

BASIMON TAPFUMANEYI  
versus  
NOAH MUSARURO (in his capacity as Executor of the  
Estate Late Vasco Musaruro)  
and  
GARIKAI MUCHINERIPI MUDZUDZU  
and  
JANE CHINYERERE MATIYENGA  
and  
TSAURAYI MUSARURO  
and  
DIRECTOR OF HOUSING AND COMMUNITY SERVICE  
and  
MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 7 February 2012 & 1 March 2012

### **Family Law Court**

### **Opposed Application**

*S. Mundungumana*, for plaintiff  
*T. Deme*, for 1<sup>st</sup> defendant  
No appearance for 2<sup>nd</sup> defendant  
*B. Diza*, for 3<sup>rd</sup> defendant  
No appearance for 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> defendants

MAWADZE J: This is an opposed application in which the third defendant took out an exception to the plaintiff's claim in terms of Order 21 r 137(1)(b) of the High Court Rules 1971 (hereinafter the rules). The application is opposed by the plaintiff only. Mr *Deme* for the first defendant declined to make submissions in the matter.

I have deliberately cited the parties as they appear in the many action for clarity purposes rather than to cite the third defendant as an applicant in this matter.

It is proper for me to give the full background history of this matter as discerned from the plaintiff's declaration in order to put the third defendant's exception into context.

The plaintiff issued out summons out of the court on 11 May 2011 claiming the following jointly and severally against all the defendants:

- “13.1 The reference case number HC 576/99; HC 18029/99 and HC 1276/04 be and are hereby consolidated.
- 13.2 The reference case numbers HC 576/99; 18029/99 and 1276/04 be and are hereby reconciled as follows:
- (a) That the order granted in HC 18029/99 be and is hereby cancelled since it was granted erroneously in that Noah (Musaruro) first defendant) was given the sole rights of the property when in fact he was only appointed Executor and not heir since he is not direct issue of the late Vasco Musaruro (*sic*).
  - (b) That the order granted in HC 1276/04 be and is hereby cancelled since it was also granted erroneously in that it did not cite all the interested parties he knew since court orders was filed with fifth defendant only (*sic*).
  - (c) That the order granted in HC 576/99 be and is hereby upheld and revived.
- 13.3(a) That the rights, interests and title in stand 7298/95 shall be ceded into the plaintiff’s name Basimon Tapfumaneyi.
- (b) The cession effected in favour of the third defendant by the fifth defendant be cancelled.
- 13.4 Ejectment of the third defendant from stand 7798-95<sup>th</sup> Crescent Glen View 8 Harare and all those claiming occupation through her or through either first and second defendants.
- 13.5 Costs of suit” (*sic*).

I have no doubt in my view that the plaintiff’s prayer is not drafted in a clear and astute manner expected of a legal practitioner. The property in issue is clumsily identified in different manner in the prayer and the parties not precisely cited. The language used is not succinct. It is however clear that the plaintiff is seeking firstly the consolidation of three cases HC 576/99, HC 18029/99 and 1276/04, secondly the reconciliation of the above cited cases by cancellation of the order granted in case number HC 18029/99 and HC 1276/04 which the plaintiff contends were issued in error, thirdly that the order granted in plaintiff’s favour in case No. HC 576/99 be upheld as the valid order and be effected, and that the rights, interest

and title in stand No. 7298/95 Crescent Glen View 8 be ceded to the plaintiff and the cession of the same rights in favour of the third defendant by fifth defendant be cancelled and lastly that the third defendant be evicted from the said property.

The dispute in this matter is centred on the property, or house in Glen View Harare known as No 7298/95 Crescent Glen View Harare. This property has allegedly been sold to the plaintiff, the second and third defendants respectively by the fourth defendant at various times. The first defendant who has entered a plea in this matter claims to be the executor of the estate of late Vasco Masaruro and legitimate son of late Vasco Masaruro. The fifth and sixth defendants are simply cited in their official capacities.

