HAMTEX INVESTMENTS (PVT) LTD

versus

KILBORN KING

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 9 October 2012 and 24 October 2012

**Opposed Application**

*T. Mpofu*, for the applicant

*T. Magwaliba*, for the respondent

MATHONSI J: The applicant is the owner of a certain property known as No 38 Wansford Townhouses being an undivided share of Stand 15125 Salisbury Township (“the property”) which it holds by Deed of Transfer No 2893/2002. It was previously owned by the Mining Industry Pension Fund (“MIPF”).

Up until 1 November 1991, the respondent was employed by the Mining Industry Pension Fund and in terms of his employment contract he enjoyed the benefit of occupying the property. When he was allowed to proceed on early retirement due to ill health, MIPF set out the agreement between the parties in a letter of 24 October 1991 which reads in relevant part as follows:-

“Dear Kilborn

Following a recommendation by the Principal Officer, the Board of Trustees have (*sic*) agreed to allow you to go on early retirement on grounds of ill health, on the following terms:-

1. You will retire with effect from the 1st November 1991.
2. Your pension will be boosted by an injection of $20 000.
3. You will be allowed to take a maximum of $10 000 by way of a commutation.
4. You will be on a joint and survivorship guaranteed (sic) for 10 years.
5. You will be allowed to live in the Fund Flat you presently occupy, which is number 38 Wansford Flats, rent free for the rest of your life plus one year
6. The Fund will continue paying your contributions with the Medical Society.

I must express, on behalf of the Board and Management, our thanks and gratitude to you for the twelve years you have served the Fund sometimes under pressure from your ill health condition.

We wish you an improvement in your health and a most rewarding retirement.

Yours sincerely

RJG CALDER

CHAIRMAN”

(The underlining is mine)

The respondent remained in occupation of the property in terms of the above arrangement but in good time, MIPF sold the property to the applicant, which then took transfer in 2002 aforesaid. The applicant now seeks the eviction of the respondent from the property on the basis that it had permitted him to remain in occupation “at the request of its predecessor in title” in the expectation that a servitude would be registered which was however not registered as the respondent was uncooperative. According to the applicant, the respondent’s failure to accede to registration of the servitude meant that he lost out. What is more, the respondent has not been paying rates, water and electricity charges. In fact the applicant has been forced to pay these charges on the respondent’s behalf.

In addition, the applicant has stated in the founding affidavit of Never Dabuka Mhlanga, its director, that the respondent has since vacated the property and given possession to a third party. The respondent has now purchased a house of his own being 22 Cheshire Road Mount Pleasant, Harare where he now resides with his family. The applicant therefore maintains that as registered owner it is entitled to an order for the eviction of the respondent and those claiming occupation through him and for the payment of the arrears which have accrued.

Not only has the respondent opposed the application, he has also filed a counter application seeking an order declaring that he is entitled to occupy the property and compelling the applicant to register a life time usufruct in his favour and directing it to pay all outstanding owner’s charges.

In his opposing affidavit to the main application, the respondent denies having relocated to 22 Cheshire Road Mount Pleasant Harare, which house he says belongs to a Mr Jogi who is a relative of his. That averment is contained at paras 3 and 4 of the respondent’s opposing affidavit where he states:-

“3 Ad Paragraphs 1 up to 3 of the Applicant’s founding affidavit

No issues arise herefrom save to state that I do not reside at No 22 Cheshire Road, Mount Pleasant, Harare. The house at No 22 Cheshire Road, Mount Pleasant, Harare belongs to Mr Jogi who is a relation of mine. The property is therefore not my residence and during the moments that I have spent time living at the House, I have not all (*sic*) abandoned my residence at No 38 Wansford Mansions, J Chinamano Avenue, Harare.

