Judgment No. HB 102/08
Case No. HC 1651/08
X-Refs 1650/08, 377/07

TENDAI MUDARIKIRI

VERSUS

ORIGA RUMEMA

AND

THE DEPUTY SHERIFF, KWEKWE N.O

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 29 AUGUST 2008 AND 9 OTCOBER 2008

Mr Ndlovu for the applicant
Mrs M Matshiya for the first respondent

Urgent Chamber Application

CHEDA J: This is an urgent chamber application for an order for stay of execution of a judgment granted in default on the 2nd July 2008 at first respondent's instance.

On the day of filing this application, applicant also filed an application for a rescission of judgment of the same judgment under consideration.

The salient facts of this matter are that, respondent purchased stand number 2162 Torwood Township, Kwekwe of Ripple Creek Estate, Redcliff [hereinafter referred to as "the property"] from applicant's husband one Mike Mudarikiri in May 2005.

The Registrar of Deeds transferred the said property to first respondent wrongfully as there was still a provisional order in operation issued by the magistrate court, Kwekwe.

It is also applicant's submission that although the judgment in question was obtained by default, she was not in willful default as her correspondent legal practitioner had not forwarded the notice of set down to her.

Respondent on the other hand had argued that, first there had been proper service and that the provisional order she is referring to, had been discharged at the time of the

granting of the default judgment. The fact, however, is that the property is not registered under her name but that of her husband.

The court has inherent powers to rescind a judgment if the judgment was obtained in default as long as good and sufficient cause has been shown. There are two requirements for this principle namely:-

(1) that the party seeking relief must present a reasonable and acceptable explanation for his default, and

(2) that on the merits the party has a bona fide defence which prima facie carries some prospect of success, see *Khumalo v Mafurirano* HB 11/2004.

Respondent has also argued that this matter was not urgent, as applicant was as of the 19th August 2008 when she filed this application had already been evicted as the eviction took place on the 18th August 2008.

This, argument in my view is difficult to believe because if someone is evicted and approaches the courts for relief that renders the matter urgent as he would be without accommodation..

Therefore, I find that the matter is one that deserves urgent attention.

Applicant, explains her default by stating that respondent's legal practitioner did not serve her with the notice of set down. This is her assertion. If this is true one wonders why her assertion is not supported by an affidavit from the said legal practitioner admitting their failure. This would no doubt have bolstered her case.

In the absence of such support, I find that she has failed to present a reasonable and acceptable explanation for her default.

With regards to her defence on the merits it is common cause that she holds no title on the property as it was registered in her husband's name. Therefore, she has no bona fide defence which prima facie carries some prospects of success, see *G.D Haulage (Pvt) Ltd v Mununguwi Bus Services (Pvt) Ltd* 1980(1) SA 729 (ZRAD).

In the circumstances, I am convinced that applicant has not given a reasonable and acceptable explanation for her failure to attend court and has no bona fide defence on the merits.

Accordingly, the application is dismissed with costs.

Messrs. Masawi and partners, applicant's legal practitioners
Wilmot and Bennett, first respondent's legal practitioners