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Judgment No S.C. 73\2001
Civil Appeal No 138\2000

LUKE MBERI v NICHOLAS MKUNDWA

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & SANDURA JA
HARARE JULY 26 & SEPTEMBER 3, 2001

R.T.M. Maganga, for the appellant

A.G. Matika, for the respondent

McNALLY JA: This is a dispute over Stand 5326, 101 Street, Warren Park D, Harare. I will refer to it as "the stand". In the court *a quo* the City of Harare was joined as a party, but took no part in the proceedings, thereby presumably signalling its willingness to accept whatever decision the court chose to make. The absence of any objection by the Council, which is in fact the owner of the premises, is an important factor in allowing the courts to decide the rights of competing tenants with a right to purchase. See *Mukarati v Mkumbu* 1996 (1) ZLR 212 (S) at 215B.

I will refer to the parties by name. Mberi was undoubtedly the original "purchaser" of the stand in terms of a written agreement with the

Municipality of Harare effective from 1 April 1984. He was to pay for the stand over a period of 30 years, at the end of which period he could become owner.

The issue is whether or not he ceded his rights in the stand to Mkundwa in August 1984. The learned judge found that he did, and ordered him to cede and assign his rights to Mkundwa. But Mkundwa's claims for rentals and ejectment were dismissed, as was Mberi's counter-claim for ejectment (both parties were living in different rooms in the disputed premises).

Mberi lodged an appeal and Mkundwa cross-appealed.

The relevant facts are as follows. As earlier indicated Mberi was the original "purchaser" in terms of the agreement with the Municipality dated 22 March 1984. It is common cause that in August 1984 Mberi was transferred by his employer to Masvingo. He left Mkundwa in possession of the stand, which at that time had a small shack on it. Mkundwa says he bought Mberi's rights from him for $500. Mberi denies it.

Mkundwa built a house on the stand in the period 1984 – 1989. In 1989 Mberi was transferred back to Harare, but lived in rented accommodation in Warren Park 1. In 1993 he returned to live in three rooms in the disputed premises. Mkundwa says he rented them. Eventually the matter came to court.

The evidence in favour of Mkundwa's version is considerable. The problem we have had with it related to the main piece of evidence, namely the written

"agreement of sale" dated 22 August 1984. We think it is a forgery, and we respectfully disagree with the learned trial judge in that regard.

The learned judge found the evidence of the handwriting expert to be inconclusive. In our appreciation this decision was based upon a misunderstanding of what Mr Blackmore said.

Mr Blackmore gave evidence as to two different and distinct matters - the signature of Mr Mberi on the alleged agreement, and the handwriting in which the document was written.

As to the signature, he had been shown the signature of Mr Mberi on the original agreement with the Municipality. He had compared it with the signature on the agreement with Mr Mkundwa. He had found the two to be identical in shape and size. He had demonstrated this by making a transparency of the one and superimposing it on the other. They fitted exactly.

His expert evidence was that it was overwhelmingly improbable that two signatures by the same person would be identical. Similar, yes; identical, no. The only way that an identical signature could be obtained would be to find a signature, place a strong light under it and a blank piece of paper over it, and then trace the signature onto the blank. Thus an identical signature would be a forgery. This signature was identical, therefore it was a forgery.

As to the handwriting, he did indeed say initially that he was unable to conclude whether the handwriting was that of Mr Mberi or not. But that was because he had not been given an acknowledged piece of writing by Mr Mberi so that he could make a comparison. His evidence on that point was thus inconclusive. But it did not affect his evidence as to the signature.

Moreover, as soon as he was shown, in court, some handwriting acknowledged by Mr Mberi, he said at once that it was different. And indeed one does not need to be an expert to see that the handwriting on Exhibits 1 and 15 is quite different. See *Hoffmann & Zeffertt* "South African Law of Evidence" 4th Ed. p 103-6. *R v Mayahle* 1968 (1) RLR 133 (AD) at 134; *R v Chidota* 1966 RLR 178 (AD).