4. Ad Paragraphs 5 & 6

If at all the applicant believes that I reside at No 22 Cheshire Road, Mount Pleasant, there is therefore no basis upon which the applicant may seek my ejectment from the immovable property known as No 38 Wansford Mansions, J. Chinamano Avenue Harare. It is therefore imperative for the applicant to have sought the identity of the present occupant of that immovable property and to have sued that person. This simply confirms that I am still residing at the above address. Accordingly therefore the order sought is not competent…”.

I might as well dispose of the argument that the third party who allegedly occupies the property should have been cited in the application. In advancing that argument, the respondent relies on the authority of *Document Support* *Centre (Pvt) Ltd* v *Mapuvire* 2006(2) ZLR 232(H) 245B where MAKARAU JP (as she then was) ruled that as it was common cause that the property from where the respondent was to be evicted was by then occupied by another family and that the respondent was no longer in occupation, the head of that other family should have been cited.

Without commenting on that analogy, I am of the view that the case of Document Support Centre (Pvt) Ltd (*supra*) is distinguishable from the present. Here we are dealing with a situation where the respondent is claiming to be in occupation of the property and that a certain individual spotted on the property is his caregiver. We have a situation where the respondent claims the existence of a servitude. Whoever is in that property is claiming through the respondent. There is therefore no need to cite a party who is sheltering under a personal right, if any, of the respondent. In my view that argument is without merit.

The respondent went on at para 9 of his opposing affidavit:-

“9. Ad Paragraph 10

I deny that I have vacated the property in issue. I have remained in occupation of the property. However, for a temporary period of time, I was requested by the owners of an immovable property at No 22 Cheshire Road, Mount Pleasant, Harare to be caretaker at their house while they were out of the country. I did not occupy that immovable property on a rental basis. It was purely to maintain their property in the condition that it was in pending their return …..”.

He went to say:-

“I deny that I have abandoned my rights in respect of the occupation of the property. At all times that I have left the place, I have been travelling out of the country or caretaking at the Mount Pleasant house indicated above. My property remained in the flat and it is still my place of residence”.

When the applicant pointed out in its answering affidavit and submitted supporting affidavits from other residents of the block of flats that the respondent does not reside at the property any more, he having vacated and carried away his property in 2007, and that the current occupant is one “Baba waKelly” from Chipinge and went on to produce more evidence pointing to the respondent’s interest in the house in Mount Pleasant, the respondent shifted ground.

At para 6 of his answering affidavit deposed to on 15 November 2011 he stated:-

“6(i) The immovable property at No 22 Cheshire Road Mount Pleasant Harare is owned by a certain Mr Joggie. He has offered to sale (*sic*) the said immovable property to me and I am in the process of purchasing it. The fact that my wife was found at that address or that I am buying the property does not constitute an abandonment of my rights in respect of No 38 Wansford Townhouses …..

(ii) I confirm that I have not installed any tenant at No. 38 Wansford Townhouse. The person referred to as my tenant is one Frank King who is my cousin and personal caregiver.

(iii) I am a quadriplegic and cannot use both hands and both legs. I therefore require assistance to get on and off the bed, to go on or off the toilet, to go in or out of the car or to do any other thing that I may require to do where hands and legs are used ……”.

The respondent did not explain how he was able to act as a caretaker at

the Mount Pleasant house in that condition. Neither did he explain how the said Frank King was able to perform the function of caregiver by remote control from the Flat when he, the respondent, is elsewhere. Clearly therefore, the respondent was not being truthful and is demonstrably unreliable.

On the issue of arrears, the respondent insisted that he occupied the property in terms of an agreement with MIPF and that his “occupation was on terms that (he) was not paying for water, electricity and other owners charges in respect of the property”. He would like the applicant to settle these liabilities because, having bought the property from MIPF, the applicant has “stepped into the shoes” of MIPF.

The respondent conceded that the parties tried to register a notarial deed of servitude on the property but could not do so partly because he had objected to the inclusion of a provision that he was to pay the “tenant’s obligations” in the deed as he wanted to occupy the property free of any charges including water and electricity bills. He maintained that there was an agreement between the applicant and MIPF for his benefit which he is entitled to enforce. He however could not set out the terms of such contract or give any particularity to it.

