FISO FIKILINI **APPLICANT**

VERSUS

JUMA JAMU **RESPONDENT**

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 18 FEBRUARY AND 24 FEBRUARY 2011

J. James, for the applicant
M. Ncube, for the Respondent

JUDGMENT

MATHONSI J: The applicant and her husband instituted proceedings against the Respondent in Case No. HC 1756/10 seeking an order for the eviction of the Respondent from No. 21B Moffat Avenue, Hillside, Bulawayo and holding over damages. The Respondent entered appearance to defend forcing the Applicant to make this application for summary judgment on the basis that appearance has been entered for purposes of delay as no defence exists against the claim.

At the commencement of the hearing Mr Ncube for the Respondent took a point *in limine* that the Applicant does not have *locus standi in judicio* to depose to an affidavit in support of the application because she is not the registered owner of the house, which is registered in the name of her husband, Ben Fikilini. Although making the point about the registered title Mr Ncube did not submit a copy of the Deed of Transfer to substantiate that point.

He argued that the Applicant, as the wife of the owner, cannot represent the husband without a power of attorney and merely by virtue of marriage. He relied on the case of Sibanda v Gumbo & Another HB 139/10. In that judgment, I stated at page 4 of the cyclostyled report;

> ''The first Respondent is not the registered owner of the rented premises. He was not a party to the lease agreement concluded between his wife and the applicant. The claim that he filed was based on a lease agreement he was not privy to. In my view he did not have *locus stand in judicio* to sue for the eviction of the Applicant in his own name. His marriage to Karen Zakeyo did not give him contractual or vindicatory rights of whatever nature. See *Muswere v Makanza* HH 16/2005(unreported). After all, all marriages in this country are out of community of property.''

The case of *Sibanda v Gumbo* is distinguishable from the present in that the husband had sued for eviction in his own name without reference to the wife who was the registered owner. He sought eviction on the basis of a breach of a lease agreement in which he was not a party. He clearly did not have *locus standi.*

In the present case, both spouses are suing for eviction as 1st and 2nd plaintiffs in the summons. The husband is therefore part of the proceedings. Its only that the wife is the one who is moving the summary judgment application. In addition the action in the present case is vindicatory in nature and not entirely premised on a breach of the lease agreement. It is alleged that the Respondent was given a lengthy notice to vacate and the owners are seeking to re-enter and take possession.

Accordingly, I came to the conclusion that the point *in limine* has no merit. It is therefore dismissed.

On the merits, the Respondent has been leasing the house for several years by virtue of a lease agreement the last one of which was signed on 19 December 2000 to take effect on 1 January 2001. On 16 January 2007 Markam, Lewis and Company, acting as the agents of the Applicants, gave the Respondent notice to vacate the house. The Respondent did not comply. Again on 23 August 2010, the Respondent was given notice to vacate by 31 October 2010.

When the Respondent did not comply, this application was filed in which the applicant maintains that the Respondent does not have a defence to the eviction proper and that appearance has been entered for dilatory purposes.

What a Respondent in an application for summary judgment has to show in order to successfully contest the application was set out in *Mbayiwa v Eastern Highlands Motel (Pvt) Ltd S 139-86* at page 4-5 which was quoted by Malaba J (as he then was) in *Hales v Doverick Investments* (Pvt) Ltd 1998(2) ZLR 235 at 238 G and 239 A-B.

> ''---while the defendant need not deal exhaustively with the facts and the evidence relied on to substantiate them, he must at least disclose his defence and material facts upon which it is based, with sufficient clarity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence (*Maharaj v Barclays National Bank Ltd* 1976 (i) SA 418 (A) at 426 D --- the statement of material facts (must)be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial will constitute a defence to the plaintiff's claim --- if the defence is averred in a manner which appears in all the circumstances needlessly bald, vague or sketchy that will constitute material for the court to consider in relation to the requirement of *bona fides* (*Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 at 228 D-E) ---- he must take the court into his confidence and provide sufficient information to enable the court to assess his defence. He must not content himself with vague generalities and conclusory allegations not substantiated by solid facts (*District Bank Ltd v Hoosain & Others* 1984(4) SA 544 at 547 G-H.)''

