LEONARD GABRIEL PAZVAKAVAMBWA
and
JUDITH PAZVAKAVAMBWA
versus
PETER CHIPIRA
and
TSITSI CHIPIRA
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 18 October 2006 and 25 April 2007

UNOPPOSED MOTION.

Mr *Gijima,* for the applicants
Respondents in default

MAKARAU JP: On 30 August 2005, the plaintiff issued summons against the defendants, praying for an order declaring them to be the lawful owners of certain immovable property in Glen Norah, Harare. The plaintiffs also sought an order declaring the cancellation by the third respondent of the cession of rights to them in the property by the estate of the late Jusa Chipira null and void. The summons was duly served on the defendants, neither of whom entered an appearance to defend the action. In due course, the requisite *dies induciae* having expired, the plaintiff filed an application for default judgment in terms of Rule 58 of the High Court Rules 1971.

In the affidavit filed by the applicants in support of the application, the following scanty facts emerge. In April 1986, the third defendant sold certain rights, title and interest in the property in dispute to the Late Jusa Chipira. The late Jusa Chipira passed on at Harare on 3 November 2000 and the first defendant was appointed as executor to the estate. The first defendant was duly issued with Letters of Administration by the Master of this court for the sole purpose of facilitating the transfer of the

property from the third defendant into his name. On 12 July 2003, the first defendant ceded rights in the property in favour of the applicants. The cause for the cession is not given in the papers.

It would appear that the plaintiffs then took occupation of the property, following cession of rights in their favour.

On 30 September, 2004, the third respondent wrote to the plaintiffs, informing them of the cancellation of the cession in their favour. The letter addressed to first defendant and copied to the plaintiffs, reads as follows:

> "I refer to the above matter concerning the cession which was carried out on the 12th July 2003.
>
> Tsitsi Chipira came to this office enquiring about the above cession and after thorough investigations, I discovered that you misrepresented facts at the High Court and at this office as well. You are therefore advised that the cession from you to the Pazvakavambwas is declared null and void and the house reverts back to Tsitsi Chipira." (The underlying is mine).

Aggrieved by the cancellation of the cession in their favour, the plaintiffs brought the above suit as detailed above.

I have described the facts that emerge from the plaintiffs' affidavit in support of their application for default judgment as scant because it is just that. The affidavit does not disclose the relationship between the plaintiffs and the second defendant, Tsitsi Chipira. The affidavit does not disclose the second defendant's relationship to the first defendant if any and the nature of the rights that she holds in the property in dispute. While the plaintiffs attached the letter canceling the cession in their favour, no explanation was tendered as to why title in the property in dispute would revert to the second and not to the first respondent. These averments were in my view necessary to enable me to reach a decision in the matter.

At the hearing of the application for default judgment, I brought these issues to the attention of the plaintiff's legal practitioners. These were the nature of the plaintiff's cause of action against the 2nd

defendant and whether in the above suit, the plaintiffs were not seeking a review of an administrative decision and action by the third respondent. The plaintiff's legal practitioners undertook to file heads of argument in respect of the two issues. Heads were only filed on 27 March 2007, hence the delay in the handing down of the judgment.

In y view, it is important that plaintiffs in applications for default judgment under Rule 58 file comprehensive affidavits if their applications are to succeed. The contents of the affidavits to be filed under the rule must be similar in all respects to the evidence that the plaintiff would have led at the trial of the matter to avoid absolution from the instance at the close of the plaintiff's case. The evidence so led must therefore establish a prima facie case against all the defendants.

Reading through the affidavit of the plaintiffs in this mattr, I was not satisfied that it established a prima facie case as it did not make what I deemed to be essential averments and did not establish a cause of action against the second defendant whose rights in the property was not adequately explained.

On the basis of the foregoing, I would have declined the application for default judgment.

Assuming that I have erred in holding as I do above that the averments in the plaintiffs' affidavits are inadequate to sustain an application for judgment under rule 58, I still would have declined the application on another basis.

It is trite that this court will not interfere with an administrative decision by a competent authority unless that decision is tainted by an illegality, irrationality and /or irregularity in its making. (See *Tsvangirayi and Another v Registrar General and Others* 2000 (1) ZLR 251). It is a settled position at law that this court will not substitute its own decision for that of an administrative authority in the absence of certain specific and proven grounds of review. Cognizant of this limitation on the power

of the court, it is apparent that the applicant has sought to allege and correctly so in my view, that the third defendant proceeded irregularly by canceling the cession in favour of the applicant without first affording them an audience as non- observance of the rules of natural justice is a recognized ground of review.

The plaintiffs are clearly seeking a review of the decision of the third respondent in canceling the cession in their favour. This is not in dispute.

However, the suit before me is improperly brought at it does not comply with the rules of this court regarding the manner in which review proceedings are to be instituted.

Firstly, review proceedings are to be brought by way of court application and not by way of summons, unless otherwise provided for in any other law.

Rule 256 of the High Court Rules provides:

> "Save where any law otherwise provides, any proceedings to bring under review the decision of any inferior court or any tribunal, board or officer performing judicial, quasi judicial or administrative functions, **shall** be by way of court application……". (The emphasis is mine).

While the distinction in procedure between applications and suits commenced by summons are getting blurred more and more, in my view, the wording of Rule 256 is imperative. It lays down in clear language that the decisions of inferior courts and administrative tribunals shall be impugned by way of a court application unless some other law provides to the contrary. No law has been cited by the plaintiffs as authorizing them to issue summons in this matter.

Secondly, the rules require that an application for review be brought within 8 weeks of the decision being brought under review. The law is even handed. I cannot conceive of a situation where after proving for the manner in which review proceedings are to be brought and the time period within such review proceedings are to be brought, it would

allow all these set procedures to be by-passed by the issuance of ordinary summons.

In *casu*, the third defendant cancelled the cession in favour of the applicants on 30 September 2004. On 30 august 2005, some eleven months later, seeking to have set aside the decision of the third defendant were issued out of this court. The summons was issued outside the 8 week period provided for under the rules for the bringing of a review application. One cannot avoid the conclusion that the summons was issued to avoid the time limited in the rules for the bringing of a review application as provided for in the rules.

On the basis of the foregoing, it is my view that the decision of the third respondent can only be set aside in review proceedings instituted in terms of Order 33 of the High Court Rules 1971. The decision cannot be set aside by way of a default judgment application after the issuance of ordinary summons as the plaintiffs in *casu* did.

In the result the application for default judgment is dismissed.

C Mpame & Associates, applicant's legal practitioners.