ESTHER ISAKA

And

DEVIANT JEMWA

And

JOSEPH SIFARA

And

TINASHE TOMUNYOKO

And

THE MINISTER OF LANDS, AGRICULTURE, WATER, FISHERIES AND RURAL DEVELOPMENT N.O

HIGH COURT OF ZIMBABWE
BACHI MZAWAZI J
CHINHOYI, 19 June 2023 – 27 July 2023

H. Chitima, for the Applicant
K. Siyaba, for the 1st & 3rd Respondents
Joseph Sifara, In Person as the 2nd Respondent
No appearance, for the 4th Respondent

BACHI MZAWAZI J: This is an application for the rescission of a default judgment of this court under case HC69/22 of the 16th of June 2022. It has been brought in terms of rule 29 of the 2021 High Court Rules. The averments are that the default judgment was granted in the absence of and without the citation and incorporation of applicant who is an interested party. Applicant alleges that the action summons in case HC69/22 where only served on the 3rd respondent who in turn did not oppose, hence the default order.

It is the applicant’s case that she has always been resident at subdivision 32 Aryshire Farm, Zvimba District, Mashonaland West by virtue of her customary law marriage to the 2nd respondent. The2nd respondent at one time had an offer letter issued by the 4th respondent on the 14th of March 2002. The property in question is a vast piece of property which saw the issuance of several offer letters to different individuals over the course of several years during the land reform program. In 2006 it was issued to one E. Matibiri but the applicant and several others challenged the allocation through the courts.

It is on record, that due to the multiplicity of offer letters issued to different individuals emanating from the 4th respondent's offices and queries thereto, the 4th respondent wrote a letter dated the 13th of September 2022 directed to the then applicant and 2nd respondent's legal practitioners.

This letter reads:

Our Ref: N/N/09
Your Ref: HIC/kpm

13 September 2022

Mutandiro, Chitsanga and Chitima Attorneys
3 St Quintin Ave, Eastlea
Harare

''**RE: CONFIRMATION OF AUTHENTICITY OF SEEMINGLY COMPETING OFFER LETTERS-SUBDIVISION 32, ARYSHIRE FARM**

We refer to your letter dated 13 September 2022; the contents which have been noted.

According to our records, Subdivision 32 was allocated to Joseph Sifara on 14 March 2002. As you may be aware, all beneficiaries at Aryshire Farm were withdrawn in 2005 when the land was allocated to Chiwewe and later Matibiri. Matibiri's offer letter was withdrawn in 2021 to pave way for reinstatement of the former beneficiaries who were withdrawn in 2004. These former farmers have remained on the farm. The Ministry is in the process of reinstating the offer letters for these former beneficiaries.

We could not ascertain the authenticity of D. Jemwa's offer letter as it is not appearing in our data base. *Prima facie*, the offer letter appears fake as it incorrectly captures the Ministry's name at the material time the offer was purportedly issued. The correct name of the Ministry at that time was Ministry of Lands, Land Reform and Resettlement. The Ministry will further investigate D. Jemwa's offer letter.

In any event, no former beneficiary at Aryshire Farm has *locus standi* to evict anyone until the offer letter have been reinstated.

Be guided accordingly."

Clearly, from the import of the above letter which is evidence of the official position on the property in contention until rebutted or proved otherwise, the 1st respondent's offer letter's authenticity is in issue. Further, no beneficiary at Aryshire Farm has *locus standi* to evict anyone until the reinstatement beneficiaries selected by the 4th respondent.

It is against this background that the 1st respondent approached this court in case HC69/22 under the pretext that he was a holder of a valid offer letter. Apparently, this was a misrepresentation and material non-disclosure. He did not disclose to the court the interests of other beneficiaries to the farm whom he did not cite. He failed to draw the court's attention to

the contentious nature of the property in question yet he was aware of the existence of other people other than the 3rd respondent. Had the court known that he had no right to prosecute the application, it would not have granted the order sought.

This turn of events necessitated this application by the applicants. Although emphasis has been placed on the rule 29 (1) (a) which addresses the non-citing or calling of an interested party to a law suit. It is clear that the founding affidavit speaks also to the other two instances where an order of this court can be rescinded in terms of the same rule.

In response, the 1st and 3rd respondents raised three preliminary objections. They firstly attacked the applicant's *locus standi* on the basis that she is only a customary law wife and she has no legal right to sue or bring an action. Therefore, that right only lies with the 2nd respondent who had an offer letter which was acknowledged by the 4th respondent in its letter copied above. Further, they argue that the applicant's legal practitioners are conflicted, in that they are purporting to sue the 2nd respondent, who should have been joined as an applicant, yet they represented his interests in other matters including in their letter to the 4th respondent.

