TONDERAI KATSA
versus
SAMUEL GOREDEMA
and
THE MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 28 & 30 December 2021

Urgent Chamber Application

D. Mukanga, for the applicant
P. Marava, for the 1st respondent
No appearance for the 2nd respondent

DEME J: The applicant approached this court on an urgent basis seeking Provisional Order for stay of execution of judgment. The order sought by the applicant reads as follows:

> "TERMS OF FINAL ORDER SOUGHT
> That you show cause to this honourable court why a final order should not be made in the following terms:
> (a) The Warrant for Ejectment against the applicant be and is hereby stayed pending the hearing of applicant's application for Rescission of Judgment under case number HC 7304-21.
> (b) First Respondent is ordered to pay costs of suit.
> TERMS OF INTERIM RELIEF GRANTED
> Pending the hearing of the application for Rescission of Default Judgment following relief:
> The second respondent be and is hereby ordered to stay execution of the warrant for civil ejectment against the applicant pending the determination of his application for rescission of default judgment under case number HC 7304/21."

I will proceed to give a summation of the facts. The applicant acquired the property known as no. 2482 New Msasa Park, Harare in 2014. The first respondent is also claiming to have acquired the same property in 2015. In 2020, the first respondent instituted the claim for eviction against the applicant at Harare magistrates court. The applicant had default judgment entered against him for failure to file his plea.

The applicant went on to file application for rescission of default judgment at the same court. The application was dismissed. Whereupon, the applicant went on to not an appeal with this court.

On 28 September 2021, the appeal was ruled in favour of the first respondent in default. The former legal practitioners of the applicant did not appear on the day in question. According to the applicant, he did not have knowledge of the judgment until he was served with the notice of eviction on 17 December 2021. Whereupon, the applicant simultaneously lodged this application and application for rescission of default judgment under case no. HC 7304/21.

At the hearing of this matter, the first respondent raised a point *in limine*. The first respondent's counsel, Mr Marava submitted that the matter is not urgent. He further submitted that the need to act arose on 28 September 2021 when default judgment was entered against the applicant. Mr Marava referred me to the case of *Kuvarega* v *Registrar General and Anor.*

On the other hand, the applicant's counsel, Mr Mukanga, submitted that the applicant only became aware of the default judgment upon being served with notice of eviction. This is when he took action. According to Mr Mukanga, the need to act only arose on 17 December 2021 when the applicant became aware of the judgment. He further submitted that the applicant promptly took action and filed the present application on 20 December 2021.

The applicant's counsel submitted that there is no evidence that the first respondent went on to serve the applicant's former legal practitioners with the copy of the default judgment handed down on 28 September 2021. The first respondent's counsel did not produce evidence disputing the assertions of the applicant's counsel. In the circumstances, I find that on a balance of probability, the applicant did have knowledge of the judgment on 17 December 2021. On this basis, the applicant's need to act arose on the same date. Thus, I dismiss the first respondent's point *in limine*.

I will now turn to the merits of the present application. Mr Mukanga submitted that the applicant's case has got prospects of success. He submitted that the application for rescission of default judgment filed under case no. HC 7304/21 has got prospects of success as he has demonstrated his ownership through agreement of allocation which he has attached to the application for rescission of default judgment. On the other hand, the first respondent's legal practitioner submitted that the application for rescission of default judgment has got no merits. He further submitted that the document relied upon by the applicant is suspicious as this document was not produced at the magistrates court. He also submitted that the application for rescission of default judgment was filed out of time, thirty days after the default judgment was entered against the applicant. The first respondent legal practitioner

also submitted that the first respondent has produced evidence of title through a copy of the letter written by ZANU PF Mukuvisi Tashinga District.

The fact whether or not the application for rescission of default judgment was filed within the prescribed time frames as specified in r 27 of the High Court Rules, 2021 will be dealt by this court at the appropriate time when hearing the actual application. It is premature for me to make a determination of whether or not the application complies with the rules of this court. However, it is important to state that the application for rescission of default judgment filed by the applicant appears to be an arguable case on paper. At the appropriate time, this court will examine the Application for Rescission of Default Judgment and make appropriate determination. I have no reason to believe that the present application and Application for Rescission of Default Judgment under case number HC 7304-21 have been instituted purely to buy time.

The applicant has attached to the Application for Rescission of Default Judgment filed under case number HC 7304-21 a document which he has called an agreement of allocation between himself and Mukuvisi Tashinga Housing Co-operative. The agreement of allocation was not produced at the magistrates court. It is not clear why it was not produced. However, new piece of evidence may be accepted by the appeal court in certain circumstances. See the case of *Cold Chain Ltd* v *Makoni*[1]. I will not deal with the merits of the admissibility of such document being alive to the fact that admissibility of the same may be the subject matter to be argued during the appeal proceedings if the matter reaches that stage. It is pertinent to mention that the mere production of that document makes the applicant's case arguable.

