

DISTRIBUTABLE (102)

IRENE MHLANGA
v
MIKE MHLANGA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHITAKUNYE AJA
HARARE, 18 MAY 2021 & 1 OCTOBER 2021

K Gama, for the appellant

V Revesai, for the respondent

CHITAKUNYE AJA. On 18 May 2021 at the conclusion of the hearing of this appeal, we dismissed the appeal with costs. We indicated that our reasons will follow in due course. These are the reasons.

This is an appeal against the whole judgment of the High Court handed down on 23 July 2020 as judgment Number HH 485/20 in which the court *a quo* ordered the eviction of the appellant and all those claiming occupation through her from House Number 1138 Section 3, Kambuzuma, Harare.

BACKGROUND

The respondent issued summons seeking the eviction of the appellant and all those claiming occupation through her from House Number 1138 Section 3, Kambuzuma, Harare. In his summons and declaration, the respondent averred that he is the owner of the house in question by virtue of Deed of Transfer No. 3302/94. He further explained that the appellant was one of his late father's three wives and she is staying at the property despite having her own house as provided to her by her late husband. Of his late father's three wives, one

resided in a house she was left in by his father in Section 5, Kambuzuma, his mother and the appellant were left residing in the house in question in Section 3, Kambuzuma.

The respondent's late father, MWAONEKA ISAAC MHLANGA, had a plan to provide all his wives with their own houses. The property in issue was for the first wife, the respondent's mother. The third wife had a house provided for her in Kambuzuma Section 5, through a co-operative and to the appellant, the deceased had arranged that she joins a housing co-operative in Mabvuku in 1989 as a result of which she was allocated Stand Number 10700 in New Mabvuku. The respondent's father, however, passed on in 1993 before he could build a house in Mabvuku for the appellant. Nonetheless, the cooperative had since built a house for her which she is renting out. The appellant refused to move out of the house in Section 3, Kambuzuma where she is occupying four of the six rooms.

In her plea, the appellant confirmed that indeed the respondent inherited the house from the deceased estate of his late father as an heir. She, however, contended that as heir, he has an obligation to provide her with alternative accommodation. She further contended that no house was acquired for her in New Mabvuku, the house actually belongs to the Cooperative as payments for the house were made by her daughter as she was incapacitated to do so. She further indicated that she only uses three rooms and this arrangement was sanctioned by the Master of the High Court at an edict meeting held in 1994, wherein it was ruled that the appellant and the respondent's mother should continue staying at the house. In essence her argument was premised on the belief that as a surviving spouse to the respondent's late father, she is entitled to continue staying at the property and can only be removed if the respondent provides her with alternative accommodation.

The issues for trial were identified as follows: -

(i) Whether or not the respondent still has an obligation to provide the appellant with accommodation, when the appellant now has her own house;

(ii) Whether or not the appellant joined the housing cooperative in Mabvuku at the instigation of the plaintiff's father; and

(iii) Whether or not the appellant should pay arrear rentals, holding over damages and costs on a higher scale.

The parties agreed on the following admissions: -

- (i) That the respondent had inherited House number 1138 Section 3 Kambuzuma in his own right in May 1994;
- (ii) That the respondent had provided appellant with accommodation from 1994 to the date of summons, a period of 21 years;
- (iii) That, the appellant had joined a housing co-operative in Mabvuku, while her husband was still alive; and
- (iv) That appellant was allocated House No. 10700 in New Mabvuku in 2005 and is now a landlady.

At the hearing the respondent abandoned his claims for arrear rental and holding over damages but persisted with the claim for eviction. Each party called one witness as most of the facts were common cause.

It was common cause that the New Mabvuku house though still in the name of Kugarika Kushinga Co-operative, had for all intents and purposes become the appellant's house. In this regard the appellant conceded that one of her children occupies part of the house whilst she leases out the other part. She, as the 'landlady', is in receipt of monthly rentals in that regard. She also confirmed that all payments to the co-operative and to the City of Harare are made in her name as the owner. Despite the above concessions on her entitlement to the New Mabvuku house, the appellant insisted that the respondent must still provide her with alternative accommodation whilst she leases out her New Mabvuku house for profit.

Upon analysis of the evidence and the law on the subject matter, the court *a quo* held that for the appellant to insist that she continues to reside in the respondent's house unless she is provided with alternative accommodation by the heir when she clearly has her own accommodation would, result in an absurd situation in which she will remain at the property in question interfering with the respondent's enjoyment of his real rights. It will mean that for pre 1st November 1997 estates under customary law, of which there are still many when the law of inheritance was changed to do away with the all-powerful heir, even those dependants who have a house or houses of their own, would still insist that the heir should still provide them with alternative accommodation. In the circumstances of this case the court *a quo* granted an order for the eviction of the appellant from the property.

Aggrieved by that decision the appellant noted this appeal on four grounds

GROUND OF APPEAL

1. The court *a quo* erred in finding that under customary law an heir only had a duty to look after his late father's wife where such wife had no other suitable accommodation.
2. Further, the court *a quo*, erred in finding that the appellant interfered with the respondent's real rights if she remained in occupation of the immovable property inherited from her late husband by the respondent in his capacity as an heir.
3. Furthermore, the court *a quo* erred in suggesting that the respondent's obligation to look after the appellant subsisted only until the deceased estate had been wound up and not for good.
4. The court *a quo* further erred in ordering the eviction of the appellant from her matrimonial home after correctly finding that the respondent as heir had not offered her alternative accommodation.
- 5.

