exercise its discretion, which is exercisable even where there is no dispute as per *Recoy Investments (Pvt) Ltd v Tarcon (Pvt) Ltd* 2011 (2) ZLR 65 (H).

The Law and Application to the Facts

Section 14 of the High Court Act provides 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.”

The background to this matter is important at this point. In matter HC 7489/20, in my judgment of 11 April 2022 in which the plaintiff sought to evict the defendant and all those claiming through her, I made the following findings:

- (i) That the plaintiff is the holder of real rights to the property as ownership was conveyed to him from his father’s estate by virtue of registration of transfer.
- (ii) That the defendant had improved the property from the initial two roomed cottage to a nine roomed house and a perimeter wall around the house. She should be protected by a salvage and improvement lien from unjust enrichment of the applicant.
- (iii) As a way forward, the parties were to agree on a compensation amount or that the defendant comes up with the actual expenses incurred reflecting the extent to which the plaintiff had been enriched.
- (iv) That the defendant is entitled to remain in possession of the property until she is compensated for all her necessary and useful expenses to the property.

In this current action the plaintiff’s prayer is set out as follows:

“Wherefore, the Plaintiff prays for the following Declaratory Order against the Defendant:

- a) An order declaring that Stand No. 3096 Highfield Township, in the district of Salisbury, measuring 332 square metres held under Deed of Transfer Number 7493/2000 in favour of the Plaintiff be sold to best advantage of the parties, within three months of this order and the Defendant be paid 34.2% of the net value of the said property, it being the depreciated replacement value of the improvements she made on the Plaintiff’s property.
- b) An order declaring that US\$3 600.00 (Three Thousand Six Hundred United States Dollars) be deducted from the Defendant’s 34.2% share – it being the 36 months’ rental that Defendant has been collecting from Plaintiff’s two roomed core-house at the average rate of US\$50.00 per month per room, resulting in the Plaintiff being unjustly impoverished and the Defendant being unjustly enriched.
- c) Order directing the Registrar of the High Court to appoint an Estate Agent next on his register to value and sale (sic) Stand Number 3096 Highfield Township, Harare within three months of this order. The cost of valuation and sale of the property shall be shared equally by both parties.
- d) The Defendant and all those claiming occupation through her shall vacate Stand No. 3096 Highfield Township, Harare within 30 (thirty) days of being paid her compensation amount.

- e) In the event that the Defendant and all those claiming occupation through her fail to move out of Stand No. 3096 Highfield Township, Harare in terms of paragraph (d) above, the Sheriff of Zimbabwe be and is hereby authorized to evict her.
- f) The Defendant shall pay the cost of suit at attorney client scale.

As per *Johnsen v AFC (supra)*,

“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 in is not a prerequisite to the exercise of jurisdiction.”

Given the facts of this matter there is rightly no contention regarding whether the plaintiff is an interested party. He is the registered holder of title to the property in issue as confirmed by the earlier judgment of this court. He is currently, and for the last 24 years not in occupation and has not enjoyed the fruits of his ownership. His interest therefore concerns both his existing right and the right to benefit from his ownership in the future.

The question placed before me is to decide whether the case before me is a proper one for the exercise of the court’s discretion under s 14 of the High Court Act. In making this decision the court must take account of all the circumstances of the matter. In *Johnsen v AFC (supra)* it was held that what, in the end, constitutes a proper case is where some tangible and justifiable advantage to the applicant is shown to exist.

The defendant avers that the plaintiff has not laid out in his claim the right which he wants protected and that the court is simply being asked to quantify what is due to each party. The claim to rent of US\$3 600 is also said not to be a declaration of a right or obligation. The respective rights and obligations of the parties are said to have been already spelt out in the earlier judgment.

The earlier judgment fell shy of specifying the actual value of each party’s entitlement in respect of the property. It declared the plaintiff as owner and the defendant as holder of a salvage and improvement lien. The parties were trusted to thrash this out. They have not and clearly the only one benefitting from the status *quo ante* is the defendant.

The learned authors Herbstein and Van Winsen in “*The Civil Practice of the High Court of South Africa 5th ed.*” at p 1438 state as follows:

“A court has a discretion whether to grant or refuse an application for a declaratory order. Some factors which could be taken into account are the utility of the remedy, and whether, if granted it will settle the question at issue between the parties, the existence or absence of an existing dispute, some tangible and justifiable advantage in relation to the applicant’s position must flow from the grant of the order sought, and that, despite the fact that no consequential

relief is claimed or being claimed, yet justice and convenience demands that a declaration be made, or that the order will be of practical significance...”

This is a fitting case in which the court should exercise the discretion to grant a declaratory order because the granting of the order will deal with the stalemate between the parties and settle the clear question at issue between the parties which is the quantum each is entitled to and whether the defendant is entitled to pay for any rentals plus quantum thereof. There is a clear dispute crying out for resolution. Once that issue is settled there will be some justifiable and tangible advantage in relation to the plaintiff's position who, so far has held title on paper only without enjoying the benefits of ownership.

Overally, this is a case where the interests of justice and convenience require that the matter be heard on the merits. Costs on a higher scale were prayed for because this is a ploy to perpetuate the status *quo*. I agree. Consequently, there is no merit in the point *in limine*. **I order as follows:**

- 1) The point *in limine* be and is hereby dismissed for lack of merit.
- 2) The registrar is directed to proceed to set the matter down for hearing at the next available date.
- 3) The defendant to pay costs on a legal practitioner – client scale.

Gasa Nyamadzawo & Associates, plaintiff's legal practitioners
Thondhlanga & Associates, defendant's legal practitioners