The facts alleged in the declaration though clumsily drafted give rise to the following scenario:

On 9 September 1998 the plaintiff entered into an agreement of sale with the fourth defendant (Tsauryi Musaruro) in respect of the property No. 7298/95 Crescent Glen View 8 Harare (hereinafter Glen View House) measuring 300m<sup>2</sup>. The agreement of sale is attached as Annexure 'B' to the plaintiff's declaration and was drawn up by RESULT REAL ESTATES (PVT) LTD and can be described as a standard agreement of sale of immovable property. I find no need to deal in any manner with the provisions of the agreement of sale save to state that the agreement of sale is signed by the plaintiff, the fourth defendant, witnesses and a representative of the estate agent mentioned. The purchase price of the Glen View house is given as Zimbabwe \$90 000-00. The plaintiff claims to have paid the purchase price in full. The problem seems to have started when the plaintiff sought to be given vacant possession of the Glen View house by the fourth defendant in terms of the agreement of sale. The plaintiff alleges that the fourth defendant became evasive and therefore could not cede title, rights and interest in this property to the plaintiff. This compelled the plaintiff to institute litigation in this court in case No. HC 5576/99 seeking an order to compel the fourth defendant to abide by the agreement of sale. In that matter the fourth defendant and the fifth defendant are cited as respondents. On 9 June 1999 MUBAKO J who dealt with the matter granted the following order:-

“IT IS ORDERED:-

1. That the first respondent (fourth defendant *in casu*) cede his rights, title and interest in stand no 7298-95<sup>th</sup> Crescent Glen View 8 Harare to the applicant (plaintiff *in casu*) by signing a Deed of cession at the office of the second

respondent (fifth defendant *in casu*) at Remembrance Drive, Mbare Harare within seven (7) days of service of this order upon him failing which the Deputy Sheriff of this Honourable Court be and is hereby empowered to sign such Deed of Cession on behalf of the first respondent.

2. That the second respondent be and is hereby ordered to consent to cession by the first respondent of his rights, title and interest in stand no. 7298-95<sup>th</sup> Crescent, Glen View 8 Harare to the applicant.
3. That the first respondent pays the costs of suit”.

The relevant order granted by MUBAKO J directing the fourth defendant to cede his rights, title and interest in the Glen View property and for the fifth defendant to facilitate that cession is attached as “Annexure C” to the plaintiff declaration.

The plaintiff as per the order by MUBAKO J said when he approached the fifth defendant to facilitate the cession he was advised to engage the Deputy Sheriff presumably on account of the fourth defendant’s evasiveness. The plaintiff said this took some time as he had to raise enough funds to engage the Deputy Sheriff. Meanwhile other developments were unfolding in the matter.

On 30 September 1999 the first defendant was duly appointed through letters of Administration DR H1060/98 as Executor Dative in the estate of late Vasco Musaruro and the first defendant was further authorised by the Master of the High Court to transfer the Glen View house from the deceased’s name to the heir (who is not named) This is the same property the plaintiff had purportedly bought a year before in 1998.

The drama in this matter continued to unfold. The plaintiff said in 1999 one Brighton Muzanhamo instituted proceedings by way of a court application against the plaintiff claiming that he, Brighton Muzanhamo had bought the same Glen View house from the fourth defendant. The plaintiff however said this court application in HC 9667/99 was withdrawn hence it is not part of the reference cases now cited by the plaintiff. This however did not seem to be the end of the plaintiff’s woes.

On 8 December 1999 the first defendant Noah Musaruro the executor dative (as per Annexure ‘A’ attached to the plaintiff’s declaration) instituted a court application in case No HC 18028/99 in which the plaintiff, the fourth defendant, the fifth defendant, the sixth defendant and one Brighton Muzanhamo were cited as the respondents. The nature of the

order sought in the court application HC 18028/99 is not stated by the plaintiff. All what is attached to the plaintiff's declaration as Annexure 'E' is a notice of withdrawal of the case No. HC 18028/99 in which the applicant therein Noah Musaruro (first defendant) withdrew the court application with the third respondent herein (the plaintiff) paying the costs. This was on 17 January 2007. The reasons for the withdrawal of this court application HC 18028/99 are not clear and it would appear the defendant Noah Musaruro had again instituted another court application in HC 14360/99 in February 2000 against the same respondents as in HC 18028/99 later withdrawn. See Annexure 'D' to the plaintiff's declaration.

It would appear that the appointment of the first defendant Noah Musaruro as the Executor Dative of the Estate of the late Vasco Musaruro nullified the appointment of the fourth defendant in the same capacity or as the heir to the estate.

According to the plaintiff this is the reason why the court application HC 18028/99 was withdrawn. The plaintiff believed the dispute could be resolved by engaging the first defendant who was now the Executor Dative of the Estate.

