

JOSHUA NKOMO HOUSING CO-OPERATIVE
versus
VAFI JEGEDE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 18 February 2013, 21 February 2013, 12 March 2013
28 March 2013, 21 May 2013 & 21 August 2013

M Nkomo, for the plaintiff
Ms S. Moffat, for the defendant

MTSHIYA J: On 31 January 2011 the plaintiff issued summons against the defendant for the following relief:-

- “(a) eviction of the defendant and all those claiming right of occupation through her from Stand No. 1091 Joshua Nkomo Housing Co-operative.
- (b) An order authorising the plaintiff to allocate Stand 1090 to another paid up member.
- (c) Costs of suit”.

The proceedings showed that the stand referred to in (a) above as Stand No. 1091 is actually Stand No. 1090, which stand is at the centre of the dispute *in casu*. I therefore want to believe that referring to it as stand No. 1091 was done in error as confirmed by the fact that the plaintiff’s prayer in the declaration correctly refers to stand No. 1090.

On 10 March 2011 the defendant filed a counter-claim seeking the following relief:-

- “(a) An order that the alleged dismissal of the defendant and Faith Tafadzwa Jegede is invalid.
- (b) An order that Faith Tafadzwa Jegede is the legal holder of stand No. 1090, Joshua Nkomo Housing Co-operative, 48 Aspindale, Kambuzuma, Harare.
- (c) An order that the defendant is the legal holder of stand No. 1102 Joshua Nkomo Housing Co-operative, 48 Aspindale, Kambuzuma, Harare.
- (d) An order that the plaintiff should pay the costs of this action”.

The above relief sought by the defendant shows that the defendant

contends that she was allocated stand No. 1102 whilst Faith Tafadzwa Jegede (Faith), who is her daughter and upon whose power of attorney she brings the counter claim, was allocated the stand in dispute (i.e stand No. 1090).

The background to this case is well captured in the plaintiff's closing submissions and I cannot do any better than reproduce what the plaintiff says herein.

In para(s) 2-6 the plaintiff's narration is as follows:-

- “2. The plaintiff Co-operative was formed in the 2000 and was allocated land known as No 48 Aspindale Park Kambuzuma, Harare by the Ministry of Local Government for housing development. The defendant joined the co-operative sometime in 2002 and as her joining contribution, she surrendered an old refrigerator.
3. After operation Murambatsvina in 2005, the Co-operative was destabilized as the structures that had been built were demolished. Many of the Co-operative's members left in the aftermath of the operation. Defendant also opted out and reclaimed her refrigerator and same was given back to her. The defendant later returned and pleaded with the then leadership for re-admission. The leadership re-admitted her. The defendant was erratic in payment of her subscriptions. During the year 2007, the leadership of the Co-operative embarked on an exercise for allocation of Stands to members. The allocation exercise was completed in early 2008. The register of members and the stands allocated to them was tendered in Court and admitted as Exhibit '3'. According to Exhibit '3', the defendant was allocated Stand No. 1090 Joshua Nkomo Housing Co-operative.
4. Defendant defaulted payment of the development fees and the Management Committee threatened her with repossession of her allocated stand. The defendant then approached the Ministry of Small and Medium Enterprises and Co-operative Development alleging that the plaintiff's Management Committee was unlawfully dispossessing her and her relatives of their Stands.
5. Meetings were held with the Management Committee, the Ministry of Small and Medium Enterprises and the Defendant wherein it was resolved that the defendant and her relatives be allocated Stands at the Cooperative. The plaintiff re-allocated the defendant Stand No 1090 Joshua Nkomo Housing Co-operative and allocated her daughter, son in law and nephew other stands. The Ministry of Small and Medium Enterprises was advised of the allocations and wrote to the defendant confirming the allocations. The letter of confirmation was tendered in court and admitted as Exhibit '4'.
6. The defendant then defaulted again on the payment of development fees and it is such breach of the Co-operatives by-laws that led to the expulsion of the defendant and the institution of the present action for eviction of the defendant from the Co-operative's stand”.

Indeed exh 4 from the Ministry of Small and Medium Enterprises and Co-

operative Development (the responsible Ministry) and dated 3 June 2010, advised the defendant as follows:-

“DISPUTE BETWEEN V. JEGEDE AND HOSHUA NKOMO HOSUING
COOPERATIVE SOCIETY LEADERSHIP

We acknowledge receipt of your letter dated 21 May 2010 in which you requested for our response to your letter dated 23 April 2010.

We note that on 22 April 2010, the Management Committee wrote a letter to you inviting you to attend a meeting to discuss provisional allocation of stands for you and your family. You apparently wrote back to them advising them that you were not going to attend the meeting and that your demands still stood.

The Management Committee went ahead with the allocation at their meeting and allocated the following stands to you and your family.

