Vitsitsi v Vitsitsi

Judgment

Court:	Supreme Court Of Appeal
Bench:	The Honourable Justice Mtambo, SC, JA, The Honourable Justice J Kalaile SC JA, The Honourable Justice Tembo, SC, JA
Cause Number:	MSCA Civil Appeal Number 4 of 2002
Date of Judgment:	October 07, 2003
Bar:	Makhalira, Counsel for the Appellant Respondent, unrepresented

Mtambo JA.

This is an appeal against the decision of a member of this Court sitting alone in which he dismissed the appellant's application for an order for stay of the discharge of the injunction order which the appellant obtained against the respondent by an ex parte application. There are two grounds of appeal, namely; that the ruling of the single member of this Court is against the weight of the evidence, and that the single member of this Court erred in law by having treated the appellant's application for stay as a matter not governed by the

provisions of the Marriage Act (Cap. 25:01) of the Laws of Malawi as read with the provisions of the Married Women's Property Act, 1882 and the Constitution of the Republic of Malawi.

The facts of the case are these: the respondent and the appellant are man and wife. There are six children of the marriage all, but one, of whom were already above the age of 21 years at the time of the hearing of the application. There is a house at Nyambadwe in the City of Blantyre in which the family has lived from 1991. The respondent is the registered proprietor of the house. There is another house at Nkolokosa, also in the City of Blantyre. The appellant is the registered proprietor of this house, the respondent having bought it specifically for her. The house is rented out and the appellant receives the rent. There is also a house just outside the City of Blantyre near a place called Lunzu along the main Blantyre/Mwanza road, and there is another one at the appellant's home, near a trading center called Yasini, also just outside the city of Blantyre along the main Blantyre/Chiradzulu road. It would appear that all the houses were built or acquired while both the appellant and the respondent were in regular employment. The respondent is now without a job since March, 2001. The appellant is still employed. She works for an organisation called Limbe Leaf Tobacco Company Limited in the capacity of administration manager.

Towards the end of the year, 2001 the respondent decided to let out the house at Nyambadwe in order to raise money for the family. A tenant was found and expected to enter the house on 25 January, 2002. The respondent's plan, or arrangement, was that the family could move into the house near Lunzu. This does not appear to have amused the appellant who on 22 January, 2002,

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commenced legal proceedings against the respondent seeking a declaration that she is entitled, as a beneficial owner, to unfettered occupation of the house at Nyambadwe, or, that because she contributed to the cost of the construction of the house she is entitled to one-half of the proceeds, should the house be sold. She also prayed for an injunction order. On 23 January, 2002, by an ex parte application, she obtained an interlocutory injunction order restraining the respondent from evicting, forcibly removing or threatening to evict her from the house. The injunction order was subsequently discharged at the instance of the respondent on the ground that the appellant was guilty of failure to make full and frank disclosure of material facts in her application for the order which she obtained, whereupon the appellant applied for stay of the discharge of the injunction order before a single member of this Court, as we have already said. The application, as we have already said above, was dismissed. The learned Judge was of the view that not alone did the appellant fail to disclose the material facts but that she also told a lie when she stated that she did not have any alternative accommodation and that the house at Nyambadwe was the only one in which she could reside.

We have said that there are two grounds of appeal. We have said that the first ground of appeal is that the ruling of the single member of this Court was against the weight of the evidence. Learned Counsel has argued in support of this ground of appeal that the learned Judge erred when he ignored the evidence of the children of the marriage, namely, Jones, Hanna, Dominic and Donald Vitsitsi. And for full appreciation of the case, we reproduce below the affidavits of the children, for whatever they are worth, starting with that of Jones and then of the others, as follows:

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“I Jones Vitsitsi, of C/O Mrs Vitsitsi, Limbe Leaf tobacco company Limited, P. O. Box 5600, Limbe make oath and say as follows:

1. THAT I never wrote an affidavit for the purpose of it to be in support of any application. What I wrote was the affidavit of account of what happened on the 16 January, 2002.

2. THAT my affidavit has been altered despite the assurance by Mr Vitsitsi that it would remain unchanged.

3. THAT my original statement number 4 read: ‘THAT he gave out the reason as having rented out the house because he was pressed for money and that he has to send his last born son to school’. No words like for maintaining the family and my brother were included.

4. THAT the whole of point No. 8 (the last statement) was not written by me. This paragraph has been added for personal interests.

5. THAT at no point would I speak on behalf of my able brothers and sisters. I do not know their views on this matter so there is no way I could make statements on their behalf.

