FAITH VAMBE
versus
JOHANNE KUNDIONA
and
TSITSI KUNDIONA
and
JOSPHIN JOILINE CHITSI MHANDU

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 18 January and 18 February 2022

Civil Appeal

F T Chingoma, for appellant
V Vengai, for respondents

MUCHAWA J: Before us is an appeal against the decision of the magistrates' court which granted an application for summary judgment thereby evicting the appellant and all those claiming occupation through her from Stand No 985 Mabelreign Township, also known as No 16 Shashi Flats Mabelreign, Harare. In addition the appellant was ordered to pay to first and second respondents, the sum of US$700.00 being rent arrears from 1 November 2020 to May 2021, to be paid at the prevailing bank rate. US$100.00 per month was also payable to third respondent as holding over damages from June 2021 to the date of ejectment.

The appellant was a tenant of the first and second respondents who were joint owners of the property which they then sold and transferred to the third respondent. The respondents issued out summons in which they alleged that the appellant had fallen into seven months' rent arrears and first and second respondents sought payment of such arrears. They claimed to have given the appellant three months' notice to terminate the lease agreement, that is, on 6 November 2020 and that arrear rentals remained unpaid. The third respondent as the new owner was claiming ejectment of the appellant and holding over damages. After the appellant entered an appearance to defend, the respondents applied for summary judgment which was granted as stated above.

Aggrieved by the decision of the court *a quo*, the appellant has filed this current appeal on the following grounds:

1. The learned magistrate erred and misdirected himself when he granted summary judgment when appellant's defence raised triable issues on the pleadings.
2. The learned magistrate erred and misdirected himself in granting an order for eviction of the appellant despite the existence of a lien over the property.
3. The learned magistrate erred and misdirected himself by ordering appellant to pay holding over damages at the rate of US$100.00 per month when the holding over damages were not specifically proven by the respondents.

It is prayed that the appeal succeeds, the judgment of the magistrates' court be set aside and be substituted with an order dismissing the application for summary judgment. The appeal is opposed. We heard the parties and reserved our judgment. In submissions before us, the appellant conflated her grounds of appeal to one single issue, which is whether the respondents were entitled to the summary judgment granted by the court *a quo*. This is what we consider below.

Ground 1: Whether the respondents were entitled to the summary judgment granted in their favour by the court *a quo*

Mr *Chingoma* submitted that the appellant had raised a defence of lien against the respondents due to improvements effected on the property and proceeded to attach evidence of the cost incurred thus showing the material facts relied on and had therefore shown that she had a *bona fide* defence to the claim.

It was also stated that the claim of lien also arises against the third respondent as new owner on the basis that at law, a new owner becomes the successor in title and assumes all responsibilities and rights of his predecessor in title as per the case of *Sydney Mazambara* v *Milan Djordjevik* HH 472/18.

Mr *Chingoma* further submitted that the appellant had made a case that she did not owe any arrear rentals as a result of a verbal agreement that she was to recoup the costs of the improvements to the property in lieu of rent, therefore she was still a statutory tenant entitled to be served with a three months' written notice to vacate as required by section 30 (2) (d) under

Part IV of the Rent Regulations, 2007. She denied the veracity of the alleged whatsapp notice to vacate.

Furthermore, Mr *Chingoma* submitted that the papers had reflected a dispute as to the security/tenancy deposit paid by the appellant, whether it was US$650.00 as she claimed or US$400.00 as claimed by the respondents. Another issue raised was that the rate at which holding over damages were payable had not been proved. It was averred that parties had not yet agreed on rentals as the parties were yet to agree on the date by which the amount expended on improvements would have been recovered.

Ms *Vengai* submitted that there are no triable issues specified in the appellant's defence for this court to look at and determine. On the issue of tenancy deposit it was submitted that the respondents produced the 2013 lease agreement signed at the very start of the landlord- tenant relationship and in clause 4.1 (a) the tenancy deposit is stated as US$400.00 which was then affected by SI 33 of 2019 and became ZWL400.00. It was argued that all the appellant was trying to do on this issue was create a non-existent dispute so as to stall conclusion of the matter.

On the issue of notice, Ms *Vengai* insisted that the appellant was not entitled to any notice in terms of the rent regulations as she lost the right claimed when she ceased to pay rent. She referred to the case of *Paget-Pax Trust* v *Highlife Investments (Pvt) Ltd* HH 518/15. As proof of the notice to vacate, the court was referred to the WhatsApp communication on record p(s) 82 to 83 and subsequent follow ups through respondent's legal practitioners, for instance by letter dated 16 November 2020.

In defence of the magistrate's decision it was argued that eviction was properly granted as the defence of lien would be inapplicable against the new owner whose ownership was clearly proved on the papers. On whether the rate of the holding over damages was proved, Ms *Vengai* averred that this amount was never disputed by the appellant and this amount appears in the notice on record p 82.

