GILBERT ZHOU

Versus

COSMAS NYONI

And

THE SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O.

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 22 APRIL & 2 JUNE 2022

Urgent Chamber Application

B. Ncube for the applicant
B. Dube with C. S. Ncube for the 1st respondent

MOYO J: This is an urgent application wherein applicant seeks the following interim relief:

Pending the confirmation of this provisional order, applicants be and are hereby granted the following relief:

3.1 The 1st and 2nd respondents be and are hereby directed not to proceed with the removal and eviction of applicant, claiming occupation through him and their goods from Plot number 11 of Black Waters Farm.

3.2 The notice of removal served upon the applicant on the 11th of April 2022 be and is hereby suspended.

3.3 In the event that at the time of granting this order, applicant, those claiming occupation through him and their goods would have been ejected from Plot 11 of Black Waters Farm, it be an is hereby ordered

that applicant, all those claiming occupation through him and their goods, be restored possession of Plot number 11 of Black Waters Farm.

The facts of the matter are that applicant entered into a development partnership with the late Lydia Ncube. 1st respondent is now heir and successor to the estate of the late Lydia Ncube. The agreement was to the effect that applicant would develop the farm representing 100 hectares. The 1st respondent has thus sought to cancel the agreement and eject the applicant from the farm.

Applicant claims that he was never served with the summons that resulted in the default judgment that led to a notice of ejectment being served on him on 11 April 2022. The 1st respondent argued that the matter is not urgent since the history of the matter is such that applicant was aware of the existence of the summons and did not act reasonably to forestall any ejectment by the 1st respondent.

The events relating to the service are otherwise of the summary are that on the 6th of September 2021, 1st respondent's lawyer wrote to applicant giving him notice to vacate the farm by 1 December 2021.

""Notice to vacate Plot No. 11 of Blackwaters Farm

The above matter refers. Please note our interests in this matter.

We act for COSMAS NYONI and his siblings.

Our clients are the holders of an offer letter from the Minister of Land, Agriculture, Water and Rural Resettlement following succession for the Plot from their later mother.

Our instructions are to request that you vacate the 100 hectares that you have been occupying as per an invalid agreement of partnership that you entered with Lydia Ncube.

> Our client now wishes to utilize the plot. On that note, you are hereby being given a formal notice that you should vacate the plot not later than the 1st of December 2021.
>
> May we have your response, in writing confirming if you will be vacating as per request. Should we not hear from you within the next seven (7) days, we shall issue summons with costs to be paid by yourself on a higher scale.
>
> We are indebted in advance for your usual co-operation.
>
> Yours faithfully
>
> Mabundu & Ndlovu Law Chambers"

Summons for ejectment were issued on 27 October 2021. Summons were then served at number 19, 1st Avenue/Connaught Avenue, Bulawayo on 4 November 2021, a letter was written by 1st respondent's lawyers to applicant's lawyers advising them of the service and attached the return of service (see page 24 of the notice of opposition)

Applicant's lawyers wrote back on 11 November 2021 advising that that address where the summons were allegedly served is not applicant's, and they requested that summons be served at the correct address. (See page 41 of the urgent application)

A further instruction was given by 1st respondent's lawyers to the Sheriff to serve the summons at the correct address.

According to applicant, the matter ended there until they were served with a notice of ejectment on 11 April 2022. 1st respondent's counsel argued *in limine* that the matter is not urgent, looking at the background as applicant was aware that there are proceedings to eject him from the farm. That summons were duly served by affixing at the correct address. To answer the question of whether

applicant acted within urgency or not in the circumstances this court has to look at whether applicant was served with the summons and neglected to act since a litigant is expected to act upon receipt of a summons. It is only upon service of a summons in terms of the rules of this court that a litigant can be faulted for failing to act. In this case although the applicant's lawyers were advised of an impending summons and intentions to serve same, it appears the summons that was subsequently served at the correct address were served by affixing.