In *casu*, the Respondent's defence is that while he moved into the house in dispute as a tenant, he later upgraded his status to that of owner, by buying the said house from the Applicants. In an effort to substantiate this claim he has annexed a bundle of documents the import of which is that sometime in 1998, he was given an option to purchase the house for a sum of US$50 000-00. An agent by the

name of Tumazos was acting on behalf of the sellers and the Respondent was required to pay a deposit of US$25 000-00 by the end of February 1998 with the balance being payable by the 30th June 1999.

In fact, in earlier negotiations the Respondent had been asked to pay the deposit by October 1997 but failed leading to fresh negotiations. A draft sale agreement was prepared by another agent of the seller Markham Lewis and company incorporating certain proposals. That document was signed on an unknown date only by the Respondent meaning that the negotiations between the parties then did not result in an agreement being concluded.

The Respondent has also submitted yet another unhelpful document being a photocopy of his Barclays Bank cheque dated 27 February 1998 drawn in favour of ''The Hot Bread Shop'' in the sum of $220 000-00 Zimbabwe currency although he alleges that the deposit of US$25 000-00 would have been much more than that. In fact he says US$20 000-00 (which was not the deposit required), was equivalent to $340 000-00 in Zimbabwe currency.

Even assuming that there was an agreement for the purchase of the house, the Respondent did not comply with that agreement because he did not pay even the requisite deposit. This is particularly so considering that, while the proposed agreement was that payment should be made to one Mrs E.L Scheijde, not only did the Respondent fail to pay anything to the said Mrs Scheijde (at least he has not produced proof), what he purports to have paid in the form of a cheque of $220 000 was paid to ''The Hot Bread Shop'' and no connection has been established between the bread shop and the Applicants or their agents.

I am fortified in my view that there was no sale agreement involving the house in 1998 by the fact that on the basis of the documents which Respondent relies upon, much later in January 2002, the house was still in the market for sale. By letter dated 21 January 2002 the Applicant's agent Markam Lewis and Company instructed John Pocock and Company to sell the house and give the Respondent the first option to purchase. That letter reads in part as follows:

> ''Dear Mr Friend.
>
> <u>B Fikilini, 21B Moffat Avenue Hillside</u>
>
> Our client resides in America and has instructed me to sell his house. Would you please make arrangements to view this property with the current tenant, Mr Juma Jamu, who must be given first option to purchase. No price has been mentioned and I would appreciate your opinion on the market value.
>
> Yours sincerely
>
> MARKHAM LEWIS AND COMPANY
>
> E. Scheijdge
>
> cc Mr J. Jamu, 21B Moffat Avenue, Hillside, Bulawayo''

John Pocock and Company proceeded to communicate with the Respondent on 28 January 2002 and in June 2002 they came up with a breakdown showing a proposed sale of the same house to the Respondent for 8 million dollars. There is nothing to suggest that any concrete agreement was concluded even at that stage.

This factor, coupled with the fact that the Respondent signed a lease agreement commencing on 1 January 2001 can only lead to one conclusion, namely that there was never a sale agreement between the parties. The Respondent was in occupation of the house as a tenant.

What the Respondent is relying upon, even if proved at the trial, would not constitute a defence to the Applicant's claim. *Hales v Doverick Investments (Pvt) Ltd (supra*) at 239A; *Kingston Ltd v L.D Ineson* 2006 (1) ZLR451 (S) at 458 C.

Even if I am wrong in that conclusion, the Respondent would still have the insurmountable difficulty of dealing with the issue of prescription, which the court is entitled to raise *mero motu*. If he were to prove the existence of a valid sale agreement concluded in 1998 as would entitle him to take transfer of the house, considering that he has not attempted to enforce that sale for well over 12 years, any claim would now be struck down by prescription in terms of section 15 of the Prescription Act, Chapter 8:11.

I am therefore of the view that the Applicant's claim is unanswerable and that the Respondent has entered appearance for dilatory purposes.

Accordingly I make the following order:

1. Summary judgment be and is hereby granted in favour of applicant.

2. The Respondent and all those claiming title through him shall be evicted from No. 21B Moffat Avenue, Hillside, Bulawayo.

3. The Respondent shall bear the costs of suit.

Messrs James, Moyo-Majwabu & Nyoni, Applicant's Legal Practitioners
Cheda and Partners, Defendant's Legal Practitioners