

LOMATHERMBA MAGADLELA SONGO N.O.

And

LOMATHERMBA SONGO

Versus

SILINDA SONGO

And

HLANGOTHI MSIMANGA

And

MANDLENKOSI SONGO

And

CITY OF BULAWAYO

And

REGISTRAR OF DEEDS

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 20 AND 27 OCTOBER 2011

E. Mangezi for applicants

S S Mazibisa for respondents

Opposed Court Application

KAMOCHA J: Lomathemba Magadlela Songo is the widow of the late Sindiso Songo and was appointed executrix of her late husband's estate. The first respondent Silinda Songo is the father of the deceased while the second and third respondents are his brothers.

On 31 January 2005 the 1st, 2nd and 3rd respondents, hereinafter referred to as “respondents” wrote a letter to the Master of this court and copied it to the applicant as executrix, lodging a claim against the estate of the late Sindiso Songo “the estate”. The claim was for ownership of the immovable property stand number 988 Mahatshula Township, Bulawayo “the property”. The respondents contended that the house was a family asset in respect of which the deceased did not have exclusive ownership but was just a joint owner with the respondents.

Before their claim in the estate was finalized they learnt that the Assistant Master had given authority to the applicant to transfer ownership of the property into her name. That prompted them to seek and were granted a provisional order under case number HC 933/05 on 27 May, 2005 against the applicant interdicting her from disposing of or alienating the property pending proper winding up of the estate.

The respondents failed to prosecute their urgent chamber application resulting in the applicant seeking and obtaining an order dismissing the application for want of prosecution under case number HC 1884/05.

That dismissal of case number HC 933/05 led to the respondents launching an application under case number HC 156/06 for its reinstatement. The application was successfully opposed by the applicant and was consequently dismissed. The judgment of the court had been reserved.

In the meantime the Assistant Master and the applicant would not accept the respondents’ claim in the estate. The respondents then issued summons under case number HC 1519/07 claiming transfer of the property to their names subject to payment of 10% value of the house to the applicant as the late Sindiso Songo’s share in the property.

Summons was served at the applicant’s address for service on 18 July 2007. Appearance to defend was duly entered on behalf of the applicant by Messrs Advocate SKM Sibanda and Partners but no plea was filed timeously. Upon being pressed to file it the legal practitioners filed a request for further particulars which were supplied by the respondents’ legal practitioners in September 2007. When pressed again to file the applicant’s plea her legal practitioners renounced agency in November 2007.

The respondents’ legal practitioners subsequently served a notice of intention to bar on applicant at the address stated by the legal practitioners in the notice of renunciation of agency. The applicant was subsequently barred after failing to respond to the notice to bar. Respondent subsequently obtained judgment in their favour against applicant under case number HC 1519/07 on 17 July 2008.

Some two years later on 14 September 2010 applicant launched this application for rescission in terms of rule 449(1)(a) of the rules of court on the basis that the judgment was erroneously granted in her absence. In that when it was granted case number HC 153/06 for reinstatement of HC 933/07 was still pending as judgment had been reserved.

I observe that case number HC 153/07 for the reinstatement of case number HC 933/07 was dismissed with costs.

The rule that the applicant sought to rely on recites as follows:-

“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 effected thereby: or
 - (b) ...
 - (c) ...”

At the hearing the allegation that the judgment was granted in the absence of the applicant was not persisted with. It was conceded on the applicant's behalf that through her legal practitioners she was very much aware of the matter as she entered appearance to defend it. She requested for further particulars which were supplied. In fact two law firms representing her were fully conscious of the dispute. The applicant was aware of the litigation at all material times. The concession by her legal representative was, therefore properly made.

However, applicant persisted with the allegation that the judgment was granted in error in that it at the time it was granted judgment, in the matter wherein it was sought to reinstate the case interdicting applicant from disposing or alienating the property, had been reserved.

The respondents have contended on the other had that the subject matter is different in that the matter that applicant wants rescinded relates to the ownership of the property. The respondents are claiming ownership in the property. This cannot be said to be *lis pendens*. There is merit in the respondents' submission. The respondents had the right to issue summons in the matter in order to assert their rights. The judgment was not granted in error.

In the result, I would dismiss the application with costs.

Judgment No. HB 158/11
Case No. HC 1818/10
X REF HC 1519/07; DRB 977/04

Messrs Maronedze, Mukuku, Ndove & Partners, applicants' legal practitioners
Cheda & Partners, 1st, 2nd and 3rd respondents' legal practitioners