1. Mrs Vafi Jegede stands No 1090 (where you are now residing)
2. Faith Jegede stand No 191 (Daughter)
3. Clarene Nyabadza stand no 70 (Son-in law)
4. Passmore Mundoga stand no 132 (Nephew)

You were notified of these developments by a letter from the Management Committee dated 14 May 2010. The letter further advised you to go and discuss your outstanding dues with the management committee.

Since the major issue of your petition to us was centered on stand allocation for you and your family members, we assume that, unless there are further disagreements, your dispute with the Management Committee has been resolved”

Exhibit 3, which is the updated register of stand allocations, confirms the above position.

Although not indicated in the register, the allocation of Stand No. 191 to Faith is not disputed

With respect to the counter-claim, the defendant, in her closing submissions, gives the following version.

“3. The defendant filed a counterclaim against the plaintiff disputing that she was never allocated the stand in question but was in fact allocated Stand Number 1102 Aspindale Park, Kambuzuma, Harare. The stand in question Stand 1090 Joshua Nkomo Co-operative, 48 Aspindale Park, Kambuzuma, Harare was actually allocated to Faith Tafadzwa Jegede who was represented by defendant by virtue of a power of attorney. The defendant was seeking confirmation of this position though her counterclaim.

4. The defendant became member of the plaintiff sometime in the year 2000 whilst Faith Tafadzwa Jegede joined the plaintiff co-operative sometime in the year

2005 proof of which was tendered as exhibits.

5. Both the defendant and her principal paid monetary contributions only towards their membership in the plaintiff co-operative. The defendant and her principal never ceased to make contributions towards their membership and made every effort to be up to date with their contributions but were prevented to do so by the plaintiff's management actions. They were also illegally fired from Joshua Nkomo Housing Co-operative membership therefore the defendant disputed the expulsion from the co-operative".

A total of 15 exhibits were produced in this case but I believe that the disposal of this case is hinged on exh(s) 3, 4 and 6 which confirm the actual allocation of stands. In the main, the other exhibits relate to the defendant's challenge to her dismissal. That issue was abandoned and I proceeded to dismiss it with the consent of the defendant's legal practitioners. Indeed, given the defendant's own contention that she was never allocated the stand in dispute, it follows that her dismissal from the co-operative cannot be an issue *in casu*.

As already alluded, at the commencement of the hearing of the matter the defendant's legal practitioners raised a point *in limine* relating to the dismissal of the defendant from the plaintiff. However, after argument, the point *in limine* was abandoned. With the consent of the defendant's legal practitioner, I then dismissed the point *in limine*. Given the relief sought by the plaintiff, I believe that was the correct thing to do. I was, however, surprised that in the closing submissions the defendant's legal practitioners, sought to reintroduce the abandoned issue which I had already dismissed. That was, in my view, improper and as such I shall disregard submissions on that issue.

As regards the counter-claim, I also find it difficult to appreciate why Faith, who is said to be residing at the disputed property, could deem it fit to give a power of attorney to the defendant. The most reasonable thing for her, if indeed she wanted to protect her interests, was to apply to be joined to the proceedings rather than sue through a representative. One really wonders why she did not find it necessary to come and give direct evidence to protect her interests.

The plaintiff called two witnesses, namely Lenias Zhou and Cecilia Chinembiri Ngwenya who both confirmed the allocations in line with exh(s) 3 and 4. Both witnesses denied that the defendant was allocated stand No. 1102. As per the register and exhibits 4 and 6, stand No. 1102 was allocated to Sybet Muranzikwa. They maintained that, following

intervention by the responsible Ministry, the defendant was allocated stand No. 1090. Both witnesses denied that the stand was ever allocated to Faith.

The defendant and Mr A.S. Tome, the Provincial Administrator of Harare Metropolitan Province, gave evidence. They both testified that stand No 1090 was allocated to Faith. They said the defendant was allocated stand No. 1102 as contained in exh(s) 7,8 and 9. Whilst admitting that allocation of stands was the responsibility of the plaintiff's management committee, Mr A.S. Tome was not able to produce evidence to support the assertions in exh(s) 7, 8 and 9. He went on to suggest, without supporting evidence, that exhibit 3 could have been "doctored". He, however admitted that the responsible Ministry was in charge of the operations of co-operative societies such as the plaintiff.

In the main, the defendant's own evidence concentrated on her challenge to her dismissal from the plaintiff. As already indicated, the issue of her dismissal was initially raised as a preliminary point. I, however, dismissed same with the consent of the defendant's legal practitioners.

The agreed issues for determination were listed as follows:-

- “(a) Whether the membership of the defendant and that of her principal was lawfully terminated.
- (b) Whether or not the defendant has any right, after the termination of her membership, to continue occupying a co-operative Stand, if so,
- (c) Whether the plaintiff exhausted compulsory arbitration established in terms of the Co-operatives Societies Act before placing the matter before this Honourable Court.
- (d) Whether or not the plaintiff is entitled to evict the defendant from Stand 1090”.

