

**THENJIWE NDLOVU**

**APPLICANT**

**AND**

**VISION SITHOLE**

**1<sup>ST</sup> RESPONDENT**

**AND**

**CITY OF BULWAYO**

**2<sup>ND</sup> RESPONDENT**

**AND**

**REGISTRAR OF DEEDS**

**3<sup>RD</sup> RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 8 SEPTEMBER AND 9 SEPTEMBER 2010

*Mrs N. Tachiona* for applicant  
Respondent in default

**MATHONSI J:** On the 6<sup>th</sup> October 2008 the first Respondent issued summons out of this court seeking an order compelling transfer of stand 20027 Pumula South, Bulawayo from the Applicant to himself. In that action he alleged that he had purchased that property from the Applicant and that a written agreement had been signed on the 22<sup>nd</sup> September 2005.

Subsequent to that a chamber application for default judgment dated 3<sup>rd</sup> November 2008 found its way into the court record. I say so because that application does not bear the issuing stamp of the Assistant Registrar of this court. In fact the only document which is stamped out of that entire application is the return of service which bears the High Court date stamp of the 9<sup>th</sup> October 2008. According to that return of service, which has since been disowned by the Deputy Sheriff, the summons was served upon the Applicant on the 7<sup>th</sup>

October 2008 and on N. Tsheza the Housing Officer at Pumula and Hydepark Estate Housing office, Bulawayo, on the same date.

I shall return to the return of service in question later. That application for default judgment was supported by an affidavit deposed to by the first Respondent on the 3<sup>rd</sup> November 2008 in which he repeated that there was “a written agreement of sale” between him and the Applicant. Significantly that agreement was not attached to the summons and declaration or indeed to the application for default judgment. It has never been produced.

The matter was placed before Ndou J who granted default judgment on 12<sup>th</sup> November 2008 on the strength of the return of service indicating that the summons and declaration had been served. Acting on the strength of that court order, the first Respondent secured transfer of stand 20027 Pumula South, Bulawayo from the Applicant’s name to his name.

The Applicant later discovered the transfer and filed an urgent application seeking to reverse the transfer and alleging that not only did he not sell the property to the first Respondent but also that he did not even know that character. According to the Applicant, first Respondent acted fraudulently in obtaining judgment against him which allowed him to take transfer of the property. She alleged that the court was induced by a fraudulent return of service to grant default judgment against her which judgment is a nullity by virtue of that fraud. A provisional order was granted in favour of the Applicant on the 9<sup>th</sup> February 2010 the interim relief of which was to place a caveat on the disputed property and to interdict the first Respondent from disposing of or alienating the property.

The first Respondent has contested the confirmation of the provisional order. He argued that the application has come rather late in the day because after obtaining transfer he went on to sell the property to “the Sibandas” who are now staying at the property and therefore that the issue is incapable of reversal. This has been challenged by the Applicant who has submitted proof that not only is the stand still registered in first Respondent’s name at the second Respondent’s offices but also that the property is not habitable at all as it remains where she left it herself, that is, at window level without roofing.

Before proceeding further it is necessary to dispose of one issue that is the additional affidavit filed by the first Respondent on the 16<sup>th</sup> March 2010 which he has called a “replying affidavit”. In terms of Order 32 Rule 235:

“After an answering affidavit has been filed no further affidavits may be filed without the leave of the court or judge.”

First Respondent did not obtain leave to file that extra affidavit and was therefore not entitled to file it. Accordingly the affidavit in question is expunged from the record and has been disregarded for purposes of this judgment.

As already pointed out the default judgment of the 12<sup>th</sup> November 2008 was granted on the strength of what was perceived to be a deputy Sheriff’s return of service. The Deputy Sheriff has submitted documents and indeed affidavits disowning that return of service. The return of service in question was allegedly signed by L. Muguto on behalf of the Deputy Sheriff.

In an undated letter attached to the founding affidavit of the Applicant as annexure “B” R. Gumbo the Deputy Sheriff for Bulawayo said:

“We refer to the above matter and the return of service dated 8<sup>th</sup> of October 2008 Ref – BN/Im 010/10/08 and wish to advise that it was not done by the Deputy Sheriff’s office. We have checked in our records and we never received the said summons. The format used to prepare the return of service is not ours.”

Lindiwe Muguto also deposed to an affidavit on 10<sup>th</sup> March 2010 in which, after analysing the return of service in question and demonstrating why she says it was not done by her or the Deputy Sheriff’s office, she concludes thus:

“I therefore would like to state that this return of service attached by Mr. Sithole is a creation of his own. It was never typed by myself. It was not signed by me. It is fake and does not emanate from the Deputy Sheriff’s office.”