In terms of the rules of this court summons are only served by the Sheriff. Can it then be held that notifying applicant's lawyers that there is a summons that 1st respondent intends to serve on the applicant, amount to service in terms of the Rules? The answer is definitely a NO since even if summons are served on a legal practitioner they must be served by the Sheriff.

The conclusion therefore is that summons were properly served on applicant only by affixing. We already know the numerous problems attendant to the service of court process by affixing. Whilst it is an acceptable mode of service in terms of our rules of court, it presents a difficulty in finding that indeed, a litigant now seeking a rescission was well aware of the service but neglected to act. It becomes difficult for the court to find that a litigant served by affixing was aware of the service and chose to ignore the summons. Which is the reason why I will also have difficulty finding that applicant was aware of the service by affixing and therefore chose not to act and should therefore be denied the right to approach this court on the basis of urgency. Whilst it can be argued that he was aware that there was pending litigation. Surely, that cannot be extended to failure to act so as to qualify to be heard on an urgent basis because to hold that would be to stretch the requirements for urgency too far.

It can safely be concluded that he waited for the summons to be properly served until he was served with the notice for ejectment on 11 April 2022. It would be different had the 1st respondent's lawyers, written to the applicant's lawyers advising that summons had been served at the correct address by affixing. I cannot therefore hold that applicant neglected to act urgently for the aforestated reasons. The point *in limine* on urgency thus fails and is dismissed.

On the merits

The 1st respondent's counsel argued that applicant was in wilful default on the same grounds as they failed to act with urgency, that is to say, they were aware of the summons, and that efforts were being made to serve them, also that a copy had been served on legal practitioners of the applicant.

Was the applicant in wilful default?

The US Legal online dictionary defines wilful default as "a conscious observation by an obligor from doing that which reasonably and under the terms of the obligation he should have done." It further states that "the words wilfull default imply more than negligence or carelessness. The word wilful means intentional and the word default means transgression." Can it be held in the circumstances of its case that applicant intended to disrespect the rules of this court and failed to take the action commanded on him by the summons if he wanted to defend them? The answer is a clear NO, for applicant cannot be held to have had the intention to disrespect the command in the summons to file an appearance to defend within 10 days if he so wished to defend the matter, when he alleges that he did not receive the summons and therefore did not see the command for him to intentionally ignore it. The summons was not served personally on him nor was it served on his folks or employees, so it cannot be held affirmatively that he did receive the summons but ignore to defend. Such is

the fate of summons served by affixing when a litigant claims lack of service, it is different.

I thus cannot hold that applicant was in wilful default in the circumstances.

Prospects of success on the pending application for rescission of judgment

The parties have a background, an agreement has been attached to the application. The 1st respondent is an heir to a party to the agreement, there is a clause in the agreement that purports to bind the respective heirs of the parties to the agreement. There is a potential claim of unjust enrichment by applicant. The legality or otherwise of the agreement, whether applicant should be paid any claim for unjust enrichment, and all matters that need to be canvassed in a full trial with all the interested parties being heard and the matter dealt with to the bottom of the real dispute between the parties.

I cannot slam the door shut on a litigant who is seeking to be heard in a matter where the background does show that there may be some prejudice to him if he is not given an opportunity to present his side of the story given that the agreement is common cause its enforceability, legality or otherwise, is contentious according to applicant. It is my considered view that indeed the applicant should be given an opportunity to present his side of the story in the circumstances so that the court dealing with the real dispute between the parties gets to the bottom of it and a fair and just outcome is achieved. I cannot at this juncture hold that applicant's case is entirely hopeless and a waste of time deserving that the door be slammed shut. I hold the view that this is one case where a litigant must be allowed to prosecute their claim. I cannot hold at this juncture that the application is most likely doomed to fail and thus that there are no prospects of success, as clearly, a lot of issues need to be canvassed and a proper finding be made vis-à-vis the respective rights of the parties. It is for these

reasons that I find that applicant has made a case for the relief he seeks and for that reason I will grant it.

The application is accordingly granted in terms of the draft provisional order.

Ndove & Associates, applicant's legal practitioners
Messrs Mabundu & Ndlovu Law Chambers, 1st respondent's legal practitioners