Given what I have already said above, it remains clear that the main issue for determination is issue (d) on the agreed issues listed above.

Mr Nkomo, for the plaintiff, submitted that the defendant had failed to produce evidence to show that stand No. 1090 was allocated to Faith and that she herself (the defendant) had been allocated stand 1102. He said the Provincial Administrator for Harare Metropolitan Province, had admitted to the fact that the issue of stand allocations rested with the Management of Co-operative Societies. The Provincial Administration office relied on information given to it by the management committees of the co-operative societies. The Provincial Administrator could not therefore usurp the authority of the leadership of the co-operative societies, whose supervision resides in the responsible Ministry.

Ms *Moffat*, for the respondent, after concentrating on the preliminary issue relating to the dismissal of the defendant from the co-operative, which issue I had, with her consent, already dismissed, went on to submit as follows:-

- “9. The plaintiff’s position that Stand 1090 the property in question belongs to the defendant is unfounded and baseless as no authority allocated that stand to her. The plaintiff’s purported list of allocation of residential stands should be dismissed as a non-event. The list can be authored to suit the plaintiff’s management own interests at any given time thus cannot help this honourable court in coming to the correct conclusion.
10. Furthermore the alleged real owner of Stand 1102 Joshua Nkomo Housing Co-operative Sybet Muradzikwa was a member of the plaintiff management committee a fact which should raise questions considering the bad treatment of the defendant of the defendant and her principal at the hands of the plaintiff management committee.
11. The office of the Provincial Administrator under the Ministry of Local Government the original owners and allocator of the land dispatched minutes to the effect that stand 1090 belonged to the defendant’s principal whilst stand 1102 belonged to the defendant. This was further confirmed by the testimony of the Provincial Administrator Mr A.S. Tome. Mr Tome testified that he relied on a list produced from Joshua Nkomo Housing Co-operative and filed at the Provincial Administrator’s offices to confirm this position. This show how the plaintiff list of allocations Exhibit 3 cannot be fully relied upon.
12. The Provincial Administrator even testified that their Ministry only allocates the original land in this case 48 Aspindale Park, Kambuzuma but individual stands are allocated through the co-operative management. His office only intervened when a dispute arose. His office only produced the letters tendered as exhibits 7, 8 and 9 after the dispute arose and in line with a resolution after an all stakeholders meeting including the plaintiff management.
13. The plaintiff clandestinely and treacherously obtained a letter to reverse this position from the District Administrator’s Office. This position was never confirmed by the office of the Provincial Administrator which is a higher office. The Provincial Administrator office dispatched another minute consolidating its earlier position and this was also confirmed through the Provincial Administrator testimony. A stand could not be resold or re-allocated”.

The evidence before me does not at all support the above submissions. The position, in my view, was clarified by the Provincial Administrator who indicated the relevant roles played by the leadership of Co-operative Societies, the responsible Ministry, his office and Ministry of Local Government, Rural and Urban Development.

In her own plea, the defendant states, in part; “The defendant is occupying Stand No. 1090 through the authority of Faith Tafadzwa Jegede who is the legal holder of the stand in dispute”. There is therefore no dispute that the defendant is currently in occupation of stand No. 1090 which she claims belongs to Faith.

The defendant lays no claim to stand No. 1090 and if there is no proof that the stand belongs to Faith, on whose authority she claims she is occupying it, then she has to go. Accordingly, notwithstanding the amount of evidence that was given in this case and the agreed issues for determination, I hold the view that the central issue for determination is whether or not stand 1090 was ever allocated to Faith.

Documentary evidence produced before me; namely exh(s) 3 and 4, clearly proves the following allocations:

- (a) Vafi Jegede (the defendant) : Stand No. 1090
- (b) Sybet Muradzikwa : Stand No. 1102.

There is no evidence before me indicating any other valid allocation. The said allocation to Faith is non-existent and furthermore, since the defendant is laying no claim to the stand, she has no reason to remain there. The strong probability is that Faith was allocated Stand No. 191. That was never disputed.

As for the counterclaim, there is no proof that the defendant was ever allocated Stand No. 1102. There is, however, proof that the stand was allocated to Sybet Muradzikwa. That being the case, there is no merit in the entire counter-claim and it must fail. The relief sought by the plaintiff is justified and ought to be granted.

I therefore order as follows:-

1. The defendant’s counterclaim be and is hereby dismissed.
2. The defendant and all those claiming the right of occupation through her of stand No. 1090 Joshua Nkomo Housing Co-operative be and are hereby evicted within seven days after service of this order.
3. The plaintiff be and is hereby authorised to allocate stand No. 1090 to another paid up member of the Joshua Nkomo Housing Co-operative; and
4. The defendant be and is hereby ordered to pay costs of suit.

Donsa Nkomo and Mutangi Legal Practice, plaintiff’s legal practitioners
Legal Aid Directorate, defendant’s legal practitioners