In the counter application he stated that the property in dispute was a terminal benefit from MIPF and for that reason he is entitled to occupy it for the rest of his life without paying anything. Any charges in respect of his occupation are for the account of the applicant.

In light of that, upon purchasing the property, the agreement between himself and MIPF was “adopted and accepted” by the applicant. It is therefore binding upon the applicant which should be compelled to register a life time usufruct in his favour, albeit 10 years after taking transfer.

I have already stated that the evidence of the respondent has been shown to be unreliable, full of inconsistencies and at times contradictory. I have not been able to find any fault in the story presented by the applicant and therefore have no reason to doubt it. Adverse inferences should therefore be drawn against the respondent who has been given an unreliable story.

Mr *Magwaliba* for the respondent submitted that there are disputes of fact in the matter as cannot be determined on the papers. He locates such dispute in what he regards as new evidence introduced in the answering affidavit and the supporting affidavits of Wilson Nyamadzawo and Elliot Mubi. He also alluded to, but without showing where the dispute of fact resides, the lack of clarity in the founding affidavit of what the cause of action is and the dispute over the basis upon which the respondent occupies the property. He would therefore want the application dismissed on those grounds: *Zimbabwe Bonded Fibre Glass* (*Pvt*) *Ltd* v *Peech* 1987(2) ZLR 338(S); *Mashingaidze* v *Mashingaidze* 1995(1) ZLR 219. I do not agree. The applicant’s answering affidavit addresses issues, already stated in the founding affidavit, namely that the respondent has relocated to Mount Pleasant and installed a third party at the property. The respondent himself admits that he is purchasing the property in Mount Pleasant and that he has stayed there, which explains why his wife was found there. He also admits that a third party resides at the property with his blessing. Nothing new comes out of this and certainly there is no dispute of fact which cannot be resolved on the papers. I agree with Mr *Mpofu* for the applicant that the perceived dispute of fact is illusory.

More importantly, the respondent has not contested the story of Elliot Mubi that he carried his property away in 2006. This, together with the fact that adverse inferences can be drawn from the respondent’s prevarications and untruths already referred to, leads me to the conclusion that the respondent has indeed moved out of the property and is now resident in Mount Pleasant and that he has indeed installed a third party at the property.

It is common cause that the applicant is the registered owner of the property. Indeed the applicant’s title has not been impugned in anyway. Instead Mr *Magwaliba* has raised a 3 legged argument which is says entitles the respondent to remain in occupation, namely that there exists a usufruct or servitude of *habitatio*, a *stipulatio alteri* and a waiver by the applicant of any rights to remove the respondent.

While conceding the ownership of the property by the applicant, Mr *Mangwaliba* relies on the authority of *Alspite Investments* (*Pvt*) *Ltd* v *Westerhof*  2009(2) ZLR 226(H) and *Agrochem Dealers* (*Pvt*) *Ltd* v *Gomo and Ors*  2009(1) ZLR 255(H) to argue that the applicant has gone beyond alleging merely ownership and alleged unlawfulness of occupation by the respondent and or that occupation is against the applicant’s will. For that reason, he insists that the applicant must prove entitlement to the eviction order which he has not done.

In *Alspite Investments* (*Pvt*) Ltd (*supra*) at 236 D-E MAKARAU JP (as she then was) stated of the *rei vindicatio.*

“The *rei vindicatio* is an action that is founded in property law. It is aimed at protecting ownership. It is based on the principle that an owner shall not be deprived of his property without his consent. So exclusive is the right of an owner to possess his or her property that, at law, he or she is entitled to recover it from wherever found and from whomsoever is holding it, without alleging anything further than that he or she is the owner and that the defendant is in possession of the property. Thus it is an action *in rem*, enforceable against the world at large. This is settled law in this jurisdiction which hardly requires authority”.