Regina Gumbo, the Deputy Sheriff for Bulawayo also deposed to an affidavit on the 11<sup>th</sup> March 2010 which reads in part as follows:-

- “(1) I aver that I find it very offensive that he (First Respondent) can allege that I was somehow influenced by Applicant to denounce his fake return of service. Let me also categorically state that SUMMONS ARE NEVER SERVED AT THE HOUSING OFFICE. If first Respondent’s summons were served by my office they would have been served on either SIKHANGELE ZHOU or SPEKIWE GUTA at Tower Block. Mr Sithole’s summons were served at the housing office so they were not served by my office.
- (2) I have made extensive enquiries on both B. Ndebele and Lindiwe Muguto who are my employees and both of them, I am satisfied, were not part of first Respondent scam of coming up with the return of service. The summons allegedly served on Applicant by B. Ndebele and thereafter a return of service typed by Muguto were neither served by my office nor typed at my office.
- (3) I further aver that I have several formats for my returns and none of those formats were used by Mr Sithole. Simply put, the return of service was typed by him. We never served Applicant with the summons. I can however confirm that I later personally served his order which he fraudulently obtained using a fake return of service. I therefore proceeded to the Housing office and transferred the property into his name. However at that time, I was not aware that the order was obtained using a fake return of service hence the receipts that he may be alleging he has may probably be those in respect of service of his order.
- (4) I am not associated in any way with Applicant and I only met her when she came with the fake return of service enquiring when we served her since on the face of it shows that my office served her. I told her I did not, a fact which I stand by

even now. I even approached the High Court and spoke to Mrs. N. Mpfulili and explained why I am saying the return of service did not emanate from my house.”

This should put the issue of the return of service to rest. To the extent that it has been disowned by the Deputy Sheriff, it must follow therefore that the document used to obtain default judgment is a forgery. The Applicant was never served with the summons in Case No. HC 2004/08 and therefore judgment should not have been entered against her.

Order 49 Rule 449 of the High Court Rules provides for correction, variation and rescission of judgments or orders made in error. Rule 449(1) provides:

“The court or judge may, in addition to any other power it or he may have mero motu or upon the application of any party affected, correct, rescind or vary any judgment or order-

- (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) ---
- (c) ---.”

The order of the 12<sup>th</sup> November 2008 was fraudulently sought and erroneously granted because the court was misled by a fraudulent return of service. It therefore cannot stand and should be rescinded.

First Respondent obtained transfer of stand 20027 Pumula South, Bulawayo by virtue of an order obtained fraudulently. He therefore acquired no legal right over that property and the transfer to him was clearly a nullity. In his opposing affidavit the first Respondent claimed that he had purchased the property from the Applicant and that the sale agreement was in writing. As already stated, he failed to produce the agreement in question. It is unlikely that it exists.

First Respondent also claimed that he had sold the property to “the Sibandas”. Not only has he failed to particularise that alleged sale he has also dismally failed to give details of the said third parties. His claim that the third party now resides at the property has been shown to be false by photographs filed of record showing that construction at the site has not gone beyond window level and the property is not habitable. It is unlikely that the “Sibandas” in question exist. Even if they did, in light of the fact that whatever first Respondent purported to sell to them, he did not possess lawfully, he could therefore not pass a right he did not have.

According to the learned author Harry Silberberg, The Law of Property, 1975, Butterworths at page 67:-

“Once a real right has been registered it becomes enforceable against the world at large provided only that it has been obtained in good faith.”

First Respondent did not obtain a real right at all because the property has no title and in any event whatever he acquired, it was ill-gotten and unenforceable.

I am satisfied that the Applicant has made out a good case for the relief sought and for the confirmation of the provisional order which is confirmed on the following terms, namely that:

- (a) The order of this court dated the 12<sup>th</sup> November 2010 be and is hereby rescinded.
- (b) The transfer of the right, title and interest in stand 20027 Pumula South, Bulawayo to the first Respondent be and he is hereby set aside.
- (c) The Deputy Sheriff be and is hereby ordered and directed to sign all documents necessary to transfer the said stand back to the Applicant.

Judgment NO. HB 104/10  
Case No. HC 259/10  
Xref No. HC 2004/10, 160/10 538/10

(d) The First Respondent shall bear the costs of this application on an attorney and client scale.

Mathonsi J.....

*Bulawayo Legal Project Centre, applicant's legal practitioners*