In my view therefore, the written agreement upon which Mkundwa relied was probably a forgery. This has two consequences. First we cannot rely upon it as support for Mkundwa's case. Second, we must scrutinise with care the rest of the evidence supporting Mkundwa's case, since his own evidence must be regarded as suspect. I may say in passing, that I find it astonishing that Mr Blackmore was called as a witness by the plaintiff. He should have been left for the first defendant to call.

The rest of the evidence in Mkundwa's favour is however very strong.

There is the evidence that Mkundwa obtained a loan from his company to pay Mberi the purchase price for his rights which was $500. The price Mberi had to pay the Municipality was $410 over 30 years, and he had paid only the deposit of

$20,50, so $500 was not an unreasonable price. In support of his assertion Mkundwa called the Administration Manager of Schweppes (Pvt) Ltd, the company they both worked for. Mr Machombo produced from the cash book of the company, evidence that on 21 August 1984 a sum of $500 was paid to Mr Mberi. Mberi simply denied any knowledge of that payment. There is an annotation next to the entry which reads "sale of Stand 5326" and there is a tick to denote that the cheque had been cashed.

Even if we do not rely on the annotation, which might have been made at any time, the entry strongly corroborates Mkundwa's story.

The other supporting evidence is that Mkundwa undoubtedly spent a considerable amount of money on building a house on the stand. He obtained approval for the building plans. He arranged for the electricity and water connections. He paid the instalments to the Municipality over the years. Why, one may ask, would he do this if he did not see himself as the purchaser/owner? It is also significant that the agreement with the Municipality requires that a house of at least four living rooms plus ablution facilities should be built within eighteen months of the date of commencement of the agreement. Clearly Mberi would not have been able to comply with this clause when he was transferred to Masvingo. Nor does he suggest that Mkundwa built the house on his behalf. In fact he expressed surprise and shock on learning that Mkundwa had built a house. That cannot be genuine, given the requirements of the agreement.

Finally there is the fact that on his return from Masvingo, Mberi spent some three – four years in rented accommodation elsewhere. He was unable to explain satisfactorily why he did not at once reclaim "his" stand in 1989.

On all this evidence I am satisfied that the learned judge came to the right conclusion despite what seems to me to be a misassessment of the handwriting expert's evidence. I agree that Mberi did cede his rights to Mkundwa. Accordingly I would dismiss the appeal.

As far as the cross-appeal is concerned, I see no reason to disagree with the learned judge's conclusion as far as the rentals were concerned. The evidence was vague and inconclusive. Indeed counsel abandoned this claim at the hearing.

On the question of ejectment I must say with respect that I disagree. Mberi's whole case was that he was entitled to occupy the house because he was the "owner" not because he was a sub-lessee of Mkundwa. Once the finding was made that he was not the "owner", his right of occupation ceased. Similarly, Mkundwa's case is not based on the termination of a lease agreement. It is true that he alleged in his plea to the counter-claim that he had leased three rooms to Mberi. However, in evidence he explained that after three months in 1993 Mberi refused to pay rent and just stayed on. In the judgment Her Ladyship found correctly that his claim for rent should properly have been a claim for damages for holding over.

Once Mberi's claim to occupation on the basis of "ownership" fell away, he had no rights as a sub-tenant. An order for eviction should have been granted.

As to costs, Mkundwa has asked that the order of costs in the court *a quo* should be amended so as to grant him all his costs rather than the 80% awarded. I would have agreed with this contention had it not been for the question of the forged agreement. As a mark of disapproval I will not alter the order as to costs. In this Court, for the same reason, there will be no order as to costs.

In the result, therefore, the following order is made:-

1. The appeal is dismissed with no order as to costs.
2. The cross-appeal is allowed, to the extent that paragraph 4 of the order in the court *a quo* is amended to read:-

    4. The plaintiff's claim for rental is dismissed.

    4a. The plaintiff's claim for ejectment is allowed. An order is made that the 1st defendant and all persons claiming through him be ejected from the property known as Stand 5326, 101 Street, Warren Park D, Harare.

3. There will be no order as to the costs of the cross-appeal.

EBRAHIM JA: I agree

SANDURA JA: I agree

Muzenda & Maganga, appellant's legal practitioners

Ziumbe & Mtambanengwe, respondent's legal practitioners