

BAFO NYONI

Versus

RUTH NYONI (NEE MADZIVADONDO)

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 6 OCTOBER 2006 AND 12 OCTOBER 2006

Mr Mazibuko for applicant
Mr T Moyo for respondent

Urgent Chamber Application

CHEDA J: This is an application for a stay of sale of a matrimonial property.

The parties who were husband and wife were married on the 7th day of February 1988 and, had their union dissolved in February 2006, after the divorce proceedings were instituted in 2001.

The reason for delay in the dissolution of the marriage was the distribution of matrimonial property, which also includes the sale of house number 5810 Cowdray Park, Bulawayo which is a subject of this application. Upon divorce applicant was awarded 62% of the value of the property while respondent was awarded 38% thereof. The relevant paragraphs of the divorce order read as follows:-

- “(a).....
- (b).....
- (c).....
- (d).....
- (e).....
- (f).....
- (g) Plaintiff be and is hereby awarded 62% of the net value of Stand 5810 Cowdray Park and Defendant be and is hereby awarded 38% of the net value of the aforesaid Stand.
- (h) The stand referred to above shall be valued by Messrs Knight Frank Estate

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Agents and Plaintiff shall have the option to buy out the Defendant within 30 days of receipt of such valuation failing which the Stand aforesaid shall be sold by the mentioned Estate Agents to best value and the parties given their respective shares.”

The Estates Agents delayed with the production of the valuation report.

Respondent was not happy with the delay and a second valuation report was done. This delay was entirely that of the Estate Agents, Messrs Knight Frank.

According to the divorce order, applicant was supposed to buy out defendant within 30 days of receipt of the valuation report. He offered to pay \$120 000-00 as down payment, \$100 000-00 after 7 days and the balance on or before the 15th of September 2006. This offer was rejected by respondent. As of the 15th day of September 2006, which was the date he had undertaken to pay, he had not done so, which means that there was still a balance of \$40 000-00.

The essence of this application, therefore, was to stop the property being sold by the Estate Agents as he wanted a further period to raise the balance. His further argument is that he has since paid \$570 000-00 of respondent's share which leaves him with a balance of \$40 000-00, and, therefore, in the interest of justice the property should not be sold by the Estate Agents.

On the other hand respondent has strenuously opposed this application. The basis of her opposition is that applicant has failed to buy her out, as per the order granted by this court and therefore, he should not be given another chance. She further argued that applicant is not sincere in his application, because he reneged on a previous verbal agreement wherein it was agreed that she should collect certain movable property on the

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day they left the court, but, she could not do so as she was prevented by applicant's relatives.

This fact, was admitted by applicant although he sought to justify his action by saying that he wanted her to first deliver a certain item. In addition to this, applicant threatened the Estate Agent after they had referred a prospective purchaser of this property.

The question that falls for determination is whether I should grant a stay of execution in this matter. Counsel for applicant has rightly pointed out that the court has a discretion in an application of this nature. I agree with him. This discretion is however, not a discretion in the air, but a judicial one.

The general rule is that the court has a discretion on a good cause shown to stay execution of a judgment pending the happening of some event.

However, such discretion, should be judicially exercised. What this means is that it must be on judicial grounds and for substantial reasons. There can not be a hard-and-fast rule for such exercise otherwise judicial independence will be interfered with and/or curbed.

In order to lean in favour of applicant, it is my view, that his actions and/or omissions in total should be carefully examined. In *casu* the following are worth of note: -

- (1) after the parties, together with their respective legal practitioners reached a verbal agreement that respondent should take the movable property as per the court order issued by consent, he prevented her from carrying out the

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agreement. This, he did, despite the fact that, respondent had hired a truck to carry the property.

- (2) He failed to pay the instalment by the 15th day of September 2006, a date which he himself had proposed.
- (3) He chased away a prospective purchaser who had been referred by Knight Frank, an Estate Agent who had been duly authorised by this court.
- (4) He threatened an official from Knight Frank, an Estate Agent which had been authorised by this court.

Applicant's conduct brings into sharp focus his bona fides in this matter. In my view, a party who asks for the court's use of its discretion should do so on legal and honest grounds. The principles of equity and justice which he has urged me to apply in his favour are misplaced in view of s actions. If anything, they favour respondent who throughout these proceedings has been acting honestly, but, endured emotional suffering and frustration at the hands of the applicant.

A party that defies the court order can not be heard to ask the same court for relief.

It is clear in my mind that applicant has been placing hurdles on respondent's path throughout in this matter thereby frustrating her.

Bearing in mind the principles of justice and equity together with the balance of convenience, the weight of the scales of justice favours respondent who has been desirous to see this matter finalised. In addition, a prospective purchaser with a higher amount has been secured. Applicant, therefore, should not be allowed to continue with his unlawful delaying tactics.

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There has been, in my view, a clear abuse of the legal system in that applicant was blocking the execution of a lawful order and literally holding respondent at ransom. He defied authority to an extent of threatening the Estate Agent whom he had agreed to his appointment. These courts can not allow this type of conduct.

Legal practitioners are urged to give proper legal advise to their clients in particular when it comes to complying with court orders.

Failure to do so, may result in the courts drawing adverse inferences against them, which may result in them being burdened with befitting costs for such behaviour. There was no reason why the legal practitioner having been part of the agreement to release property to respondent, later acquiesced at applicant's unlawful conduct in refusing with respondent's property up to the day of this hearing.

The following order is therefore made: -

- (1) This application is dismissed with costs at attorney and client scale.

Messrs Calderwood, Bryce Hendre and Partners, applicant's legal practitioners
Hwalima and Associates, respondent's legal practitioners

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