TENDAI MUJAJI WILSON
versus
THEMBA SIPINDIYE
and
DEPUTY SHERIFF N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 23 JUNE 2017 AND 29 JUNE 2017

Opposed Application

Applicant in person
J T Tsvangirai for the respondent

MATHONSI J: The applicant and the first respondent were divorced 18 years ago but remain tied to each other by virtue of their joint ownership of the former matrimonial home being house number 4 Nicholson Road Romney Park Bulawayo. When the divorce was granted the court ordered that the applicant would enjoy a usufractuary right over that house until the youngest of the children attained the age of 18 years after which the house was to be evaluated with each of them getting a half share of the net proceeds of the house.

Although the youngest child of the marriage attained the age of 18 years 13 years ago on 13 October 2004, the applicant has remained firmly rooted at the house and has frustrated all efforts to dispose of the house in terms of the divorce order for the first respondent to get his share. The first respondent sued the applicant in HC 349/14 seeking an order directing the applicant to co-operate in the evaluation of the house and its sale by private treaty. Following a full trial in which the applicant resisted the grant of that relief on frivolous grounds, I issued the following order in HB 256-16;

"In the result, it is order that:

1. The defendant's counter claim is hereby dismissed.
2. The defendant is directed to co-operate in the evaluation of stand No. 4 Nicholson Road Romney Park by a valuer agreed upon between the parties after which the said property shall be sold by such valuer and the proceeds shared equally between the parties.
3. In the event of the parties' failure to agree on an estate agent and/or valuer to value and sell the property within 30 days of the date of this order then the sheriff of the

High Court is hereby directed and empowered to appoint an estate agent and/or valuer of his choice who shall value the house.

4. Thereafter the sheriff of the High Court shall sell the said property by private treaty and divide the net proceeds equally between the parties.
5. The defendant shall bear the costs of suit on an ordinary scale."

The judgment in question is final and definitive in nature. That however did not stop the applicant, with her eyes firmly fixed on her first prize, to hold on to the former matrimonial home at all costs and until the end of the world, from filing this application in which she seeks leave to appeal to the Supreme Court against that judgment. To show that focus was probably never on testing the correctness of the judgment sought to be appealed against, the applicant even cited the second respondent as if there had been an attachment in execution.

Perhaps the sooner the applicant appreciated that she cannot escape the consequences of divorce which include the sharing of property and that the first respondent is entitled to his share of the former matrimonial home in terms of a court order which has not been contested the better. Just why divorced couples would like to remain hooked to one another instead of commencing a new life apart is difficult to comprehend. As it is the applicant has tied the first respondent to footling litigation for no other reason but blind selfishness. In terms of s43 of the High Court Act [Chapter 7:06];

"(1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.

(2) No appeal shall lie –

(a) from an order allowing an extension of time for appealing from a judgment;

(b) from and order of a judge of the High Court in which he refuses an application for summary judgment and gives unconditional leave to defend an action;

(c) from –

(i) an order of the High Court or any judge thereof made with the consent of the parties;

(ii) an order as to costs only which is left to the discretion of the court, without the leave of the High Court or of the judge who made the order or, if that has been refused, without the leave of a judge of the Supreme Court;

(d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases—

(i) where the liberty of the subject or the custody of minors is concerned;

(ii) where an interdict is granted or refused;

(iii) in the case of an order on a special case stated under any law relating to arbitration."

I have said that the order issued was final and definitive in nature. It was not interlocutory. For that reason it does not fall within the ambit of those in which leave to appeal is required. Therefore this is a completely unnecessary application. The first respondent opposed the application and in his opposing affidavit filed on 3 November 2016 pointed out that the judgment sought to be appeal against was final requiring no leave to appeal. The opposition to the application along those lines did not move the applicant to see the light and withdraw the application. Neither did the filing and service of heads of argument on 7 December 2016 in which the same argument was advanced.

When the applicant appeared before me unrepresented she submitted that she had a feeling that she had to make the application. When it was pointed out to her that the application was unnecessary she insisted that she had heard a word from Jesus Christ that her fortunes will change at the Supreme Court. Unfortunately this court applies the law and not feelings nor visions litigants see in their sleep. More importantly though, from the applicant's submissions, it was apparent that she had either not bothered to read the opposing papers or was deliberately contemptuously.

Ordinarily this court tends to sympathise with self-actors and as much as possible assists them to prosecute their claims, which is why even at the trial costs were awarded against the applicant on an ordinary scale when her defence to the action and her general conduct called for punitive costs. Where however, a litigant continues to abuse the process of the court with disdain, that is to use that process for the purpose for which it was not intended, the court will register its disapproval by awarding costs against such litigant on a punitive scale. In any event, the respondent has been unnecessarily put out of pocket and for that reason the applicant must suffer grief.

In the result, the application is hereby dismissed with costs on a legal practitioner and client scale.

Dube-Tachiona and Tsvangirai, 1st respondent's legal practitioners