

SAMUEL SANDLA KHUMALO

Versus

NOZIZWE NCUBE

AND

THE DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBBAWE
CHEDA J
BULAWAYO 4 JULY 2012 AND 29 NOVEMBER 2012

Mrs H Moyo for the applicant
Mr N. Ndlovu for the 1st respondent

Rescission of Judgment

CHEDA J: This is an application for a rescission of judgment whose provisional order is couched as follows:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause why a final order should not be granted in the following terms:

- (1) The execution of the order and the writ of eviction in case number HC 423/11 be and is hereby stayed pending the final determination of the application by the Applicant for rescission of the said judgment.
- (2) The 1st Respondent pays the costs of this application.

INTERIM ORDER GRANTED

That pending the final determination of this application, it is ordered that:

- (3). The 1st and 2nd Respondents or any of their authorized officers, be and are hereby ordered to stop the execution and the eviction of the writ in HC 423/11 pending the final conclusion of this application and forthwith to restore occupation and possession if the eviction has been carried out by the time this order is served.
- (4). The Applicant files the application for rescission of judgment in case number HC 423/11 within ten days of the date of this order.”

The brief background of this matter is that applicant is the Executor in the estate of the late Joyce Khumalo [hereinafter referred to as “JK”] and is also the beneficiary of the said estate

as the deceased was his mother. He was issued with letters of administration on the 17th August 2008. First respondent is the purchaser of house number 61482 Pelandaba Township, Bulawayo of which transfer of title was passed to her on the 2nd of November 2011. The late JK passed away on the 28th January 2008, this fact was only known to first respondent at a later date who had already issued summons against her. Applicant brought to the attention of first respondent that summons were defective. First respondent however, did not withdraw the said defective summons. The summons were defective in the sense that JK had passed on at the time of the issuance of the said summons. It is contended that first respondent should have cited the Executor of the estate. She, however, filed a court application wherein she applied to join "the occupants" of 61482 Pelandaba as co-defendants to the action against JK under HC 423/11. She thereafter proceeded to obtain an order joining the occupants of the said house. The occupants included applicant. The summons under case 423/11 together with a court order joining all the occupants was served on J K's son, Siphon on the 21st March 2012. Applicant and other occupants did not defend that action and were subsequently barred.

On the 24th May 2012 this court ordered the eviction of all occupants of the said property. This is the eviction which has led to the present application.

However, applicant is in agreement with first respondent regarding the background of this matter. However, he has sought to explain the position further. He acknowledges service of summons and he instructed his legal practitioner to defend which they did not formally do, but, however, advised first respondent's legal practitioner that JK was deceased. First respondent did not, however withdraw her summons, but, instead applied to join the occupants through a court order. Applicant in his founding affidavit stated that he indeed saw the summons served on the 21st March 2012, but, ignored them as he was of the opinion that these were the same summons which had been served at the house before. It is his further argument that the summons which was served did not have a joinder order attached to it. He is, therefore, surprised that the Deputy Sheriff later on issued a second return of service wherein he stated that infact the summons under discussion had an order attached to it.

Points in limine

Before the matter was argued on the merits, first respondent, through her legal practitioner Mr *N. Ndlovu* raised two points *in limine*.

(1) Urgency

It is his argument that the certificate of urgency does not bring out clearly the basis of urgency as envisaged by the rules. Indeed, Mr *Ndlovu* is correct, the matter does not become urgent on the basis of a party's mere say-so.

This matter has a long standing historical dispute. In light of that I am of the view that it has to be dealt with in order to conclude it if need be. The fact that eviction was pending, the day of reckoning was imminent and the delay occasioned was not that long to an extent of shutting the door on applicant's face, I allowed the matter to proceed. I took into account the principles regarding urgency as stated in *Kuvarega v Registrar General and another* 1998 (1) ZLR 188 and 1990 (2) ZLR 301, but, above all, the need for the attainment of justice persuaded me to allow the matter to proceed so that the real issues could be properly ventilated.

(2) Provisional Order

Mr *Ndlovu* further argued that this court should not grant the relief sought because applicant has not filed an application for rescission of judgment. For that reason this application should not succeed. On the other hand Mrs *Moyo* for applicant has vigorously argued that applicant while aware of the need to file an application for rescission, he did not do so as he did not have enough time to do so. He, therefore, asks for 10 days within which to file the said application.

After listening to submissions by both counsel, I ruled that submissions be made on the merits. This matter involves an estate and the children of the late JK. First respondent holds title to this property. Applicant argues that his mother JK had already mounted a challenge of ownership and/or transfer of this property to first respondent before she passed on. Applicant in his wisdom is of the firm view that he can carry that burden of proof in challenging the

purchase of the disputed property by first respondent. There are issues which are disputed by both parties. For that reason I allowed the matter to proceed in order for the issues to be properly dealt with and hopefully bring this matter to finality.

It is in the interest of justice that this matter be finalised as all matters should be, at the slightest convenience to both parties. Applicant has argued that the default judgment was not properly obtained as it was not in compliance with the requirements for summons against a non-existent person. He has further argued that it is his intention to apply for a rescission of judgment. It is also his argument that the late JK had challenged the transfer of the house to first respondent and the matter is pending under HCA 122/02.

I identify the following issues in this matter, namely that:-

- (1) whether first respondent should not have joined the “occupants” of this house which includes applicant in these proceedings;
- (2) whether first respondent should have withdrawn her action against JK and/or cited the estate/executor;
- (2) whether or not applicant should be accorded 10 days within which to file an application for rescission of judgment, and
- (3) whether or not it will be in the best interest of justice to dismiss this application in light of the pending challenge of title of the house in dispute.

Both parties have a genuine interest in this matter in as far as its finalization is concerned. Applicant is the executor and beneficiary of the estate of JK. Equally so, first respondent holds title to the disputed property which makes her *prima facie* the owner. This dispute has been going on for over 12 years. It is in the best interest of justice that litigation should be brought to finality.

Both parties in my view should be given an opportunity to argue this matter further upon presentation of facts and in particular applicant seeks to prove the alleged fraud surrounding the agreement of sale and subsequent transfer of the house to first respondent and *vice versa*. The said issues therefore need to be examined properly before a final conclusion is made. These issues cannot be determined in isolation. It is therefore my view that

it is in the best interest of justice that this application should succeed in order to allow the parties to properly ventilate the issues at hand.

The following order is therefore granted:

Order

That pending the final determination of this application, it is ordered that:

- (1) The 1st and 2nd Respondents or any of their authorized officers, be and are hereby ordered to stop the execution and the eviction of the writ in HC 423/11 pending the final conclusion of this application and forthwith to restore occupation and possession if the eviction has been carried out by the time this order is served, and
- 2) Applicant files the application for rescission of judgment in case number HC 423/11 within ten days of the date of this order.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Cheda and partners, 1st respondent's legal practitioners