

IRENE MASANGO

Versus

ZANELE SIBANDA N.O.

And

ASSISTANT MASTER

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 23 JUNE 2010

G Nyoni for applicant
N Siphuma for 1st respondent
No appearance for 2nd respondent

Opposed Court Application

Ex Tempore

KAMOCHA J: The applicant in this matter was seeking the rescission of this court's judgment granted on 19 November, 2009 under case number HC 1274/09. Further, she sought leave of the court to file her opposing papers within 5 days of the order being granted. If the 1st respondent opposed the application she would be liable to pay costs of suit.

The judgment she sought to have rescinded was in the following terms:-

"It is ordered that:-

- (a) the affidavit dated 12 August, 2009 filed by the first respondent with the 2nd respondent be and is hereby declared to be invalid and of no force and effect;
- (b) the Last Will and Testament of the late Dickson Filson Goni dated 14 June, 2004, be and is hereby declared to be valid.
- (c) 1st respondent and all those who claim occupation through her be and are hereby ordered to vacate house number 3179 Magwegwe North, Bulawayo within 7 days of service of this order;

- (d) should 1st respondent and all those who claim occupation through her fail to comply with paragraph (c) above, the Deputy Sheriff, Bulawayo or his lawful deputy be and is hereby authorized to evict them;
- (e) 1st respondent pays costs of suit.”

Zanele Sibanda was the executrix of the estate of the late Dickson Filson Goni. She instituted proceedings to evict the present applicant from house number 3179 Magwegwe North, Bulawayo. The application was served on the applicant personally on 26 October 2009. The Deputy Sheriff explained to her that if she intended to oppose the application she would have to file her opposing papers within 10 days as failure to do so would result in the application being set down for hearing without further notice to her and the matter would be dealt with as an unopposed application.

She failed to do so within the 10 days until the application was set down on the unopposed roll. She failed to do so with the full knowledge of the consequences for such failure. Her explanation for the failure was that she had been looking for a legal practitioner to represent her. The explanation is unacceptable in the light of what she had said in an affidavit she had filed two months before she was served with the application. She stated in an affidavit filed on 12 August 2009 that she had been seeking for the services of a legal practitioner at that stage. It therefore cannot be true to suggest that she started looking for a lawyer after she had been served with the court application. She was clearly in willful default since she deliberately failed to file her opposing papers and only did so when her eviction was imminent. Her suggestion that she was not aware of the time limit is untenable because the Deputy Sheriff advised her of the same.

Having found that she was in willful default the next issue I have to consider is whether or not she had a defence to the executrix's claim to evict her from the property. She stated that the deceased was her maternal uncle and she used to live with him at the said house and was claiming a usufruct to the house.

However, papers filed of record reveal that she never lived at the house during the deceased's life time. She only went to stay at the house after he had passed on. This she did by arranging with Kessie Sibanda who at that stage was in charge of the property. Kessie Sibanda was about to put some tenants into the house when applicant pleaded with her to allow her to occupy the house.

Further, the applicant attended an edict meeting at the Master's Office. She never raised the question of her right to a usufruct of the house.

Applicant alleged that before his death, the deceased held a meeting with her, and Kessie Sibanda and four other people whereat he declared that she would remain in the house and raise her children therein and did not want her children to suffer. She said she did not remember the date of the alleged meeting.

Kessie Sibanda on the other hand denied that any such meeting ever took place. She emphasized that applicant never lived at the house during the deceased's life time. Deceased used to stay with his tenants. He never gave a usufruct to the applicant.

In light of the foregoing I find that applicant does have a defence to the executrix's claim.

In the result her application must fail and is accordingly dismissed with costs.

Messrs Moyo & Nyoni, applicant's legal practitioners
Sansole & Senda, respondent's legal practitioners