Lastly, they advance that the relief sought is incompetent, therefore *brutum fulmen*. it is their submission that the essence of the order sought is that of a joinder yet no application for a joinder has been made. In addition, they argue that the order will result in reopening case HC69/22 but will not reverse the effects of order already granted by the court as the applicant stands evicted from the said property. On the merits, they encompassed their submissions in limine.

From the above facts and submissions, the main issue is whether or not the order of the court in case HC69/22 was granted or sought erroneously? The sub-issues are whether or not the applicant has *locus standi* to prosecute this application? And or whether there has been a conflict of interest? Lastly whether the order sought is *brutum fulmen*. Starting with the issue on *locus standi* which has a bearing on the progression of this matter, I agree with the applicant's submissions. It has not been challenged that applicant is a customary law wife of the person who was a holder of rights in the property in question. Secondly, she has been resident at the farm. The determination ordering the ejectment on the farm without notification, yet her existence was known affected her rights. She had a right to an audience which is a natural law right that is to be respected, audi alteram partem rule see, *Cook-v-Abrahams and 5 Ors HH26-21 and Chiangwa and 7 Ors-v-AFM in Zimbabwe and 7 Ors SC67/21*.

In that regard, the first point in limine has no merit and is dismissed. The applicant is no stranger to the dispute as pointed out above. She had a legal interest based on her husband's offer letter and stay or occupation of the farm alongside other beneficiaries. See *Madzwa and Ors SC71-14, Chombo-v-Chombo SC326/2014*.

The other two points in limine have no merit. There is no conflict of interest. The 2nd respondent was only included as a party. He is not affected by the order currently sought. He did not oppose the application. He actually admits that he is customarily married to the applicant and that he is the holder of an offer letter which has been withdrawn pending reinstatement as per the letter from the 4th respondents referred to herein.

Logically, as pointed out by the respondents, the 2nd respondent should have been one of the applicants. However, there is no prejudice on any of the parties.

This court finds nothing amiss or incompetent in the order sought. The draft order is simply asking the court to set aside or rescind the default order if satisfied to do so. There is no *brutum fulmen* to talk about. This point in limine fails.

Progressing to the merits, on examination of rule 29 of the 2021 High Court Rules is necessary. This rule reads:

> "1. The court or a Judge may, in addition to any other powers it or he or she may have, on its own initiative or upon the application of any affected party, correct, rescind or vary-
>
> a. an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; or
> b. an order or judgment which there is ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
> c. an order or judgment granted as a result of a mistake common to the parties.
>
> 2. Any party desiring any relief under this rule may make a court application on notice to all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order or judgment.
> 3. The court or Judge shall not make any order correcting, rescinding or varying an order of judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

The test to be applied for one to rely on this rule is three faceted. The applicant has to establish one or more of the following grounds:

a. That the impugned judgment was erroneously sought or,
b. It was erroneously granted or,
c. It was granted in the absence of an interested party.

See *Sachiti & Anor-v-Mukavanda HMT38/21, Munyimi-v-Tauro SC41/13.*

Rule 29 enjoins the court to correct, rescind or vary on its own volition or at the instance of the parties, any judgment or order so erroneously granted once the court finds so.

See *Banda-v-Pitluk 1993 (2) ZLR 60 (H).*

On evaluation of the law, facts and submissions, it is not contested that indeed a default judgment was granted. It was granted in the absence of applicant who resided on the farm and was affected by the outcome of the default judgment.

So, on the first ground the applicant succeeds.

If we are to proceed, it is clear that the legal status to evict anyone from the farm in dispute lay only with the 4th respondent. It is apparent that all the offer letters had been withdrawn pending their reviewal as connoted by the letter above. Therefore, had the court sitting under case HC69/22 been informed of the truth on the ground it would not have granted the default order. As such, the order was erroneously sought and erroneously granted.

See *Museredza and Ors-v-Minister of Agriculture, Lands, Water and Rural Resettlement and Ors CCZ (1) of 2022.*

Accordingly, the application succeeds.

It is hereby ordered that:

1. Application be and is hereby granted.
2. Default judgment entered against the 3rd respondent and all those who occupied through him property known as subdivision 32 Aryshire Farm, Zvimba District, Mashonaland West in case HC69/22 is hereby rescinded.
3. Each party to pay its own costs.

Mutandiro, Chitsanga and Chitima Attorneys, the applicant’s legal practitioners
Bherebhende Law Chambers, the 1st respondent’s legal practitioners
Joseph Sifara, *in Person*