PILO KAUMA
and
ESTHER KUFA
versus
PINKY DAMBUDZO VAMBE
and
NYASHADZASHE PIAH TAPI

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 25 November & 19 December 2022

Urgent Application

Mr *B T Mudhara*, for the applicants
Mr *A Chimhofu*, for the respondents

MUCHAWA J: This is an urgent chamber application for stay of execution of an order under case No HC 4296/22 pending rescission of judgment.

The applicants give the background to this matter as follows; It is averred that the first applicant entered into an agreement of sale with the two respondents for a property known as Share 100 of Remainder of Lot 12 Tynwald, Harare. The agreed purchase price was US$ 18 000.00 which was to be paid by first depositing US$ 10 000.00 upon signing the agreement and thereafter by monthly instalments of US$ 350.00. The agreement of sale is attached. The respondents are said to have paid a total of US$ 12000.00 leaving a balance of US$ 6000.00. The first respondent states that he reminded the respondents to rectify their breach which first occurred in 2018 throughout 2019 and 2020 but they remained in breach. It is alleged that sometime in 2020, the respondents were served with a notice of cancellation of the agreement by first respondent's erstwhile legal practitioners, Mugiya and Muvhami. In addition, the first applicant says he also gave respondents notices of cancellation by way of phone messages. Another notice of cancellation is said to have been given in April 2022 through the applicant's current legal practitioners. Such notice is attached as annexure B.

The first applicant alleges that when he got no response from the respondents, he then proceeded to sell the stand to second applicant who is alleged to be an innocent third party. It is presumed that the respondents were spurred by the official notice of cancellation of April 2022, to sue the first applicant. It is explained that about two or three weeks ago when the first applicant was away at his farm, his wife called him and said first respondent had come in the company of a lawyer and brought summons which he instructed to be taken to his legal practitioners. It is alleged that it was only thereafter upon attendance at his legal practitioners, that he learnt that what had been received was not summons but a default judgment. The applicant avers that there was no urgent attendance by his then legal practitioners to establish the case relating to the default judgment and he had to change lawyers to the current legal practitioners who then advised him on 16 November 2022 about case HC 4296/22.

The applicant expresses shock as he claims he had never received any court process at his home where service was effected. He claims that the person identified on the return of service, Mr Hasley, as having been served, is unknown to him. Service by affixing on the door of a wooden cabin for second applicant is alleged to have been improper too and that she too, never saw the summons.

The first applicant says that it was only on 16 November that he got to know that the respondents had issued summons on30 June 2022, claiming specific performance and cancellation of second applicant's agreement, eviction of applicant and all persons claiming occupation through her.

It is averred that the claim by the first respondent in HC 4296/22 has no merit as he cancelled the agreement with respondents following a breach of the agreement of sale and that to date they still owe the outstanding balance and have not rectified their breach. It is contended that the respondents are trying to avoid their obligations by snatching a judgment in their favour.

A different aspect is related to by the first respondent, which is that the stand sold to the respondents was 500 square metres but after the breach the stands were re developed and re subdivided and the second applicant was sold a different stand as it is more than 1000 square metres. The first applicant says he is ready to refund the respondents the money they paid in terms of the agreement.

The second applicant filed a supporting affidavit and insists that she is an innocent third party in this matter who has used as much as US$ 40 000.00 to purchase both the stand and the building materials. She also says that due to the subsequent subdivision, the property bought by the respondents is no longer there. She says she never saw the summons which were served by affixing on a wooden cabin door as nobody stays there and it is just a store room.

Mr *Mudhara* submitted that this matter is urgent because though the order in question was granted on 28 September 2022, the applicants only became aware of it on 16 and 17 November 2022. The parties are alleged to have acted as soon as they became aware of the order particularly as there is no proof that the order of 28 September was ever served on them as per *Cohen* v *Cohen* 1979 (3) SA 420 (R).

