

TIMOTHY SIJIYE

Versus

MFANUKHONA PHIRI

And

DAVID MPOFU

And

TAKATSO MPOFU

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 11 AND 25 MARCH 2010

H Shenje for applicant
J Sibanda for 1st respondent
No appearance from 2nd and 3rd respondents

Opposed Court Application

KAMOCHA J: This is an application for the rescission of two default judgments in case number HC 1460/07 and case number HC 907/08 with costs being jointly and severally borne by 1st, 2nd and 3rd respondents, one paying the others to be absolved. The applicant was not a party to the proceedings relating to the two judgments. He, however, seeks to rely on the provisions of order 49 rule 449 (1)(a) of the rules of this court.

The circumstances giving rise to these proceedings are these. On 22 March 2007 the parties signed a memorandum of agreement. The first respondent Mfanukhona Phiri hereinafter referred to as “Phiri” and his wife purchased house number 6780 Nkulumane, Bulawayo – “the property” from the second respondent David Mpfu and his wife the third respondent.

David Mpfu was allegedly represented by his wife. The couple was acting through an agent known as Defiant Hardware and Construction which prepared the agreement of sale for the parties.

Under mode of payment in clause 3 the agreement of sale reflects that a cash payment of \$50 million (fifty million dollars) had been paid. Clause 6 stipulated that the seller would give vacant possession to the buyer upon three months notice since she had received full payment. Clause 8 stipulated that transfer would be initiated as soon as possible.

But trouble started on 25 June 2007 when Phiri approached David Mpfu's wife seeking vacant possession of the property.

The wife, who was still resident at the property, would simply not co-operate. Phiri went to Defiant Hardware and Construction – the sellers' agent which was not helpful either. While the sellers alleged that they had not received their purchase price from their agent, the agent alleged that the agreement of sale was illegal because the equivalent of the \$50 million was paid in South African rands. Instead the agent suggested that Phiri should accept another stand. This is difficult to follow.

On realizing that the sellers were not going to let them take vacant occupation of the property Phiri launched a court application on 3 July 2007 in case number HC 1460/07 wherein he sought an order directing David Mpfu to attend at the relevant Housing Office and sign all the necessary documents to effect change of name in respect of the property to that of Phiri within 7 days of the order, failing which the Deputy Sheriff would do so in his place and stead to give effect of such transfer.

The application was served in respect of both respondents on 24 July 2007 by handing copies to their daughter Dalphin who was found at the property. As stated earlier in this judgment the wife was still resident at the property. There was proper service of the application upon them by the Deputy Sheriff but they did not oppose it resulting in the court entering a default judgment in favour of Phiri on 30 August 2007.

Since David Mpfu did not comply with the court order the Deputy Sheriff acted in his place. City of Bulawayo granted its consent for cession of right, title and interest in the property to Phiri on 20 November, 2007 in terms of this court's order in case number HC 1460/07. The consent is filed of record as annexure "B" in case number HC 907/08.

The Mpfus were not only unwilling to vacate the property but they also were busy trying to find another buyer for the same property. They attempted to sell it to one Mlamleli Mswazi who tried to obtain this court's order against them, but fortuitously Phiri got wind of what was about to happen and intervened to stop the proceedings.

In light of all this Phiri filed a court application in case number HC 907/08 on 29 April 2008 wherein he sought an order that the Mpfus be ordered to vacate the said property

within seven (7) days of the court order failing which the Deputy Sheriff would be authorized to carry out their eviction from the property and all those who claimed through them.

According to the return of service filed of record copies of the application were served on 13 May 2008 by handing them to a Ms Ndlovu who was found at the house. The parties to the contest were Mfanukhona Phiri and David Mpofu and his wife Takatso Mpofu.

The couple did not file any opposing papers. The result was that an order was granted by default on 26 June 2008. The service that was effected was proper, in my view.

A month later on 25 July 2008 the Mpofus and all those who were claiming through them were evicted from the house. Amongst those claiming through them was Mr Timothy Sijiye the present applicant for the rescission of the two judgments to which he was not a party.

The applicant Mr Timothy Sijiye hereinafter referred to as "Sijiye" does not state in his draft order what is to happen in the event of the court granting him the order he seeks. The draft order is couched thus:-

"It is ordered:-

1. That judgment granted in case number HC 1460/07 be and is hereby rescinded.
2. That judgment granted in case number HC 907/08 be and is hereby set aside.
3. That costs be borne by the 1st, 2nd and 3rd respondents jointly and severally, the one paying the others to be absolved."

The basis for claiming the order was that he had allegedly purchased the said property much earlier than Phiri in 1998 and had already taken occupation of the property. That, *ipso facto*, made him an interested party. He further alleged he had instituted proceedings in this court in case number HC 1552/08 seeking to have the sale between Phiri and the Mpofus set aside.