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6. THAT I was told to sign for the affidavit in haste amidst assurance that no word was removed nor added.

7. THAT I only perused through the document in faith that Mr Vitsitsi, my father, would keep his integrity and not cheat which he did. (He cheated).”

And then:

“We, Hanna Vitsitsi, fourth born daughter of Mr and Mrs Vitsitsi, Dominic Vitsitsi, fifth born son of Mr and Mrs Vitsitsi and Donald Vitsitsi, sixth born son of Mr and Mrs Vitsitsi of C/O Mrs Vitsitsi, Limbe Leaf Tobacco Company Limited, P. O. Box 5600, Limbe make oath and say as follows:

1. THAT on the family discussion that happened on the 16th day of January, 2002 at 6 pm nothing was discussed. We were being told to vacate the house the following Saturday or Sunday.

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2. THAT we were not asked of our views to the matter since the house had allegedly already been rented out.

3. THAT I, Hanna Vitsitsi, actually saw the affidavit of account that Jones Vitsitsi wrote and that there wasn't the last paragraph stating that we are prepared to go and live in Lunzu. That paragraph was added by someone else and not Jones Vitsitsi."

Such really was the evidence of the children and we hasten to observe here that the affidavits referred to in paragraphs 1, 2 and 3 of the affidavit of Jone's Vitsitsi and that referred to in paragraph 3 of the affidavit of the other children have not been brought to our attention. When learned Counsel for the appellant was asked about them he was unable to tell us where they might be. That said, we have no hesitation in saying that we find nothing in the statements contained in both affidavits which could have been useful to the learned Judge to enable him determine whether the discharge of the injunction order could be stayed. There is nothing in the statements to suggest that the injunction order had been granted upon a fairly stated and candid disclosure of facts. Accordingly, we are of the opinion that the evidence of the children was properly ignored and, therefore, that the first ground of appeal fails.

Regarding the second ground of appeal, it has been submitted that the application for stay of execution of the order discharging the injunction order is a matter governed by the provisions of the Marriage Act (Cap 25:01) of the laws of

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Malawi as read with the Married women's Property Act, 1882 and the Constitution of the Republic of Malawi, which, it was submitted rather generally, give women power to protect their property and, therefore, that the appellant was entitled to stay in, and enjoy, peaceful occupation of the house, adding that this is particularly so because the appellant had been using the house for a long time and that she contributed to the cost of its construction.

Generally, learned Counsel's submission might indeed represent the position in law. But whether the contention makes sense in the present proceedings is another matter. Here we are concerned, and so was the learned member of this Court, with whether the appellant should be allowed advantage of the order of injunction which she obtained in an ex parte application or whether the respondent is entitled to the discharge of the order. The member of this Court and the court below, as we have already indicated, were both of the view that the appellant could not be allowed the advantage she gained by means of the order on the ground not alone that she did not fully disclose the facts in the application for the order but that she also told a lie when she deponed that she had no alternative accommodation when in fact there is the house at Lunzu, where the respondent presently lives, and the other two houses which we have mentioned above. We ourselves have carefully considered all the facts and have no hesitation in saying that the statement regarding alternative accommodation is untrue and far from being honest and candid, and that the facts appear, generally, to have been presented as to mislead and deceive the court. As for the applicable law, it is a perfectly and long settled principle of law that a person who makes an ex parte application to the court is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not do so he will not be allowed any advantage gained by means

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of an order which will have been so obtained – and if authority is needed for this it is R v Kensington Income Tax Commissioners, Princess Edmond de Polianac [1917] 1 KB 486, and also Order 29/1/17 of the Rules of the Supreme Court. And it seems to us that the principle makes a lot of sense considering that such applications will almost invariably be for a discretionary remedy and, therefore, a person who seeks such relief in the absence of the other (that is to say, who will be affected by the relief) is obliged to disclose to the court all the material facts within his knowledge, and especially those facts which may offer a reasonable explanation in opposition to the relief sought, in order to enable the court to exercise its discretion properly and prevent an abuse of its process. All in all, we are saying that the application for stay of execution of the order discharging the injunction is not a matter governed by the provisions of the Marriage Act of the Laws of Malawi or the Married Women's Property Act, 1882 or the Constitution of the Republic of Malawi. It is, in our view, a matter essentially governed by the principles of law relating to applications made ex parte for the grant of injunction. The argument which learned Counsel advanced before us may perhaps be useful at the hearing of the main action now pending in the High Court. The second ground of appeal must also, therefore, fail.

In the result, the appeal against the decision of the member of this Court fails and it is dismissed with costs.

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