The plaintiff said when he sought to have the property ceded to him by the fifth defendant the fifth defendant again refused on the basis that the fifth defendant had been served with two court orders from the same court which orders are apparently in conflict. It is not clear which the two orders are but the order filed of record is in case No. HC 5576/99 by MUBAKO J and HC No. 18028/99 was only withdrawn in January 2007. I am not privy as to the order sought in HC No. 14360/99 nor the outcome thereof of that application. Suffice to say that the plaintiff had sought to have the property ceded to him for the second time on 29 September 2000 and the fifth respondent's reply to that request is captured in a letter Annexure 'F' dated 29 September 2000 written to the plaintiff's lawyers which states as follows:-

"RE: STAND 7298-95<sup>TH</sup> CRESECENT GLEN VIEW

I acknowledge receipt of your letter where you represent Mr Basimon Tapfumaneyi.

Please be advised that these offices will not do any cession or transfer until the two court orders are reconciled".

As already stated the two court orders to be reconciled are not cited in

that letter. The bottom line however is that as per Annexure 'F' the fifth defendant declined to cede or transfer the Glen View house to the plaintiff on account of two contradictory court orders in existence in 2000.

The plaintiff was dissatisfied by the response by the fifth defendant as per Annexure 'F' and proceeded to institute a court application in HC 1224/07 to compel the fifth defendant to cede the property to him. It is not clear why this was necessary when in fact a similar order had been granted by MUBAKO J in HC 5576/99. My assumption is that this may have been on account of the involvement of the first defendant in this matter who was no part to the order granted by MUBAKO J. The plaintiff said he did not succeed in HC 1224/07 and was advised to have the two existing court orders reconciled.

It would appear that when all this was happening the fourth defendant was still in the picture. According to the plaintiff the fourth defendant in the midst of this confusion proceeded to sell the same Glen View house to the second defendant Garikayi Muchineripi Mudzudzu. Apparently the second defendant could not take transfer of the property and had to also institute litigation to compel the fourth defendant to transfer the Glen View house into the second defendant's name. The second defendant instituted a court application HC 1276/04 in which only the fourth defendant and the fifth defendants were cited as respondents. On 7 April 2004 HLATSHWAYO J granted the following court order in HC 1276/04:-

"IT IS ORDERED THAT:-

1. The first defendant (fourth defendant *in casu*) is hereby ordered to effect transfer of House No 7298-95<sup>th</sup> Crescent Glen View 8 Harare into the name of the plaintiff (second defendant *in casu*) upon the service of this order.
2. The Deputy Sheriff be and is hereby advised to sign all necessary papers to effect transfer of the property and evict the first defendant (fourth defendant *in casu*) and all enjoying occupation at No. 7298-95<sup>th</sup> Crescent Glen View Harare with immediate effect.
3. The second respondent (fifth defendant *in casu*) is hereby ordered to record this transaction of change of ownership.
4. The first defendant to pay cost of this application".

It would appear that on the basis of the order granted by

HLATSHWAYO J on 7 April 2004 the second defendant managed to enforce that order. The drama in the matter continued to unfold.

The second defendant who now had presumably assumed ownership of the Glen View hence proceeded to sell the same house to the third defendant Jane Chinyerere Matiyenga and cession was effected into her name contrary to the earlier protestations by the fifth defendant in the letter dated 29 April 2000. Currently therefore it is the third defendant who has title, rights and interest in the Glen View house and is actually staying at the house. It is therefore on the basis of this background that the plaintiff issued out summons out of this court and cited all the six defendants herein on 11 May 2011.

It would appear from the record that only the first and the third defendants have entered appearance to defend in terms of the rules and that the first defendant has entered a plea to the claim.

I now turn to the facts giving rise to the exception raised by the third defendant.

The third defendant on 17 May 2011 entered on appearance to defend. On 15 June 2011 the plaintiff filed a notice to plead and intention to bar as the third defendant had not entered a plea. The third defendant proceeded in terms of order 21 r 140 of the Rules by writing a letter to the plaintiff's legal practitioners raising an exception to the effect that the summons served on the third defendant do not disclose the exact grounds upon which the cause of action is based and that the summons falls foul of Order 3 r 11(c) of the Rules which provides that the summons shall contain "a true and concise statements of the nature, extent and grounds of cause of action and the relief or remedies sought in the action". The third defendant asked for this anomaly to be rectified within 24 hours to enable the third defendant to plead failure of which the third defendant would file an exception.

