KUDZANAI PATRICK KUJENGA
and
MAYFAIR CATERING SERVICES
versus
PARKS AND WILDLIFE MANAGEMENT AUTHORITY
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 20 April 2020

Urgent Chamber Application

T.Pisirayi for the applicant
W.P.Zhangazha, for the respondent

ZHOU J: This is an urgent chamber application for stay of execution of the judgment granted in default in case No HC 4195/21. The judgment was granted on 26 January 2022. The first applicant herein was the respondent/defendant in that case wherein he is cited as KUDZANAI PATRICK KUJENGA trading as MAYFAIR LODGES AND RESTAURANTS. The order granted in HC 4195/21 is for a declaration that the applicants are not entitled to occupy the immovable property known as Le Rhone Site, Kyle Recreational Park, Masvingo and for the ejectment of the applicant and all persons claiming occupation through him from that property. Holding over damages in the sum of USD$42, 00 per day were awarded with effect from the date of service of the summons.

This application is opposed by the first respondent. In addition to contesting the application on the merits, the first respondent objected *in limine* to the consideration of the merits of the application on three grounds, namely (a) that the matter is not urgent; (b) that the second applicant has no *locus standi* to institute the application, and (c) that the second applicant's papers are not in order because the first applicant has not produced proof of authority to depose to the affidavit. I dismissed all the objections and indicated that the reasons for the dismissal would be given in the final judgment.

Urgency

The first respondent's submission is that since the applicant denies being in occupation of the property then the application is not urgent because he will suffer no irreparable prejudice if the matter is not heard urgently. Clearly, the respondent's counsel took the first applicant's submission out of context. The submission by the first applicant is that his presence at the premises is merely by virtue of his employment as the Managing Director of the company that is operating the business at the property. The urgency of the matter arises from the fact that a writ of ejectment has been issued which has already been served and also, that nothing stops the first respondent from enforcing the portion of the order relating to holding over damages. The ejectment was due to take place on 12 April 2022 and was only stopped pending determination of the instant application. The notice of ejectment was served on 8 April 2022. The instant application was filed three days later on 11 April. The objection that the matter is not urgent is therefore misconceived and must be dismissed.

The *locus standi* of the second applicant

The first respondent submitted that the second applicant does not tell the court what kind of entity it is. But this is the very same entity that the first respondent concluded the lease agreement with. The first respondent is approbating and reprobating by questioning the legal status of the entity that it contracted with which is approaching the court to vindicate its rights in terms of the lease agreement. From the papers, it is clearly a division of Mayfair Children Services (Pvt) Ltd. The rules in r 11(2) provide that a firm may sue or be sued in its name. The definition of firm includes "a business including a business carried on by a body corporate…" The parties would obviously have been aware of that position when they entered into the contract otherwise there is no reason why the first defendant would not have asked for confirmation of the legal status of second applicant at that stage. For these reasons, the objection is without merit and is dismissed.

The authority of second applicant to institute the proceedings.

In para 21 of the first applicant's founding affidavit, he confirms that he is the Managing Director of Mayfair Children's Services (Pvt) Ltd and in para 19 of the same affidavit and para 8 of the affidavit he states that the second applicant is a division of the incorporated entity. The authorities are clear that it is not in every case that a resolution is required to prove the authority

to institute proceedings on behalf on a company. Where, as *in casu*, the Managing Director of an entity declares that he is authorized to represent it the *onus* is on the person challenging such authority to adduce evidence to the contrary. No such evidence has been tendered to support the challenge of such authority in the present case. In the result, the objection is meritless and must fail.

The Merits

The stay of execution *in casu* is being sought pending determination of the application for rescission of judgment filed under case No HC 2214/22. The interim relief is being sought pending the return date of this application

Execution is a process of the court. In the exercise of its inherent authority to control its own process, the court can stay, suspend or even set aside the process of execution, including setting aside a writ of execution. The court will exercise such power in relation to the process of execution where real and substantial justice demands that the execution be stayed, suspended or set aside , see *Mupin*i v *Makoni* 1993 (1) ZLR 80(S). In other words, the court will interfere with the process of execution where an injustice would be occasioned by allowing the execution to proceed.

In the instant case, if execution is allowed to proceed and the applicants succeed in having the default judgment rescinded then the applicants would be irremediably prejudiced. They would have been ejected from the property by the time that the application for rescission is determined. Equally, if the position of the default judgment that sounds in money is executed the applicants would have lost their property if it be attached in execution. Thus, an injustice would have been occasioned by allowing execution to proceed in the face of a pending application for the setting aside of the default judgment.

In considering whether real and substantial justice dictates that stay of execution be granted, I have also considered the applicants' prospects of success in relation to the application for rescission of judgment and, indeed, the main case. The main claim is premised upon a false cause, in that the first respondent knows that the applicants are at the property as a result of the lease agreement which was concluded between it and the second applicant. The essence of the applicants' case is that in substance the first respondent is seeking the ejectment of the second applicant and, through it Mayfair Children's Services (Pvt) Ltd. The issues raised by the applicants

cannot be dismissed out of hand but merit investigation. First applicant, who is cited as the only respondent in HC 4195/21, has produced documents to prove that he is merely the Managing Director of the company and occupies the property through it. The debate about whether there is a reasonable explanation for the default is one that will be resolved at the hearing of the application for rescission of judgment. On the papers filed in the present application, applicants state that they never become aware of the service of the summons and declaration. While there is the presumption of regularity of service which arises *ex facie* the Sheriffs return of service, the presumption is rebuttable. But in the context of rescission of default judgment the question is not *per se* whether the service was proper but whether, having knowledge of the service or set down, the applicant deliberately and freely took the decision to refrain from defending the matter with the full appreciation of the consequences of the default. In light of the assertion that the summons was not brought to his attention, the question of the reasonableness of the explanation for the default is one that deserves consideration in the application for rescission of judgment.

In all the circumstances, the applicants have proved that real and substantial justice demands that execution of the default judgment be stayed.

In the result, the provisional order is granted in terms of the draft thereof.

Nyakutombwa Legal Counsel, applicant's legal practitioners
Chinogwenya &Zhangazha, respondent's legal practitioners