A look at case number HC 1552/08 reveals that after Sijiye had been evicted in terms of an order granted by this court in case number HC 907/08 he instituted proceedings in case number HC 1552/08. He sought, *inter alia*, to have Phiri evicted from the said property so that he himself could regain occupation thereof. He also sought to interdict the transfer of the property from David Mpofu to Phiri pending the finalization of that matter or case number HC 3804/01, whichever of the two cases would be finalized first. In the final order he sought to have the sale of the property between Phiri and the Mpofus set aside.

The application which had been filed on a certificate of urgency was filed on 30 July, 2008. It was set down for a hearing in chambers on 20 August 2008. The application was dismissed with costs on the appointed date.

In case number HC 3803/01 Sijiye issued summons on 19 December 2001 seeking an order compelling David Mpofu to sign all the documents necessary for the transfer of rights, title or interest in the said property from David Mpofu's name into Sijiye's name, failing doing so within seven days of the order, the Deputy Sheriff would be empowered and directed to do so.

In his declaration Sijiye alleged that on 16 May 1998 he had entered into an agreement of sale of the property with David Mpofu. The purchase price was \$120 000,00. He allegedly paid the sum of \$55 000,00 on signing the agreement. The balance would be paid in monthly installments of a minimum of \$2 000,00 until it was liquidated.

He averred that he had paid the full purchase price of \$120 000,00 and was therefore entitled to have the rights, title or interest in the property transferred from David Mpofu's name into his name.

The other side of the coin as averred by David Mpofu was that Sijiye had not paid the purchase price in full. In fact, he had not even paid the deposit in full. Instead of paying the deposit of \$55 000,00 he had only managed to pay the sum of \$42 400,00. The explanation he gave to David Mpofu for his failure to pay the deposit in full was that he had applied for a loan whose approval he expected before December 1998. The funds from the loan would enable him to clear the balance owed. But, alas, that did not materialize. Sijiye had taken occupation of the property which prompted David Mpofu to demand rentals from him at the rate of \$2 000,00 *per mensem*. Sijiye allegedly failed to pay the rentals as well. David Mpofu alleged that since Sijiye breached the agreement by his failure to pay the purchase price he had no option but to cancel it. The cancellation was allegedly communicated to Sijiye in December 1998. A civil trial has already commenced in that matter but the hearing was postponed *sine die* in April 2006.

The present application was hotly contested by Phiri who raised points *in limine*. The first point was that applicant should have firstly applied to be joined to the two cases which he seeks to have rescinded. This point is without merit since those two matters had already been finalized. One cannot seek to be joined in cases that have already been finalized.

The second point was that applicant was not entitled to have recourse to the provisions of order 49 Rule 449 (1) (a) of the rules of this court which he sought to rely on. The provisions are couched thus:-

“449 Correction, Variation and rescission of judgments and orders

- (1) 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;”

It was contended that the above provisions did not apply to the present case but only to civil trials and judgments obtained following such civil trials, not applications.

I disagree. The rule applies to any judgment or order which was erroneously sought or erroneously granted in the absence of any affected party – even in court applications. What is important is that the judgment or order must have been erroneously sought or erroneously granted. Like for instance what happened in the case of *Matambanadzo v Goven* 2004 (1) ZLR 399 (S) where the court granted an eviction order without the pre-requisite certificate in terms of section 30(4) of the Rent Regulations 1982, to the effect that the requirement that the lessee vacate the dwelling was fair and reasonable. The court did not have the power to grant an eviction order unless the Rent Board had issued the requisite certificate and yet it went ahead and erroneously did so in the absence of the affected party. The order was accordingly set aside.

The Supreme Court went to spell out the requirement for a party to establish whether or not he/she has the requisite *locus standi in judicio* to seek the rescission of a judgment or order granted in his or her absence. SANDURA JA had this to say at 404C-E

“The issue which I now wish to consider is what the applicant for an order rescinding a judgment or court order ought to show in order to establish that he has the requisite *locus standi in judicio*. That question was answered by CORBETT J, as he then was, in *United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (c) at 415A-C as follows:

“In my opinion, an applicant for an order setting aside or varying a judgment or order of court must show, in order to establish *locus standi*, that he has an interest in the subject matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted.”

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I entirely agree with the learned Judge and that is the test which I shall apply in considering whether *Matambanadzo* had the requisite *locus standi* to seek the rescission of the order granted on 19 December 2001.”

I, too, shall apply the same test and accordingly find that Sijiye had the requisite *locus standi in casu*.

But the final issue to be determined is whether or not the two judgments Sijiye seeks to have rescinded were erroneously sought or erroneously granted. I have found that David Mpfu and his wife were properly served in terms of the rules as the applications were served on responsible people found at the premises.

No notice of opposition was filed in respect of each case. The court made no error in granting each of the judgments Sijiye sought to have rescinded. His application must, accordingly fail.

In the result I would dismiss the application with costs.

Shenje & Co, applicant’s legal practitioners
Job Sibanda & Associates, 1st respondent’s legal practitioners