

URMILLA USHA GIGA
versus
ALBION PROPERTIES
and
MESSENGER OF COURT HARARE
and
APPLISET INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 28 November, 1 and 2 December 2011

Urgent Application

E Hamunakwadi, for the applicant
P Nhokwara, for first respondent
C Takaendesa, for third respondent.

UCHENA J: The applicant was the first respondent's tenant at number 5 Albion House, 74 Harare. She was evicted from the premises without being given 48 hours notice as provided by r 4A (1) of Order 26 of the Magistrate's Court (Rules 1980). She seeks an order of this court reinstating her into the premises pending the hearing of her application for the condonation of her late noting of an appeal against the decision of the magistrate on the strength of which the first respondent evicted her from the property.

The first respondent was the applicant's landlord for 11 years. It sought and obtained an eviction order against the appellant. The order was enforced in the manner already explained above.

The second respondent is the Messenger of Court Harare. He is an officer of the Magistrate's Court entrusted with the responsibility of enforcing that court's orders.

The third respondent is the first respondent's new tenant with whom it entered into a lease agreement after this application had been issued and served on the first respondent. It has not yet taken occupation of the property in dispute.

The applicant was aware of the court's order for her eviction. She was then being represented by her erstwhile legal practitioners whom she instructed to appeal against the

magistrate's decision. She in her founding affidavit said she was surprised when the messenger of court gave her notice and forthwith evicted her. She on inquiring with her erstwhile legal practitioners was advised that they had not filed the appeal as instructed as she had not paid them. She has since retrieved her file from them and instructed her current legal practitioners to note the appeal and file an application for condonation of the late noting of the appeal concurrently with this application.

The applicant's property was removed from the premises and is now stored outside her residential property and is exposed to the elements. She therefore filed this urgent application in which she seeks reinstatement mainly on the ground that her ejection did not comply with r 4A (1) of Order 26 of the Magistrate's Court Rules.

Mr *Nhokwara* for the first respondent submitted that this application is not urgent because the applicant did not immediately act after her ejection. Mr *Hamunakwadi* submitted that she acted as soon as she could in the circumstances of this case. She was surprised by the ejection as she believed her erstwhile legal practitioners had attended to her appeal against the magistrate's decision, though she erroneously believed that the appeal would suspend the magistrate's decision. She was ejected without the requisite 48 hours notice. She had to retrieve her file from her erstwhile legal practitioners, and instruct her current legal practitioners. She had to do this in the circumstances she had been plunged into by the unprocedural eviction. I am satisfied that the delay between 16 November 2011, when she was ejected and her filing this urgent application on 21 November 2011 has been adequately explained. I am also satisfied her erstwhile legal practitioners failure to note the appeal and the sudden unprocedural ejection justifies the hearing of the applicant's application on an urgent basis.

Her application is strengthened by her having been evicted without being given 48 hours notice. Rule 4A (1) of Order 26 of the Magistrate's Court (1980) Rules, which provides for the notice provides as follows;

“(1) Upon receiving—

- (a) a warrant of execution against property; or
- (b) a warrant of ejection and execution against property; or
- (c) a warrant of delivery and execution against property;

the messenger shall, within twenty-four hours or as soon as circumstances permit, go to the house or place of business of the execution debtor and deliver to the debtor or leave at the house or place of business a notice warning the debtor of the date of the proposed execution of the warrant, which date shall not be sooner than forty-eight hours after the notice was so delivered or left:

Provided that the messenger need not deliver or leave such a notice in any case in which he has reasonable grounds for believing that immediate execution of the warrant is necessary in order to prevent the execution debtor from concealing or disposing of any property in order to avoid its attachment.”

The second respondent did not oppose this application, nor did he file any papers explaining why he executed without giving the requisite 48 hours notice. Mr *Nhokwara* for the first respondent submitted that the messenger of court’s inadvertent failure to deliver or leave notice to the judgment debtor in terms of subrule (1) shall not invalidate the ejection. Mr *Hamunakwadi* for the applicant submitted that the issue in this case is not on failure to deliver or leave the notice but giving inadequate notice contrary to subrule (1). Subrule (2) which the respondent’s counsel relied on provides as follows:

“(2) An inadvertent failure by the messenger to deliver or leave a notice in terms of subrule (1) shall not invalidate any attachment, sale in execution or ejection effected in accordance with a warrant.”

The first respondent’s submission can not be accepted in view of the fact that there is no evidence that there was an inadvertent failure to deliver or leave the notice at the applicant’s premises. The applicant’s case is in fact that she was given notice, but was evicted without being given 48 hours, after that notice which would have given her time to take legal action against that notice. Her claim is that the second respondent acted unlawfully by not giving her 48 hours, during which he should not have ejected her, after the delivery of the notice. That argument is supported by r 4A (1) of Order 26 which is couched in peremptory terms, and provides exceptions which would justify, failure to give 48 hours notice. The rule requires the messenger of court to deliver notice, “of the date of ejection which date shall not be sooner than forty-eight hours after the notice was so delivered or left”.

The exceptions are provided in the proviso to subrule 4A (1) which deals with circumstances when a messenger can justifiably not deliver or leave notice of ejection

or attachment. The first respondent's opposing papers do not allege the existence of such circumstances. The second respondent who the proviso authorities to make such a decision did not file any papers to oppose this application nor did he file any papers supporting the first respondent's opposition of this application. There is therefore no explanation before this court justifying the immediate ejection of the applicant. In the absence of such an explanation I hold that the applicant was unlawfully ejected from the premises.

Mr *Nhokwara* for the first respondent argued that as the horse has already bolted from the stable, the application should be dismissed, as the premises have already been occupied by a new tenant. Mr *Hamunakwadi* then applied for the joinder of the third respondent who was alleged to be the new tenant who had taken occupation of the premises. The application for joinder and postponement was not opposed. The third respondent and his legal practitioner appeared before the court and confirmed that it had entered into a lease agreement with the first respondent for the premises in dispute. It however told the court that it had not yet taken occupation of the premises, contrary to what the first respondent had told the court. The lease agreement was entered into after the first respondent had been served with notice of this application.

The illegality of the applicant's ejection and the fact that the third respondent and the first applicant entered into the new lease agreement when these proceedings were pending and that the third respondent has not yet taken occupation justifies an order for the reinstatement of the applicant into the premises in terms of the draft provisional order.

The provisional order is therefore granted in terms of the draft order.

Hamunakwadi Nyandoro & Nyambuya, applicant's legal practitioners

Mambosasa Legal Practitioners, first respondent's legal practitioners

Hangaha & Charamba Legal Practitioners, third respondent's legal practitioners