In *Chotty* v *Naidoo* 1974(3)SA 13(A) at 20B-D, JANSEN JA stated:-

“It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and the defendant is holding the *res* – the onus being on the defendant to allege and establish any right to continue to hold against the owner.”

The above pronouncement was quoted with approval in *Alspite Investments* (*supra*) where the learned judge went on to say at 237 A-B.

“There are primarily two defences to the *rei vindicatio*, each aimed at destroying each of the two essential elements of the action. The first one seeks to destroy the claim of ownership completely by denying that the plaintiff is the owner of the property in question or seeks to diminish his rights in the property by admitting his or her ownership but by alleging that the plaintiff has parted, under, some recognized law, with the right to exclusive possession of the property. The second defence of course is to deny possession of the property at the time the action is brought or the claim is instituted”.

See also *Agrochem Dealers* (*Pvt*) *Ltd* v *Gomo* (*supra*) at 259 E-G.

Mr *Magwaliba* submitted that the respondent has a usufruct or *habitatio* in his favour which he obtained from MIPF. This usufruct subsisted until the property was transferred to the applicant. When the transfer took place the applicant inherited the liability of MIPF for his benefit. Although conceding the efforts of the parties to register a servitude, which efforts came to naught, he maintained that the applicant is bound by the *habitatio* he already enjoyed prior to transfer. Alternatively, there was a contract between MIPF and the applicant, a *stipulatio alteri* for the respondent’s benefit.

Mr *Mpofu* has countered that argument by saying that the contract that existed between the respondent and MIPF was only valid *inter partes*. He relies on the pronouncement of INNES CJ in *Willoughby’s Consolidated Co Ltd* v *Copthalls Stores Ltd* 1918 AD 1 at 16 where he stated:-

“Now a servitude, like any other real right, may be acquired by agreement. Such an agreement however, though binding on the contracting parties, does not by itself vest the legal title to the servitude in the beneficiary any more than a contract of sale of land passes the dominium to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coramlege loci* by an entry in the register and endorsed upon the title deeds of the servient property”,

It is common cause that at no time did the respondent enjoy the benefit of a registered servitude. He was in occupation of the property by agreement with MIPF. The property was then transferred to the applicant which was not a party to the agreement between the respondent and MIPF which contract was only binding *inter partes*.

The issue of whether the respondent’s right of occupation extended to the applicant can only be understood by consideration of the conduct of the parties when the applicant took transfer. The parties took quite some time negotiating the terms of a servitude they intended to register. The applicant’s legal practitioners drew up a deed in terms of the proposal made by the applicant. Nothing came of that activity and a servitude was never registered. In fact, the respondent rebuffed the advances of the applicant. He stated in defence of that rebuff at para 6(vi) of his founding affidavit to the counter application;

“Any reduction in respect of my benefit in that regard was neither agreed upon and therefore not contractual nor sustainable on any recognised ground in the law”.

And at para 6(viii):-

“I rejected that attempt in clear terms and the respondent has then retaliated by refusing to register the usufruct”.

In my view it was always the intention of the parties to register the usufruct. They could not agree on the terms and it was never registered. The outcome of the aborted endeavour is the non existence of an agreement between the parties. The respondent has himself to blame because it is his despondency and refusal to have the servitude which has left him with nothing to enforce. If a servitude existed before transfer of the property to the applicant which was inherited by the applicant upon registration as argued by the respondent, then there would have been no need to seek registration as frantically attempted by the parties. I therefore come to the inescapable conclusion that whatever subsisted between the respondent and MIPF was only valid *inter partes* and not against the applicant.

It has also been argued in the alternative that a *stipulatio alteri* exists which the respondent is entitled to enforce against the applicant. It is asserted that MIPF and the applicant entered into an agreement that the respondent be allowed to remain in occupation of the property until his death and that his family would continue enjoying that benefit for a further year after his death.

