

SAMSON HLANGANAYI MHLANGA
versus
PRISILA MAKUYANA
and
DEPUTY SHERIFF- HARARE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 28 March 2013

MANGOTA J: This matter came before me as an urgent chamber application which the applicant instituted against the first and the second respondents.

The applicant is the former husband of the first respondent. The two were married in terms of Customary Law in 1976 and, in 1983, the parties solemnised their marriage in terms of the Marriage Act, [*Cap 37*] (now 5:11).

They divorced in this court on 17 March, 2011. The court which dealt with the parties' divorce granted them a decree of divorce and ordered that:

- (1) The parties' matrimonial home, number 7 Orchard Lane, Hatfield, Harare be awarded to the parties' children namely Samson Mhlanga and Lesley Mhlanga both of whom were born on 25 April, 1992.
- (2) The plaintiff (first respondent) and the defendant (applicant) shall sign all the necessary documents to enable transfer within 90 days of the date of the order.
- (3) The defendant (applicant) shall vacate the matrimonial home within six (6) months of the date of the order and that, if he failed to do so, the Deputy Sheriff, Harare be, and is hereby, directed to eject him at the instance of the registered new holders of title – and
- (4) the plaintiff (first respondent) and the defendant (applicant) shall pay the costs of transfer in equal proportions.

Neither the applicant nor the first respondent has complied with his, or her, obligations under the order. Those obligations have time lines which the parties should have adhered to in full.

The parties, for instance, have not signed all the necessary documents which would enable transfer of the property from their joint names into the names of their twin-children who are the intended beneficiaries of the matrimonial home. The court which dealt with the parties' divorce and other

ancillary matters gave them 90 days within which they should have signed the documents for the transfer of the property. Two years have lapsed and none of them has done anything which is positive in this regard.

The applicant was given six (6) months within which he should have vacated the matrimonial home. The applicant has remained on the property from the time of the court order, 17 March 2011, to date. His continued presence at the property compelled the first respondent to approach the court and have the applicant evicted from the property. The first respondent enlisted the services of the second respondent in this regard.

The first respondent's move necessitated the present application by the applicant. The court noted that both parties are approaching the courts with dirty hands. None of them has complied with the order of this court for two consecutive years. On a proper interpretation of the law, therefore, none of them should be heard until he, or she, makes a clearly defined effort to comply with the order which the court made on 17 March 2011, in favour of the parties' twin-children.

The fact that the parties to this application were or, are, self actors persuaded me not to adopt a strict approach to the "dirty hands" principle and I, accordingly, proceeded to hear them speak on the issue of eviction. During the hearing, it became apparent to me that:

- Neither the applicant nor the first respondent has *locus standi* to issue court process aimed at evicting the one, or the other, from the parties' former, or current, matrimonial property.
- The beneficiaries who are the parties' twin-children do not have title to the property and they cannot, therefore, evict the applicant from the parties' former, or current, matrimonial home.
- Neither of the parties, the applicant in particular, has the necessary intention to comply with the order which the court made on 17 March, 2011.

The applicant appears to be happy with the statement which the parties created when they failed to comply with the order of the court. He is aware that the first respondent cannot evict him. He is also aware that the twin-children who are the parties' intended beneficiaries cannot evict him from the property when they have not acquired title to the property. He will, accordingly, do all he can in an effort not to have the

property registered in the names of his twin-children. He will, in other words, make every effort not to comply with the order which the court made in favour of the parties' twin-children on 17 March, 2011. He will continue to violate a clearly defined court order and, in the process, secure his continued presence at the property.

This matter should not be allowed to drag on and on *ad infinitum*. It must be resolved in a conclusive manner for the benefit of the applicant himself, his former wife who is the first respondent and the parties' twin-children who are the intended beneficiaries of the property.

At the conclusion of the hearing of this matter, I informed the parties that directions will be made towards a conclusive resolution of the case. It is, accordingly, in line with that undertaking that it is ordered that:

- (i) the applicant and the first respondent do, within thirty days, comply with the order of the court of 17 March, 2011
- (ii) the thirty days start to run from 1-30 April, 2013
- (iii) should the applicant, or the first respondent, or both, fail to comply with the court order of 17 March, 2011 within the 30-day period which has been stipulated herein, the Sheriff of this court is directed to:
 - (a) Transfer the property, No. 7 Orchard Lanes, Hatfield Harare into the names of Samson Mhlanga and Lesley Mhlanga, both born 25 April, 1992 – and
 - (b) Eject from the property the applicant and all persons who claim occupation through him
- (iv) Each party bears his, or her, own costs of suit