It was contended that in an application for stay of execution, the requirement is only real and substantial justice as between parties and *in casu* if execution was to proceed the second applicant would suffer irreparable damage as she has invested a lot of money in the stand and is an innocent third party. Mr *Mudhara* emphasized that the respondents had their agreement cancelled by first applicant for breach and reliance is placed on the letter from first applicant' erstwhile legal practitioners on p 23 of the notice of opposition. Such breach is alleged not to have been denied but that the respondents claim that there was a variation to the agreement yet there is no proof of same and it is not allowed by the agreement.

Furthermore, it was argued that all the applicants need to prove is a prima facie case and there is no need to show a clear right as per *Tonderai Katsa* v *Samuel Goredema and Anor* HH 09/22 and r 60 (9).

It was also pointed out that there is no proof of service of the urgent application on the second respondent, which application the respondents seek to rely on. An application for rescission was said to have been simultaneously filed under cover of case No 7893/22.

The application is opposed. Mr *Chimhofu* argued that the matter is not urgent as there is no application for rescission yet before the court yet the legal practitioner who provided a certificate of urgency, certified the matter urgent, essentially certifying it from the air.

Secondly, the first applicant is said to have peddled lies with a view to misleading the court as he claims to have first become aware of the summons in case HC 4296/22 on 16 November 2022. This is said to be an insult to the intelligence of the court as the first applicant

defended an urgent chamber application which was founded on the same summons he claims to now have no knowledge of. The first applicant is alleged to have even attended in Honourable Justice MANGOTA'S chambers with his lawyer and wife on 5 July 2022. His opposing affidavit in that matter has been placed before the court. The papers before the court show that the summons in case HC 4296/22 were attached to the urgent application under HC 4318/22. The applicant is therefore said to have been aware of the summons as early as 5 July 2022 therefore.

Mr *Chimhofu* further argued that none of the applicants is worthy of protection as second applicant went ahead and bought the stand upon which the respondents had constructed a four roomed cottage which applicants went ahead and destroyed causing her to suffer an injustice. Pictures were provided on pp 32 to 38 of the rubble of the destroyed cottage and the second applicant's foundation allegedly dug over respondents' own.

Mr *Chimhofu* also contends that stay of execution requires the serving of real and substantial justice. In this case, his argument is that there is nothing to stay execution for as the applicants have no proper defence to the matter in HC 4296/22. Both applicants are said to have been in wilful default as they were properly served. They are also said not to have a defence because the contract of sale between the first applicant and respondents was an installment sale of land agreement regulated by the Contractual Penalties Act [*Chapter 8:04*] as per s 2. Cancellation of such an agreement is said to be done terms of s 8 thereof which requires one to be given notice to remedy the breach, in writing. Reference was made to the case of *Nenyasha Housing Cooperation* v *Sibanda* HH 456/19. Contrary to the requirements of the law, it was argued that there is no notice advising the respondents of their breach, nor a notice calling upon them to remedy the breach within 30 days, nor even the notice of cancellation.

The argument that the property is different due to a subdivision was alleged to be non-compliant to s 40 of the Regional Town and Country Planning Act, [*Chapter 29:12*] which requires a permit for any subdivision. There is none availed in this case. The applicants' argument is alleged to be illogical as one cannot subdivide a 500 square metre piece of land into a 1000 square metre plus piece of land. Such subdivision is said to be unlawful in light of the extant order on page 24 of record which order is sought to be rescinded.

