Judgment No. HB 123/10
Case No. HC 1729/09
Xref No. HC 3120/04, 1063/09
Xref No HC 1047/05 & 1270/03

EDGAR HOWERA **APPLICANT**

AND

HERBERT TARIRAI MUDZINGWA **1ST RESPONDENT**

AND

NAOMI BENEDICTA MUDZINGWA **2ND RESPONDENT**

AND

DEPUTY SHERIF, KWEKWE **3RD RESPONDENT**

AND

DIRECTOR OF HOUSING, MBIZO, KWEKWE **4TH RESPONDENT**

AND

THE REGISTRAR OF DEEDS, BULAWAYO **5TH RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 12 OCTOBER 2010 AND 21 OCTOBER 2010

Advocate L. Nkomo for applicant
Mr B. Longhurst for respondents

Opposed Application

MATHONSI J: When the Supreme Court eloquently expressed indignation to unending litigation in the case of *Ndebele v Ncube* 1992(1) ZLR 288(S) it must have had in mind a case like the present. In that case the Supreme Court unequivocally stated at 290 C – E that:

> "It is the policy of the law that there should be finality in litigation. On the other hand one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage, vigilantibus non dorminientibus jura subveniunt – roughly translated, the law will help the vigilant but not the sluggard."

Historically this matter makes interesting reading. Since the first document was filed in court in the form of a summons commencing action on the 27th June 2003 as case number HC 1270/03, there has been no less than 5 applications and counter applications filed in this matter which have all tended to take the dispute round and round in circles. There has been applications for stay of execution and rescission of judgment, applications for condonation of late filing and a further application for rescission with the result that no finality has been achieved and the parties have remained rooted exactly where they were when they started off more than 7 years ago.

The first and second Respondents took transfer of stand 6300 Mbizo Township of Mbizo, Kwekwe, also known as number 116/8 Mbizo Kwekwe, (the house), on 12 December 2002. When this happened the Applicant was already staying at the house he having bought it from the same individual who later sold it to the first and second Respondents, one Stephen Nyamutuma. In fact, the papers show that the Applicant had purchased the house from Nyamutuma in 1999, took occupation at some stage and did nothing to secure transfer to

himself even as Nyamutuma held the house by virtue of a Deed of transfer number 2216/97 from 30th June 1997.

On the 27th June 2003, the first and second Respondents, as joint owners of the house, instituted proceedings in this Court seeking an order for the eviction of Applicant from the house. The Applicant entered appearance to defend and filed a plea grounding his defence solely on the fact that by court order made by this court sitting in Harare in civil appeal number 4/02, he had been declared the legal owner of the house. This prompted the first and second Respondents to seek further particulars in the form of the court judgment in question.

When Applicant failed to provide those particulars an application to compel the supply of the particulars was filed on 11 August 2004 under case number HC 3120/04 with the order being granted on 9 September 2004. As the first and second Respondents took the view that Applicant had failed to comply with that order they made an application on 4 May 2005 under case number HC 780/05 seeking to strike out Applicant's defence and for an eviction order. This was granted on 11 May 2005.

When first and second Respondents attempted to execute the judgment, Applicant resisted and then made an urgent ex parte application for a stay of execution and rescission of the order of 11 May 2005. This application was filed as case number HC 1047/05 on 9 July 2005 (although the Registrar's stamp is erroneously dated 9 July 2007). The provisional order was granted by consent with minor amendments on 23 August 2005.

The first and second Respondents opposed the confirmation of the provisional order and the matter proceeded as an opposed court application only to be subsequently set down

for argument on 18 July 2008. In that application, Applicant had argued that he had not wilfully defaulted in supplying the particulars requested as he had struggled to uplift the High Court judgment from Harare only managing to supply an incomplete judgment. In that application he did not set out what defence he had against the first and second Respondents' claim as would persuade the court to grant him a reprieve.

Be that as it may, both the Applicant and his counsel failed to appear in court on 18 July 2008 and judgment was granted in default against him effectively discharging the provisional order of 23 August 2005 and directing Applicant's eviction from the house. In pursuance of that order, first and second Respondents succeeded in evicting the Applicant from the house on fools' day, the first day of April 2009. As things stand now, not only are the first and second Respondents the registered owners of the house, they have also taken occupation after the eviction of the Applicant.

Stung by the eviction, the Applicant was not to be deterred by anything and after delaying by some months, he filed an application for condonation of the late filing of an application for the rescission of the judgment issued on 18 July 2008. This application was filed as HC 1063/09 on 8 July 2009. It was granted on 20 October 2009 paving the way for the Applicant to file this application for rescission of judgment on 2 November 2009.