The case of *Hales* v *Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (HC) is almost on all fours with this one and is instructive. A sale of a hotel and the land on which the hotel was situated was cancelled by the seller because the buyer had breached the contract by failing to make payments in accordance with the contract. The buyer did not deny that it had breached the contract by failing to make these payments. However, it opposed the seller's application for

summary judgment for its ejectment from the property on the grounds that it had made improvements to property and was therefore entitled to retain possession of the property under an improvement lien. The seller denied that the buyer had made any improvements on the property and that the buyer had any defence to the application for summary judgment for ejectment. The approach of the court in dealing with plaintiff's defence is what I will focus on.

It was held therein that where a plaintiff applies for summary judgment against the defendant and the defendant raises a defence, the onus is on the defendant to satisfy the court that he has a good prima facie defence. He must allege facts which if proved at the trial would entitle him to succeed in his defence at the trial. He does not have to set out the facts exhaustively but he must set out the material facts upon which he bases his defence with sufficient clarity and in sufficient detail to allow the court to decide whether, if these facts are proved at the trial, this will constitute valid defence to the plaintiff's claim. It is not sufficient for the defendant to make vague generalizations or to provide bald and sketchy facts.

In casu, the appellant stated as follows in her defence:

> "At any rate I have a lien over the property in light of the fact that I renovated the house and incurred expenses in excess of US$6 000.00 as the house had been damaged by fire prior to my occupation. The agreement was to the effect that we would be setting off any rental amounts with the cost of renovation and it is therefore absurd for first and second plaintiffs to then allege that I owe them arrear rentals. Attached hereto and marked Annexure E series is proof of the renovations."

On the contrary, the respondents were able to show through a lease agreement that the appellant had in fact been in occupation of the house from 2013 and not after May or September 2015 being the dates appearing on the receipts provided by the appellant. The appellant did not take the court into her confidence and seems to have wanted to hoodwink the court about the time at which improvements were made, possibly to sanitize whatever role she may have played in the damage and her responsibilities in the repairs thereof. That issue was however not before the court but that slip resulted in the appellant's defence being inherently or seriously unconvincing.

The appellant's case is worsened by the actual generalization regarding the actual costs of renovations which she says were over US$6 000.00. Though receipts are provided, it is unclear what was actually done on the property. The onus burdens the defendant to identify by affidavit rights it has against the plaintiff arising from the alleged improvements to the property whose

enforcement a right of retention is a remedy. It had to allege facts which, if proved at the trial, would show that the plaintiff is under an obligation to pay it compensation for useful improvements. See *Hales* v *Doverick Investments* supra. In addition she goes further to say there was a verbal agreement to set off such expenses against the rentals, whose amount she says had not yet been settled leaving the court askance as to what period then it would take for appellant to recoup her expenses and resume rental payments and at what rate.

Regarding the tenancy deposit, the lease agreement settled the issue and proved that at the commencement of the lease agreement, the appellant had paid US$400.00 as alleged by her. It is also curious that in para 3 of the appellant's request for further particulars on record p 26, she stated "is there reason why first and second plaintiffs did not plead that they hold defendant's deposit of US$600.00?" This story changes in the notice of opposition on record p 52 in para 11 where first and second plaintiffs are now suddenly said to be holding a tenancy deposit of US$650.00. This too is unconvincing.

On whether or not the appellant was given notice to vacate, the appellant makes a bare denial and alleges that the WhatsApp communication was cooked up by the respondents. There are however some follow up letters from the respondents' legal practitioners. Sight must not be lost of the fact that the appellant confirms she was no longer paying rent and was therefore no longer a statutory tenant and was not entitled to be given the notice she is clamouring for in terms of the rent regulations.

The respondents in the communication on p 82 were able to show that during the notice period, the appellant was to continue paying rentals of US$100.00 per month. On the other hand, the appellant unconvincingly says no rent was set and it was unknown by when she would have recovered her unspecified expenses. She also does not dispute the rental as claimed.

The paucity in the areas of the evidence pointed out, the inconsistencies and generalizations in some parts leave me with only one conclusion, that the appellant was unable to discharge the onus of proving that the statement of material facts were sufficiently full to persuade the court that what she alleged, if it is proved at the trial will constitute a defence to the plaintiff's claim. The respondents were therefore entitled to the summary judgment granted in their favour.

I would like to point out that the court *a quo* may have erred in finding that, had the lien been sufficiently proved as a material defence, then the third respondent would not be liable. This issue is now inconsequential in the light of my findings above. In Silberberg and Schoeman's Law of Property, 5th edition at p 313 they state;

> "As a general rule the claim has to be instituted against the person who is the owner of property at the time of institution of proceedings. If, however, the previous owner, and not the present owner, has been enriched, action has to be instituted against the former although the possessor's lien will be effective also against the new owner."

Consequently, this appeal is dismissed with costs.

WAMAMBO J AGREES ----------

Jiti Law Chambers, appellant's legal practitioners
Warara & Associates, respondent's legal practitioners