In our jurisdiction, a person who is not a party to an agreement is not liable and is unable to claim on it as he or she enjoys no privity of contract. What is usually referred to as a contract for the benefit of a third party or a *stipulatio alteri* is an extension of the doctrine of privity of contract. For such to exist, there are certain requirements which must be met. These are set out by the learned author R.H. Christe, Business Law in Zimbabwe, 2nd Ed, Juta & Co Ltd at pp 75-76 in the following:-

“The relationship between the parties is that A and B enter into a contract which C, the third party, may at his option adopt as his own. The intention that the third party should have this option must appear from the contract …. This is the true nature of what is sometimes misleadingly called intention to benefit the third party. Misleadingly because it is clear that when the third party adopts the contract as his own he is not only entitled to its benefits but bound by its obligations. To adopt the contract the third party must accept the option or offer contained in the contract (Old Mutual above at 95, 328) And communicate his acceptance to the promisor (*Brown Executrix* v  *McAdams* 1914 AD 231) and the validity of his acceptance will be tested in the same way as the acceptance of any other offer .. Especially, the offer must still be open for acceptance…”.

In my view, the facts alleged by the respondent, do not even begin to satisfy the requirements of such a contract. He has not even stated when such contract was created and what its terms were. He has not shown when he adopted the contract as his own and when and how he communicated his acceptance. The closest the papers come to shed some light on the issue is what is contained in para 6 of the applicant’s founding affidavit which reads in pertinent part thus:-

“The applicant permitted the respondent, at the request of its predecessor in title, the Mining Industry Pension Fund, to remain in occupation of the above premises in the expectation that a servitude would be registered against the property, giving the respondent the right of occupation”.

Clearly therefore there was no valid *stipulatio alteri* in this matter. Indeed, the fact that the respondent rejected the terms of the servitude proposed by the applicant is indicative of the non-existence of such contract. In any event, MIPF has not been cited.

Which bring me to the argument that the applicant waived its right to seek the eviction of the respondent by waiting for 8 years before asserting its rights. This cannot be taken seriously at all. I agree with the words of MAKARAU JP (as she then was) in *Alspite Investments* (*supra*) at 237C that:-

“There are no equities in the application of the *rei vindicatio*. Thus in applying the principle, the court may not accept and grant pleas of mercy or for extension of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership”.

Here is a party that wants to occupy the property of another but has refuses to accept the terms offered to it. A party that over-rates its entitlement to the property of another to the extent of wanting to dictate terms including the inexplicable demand that the owner should pay rates and taxes as well as pay for water and electricity consumed by that party when there exists no obligation whatsoever for that. The respondent may have certain rights against MIPF but those surely do not extend to the applicant.

Even if I am wrong in that conclusion, I am persuaded that the respondent has abandoned the property in preference of the comfort of a house he is purchasing in Mount Pleasant. Therefore even the request made by MIPF to the applicant to allow him to occupy the property cannot be used to defeat the applicant’s vindicatory action against the respondent.

I am of the view that the applicant is entitled to the relief that it seeks. It is the issue of costs on an attorney and client scale which I do not agree with. The parties were negotiating the terms of a servitude to be registered which negotiations failed. The applicant sat on its right to remove the applicant thereby misleading him into believing that he could stay. The applicant was therefore complicit. For that reason the respondent should bear the costs on an ordinary scale.

In the result, it is ordered that:-

1. The respondent together with his assigns, invitee’s and any other person who is claiming through the respondent, are directed to vacate the applicant’s premises, being an undivided 1, 7209544%, share of Stand 15125 Salisbury Township also called 38 Wansford Mansions, Josiah Chinamano Avenue, Harare.
2. In the event that they fail to vacate forthwith from the applicant’s premises, then the Sheriff for Zimbabwe or his lawful Deputy is hereby directed and authorised to evict them from the applicant’s premises described above, and place the applicant in the possession and control thereof.
3. The respondent’s counter application is hereby dismissed with costs.
4. The respondent shall bear the costs of this application.

*Gill Godlonton & Gerrans*, applicant’s legal practitioners

*Magwaliba & Kwirira*, respondent’s legal practitioners