

TREZIAH NDLOVU

Versus

SARAH MLANGENI

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 21 AND 24 OCTOBER 2010 AND 19 JANUARY 2012

S Nkiwane for applicant
T. Moyo-Masiye for respondent

Opposed Court Application for Condonation and Application for Rescission

KAMOCHA J: On 14 May 2008 Sarah Mlangeni applied for and was granted an order in the following terms:

“It is ordered that:-

1. The defendant’s plea be and is hereby struck off.
2. Plaintiff be and is hereby granted leave to set this matter down on the unopposed roll.
3. Defendant be and is hereby ordered to pay today’s costs.”

The order was granted after Treziah Ndlovu the applicant in this case who was the defendant in the main case and her legal practitioners had failed to attend a pre-trial conference after proper service of the notice to attend the pre-trial conference was effected on them.

Following the above order Sarah Mlangeni herein referred to as “Sarah” on 26 June 2008 sought and was granted a default judgment in these terms:

“It is ordered that:-

Judgment be and is hereby entered in favour of the plaintiff in the following terms;

1. Defendant be and is hereby ordered to deliver to applicant 27 heads (sic) of cattle together with their progeny failing which the Deputy Sheriff, Bulawayo be and is hereby authorized and directed to seize same and deliver to plaintiff.
2. Defendant to pay the costs.

Alternatively

3. Judgment be and is hereby granted to plaintiff against defendant in the sum of \$54 trillion together with costs and interest thereon from the date of judgment.”

The genesis of this matter is briefly the following. On 2 August 2006 Sarah issued summons out of this court claiming delivery of 27 heads of cattle together with its progeny which defendant Treziah Ndlovu – “Treziah” had allegedly registered in her name fraudulently and still had them in her possession.

Alternatively she claimed payment of the sum of \$1 620 000 000 Zimbabwe dollars being the value of the plaintiff’s cattle unlawfully appropriated by defendant plus interest thereon from January 1999 at the prescribed rate.

Defendant had to meet the costs of suit.

In her declaration plaintiff alleged that sometime in the 1940s she had inherited a number of cattle from her grandmother Hubayi Gumbo. She, at some stage, entered into an agreement of loan with Juqu Ndlovu of the said cattle under the customs and usages of the Ndebele people known in Sindebele as “amasiso”. She and the late Juqu Ndlovu enjoyed a cordial relationship and she would from time to time receive proceeds of sale of cattle from Juqu after instructions to sell by her. Juqu Ndlovu was the husband of the defendant. She averred that she kept on visiting Jugu Ndlovu’s homestead in order to see him and her cattle and sold some of them from time to time and gave him some money thanking him for keeping the cattle for her. The defendant had always known about the arrangement.

Trouble started after the death of Juqu Ndlovu in 1987. Plaintiff made several visits to defendant’s homestead with a view to make new arrangements about the “*amasiso*” cattle but got no joy.

In the 1990s she went to the defendant’s homestead to claim the “*amasiso*” cattle without success. Initially the defendant told her that her children were not available, she therefore, could not release the cattle in their absence. She would give the plaintiff a new date on which to return but each time she returned defendant would have one excuse after the other for not releasing the cattle.

While that was happening the defendant registered the cattle into her own name in the year 1996. The plaintiff claimed that her cattle were 27 in number when she instituted proceedings in the customary law court in 1999. The matter has been in the courts ever since and has ended up in this court.

In her plea the defendant had this to say. She denied that plaintiff inherited any cattle from Hubayi Gumbo in the 1940s. She went on to deny that her late husband had entered into the “*amasiso*” agreement with plaintiff. She further denied that the plaintiff used to go to sell some cattle from time to time and thanking her husband by giving him money as a sign of gratitude for keeping the cattle. She in fact denied being aware of such an arrangement and averred that the arrangement never existed at any stage.

She flatly denied ever fraudulently registering plaintiff’s cattle into her name and averred that the cattle transferred from her husband’s stock card into her name were hers. She accordingly denied ever possessing plaintiff’s cattle.

It was her story that if the cattle were brought to her late husband in the 1940s that was long before she got married to him in 1959. She was not yet a daughter-in-law of the Juqu Ndlovu family. She therefore could not be called to account for the cattle which she never had possession of.

In her plea she merely claimed ownership of cattle that were transferred from her late husband’s stock card into her name without stating how she had acquired them. It was only in her summary of evidence that she mentioned that the cattle she currently had were acquired through the sale of grain. This was a material point in her case as the plaintiff was alleging that those were “*amasiso*” cattle. The defendant should have raised that point in her plea. Mentioning that material point belatedly seems to suggest that it was an after-thought.

In her synopsis of evidence she averred that she would call three witnesses to support her story namely Jibidi Nobert Tshuma a nephew of her late husband who inter alia would state that all the cattle in the late Juqu Ndlovu’s homestead belonged to that family and not to plaintiff. He even had sold one beast to his uncle in 1981. It was in exchange of 6 bags of *Nyawuthi*.

Another witness would be Michael Mpande a close cousin of the late Juqu Ndlovu. The third witness would be the son of the late Juqu Ndlovu one Petros Ndlovu who would inter alia testify that there was bad blood between the defendant and plaintiff and her witnesses.

The plaintiff on the other hand stated in her summary of evidence that she would lead evidence from two witnesses to the effect that the cattle were hers and that Juqu Ndlovu never had cattle of his own. The witnesses would confirm that the cattle were “*amasiso*” cattle and that some of the cattle were sold and proceeds thereof were given to the plaintiff. The first witness would be the brother of the late Juqu Ndlovu one Wilson Ndlovu who is now in her seventies and one Joe Ndlovu their nephew.

Judgment No. HB 4/12
Case No. HC 2070/08
X REF HC 2071/08; 1555/08;
1798/06; 1719/06; 120/09

At the hearing I granted the application for condonation as I held the view that the legal practitioners of defendant had handled the matter in a very perfunctory fashion.

A look at the merits suggests to me that an injustice would result if the parties are not allowed to have their day in court. The default judgment was granted due to the fault of the legal representatives of defendant.

Execution has been effected and the defendant has been incarcerated for contempt of court but she still feels that she has a story to tell the court about the cattle. Twenty-seven (27) animals have been taken away from her without her side of the story being heard due to the incompetence of her legal representatives. It seems to me that this is a proper case where rescission of judgment should be granted.

In the result I would issue the following order.

It is ordered that:-

1. The default judgment granted to respondent by this court against the applicant on 26 June 2008 be and is hereby rescinded; and
2. Respondent shall pay the costs of this application.

Khumalo & Company Attorneys, applicant's legal practitioners
Hwalima, Moyo & Associates, respondent's legal practitioners