PRECIOUS MANDIKWAZA
and
TRUST SIMANGO
versus
NYEPUDZAI THERESA CHINYANI (into her capacity as the
Excutive Dative in the Estate Late Abel Immanuel Anesu Zisengwe)
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 12 & 13 October 2023

Urgent Chamber Application

V Makuku, for the applicants
S Gahadzikwa, for the respondent

ZHOU J: This is an urgent chamber application for stay of execution of the judgment in HC 2315/23. The judgement was granted in default of the applicants on 20 July 2023.The judgment is for the ejectment of the applicants and all persons claiming occupation through them from the immovable property described in the order as Stand 12020 Glen View 17 Extension Harare.

The instant application is opposed by the first respondent. In the opposing affidavit the first respondent had raised certain points *in limine,* including an objection to the urgent hearing of the matter. These objections *in limine* were abandoned at the hearing hence the matter is to be considered on the merits thereof.

The applicants state that they became aware of the default judgment on 30 September 2023 when they found the order and writ of ejectment at the place of residence at the property in dispute. The ejectment was scheduled for 3 October 2023 which was the date on which this application was filed. Applicants are seeking stay of execution pending determination of the court application for rescission of judgment that was also filed on 3 October 2033.

The law in regard to an application for stay of execution was explained in the case of *Mupin*i v *Makoni* 1993 (1) ZLR 80 (S) AT P. 83 B-D:

> "Execution is a process of the court and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special

> circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it."

Thus the onus *in casu* is on the applicants to show such special circumstances as would justify interfering with the efficacy of the judgment and the principle finality in litigation. In considering the application, the court must peep into the merits of the applicant's case in both the application for rescission of the default judgement and in the main case HC 2315/23.

The applicant's explanation for their default is that they did not see the summons. They deny knowledge of the person named in the return of service by the Sheriff who is described as their daughter. There is a presumption of validity of a return of service rendered by the Sheriff, and the return of service itself is by law regarded as prima facie proof of the matter contained therein, see *Taona Investments (PA) Ltd* v *Fire in Light Videographers (Pvt) Ltd And Another* 1998(1) ZLR 494(H)*; Wattle Co (Pvt) Ltd* v *Inducom (Pvt) Ltd* 1993 (2) ZLR 108 (H) at p 110C-D. This places an *onus* on the party alleging the irregularity of the service or the falsity of the contents of a return of service to rebut the presumption. It is thoroughly inadequate for the applicants to merely state that they do not have a daughter who answers to the name stated in the return of service without explaining where that person may have come from and how she ended up at their address. The imputation of such an explanation is that the sheriff served the summons upon a fictitious person. If that kind of approach was to be embraced, the administration of justice would be hamstrung by litigants pleading ignorance of the recipients of court process served upon them. The applicants' explanation for their default is inherently unconvincing but I would have given the applicants the benefit of doubt in respect of the explanation for default if their case on the merits had prospects of success.

On the merits, the applicant's case is that they purchased the immovable property in dispute from the first respondent and her late husband in 2015. They attached a copy of a written agreement of sale. The sellers stated in the agreement are Abel Immanuel Anesu Zisengwe and Nyepudzai Theresa Chinyani. The agreement is dated 2015. It is common cause that Abel Immanuel Anesu Chinyani died in 2011. The agreement purports to have been signed by him.

In a letter written by their erstwhile legal practitioners the applicants alleged that they had seen the deceased when he signed the agreement. The first respondent categorically denied ever selling the property to the applicants. She does not know them. She also states in her papers that the address ascribed to her and her deceased husband is not and has never

been theirs as they have never stayed at the farm in Nhowe or Murewa. Prevaricating from the original case advanced by the applicants, Mr *Makuku* representing the applicant made the startling submission that the first respondent sold the property to the applicants in her capacity as Executor Dative of the Estate of her Late husband. This submission is without substance. The written agreement does not say that the property was sold by the executor. Indeed, it does not state that she was acting in a representative capacity. Secondly as noted earlier on, the name of the deceased appears in its own right with a signature that purports to be his.

Confronted with the above difficulties, Mr *Makuku* made the submission that the second respondent sold the property in her capacity as heir and surviving spouse. This too is not supported by the text of the agreement. In any event, such a sale of property belonging to a deceased estate by an heir or surviving spouse would not be valid at law. Even the executor when selling property belonging to a deceased estate would have to obtain the authority of the Master which is not alleged let alone proved, to have been given. Given the denial by the applicant that she had any dealings with the applicants involving the immovable property and in light of the invalidity of the purported sale even if it had been proved to have been by her alone the applicants have no case on the merits. The application for rescission of judgement is therefore manifestly doomed to failure.

Granting stay of execution in light of the above facts would offend against the principle of finality in litigation. Real and substantial justice dictates that the application be dismissed.

The question of whether or not Mr *Makuku* should recover costs from the applicants exercised my mind. I raised it with him during the hearing. All the facts point to a fraud having been committed. But even on the facts alleged by the applicants they have no valid claim at law. This should be clear to any trained lawyer. Be that as it may the respondents did not push for a special order of costs or costs against the applicant's legal practitioner. For these reasons, the applicants would have to bear the costs themselves.

In the result, **IT IS ORDERED THAT:**

1. The application is dismissed.

2. Applicants shall pay the costs

Makuku Law Firm, applicant's legal practitioners
Madanhi Mlugadza & Co Attorneys, first respondent's legal practitioners