

LEWIS TAPIRINGANA CHIGUVARE

And

JUDITH CHIGUVARE

And

TAPFUMANEI CHIGUVARE

versus

CALEB HATIZVIGONI MUCHECHE

(In his capacity as Executor Dative of Estate of the Late ANTONIO MAPFUMO
CHIGUVARE)

And

SHERIFF OF THE HIGH COURT CHINHOYI (NO)

HIGH COURT OF ZIMBABWE

BACHI-MZAWAZI J

CHINHOYI, 21 June 2023

Urgent Chamber Application

C. Nziranzemhuka & W. Siyawareva, for the Applicant
C. Nhemwae, for the 2nd Respondent

Introduction

BACHI MZAWAZI J: In this contested urgent chamber application, applicant seeks the stay of execution of a default order of this court in case HC231/22, pending its rescission. An application for the rescission of the said default judgment has been filed under case HC134/23 on the 9th of June 2023.

Background

The historical narrative is that, the first and third applicants are brothers borne of the same father, whilst the second is a wife to their late brother. The dispute revolves around their stay and occupation of a once family property, farm 27 Chitomborwizi East, Chinhoyi. The farm is said to have originated from their biological father Johannes Ngandu Chiguvare who

was the original occupier or acquirer in the late 1940s. Somehow, their late father is said to have donated his rights and interests in the said farm to one of his sons, a brother to the two applicants, Antonio Mapfumo Chiguvare. Antonio Mapfumo Chiguvare proceeded to obtain title deeds to the property sometime in 1949.

The common cause facts are that both the father of the applicants and Antonio Mapfumo are now deceased. Further, that the applicants have been resident on this property for over sixty years with the blessing of both deceased persons.

When the registered title holder of the property passed, one of the brothers became the executor of his estate, mainly the farm in contention. He too had peaceful co-existence with all the applicants. However, he in turn passed resulting in the 1st respondent's appointment as his successor in title as the current executor of the farm administering the property on behalf of the beneficiaries of the estate of Antonio Mapfumo.

It is alleged that since the appointment of the 1st respondent there has been a wrangle over the status of the applicants' stay on the farm. Some of the beneficiaries are in favour of the status quo and some are against their continued occupation.

As a result, the 1st respondent launched an application for the eviction of all the three applicants and those who occupy through them from farm 27 Chitomborwizi East, Chinhoyi. He obtained a default judgment on the faith that the applicants had been notified of the set down date and served through their correspondent legal practitioners but did not turn up on the hearing date. The return of service from the Deputy Sheriff was adduced as proof of service of the notice of set down of that matter. The default judgment was immediately followed by the writ of execution which has already been served on the applicants by the Deputy Sheriff necessitating the current urgent chamber application for the stay of execution pending the rescission of the default judgment.

The Respondent's Case

At the hearing the 1st respondent raised several preliminary issues. The first one is that he was not served with the notice of withdrawal of the two initial applications of the same nature, filed of record by the applicants in cases, HC120/23 and HC 123/23 for stay of execution and rescission of the default judgment, respectively. It is their submission that, the applicants cannot, therefore file another set of the similar applications without the withdrawal of the first set.

The second objection taken is that the applicants have failed to establish urgency warranting an urgent treatment of their matter as the delay in taking the appropriate immediate action was self-inflicted as evidenced by their lackadaisical approach in filing two different set of applications firstly, claiming non-service and later acknowledging service but stating that it never reached them.

On the merits, the 1st respondent argued that the default was wilful. Therefore, the applicants have no prospects nor a good and sufficient cause in their application for the rescission of the default judgment. They state further that the 1st respondent has real rights over the property and the applicants have no legal basis to cling onto the property. Therefore, they have no prospects of success in their application for rescission of judgment. Hence, the application should be dismissed with costs.

Applicant's Case

Applicants motivate that the matter is urgent because had it not been for this application the Sheriff who has already given them time to vacate through a notice of removal or execution is waiting to descend on them at any time as indicated on that notice.

They contend that they were all born on the farm including the second applicant's late husband. They have known this farm as their only home for more than six decades. They have also invested considerably on the farm in their respective individual portions and they do not have any alternative place to stay.

As it were, if the court does not intervene or act now, it will be too late. They will lose the only shelter and home they have known from birth and a very long period thereby suffering irreparably harm as they have no alternative shelter. In that regard, they have no other remedy as if the default judgment is rescinded as they believe they have prospects of success and good cause it will be difficult and costly for them to spoliolate their stay. They further argue that the balance of convenience favours them who are currently resident at the farm as no prejudice will befall the 1st respondent pending the hearing of the main matter on the merits.

In addition, they plead a *prima facie* right, as they had enjoyed peaceful occupation and co-existence with the late Antonio who passed in 2016. Fidelis Chiguvare the then appointed executor of Antonio Mapfumo also respected their occupation. He too passed away and left them inhabiting there. They all claim to have stayed on the Farm for over sixty years and plead special circumstance as already noted. Applicants argue that trouble started when the first respondent who is being instructed by yet another one of their brothers was appointed the succeeding executor. The first respondent claims to be acting on behalf of the beneficiaries but some of those are against the applicant's eviction from their only home as evidenced by the supporting affidavit of Josephine Chiguvare, a daughter of the late Antonio Mapfumo, filed of record.