Mr *Chimhofu* also submitted that the applicants are unworthy of the court's protection or assistance for concealing material information to this matter and even lying. The alleged lie is

that the applicants profess to only have become aware of the summons in case HC 4296/22 on 16 November 2022 when in fact, they were aware as early as 5 July 2022. The first applicant is also said to have concealed that on 19 November 2019 he had caused a summons to be issued against the respondents in which an order for cancellation of the agreement of sale was sought and that the money paid by respondents be retained as damages. This was under cover of case HC 9438/19, a matter which was defended and at a pre-trial conference the parties agreed to further engage with a view to settlement as it had been observed that the parties both owed each other. The first applicant however withdrew this matter on 2 March 2022 and on 11 March destroyed a cabin which the respondents had erected on the stand and thereafter destroyed another cabin that had been put up and threatened to destroy the four roomed cottage which had been constructed to window level. The respondents state that they made a police report of this and provide references of such reports. The respondents claim to have informed the second applicant of their interest in the stand, on or about 25 June 2022 which is the time when her four roomed cottage was destroyed by the first and second applicants. The applicants are also said to have concealed that after the issuing of summons under HC 4296/22, they followed this up with an urgent chamber application under case No HC 4318/22 against the two applicants and the second respondent's appointed contractor, one Talent Paradzai to stop them from carrying any construction work on the property pending the hearing of the summons matter in HC 4296/22.

The respondents pray for dismissal of the application with costs on a higher scale due to the deplorable conduct of the applicants who took the law into their hands and unlawfully evicted the respondents.

The conduct of the applicants fits squarely within what was roundly condemned by Honourable MAFUSIRE J in the case of *Sadiki* v *Muteswa & Ors* HH 281/20 where he held as follows;

> "Litigants should not play hide-and-seek with the courts. Lawyers should not behave like hired guns. They are officers of the court. Litigation is not a game of wits. It is a serious and scientific process to resolve disputes amongst individuals and to settle problems in the society. The search for truth is paramount. It is a duty thrust upon everyone. A party that conceals material information from the court must be unworthy of its protection or assistance. If you seek relief, you must take the court into your confidence, laying bare all the relevant facts on the matter. In the English case of *Rex* v *Kensington Income Tax Commissioners: Ex Parte Princes Edmond de Polignac* (1917) 1 KB 486, Viscount READING CJ, in relation to *ex parte* applications, said, at p 495 – 496:

> "Where an *ex parte* application has been made to this Court for a rule *nisi* or other process, if the court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the facts, **the Court ought, for its own protection and to prevent an abuse of its process**, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived (*my emphasis*). "

Similar findings were made in the case of *Nehanda Housing Cooperative Society & 5 Ors* v *Simba Moyo & Ors* HH 987/15;

> "The applicants' conduct that I found unacceptable was that they were guilty of forum-shopping and material non-disclosure. The provisional order by TAGU J on 27 June 2015, the confirmation for which was before me, was the second in a space of twenty-two or so days. On 4 May 2015 this court, per MATANDA-MOYO J, had dismissed the same application. The applicants did not disclose this in their founding papers. So the learned TAGU J must obviously have been unaware of this information when he granted the provisional order. I was told that the respondents were by then not represented. They had filed no opposing papers. They only did so afterwards when they were opposing the confirmation.
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> In my view, a party that conceals material information must be unworthy of the protection or assistance of the court. If you seek relief, you must take the court into your confidence, laying bare all the relevant facts on the matter, even those that you may perceive to be adverse to the relief that you seek."

In casu it was incumbent upon the applicants to disclose that they had in fact been before the court in the cases under HC 9438/19, HC4296/22 and HC 4318/18 in order to take the court into confidence by laying bare all the relevant facts of the matter, including what they may have perceived would be adverse to their case. The first applicant in fact lied that he only became aware of the summons in HC on 16 November 2022. This is what he says in his founding affidavit,

> "16. I was shocked since I never received any court process at my home. I requested for a copy from the record in case No 4296/22 and then noticed that the Sheriff said he gave the summons to Mr Hasley at my home.
>
> 19. It was then only that I got to know that the respondents issued summons on 30 June 2022, claiming specific performance and cancellation of 2nd applicant's agreement, eviction of applicant and all persons claiming occupation through her."

Such averments are made in the face of the urgent chamber application which the respondents filed which was hinged on the summons matter of HC 4296/22. The first applicant is clearly not worthy of the protection of the court. Similarly, the second applicant who

associated herself with the same averments and was a party to the proceedings cannot seek the court’s protection.