In this application, Applicant alleges that while he was aware of the Court date and did discuss the matter with his then legal practitioner, *Mr Magodora* in preparation for court, he had not attended court because his counsel advised him that it was not necessary for him to be in attendance. His counsel assured him that he would appear and argue the matter on his

behalf especially as the Applicant had paid him all that he demanded for him to do so. He is unable to explain why *Mr Magodora* defaulted in Court and the erstwhile legal practitioner has not been invited to explain himself. According to the Applicant he has become hostile to the extent of refusing to release his file to him to instruct another legal practitioner.

This has caused the Applicant to report *Mr Magodora* to the Law Society of Zimbabwe for unprofessional conduct. Not much information has been disclosed about this complaint to the Law Society of Zimbabwe. Usually when legal practitioners refuse to release a client's file, they would be enforcing their lien right for non-payment of fees. Whatever the circumstance, Applicant argues that he was not in wilful default.

Regarding the bona fides of his defence he emphatically argues that having purchased the house much earlier than first and second Respondents, he holds a superior claim to it than the two by virtue of the law relating to double sales. Quite belatedly, as if by afterthought, in his answering affidavit Applicant claims that first and second Respondents are not innocent purchasers because they ought to have known that the house had been bought by him before they purported to purchase it. He fortifies this argument by another belated one, which only appears in his heads of argument, namely that he had resisted an attempt by the first and second Respondents to install a telephone line at the house. In his view, this should have warned them of Applicant's claim to the house. *Advocate Nkomo* who appeared for the Applicant developed that point further that it did not make sense for first and second Respondents to buy a house without viewing it. In his view this showed that they were aware of Applicant's right to the house. I am not persuaded by that argument.

Applicant then faintly alludes to the judgment of HUNGWE J in the interpleader proceedings where he successfully repelled an attempt by a third party to attach the house in execution because he had a claim to the house. If I were to accede to Applicant's prayer and rescind the judgment of 18 July 2008 this will only take the Applicant to a position where he would pursue his own urgent application for a stay of execution and rescission of the judgment made on 11 May 2005. It will still leave him with the task of satisfying the Court, on another day, that he has good and sufficient reasons for his default which led to that order being granted.

If, by some feat of luck, Applicant were to succeed in rescinding the second order standing against him, that of 11 May 2005, it will leave him free to defend the eviction summons issued under case number HC 1270/03. In that matter he only filed a plea in which he sought to rely on Justice Hungwe's interpleader judgment. He did not file a counter claim for transfer of the house to himself. In fact, Applicant has not commenced any litigation claiming transfer of the house to himself although he has known of first and second respondent's ownership rights at least from the time he received summons in case number HC 1270/03 way back in June 2003, more than seven years ago. He will therefore still have to grapple with the provisions of Section 15(d) of the Prescription Act, [Chapter 8:11]. The argument by *Advocate Nkomo* that Applicant's rights can still be determined in the eviction application, even without a counter application, is without merit.

In terms of Rule 63 of the High Court Rules, 1971:

"(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application not later than one month after he has had knowledge of the judgment; for the judgment to be set aside.

(2) If the court is satisfied on an application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action; on such terms as to costs and otherwise as the court considers just."

I do not propose to be drawn into the controversy surrounding the interpretation of subrule (1) at this stage because I am of the view that this matter is capable of resolution without reference to that provision. I will therefore ignore it for now.

Subrule (2) of Rule 63 was discussed in *Stockill v Griffiths* 1992 (1) ZLR 172(S) at 173 D – F where GUBBAY CJ said:

> "The factors which a court will take into account in determining whether an application for rescission has discharged the onus of proving 'good and sufficient cause', as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd v CC International (Pvt) Ltd* S- 16-86 (not reported) *Roland and Another v McDonnell* 1986 (2) ZLR 216(S) at 226 E – H; *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211 C – F. They are
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> (i) the reasonableness of the Applicant's explanation for the default.
> (ii) the bona fides of the application to rescind the judgment; and
> (iii) the bona fides of the defence on the merits of the case which carries some prospects of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

See also *Hutchison and Another NNO v Logan* 2001 (2) ZLR (1) (H).

The explanation given for failing to appear in court is that the legal practitioner engaged to do so did not turn up without giving any reason and has held on to the Applicant's file up to now although he had promised to appear. The Applicant was complicite because after such assurance he blissfully stood akimbo without even enquiring of the outcome of the hearing

from 18 July 2008 until he was awakened by an eviction writ in April 2009, almost a year later. This, coupled with the fact that the legal practitioner in question has not been invited to explain himself, raises questions and is far from being a satisfactory explanation for the default. It is simply not reasonable.