Applicants assert that there are a lot of triable issues and disputes of facts in the application granted in default that need ventilation in a trial.

They submit that they were not in wilful default as they were not aware of the notice of set-down in the main matter. They only stumbled upon the default judgment of the 22nd of May on the 31st of May 2023 during a routine check at court on the progress of their several

matters. They asked their own legal practitioners who professed ignorance and in turn queried the correspondent law firm.

As a stop gap measure, they promptly filed two applications under cases HC120/23 and HC 123/23 for stay of execution and rescission of the default judgment, respectively. Their defence was that there was no notice of set down. They then only learnt of the existence of the notice of set down in the hearing of the urgent application in case HC 123/23.

The revelation compelled them to withdraw both cases in order to carry out more investigations on the alleged notice of set down. They withdrew both matters and reinstated the cause of actions in the current case and case HC 134, on the basis that, indeed the notice of set down had been served but through a disused WhatsApp application. Hence, they did not see it. This averment is supported by affidavits from the receptionist of the correspondent lawyers who accepted service and posted to a defunct WhatsApp application, and that of the applicants' legal practitioners respectively.

They pray for the interim relief pending the return date.

Analysis

On analysis, the all-embracing issue, whether or not the applicants have made a case for a provisional order stay of execution?

In assessment, nothing turns on the third *point in limine* on the current certificate of urgency bearing more or less the same averments as those of the one filed previously. On the issue of non-withdrawal of the first two applications, the assistant registrar of this court, has sought clarification from the Registrar, as the copies of the notice of withdrawal were not part of the record before the court. The Registrar, from his receipt books acknowledged receiving both notices of withdrawals.

Turning on the aspect of urgency, it is evident that, upon learning about the default judgment, the applicants took all measures necessary to prosecute their matter as detailed in their submissions. They even filed aborted relevant applications and wrote several letters pursuing their cases restlessly up to the present application. They therefore, did not seat on their laurels waiting for the reckoning day or karma. Thus, they have passed the test of urgency as outlined in *Kavarega-v-Registrar General & Anor 1998 (1) ZLR* and *Document Support Centre (Private) Limited-v-Mapuvire 2006 (2) ZLR*, *Gumbo-v-Porticullis (Private) Limited SC 28-14* amongst others.

In addition, it is an undisputed fact that they have stayed on the property which they regard as their sole home for a considerable long period. There is no evidence that they are illegal squatters. It follows that they do have some form of right real or far-fetched but all the same a *prima facie* right to be protected and be determined by and in terms of the law. See

Tribac (Private) Limited-v-Tobacco Marketing Board 1996 (1) ZLR 289 (SC) and the often quoted benchmark case, *Setlogelo-v-Setlogelo 1914 AD 221*.

Further, it is also irrefutable that the Deputy Sheriff will be pouncing on them any time soon. It is obvious that if this application is not granted or if the court does not intervene in this regard all will be lost. Irreparable harm of displacement will have been occasioned making it arduous and costly to go the spoliation route. This court is satisfied that there is no other remedy once they have been displaced.

The court is also of the view that the balance of convenience favours the applicants in that the judgment was obtained in default. They have the right to be heard on merits, *Audi alteram partem*, so as to bring finality to litigation. If they are given a chance to have the decision rescinded it levels the playing field giving them the chance for each party to win or lose fairly and squarely. They have a right to canvass their defence and say their side of the story in a trial given the facet of disputes of facts in this matter. The rules of natural justice and common law are of binding precedent. See, *Augar Investments OU& Anor 2015 (1) ZLR 502 (H)* *Metsola v PTC & Anor 1989 (3) ZLR 147 (S)* at p154, *Secretary for Transport & Anor v Makwavarara 1990(1) ZLR 18(S)*.

It is trite that the court has a discretion which must be exercised judiciously to grant or not an application of this nature. The other guiding factors to be considered are the interests of justice. Given the long history of the property in question *viz a viz* the relationship of the parties, in the circumstance of this case, the dictates of justice favours the granting of the application for stay of execution pending the finalisation of the application for rescission of judgment. See *Mupini-v-Makoni 1993 (1) ZLR 80 (S)* and *Chibanda-v-King 1985 (1) ZLR 116*.

Accordingly, it is ordered that:

Terms of the final order sought

1. That pending the hearing of an application for rescission of default judgment filed under case HC 134/22, 2nd Respondent is hereby ordered to stay execution of judgment in HC 231/22 dated 22 May 2023.
2. Each party to bear its own costs.

Interim Relief Granted

Pending the finalisation of this matter, Applicants are hereby granted following relief;

1. The 2nd Respondent be and is hereby ordered to stay execution of the judgment in case HC 231/22 dated 22 May 2023.

2. Cost be in the cause.

Service of Provision Order

Service of this order to be done by the Applicant's legal practitioners.