On 23 June 2011 the plaintiff's legal practitioners replied the third defendant and were unimpressed by the concerns raised by the third defendant. The plaintiff in response stated that the claim was clear as it sought consolidation and reconciliation of apparently conflicting orders pertaining to the same property, the Glen View house, which house the third defendant has an interest moreso as the plaintiff seeks to nullify the transfer of the house to the third defendant, and the eviction of the third defendant from that house. This explanation did not find favour with the third defendant and on 27 June 2011 the third

defendant took out an exception in terms of Order 21 r 137(1)(b) of the rules on the following grounds:-

- “1. That the plaintiff’s summons does not describe any averment which is necessary to sustain an action against the third defendant.
2. Whilst the summons is clogged with averments by the plaintiff, none of the said averments are directed to or involve the third defendant.
3. The third defendant on that basis is at pains as to what to she is being required to answer as against the plaintiff’s claim whereof the third defendant pray for the dismissal of the plaintiff’s claim with costs”.

I am not persuaded by the argument raised by the third respondent in filing out the exception in this matter. The third respondent’s contention is that the plaintiff’s summons and declaration fall foul of the Order 3 r 11(c) which provides as follows:-

“Contents of summons

Before issue every summons shall contain –

- (a) .....
- (b) .....
- (c) A true and concise statement of the nature, extent and grounds of the cause of action and the relief or remedies sought in the action.
- (d) .....

My considered view is that facts of this matter as particularised in the declaration can be summarised as follows:-

- (a) That the plaintiff bought the Glen View house from the fourth defendant on the basis of a valid agreement of sale and that this court as per the order granted by MUBAKO J compelled the fourth defendant to cede the title, rights and interest in the property to the plaintiff. This order has not been set aside.
- (b) That the fourth defendant has not acted in good faith as he has sold the same property to the second defendant without complying with the order granted by MUBAKO J and whilst there was further pending litigation in respect of the same property.
- (c) That the second defendant proceeded and obtained another court order from this court in respect of the same property granted by HLATSHWAYO J compelling the fourth defendant to transfer the title, rights and interests in the property to the



second defendant, which *prima facie* contradicts another valid court order by MUBAKO J.

- (d) That the second defendant has now proceeded to sell the same property Glen View House to the third defendant on the basis of this order granted by HLATSWAYO J and that the third defendant now has title, rights and interests in the Glen View house property.

Although the plaintiff's declaration is drafted in a rather long and winding manner ( may be on account of the long and complicated history of the matter) it is a very clear statement which sets out the nature, extent and grounds of the cause of action. The plaintiff seeks the reconciliation of the court orders which are in apparent conflict and a determination of the various parties' (defendants') rights, interests and title in the property in issue. The history of the matter is therefore clear as per the plaintiff's perspective.

It is not correct that the averments made in the declaration are not directed to or involving the third defendant. Paragraph 12 of the plaintiff's declaration is very clear that the property in issue was sold to the third defendant despite the existence of the court order by MUBAKO J and an undertaking to the contrary by the fifth defendant as per Annexure 'F'. This averment links the third defendant to the matter more so as the third defendant is the current registered owner of the property and is staying at the same property. The plaintiff, through the history of the matter explains not only the involvement of the third defendant but the basis of challenging the rights, interests and title in the property which have accrued to the third defendant. It is therefore clear that the averments made by the plaintiff sustain an action against the third defendant.

The remedy sought by the plaintiff is clear as he seeks to vindicate his rights in the property in issue. The plaintiff seeks to reverse the cessation of the property in issue to the third defendant and the eviction of the third defendant from the property. It is therefore puzzling that the third defendant purports not to appreciate the cause of action against the third defendant and the relief sought against the third defendant. The third defendant is therefore properly cited in these pleadings as failure to do so would render the plaintiff's claim meaningless. The third defendant should, and I believe clearly understands what she is

required to answer to. In short the third defendant has to defend her title, rights and interests in the property in her possession.

I am not persuaded by the point taken in argument by Mr *Diza* that the third defendant is prejudiced if she is ordered to plead to the plaintiff's claim in terms of order 18 r 116(1). It is therefore my finding that the cause of action in respect of the third defendant is sufficiently particularised. The link or the involvement of the third defendant is sufficiently clear. The relief sought affects the title, rights and interest of the third defendant in the property in issue. The exception taken out by the third defendant is therefore unfounded and without basis.

In the result, I make the following:-

1. The third defendant's exception is hereby dismissed with costs.
2. The third defendant is ordered to enter her plea in terms of Order 18 r 119 within 10 days upon the service of the order.

*Mushonga & Associates*, plaintiff's legal practitioners  
*Chibune & Associates*, first defendant's legal practitioners  
*Musunga & Associates*, third defendant's legal practitioners