A mere perusal of the documents held by parties to the dispute for purposes of proving title suggests that the documents are from different authorities. The document held by the applicant was authored by Mukuvisi Tashinga Housing Co-operative while the first respondent's document was generated by ZANU PF Mukuvisi Tashinga District. I will not deal with the authenticity of the documents as this will be done at the appropriate forum. What is important to mention is that the applicant is in possession of the document that makes his case arguable. On that basis, I am of the considered view that the applicant has demonstrated *prima facie* case as specified in r 60(9) of the High Court Rules, 2021. See also

[1] SC 9-12.

the case of *Setlogelo* v *Setlogelo*[2]. In light of this, it is significant to ensure that the applicant be given a chance to present his case.

It is important to highlight that:

> "The principles that a court must have regard to in an application for stay of execution are akin to those considered when deciding whether or not to grant leave to execute pending appeal".

See the case of *Chingwena* v *SMM Holdings (Pvt) Ltd and Others*[3], *Nzara* v *Tsanyau and Others*[4] and *Old Life Mutual Assurance Company (Pvt) Ltd* v *Macgatho*[5]. The principles include the following:

> "1. An appellant has an absolute right to appeal and test the correctness of the decision of the lower court before he or she is called upon to satisfy the judgment appealed against.
> 2. Execution of the judgment of the lower court before the determination of the appeal will negate the absolute right that the appellant has and is generally not permissible.
> 3. Where, however, the appellant brings the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court, but is motivated by a desire to either buy time or harass the successful party, the court, in its discretion, may allow the successful party to execute the judgment notwithstanding the absolute right to appeal resting in the appellant.
> 4. In exercising its discretion, the court has regard to the considerations suggested by CORBETT JA in *South Cape Corporations (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545.
> 5. Where the judgment sounds in money and the successful party offers security *de restituendo* and the appellant has no prospects of success on appeal, the court may exercise its discretion against the appellant's absolute right to appeal.
> 6. An application for leave to execute pending appeal cannot be determined solely on the basis that the appellant has no prospects of success on appeal, especially where the whole object of the appeal is defeated if execution were to proceed (see *Woodnov Edwards and Another* 1966 RLR 335."

In light of this, I am of the considered view that the present application meets the test set out above. He has the right to test the correctness of magistrates court's decision through the finalisation of the matters pending before this court. The applicant is entitled to the right to be heard as contemplated by s 69 of the Constitution. Granting of the present application will ensure that the applicant will be able to test the decision of the magistrates court.

In the present application, the applicant has onus to prove irreparable harm if the relief is not granted. See the case of *Chibanda* v *King*[6], where the court held that:

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[2] 1914 AD 221.
[3] HB 97-18.
[4] 2014 (1) ZLR 674 (H).
[5] HH39-07.
[6] 1985 (1) ZLR 116.

> "In an application for stay of execution of the judgment of the court, it is not enough for the applicant merely to allege hardship. He must satisfy the court that he may suffer irreparable harm or prejudice if execution is granted ---- it must also be borne in mind that if the court were to extend mercy, it would be doing it at the expense of a litigant who has already established in court his right and title to what is being claimed. Such mercy should rather be sought in the action itself before judgment is given not afterwards."

In the circumstances, the applicant has been staying at the disputed property for many years. The applicant constructed a structure at the disputed property where he has been staying to date. Eviction of the applicant certainly amounts to irreparable prejudice since he would become homeless.

In the case of Chingwena (supra) it was held that:

> "It is trite that the power to grant stay of execution is a common law exercise of the power that inheres in the court. This discretion is very wide".

In the case of *Mungwambi* v *Ajanta Properties (Pvt) Ltd*[7], the court emphasised that in determining such an application is to grant stay where real and substantial justice requires such a stay or conversely where injustice would otherwise be done.

It is apparent that real and substantial injustice may occur if the present application is not granted. It is in the interest of justice that the applicant be allowed to stay at the disputed property pending the resolution of the dispute between the parties. If the dispute is resolved while the applicant is no longer at the premises in question, the prejudice likely to be suffered by the applicant will be difficult to reverse.

The balance of convenience favours the applicant. The applicant has been staying at the property for some years and had already made a structure thereat as his shelter. On the other hand, the first respondent has not been staying at the premises but is claiming to have acquired the same property. The first respondent did not construct any structure on the disputed property unlike the applicant. Allowing the applicant to remain at the disputed property pending the finalisation of Application for Rescission of Default Judgment under case number HC
7304-21 would cause limited prejudice to the first respondent compared to the prejudice that would be suffered by the applicant. The concept of balance of convenience was discussed in the case of *Setlogelo* v *Setlogelo* (supra).

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[7] HH771-08.

The applicant, through his counsel submitted that there was no other remedy available by which the applicant may stay proceedings. I am of the considered view that there is no other remedy available by which the rights of the applicant may be protected. It is an established requirement that the applicant must prove absence of other remedy by which he or she may protect his rights. See the case of *Setlogelo* v *Setlogelo* (supra).

Accordingly, it is ordered that Provisional Order be granted in terms of the draft as amended.

Newman Attorneys, applicant's legal practitioners
Marufu – Misi Law Chambers, 1st respondent's legal practitioners