

CLENIKA NKOMO

And

CLAYTON NKOMO

Versus

DRAWCARD ENTERPRISES (PVT) LTD

And

**MINISTER OF LANDS, AGRICULTURE, FISHERIES,
WATER AND RURAL DEVELOPMENT N.O**

And

REGISTRAR OF DEEDS N.O

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 16 MAY 2022 AND 7 SEPTEMBER 2023

Opposed Application

Advocate S. Siziba, for the applicants
B. Mhandire, for the 1st respondent
S. Jukwa, for the 2nd respondent
No appearance for the 3rd respondent

TAKUVA J: This is an application for a declaratur. Applicants seek an order in the following terms;

- “1. The Deed of Transfer that was registered on the 20th of March 2009 in favour of the 1st respondent in respect of a certain piece of land in extent 1946, 1460 hectares being the remainder of Naseby situate in the district of Gwelo be and is declared null and void.
2. The Certificate of No Present Interest that was issued by the 2nd respondent’s office on the 5th of January 2009 in respect of Naseby Farm Estate be and is hereby declared null and void.

3. It is declared that title in the property being a certain piece of land in extent 1946, 1460 hectares being The Remainder of Naseby situate in the District of Gwelo currently vests in the State and that the 3rd respondent shall record as such in its records.
4. It be declared that 1st respondent not being the registered owner of the Remainder of Naseby situate in the District of Gwelo has no legal right to evict the applicants from the said property.
5. 1st respondent be and is hereby ordered to pay costs of suit.”

BACKGROUND FACTS

The applicants who are mother and son have been resident at the property which is a farm situate in the District of Gwelo since 1989. The 1st applicant’s late husband Moven Nkomo entered into an oral lease agreement with Naseby Estate Ltd, a company which previously owned Naseby farm. Applicants have been rearing cattle, goats, pigs and poultry at the farm apart from being engaged in crop cultivation. In 2005, applicants were advised by the Ministry of Lands that the farm had been gazetted for acquisition by government. Further, they were promised first preference during the impending resettlement.

In 2009, the 1st respondent purportedly purchased the farm from its previous owner and it was transferred to it. Thereafter 1st respondent instituted eviction proceedings against the 2nd applicant and all other occupants thereto. Applicants who still reside on the farm have filed this application seeking the above order.

At the commencement of the hearing, the applicants’ legal practitioner raised a point *in limine* relating to the admissibility of the 1st respondent’s opposing affidavit on the grounds that it was prepared by his legal practitioners and also commissioned by a legal practitioner of the same law firm being one Mr Tapiwa Benza. The 1st respondent conceded the point but went on to argue that it was not fatal to its case.

In *Core Mining & Minerals Resources (Pvt) Ltd v The Zimbabwe Mining Development Corporation & Ors* HH 280-10, the court remarked as follows;

“With regards to the affidavits attached to Masimirembwa’s opposing affidavit, in the *Civil Practice of the Superior Courts in South Africa 3rd Edition* (Herbstein and Van Winsen) at p 443, the following is stated;

“An affidavit should be sworn to before a Commissioner of Oaths who is independent of the office in which it is drawn. The court will not admit affidavits sworn to before an attorney or a person having an interest in such affidavit.”

The authors refer to a number of case authorities in support of the highlighted portion of the above quotation including *Herman v Angitey* 1936 CPD 386 wherein DAVIS J stated at p. 387:-

“I said nothing about this affidavit yesterday because I wished to say nothing in a hurry and desired to have an opportunity to think it over and to consult my brother Judges. This affidavit is objectionable from every point of view. In the 1st place it was taken before one of the partners of the firm of attorneys acting for the plaintiff. It has been stated in this court, time and again that that is an improper practice.”

I notice that as recently as the 11th Nov last in the matter of *White’s Stores v Bridle N.O and Others* (1936, T.P.D. 72), PITMAN J, had occasion to go into the matter somewhat fully, and came to the conclusion that an affidavit taken under these circumstances is not receivable as evidence. However that maybe, clearly an affidavit should not be taken before a member of the firm who is acting in the case.” (my emphasis)

The rationale for this principle in my view is that an affidavit that is being relied upon by a party should be attested independently if it is to be admissible. In other words for admissibility, affidavits should be attested by a Commissioner of Oaths who is impartial, unbiased and independent in relation to the subject matter of those affidavits. See *Chifanza v Edgars Stores Ltd & Anor* HB 27-05 where it was held *inter alia* that a legal practitioner of the same firm has the same financial interest in earning fees from the client and also concerned about the good will of the firm.

In the present matter, I find that the 1st respondent failed to file a proper opposing affidavit. Therefore its opposition to the application is fatally defective. Any failure to comply with the rules of court has consequences. *In casu*, such consequences are spelt out in R 59(9) of the High Court Rules 2021 SI. 202 of 2021 which provides;

“A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (8) shall be barred,”

The point *in limine* is meritable and disposes of the matter.

In the result, it is ordered that;

1. The 1st respondent's notice of opposition and opposing affidavit be and are hereby struck out.
2. The application be and is hereby referred to the unopposed roll.
3. The 1st respondent pays the applicants' costs of suit at the ordinary scale.

C T Mugabe c/o T. J Mabhikwa & Partners, applicants' legal practitioners
Masawi & Partners, 1st respondent's legal practitioners
Civil Division of The Attorney General's Office, 2nd respondent's legal practitioners