Rule 60 (9) enjoins this court where in an application for a provisional order the judge is satisfied that the papers establish a prima facie case he or she shall grant a provisional order either in terms of the draft filed or as varied. In this case, there is no prima facie case established.

In the case of *Mburuma* v *United Apostolic Church & Anor* HH 142/15, Honourable MATHONSI J made findings which I associate with regarding how to approach this matter. He said,

> “A stay of execution is discretionary upon the court, a discretion which must be exercised judiciously at all times. This court is not in the habit of exercising its discretion in favour of those abusing its process: *Zvidza & Anor* v *Mudoti* HH 422/14. It is true that I am not dealing with the rescission of judgement application which the applicant has filed, but in deciding whether to exercise my discretion to grant the applicant an indulgence of a stay of execution, I must consider whether he presents good and sufficient cause (r 63(2)) for a rescission of judgement. In other words it is imperative to peep into the rescission of judgement application to see if it has merit before exercising my discretion in favour of the applicant.
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> Where the application for rescission itself lacks merit, a court should not grant the indulgence of a stay of execution because doing so would offend against the time tested principle of our law that there should be finality in litigation. In such circumstances, the default judgement would prevail and therefore a stay of execution should purposely be refused. The onus is on the applicant in such an application, to satisfy the court that he is entitled to an indulgence. ”

In this case it is clear that the applicant has not availed to the court, the requirements to be met in cancellation of the agreement of sale with respondents as set out in the Contractual Penalties Act. It provides in s 8 as follows;

> 8 **“Restriction of sellers’ rights**
>
> (1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser—
> (a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
> (b) terminate the contract; or
> (c) institute any proceedings for damages;
> unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.
> (2) Notice for the purposes of subsection (1) shall—
> (a) be given in writing to the purchaser; and
> (b) advise the purchaser of the breach concerned; and

> (c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than—
>
> (i) the period fixed for the purpose in the instalment sale of the land concerned; or
> (ii) thirty days;
> whichever is the longer period.''

In casu there is no notice on record given in writing to the purchasers, the respondents advising them to remedy or rectify the breach and thereafter a notice cancelling the agreement. The notice sought to be relied on which appears on p 23 of the Notice of Opposition falls far short of the requirements of s 8. It is a response from the applicant's then lawyers to a letter they had received from respondents' lawyers. All it says is the following;

> "We refer to your letter dated 26 November 2019.
> Our client advises us that your client failed to meet the material terms of the agreement as she did not pay her monthly instalments as contained in the agreement of sale. Consequently ours cancelled the agreement and has already commenced litigation as per annexure "A" a copy of the Summons which your client will be served with by the Sheriff, you may proceed to enter appearance if you have such instructions from your client."

The argument about the land sold to the respondents being no longer available is at best illogical as one cannot envisage how a 500 square metre stand is subdivided into a 1000 square metre stand especially where there is no subdivision permit as required in terms of the law. It is incredible that the first applicant says this when he clearly states in this founding affidavit para 12 that when he got no response from the respondents, he sold the stand he had sold to them to the second applicant. He seems bent on twisting the court's mind.

This is a clear case where a peep into the application for rescission does not show any prospects of success and the non-disclosure of material facts make the applicants unworthy candidates for protection by the court.

Costs on a higher scale are awarded only in exceptional circumstances where a party's conduct is mischievous and objectionable and the cause of all costs. *In casu* I have gone to great lengths to show how the applicant's conduct is objectionable. Costs on a higher scale are warranted.

Accordingly, the urgent chamber application for stay of execution pending rescission of judgment be and is hereby dismissed with applicants paying costs on a legal practitioner- client scale, the one paying, the other to be absolved.

Mundia & Mudhara Legal Practitioners, applicants' legal practitioners
Rusinahama-Rabvuka Attorneys, respondent's legal practitioners