RELIEF SOUGHT

- (a) That the appeal be allowed with costs.
- (b) That the judgment of the court *a quo* be set aside and that the following order be made in its place;

“The plaintiff’s claim for eviction of Defendant from House No. 113B Section 3 Kambuzuma, Harare be and is hereby dismissed with costs.”

ISSUE FOR DETERMINATION

I am of the view that only one issue commends for determination. That is:-

Whether or not the court *a quo* erred and misdirected itself by ordering the eviction of the appellant from House Number 1138 Section 3, Kambuzuma without the provision of an alternative accommodation.

In motivating the appeal, appellant’s counsel submitted that despite the appellant now owning her own house, she remained a dependant under customary law and the respondent must provide her with alternative accommodation if he is to evict her from the property in question. Counsel’s submissions were for the perpetual dependence syndrome under the guise of customary law oblivious of the developments away from that dependence syndrome for the emancipation and empowerment of women and *in tandem* with the constitutional principles on gender equality.

Whilst the customary law position is appreciated, it is absurd to expect that the respondent should continue providing her with accommodation when she now has her own house whose acquisition started when her late husband was still alive. Going by her own contention that as a customary law wife she was unable to act on her own it would mean that her joining the housing co-operative was with the arrangement or blessing of her husband in order that she would have her own house.

It is trite that developments in the field of the law of succession have been for gender equality and emancipation of women from the tag of perpetual dependants. Now that the appellant has been empowered and has a house of her own it is absurd and contrary to modern developments that she should cling onto being considered a perpetual dependant who has to be provided for by an heir to her late husband's estate. This perpetual dependence syndrome is anathema to modern society where the drive is for gender equality. In any case the appellant admitted that for more than twenty – one (21) years since her husband's death the respondent has provided her with accommodation. Before she was given occupation of the New Mabvuku property the respondent had never asked her to vacate the property in question. Clearly, in my view, the respondent has played his part and it is only proper that the appellant vacates the property that she acknowledges now belongs to the respondent. The duty to provide for dependants must be premised on the needs of the dependant. Where a dependant has his/her own suitable accommodation they should not insist on being treated as dependants or minors as appellant's counsel argued. The turning point in this case is the fact that the appellant has suitable alternative accommodation of her own. The cases that appellant's counsel sought to rely on pertained to dependants who had no alternative accommodation of their own hence the heirs were enjoined to provide alternative accommodation.

In *Kusema v Shamwa* 2003(1) ZLR395 (H) at 400E-G MAKARAU J (as she then was) stated as follows-

“Generally, the rights of widows at customary law to support and accommodation by the heir of their late husband's estate has been long recognised by these Courts. In this regard I refer to the case of *Masango v Masango* SC 66/86 (an unreported judgment) where at p 3 of the cyclostyled judgment; BECK JA had this to say-

‘In the absence of making it possible for the appellant to find such alternative accommodation for herself and her children as would be reasonable in all the circumstances, I do not consider that the respondent is entitled to insist upon their eviction from what is admittedly now his house. To order their eviction without suitable alternative provision having been made for their shelter would

be tantamount to sanctioning an avoidance by the respondent of his customary law obligation to care for his father's wife and children.”

The customary law position to provide accommodation to a widow must thus be read in conjunction with her dependence on the late husband for shelter. Where she has suitable accommodation of her own surely treating her as a perpetual dependant who still needed to be provided with accommodation is untenable. It is trite that a dependant is such because they do not have their own accommodation or means of surviving hence have to depend on others for provisions but when they become emancipated and have their own houses they are no longer dependants.

In the case of *Vareta v Vareta* 1992(2) ZLR 1 the court in dealing with the issue of provision of accommodation for dependants held, *inter alia*, that although the applicant had a duty under customary law to support his father's dependants, this duty did not necessarily include a duty to provide accommodation for those dependants, especially if there was a separate home in the communal lands where the dependants could live.

The important aspect to consider is the availability of suitable accommodation elsewhere for the dependants.

In *casu*, it is common cause that by 2005 the appellant had a house to her name which she has since been letting out for profit. It was never her argument that that house was not suitable. The availability of this house meant that appellant could no longer be considered as a dependant of the heir for accommodation.

The court *a quo* alluded to ss 10 and 11 of the Deceased Persons Family Maintenance Act [Chapter 6:03] to buttress the point that the provision of support and accommodation has to come to an end at some point.

The court *a quo* can therefore not be faulted for granting the order for eviction as clearly the appellant had suitable accommodation of her own. The issue of dependence on the heir for accommodation had to come to an end.

DISPOSITION

The appeal has no merit. It was accordingly dismissed with costs.

GWAUNZA DCJ : I agree

MATHONSI JA : I agree

Gama and Partners, appellant's legal practitioners

Pundu & Company, respondent's legal practitioners