

DISTRIBUTABLE (60)

Judgment No S.C. 68/03
Civil Appeal No 20/02

Anna Chipezeze V Magnifayi Mungani Mavhundukure

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE SEPTEMBER 11, 2003

N.B. Nagar, for the appellant

A.A. Brooks, for the respondent

CHIDYAUSIKU CJ: The respondent, (whom I shall refer to as the plaintiff for convenience) issued summons for the eviction of the appellant, (whom I shall refer to as the defendant) from stand no 5880 Sambarafuta Crescent, Mucheke Township, Masvingo, (hereinafter referred to as "the house"). The defendant filed a plea and a counter-claim. Thereafter, the plaintiff applied for summary judgment. The defendant opposed the application for summary judgment. Summary judgment was granted. The defendant was aggrieved by this and appealed against the whole of that judgment.

At the conclusion of submissions by counsel this appeal was dismissed and the reasons for judgment were to follow. The following are the reasons for judgment.

The facts of this case are as follows:

It is common cause that the plaintiff is the owner of the house, having taken transfer in early 1999. The defendant had been staying in that house as a tenant of the previous owner and he is still in occupation of the house. It is also common cause that the plaintiff concluded an agreement for the sale of

the same house to the defendant. The two parties now accuse each other of breaching that agreement of sale.

The money that the defendant had paid to Winterton Holmes & Hill by way of deposit and transfer of costs was subsequently refunded to the defendant who accepted the money. The court *a quo* concluded that the defendant had no defence to the plaintiff's claim and granted the summary judgment. In this regard the learned judge in the court *a quo* had this to say:-

"The respondent did consult legal practitioners who did write to the applicant's legal practitioners seemingly accepting that the agreement had been breached and that they were going to sue the applicant for damages arising out of the breach of that agreement. It would appear therefore that even the counter claim which is not before me for adjudication does not seem to have bright prospects of success in view of the stance initially taken by the respondent in accepting that the agreement had been cancelled and that damages would be claimed in due course.

But the most important aspect of this case is that the applicant is the owner of the house. He wants his house back, apart from alleging an agreement of sale the respondent has not put forward any averments which would amount to a right to occupy the premises. She relies simply on the agreement of sale. That agreement, before it is implemented, does not give rise to any right of occupation on the part of the respondent. Her right, if any, is to sue the applicant to compel the enforcement of the agreement and the consequent transfer of the house to herself before she can claim occupation of the house. As of now no right of occupation has been averred and consequently the opposition to the application for eviction seems to be ill-founded in my view.

Accordingly I will have to make an order for the ejection of the respondent from those premises. The claim initially made for holding over damages has been properly abandoned by Mr Brooks, who appears for the applicant, and it consequently falls away. So I will delete paragraph 1 point 2 of the draft order and make an order in terms of the draft as amended."

The above reasoning and conclusion of the learned judge cannot be faulted. The remedy of summary judgment is a very stringent remedy in that it closes the door to the defendant and should not be readily granted. However, in a situation such as *in casu*, even if the defendant were to establish as fact at the trial all the averments found in the opposing affidavits, those facts would not

constitute a defence to the plaintiff's claim. In such a case summary judgment should be granted. The learned judge was therefore correct in granting such relief in this case..

The plaintiff is the registered owner of the house. He wishes to secure occupation of his house. The defendant alleges that there was an agreement of sale of the house to her which the plaintiff breached. Even if the defendant were to establish at the trial that there was such an agreement and the plaintiff was in breach of it that would not entitle the defendant to occupation of the house. The defendant's entitlement to occupation would only accrue upon conferment of ownership on her. The agreement of sale attached to the papers does not confer on the defendant the right of occupation. The breach of the agreement of sale alleged by the defendant does not confer on the defendant the right of occupation. Indeed as the learned judge correctly observed her right of occupation will only accrue once she has succeeded in having the agreement of sale declared enforceable and the house consequently transferred to the defendant. At the time of the application no right of occupation had accrued to the defendant nor was any such right averred.

In the result the appeal was dismissed with costs.

ZIYAMBI JA: I agree

MALABA JA: I agree

Muzenda & Partners, appellant's legal practitioners

Winterton Holmes & Hill, respondent's legal practitioners