Looking at the fact that not only have the first and second Respondent taken transfer, in fact they did that almost 8 years ago, but also that Applicant was evicted from the house 1 ½ years ago, the bona fides of the application to rescind the judgment are put to the sword.

In addition, the Applicant's defence to the eviction is as shaky as it is non-existent. In his plea to the summons action the Applicant sought to rely on Justice Hungwe's judgment as declaring him the owner of the house. I agree with *Mr Longhurst* for the first and second Respondents that that defence is demonstrably not available to the Applicant because Justice Hungwe was not adjudicating over ownership of the house but merely interpleader proceedings and declared that the house was not executable at the instance of that third party as the Applicant was "the holder of the better claim" (page 2 of the cyclostyled judgment). Against first and second Respondents that judgment cannot help the Applicant.

Regarding the issue of the double sale, Nyamutowa having sold to Applicant and the first and second Respondents, the position is as clear as daylight. In *Crundall Brothers (Pvt) Ltd v Lazarus N O and Another* 1991 (2) ZLR 125(S) at 132 G and 133 A – B, the full bench of the Supreme Court stated the law as follows:

> "This approach was set out as follows by Professor McKerron in (1935) 4 SA Law Times 178 and repeated with approval by Professor Burchell in (1974) 91 SALJ 40:

> 'It is submitted that where A sells a piece of land first to B and then to C – and the position is the same mutatis mutandis in the case of a sale of a movable of which the court would decree specific performance- the rights of the parties are as follows:
>
> (1) ---
>
> (2) where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of sale or at the time he took transfer, of the prior sale to B, and B's only remedy is an action for damages against A. If, however C had knowledge at either of these dates B, in the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event C's only remedy is an action for damages against A."

I am satisfied that first and second Respondents did not know of the sale to Applicant either at the time of the sale or at transfer. In fact even the Applicant himself conceded that much in earlier papers filed in this court. He appears to have changed his stance in his answering affidavit and in the heads of argument perhaps after realising the difficulties of his case. For that reason, first and second Respondents were innocent purchasers and applying the above legal proposition, they should retain transfer.

In any event, having taken transfer, and indeed occupation, the balance of equities favours maintenance of the status quo ante.

In addition to that, even if Applicant had a claim against the current registered owners such claim is prescribed in terms of the Prescription Act, [Chapter 8:11]. In *Singo v Sithole and Others* HB 114/10 I stated at page 7 of the cyclostyled judgment that:

> "Prescription strikes at the root of the Plaintiff's allegation of a right by asserting that such a right permanently ceased to be enforceable."

I therefore come to the inescapable conclusion that the Applicant has not discharged the onus resting upon him in terms of Rule 63(2) to show "good and sufficient cause" to rescind the judgment of this court.

Even if I am wrong in that conclusion, the Applicant still faces the insurmountable task of unlocking the unresolved and immense practical problems posed by the case of *Sibanda v Ntini* 2002 (1) ZLR 254(S) where in interpreting Rule 63(1) the Supreme Court ruled that an application for rescission of judgment must be set down within a month. If one follows that judgment, the Applicant is out of time and he has not sought condonation. *Advocate Nkomo's* attempt to seek condonation from the bar at the hearing of this matter, will not work.

I am aware of the contrary interpretation by the Supreme Court in Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd 1998 (2) ZLR 249 where it came to a different conclusion regarding the same issue.

As stated earlier, it is not necessary in this matter to deal with that issue as, even without reference to the time factor, this application cannot succeed. Earlier on in this judgment I did mention the fact that there must be finality to litigation. Applicant appears to have put first and second Respondents unnecessarily out of pocket in making this application. After his eviction he must have realised that the odds were heavily tilted against him but proceeded all the same. Having failed to institute proceedings claiming ownership for several years after discovering the transfer of the house to first and second Respondents, it ought to have dawned on him that his was a lost cause due to prescription.

I am therefore convinced that an award of costs on a higher scale is called for in this matter.

In the result I make the following order:

1. that the application for rescission of judgment in case number HC 1729/09 be and is hereby dismissed.
2. that the Applicant shall bear the costs on an attorney and client scale.

Donsa Nkomo and Mutangi, applicant's legal practitioners
Messrs Webb, Low and Barry, 1st & 2nd respondents' legal practitioners