

TAWANDA DREGO TICHIVANHU
versus
WILBERT DANDA
and
BRITON SIMBI
and
CHITUNGWIZA MUNICIPALITY
and
DEPUTY SHERIFF CHITUNGWIZA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE 22 and 28 January 2004

Urgent Application

Mr *D. Dikwa*, for the applicant
Mr *Chikore*, for the respondents

BHUNU J: This is an urgent application in which the applicant seeks to interdict the fourth respondent from evicting him from stand number 11325 Zengeza 4. Chitungwiza. He also seeks an order interdicting the second and fourth respondents from transferring the immovable property into first respondent's name.

The facts giving rise to this application are to a large extent not in dispute. The undisputed facts are that Shadreck Simbi the owner of stand number 11325 died at Chitungwiza, Zengeza 4 on the 23rd June 2002. He was survived by his two daughters Memory and Loveness. His young brother Briton Simbi was however, appointed executor to his deceased estate.

On the 10th April 2003 the first respondent Wilbert Danda sued Briton Simbi in his capacity as executor demanding cession of stand number 11325 Zengeza 4. He claimed that he had bought the stand from the late Shadreck Simbi during his life time but Shadreck had died before effecting transfer.

Wilbert now the first respondent was successful in his claim and

KAMOCHA J issued the following default order on the 2nd December 2004.

“It is Ordered:

1. That the 1st Respondent (Briton Simbi now second respondent) be and is hereby compelled to cede his rights, interests and title in stand No. 11325 Nehanda Road, Zengeza 4, Chitungwiza into Applicant’s name within 7 days of service of this order, failure of which the Deputy Sheriff, Chitungwiza be and is hereby authorized to sign all relevant papers for and on behalf of the 1st Respondent for purposes of ceding respondent’s rights, interests and title in the aforesaid stand into applicant’s name.
2. That the 1st Respondent and all those claiming the right of occupation of stand 11325 Nehanda Road, Zengeza 4, Chitungwiza be and is hereby evicted from the aforesaid stand forthwith.
3. That the 2nd Respondent be bound by the provisions of this order.
4. That the 1st Respondent pays costs of this application.”

Before the first respondent could execute the applicant lodged this application on the 15th January 2004 seeking to interdict the first respondent from executing the valid order of this court. His claim is that he bought the stand in question from memory and Loveness Simbi the late Shadreck Simbi’s beneficiaries.

There is absolutely no substance in that claim firstly, because Shadreck Simbi by a judgment of this court dated 2nd December 2003 has been adjudged to have sold the property to the first respondent during his life time. That being the case the stand did not form part of the late Shadreck Simbi’s estate.

Secondly, Memory and Loveness not being executors to the late Shadreck Simbi’s estate could not validly sell the stand to the applicant even if I were to hold for one moment that the stand formed part of the late Shadreck Simbi’s estate.

The applicant was not a party to the case in which first respondent was granted default judgment. He therefore lacks the requisite *locus*

standi to seek its rescission. The only person who can seek the rescission of the default judgment is Briton Simbi. Briton Simbi has however sought nor expressed any intention to seek rescission of the default judgment granted against him.

Even if rescission of default judgment was to be granted the applicant's prospects of success on the merits are pretty dim indeed. This is for the simple but good reason that his claim is based on an invalid contract of sale. The first respondent's contract predates that of the applicant. That being the case he is unlikely to succeed in his claim that his contract of sale with Memory and Loveness is valid.

Thus on the merits the applicant has dismally failed to establish that he has any cause of action against the first respondent who has been conferred with legal ownership of the property by a valid judgment of this court.

The judgment still stands and is binding. It has not been interfered with and there are no reasonable prospects that it will be interfered with in the near future as no one has expressed any intention to do so.

For the court to grant a stay of execution it must be satisfied that an injustice would result if the stay were not granted see *Chibanda v King* 1985 (1) ZLR 116. This the applicant has failed to do.

The applicant has the onus of proving that he will suffer irreparable harm if execution is not stayed, *Santam Insurance Co Ltd v Paget* 1981 ZLR 132.

It must be borne in mind that if the court were to grant the application it would be doing so at the expense of a litigant who has not established his right and title to the stand in a court of law. In the absence of a just cause the court cannot grant the application without subverting its own judgment.

Once the court has passed its judgment execution must follow unless there are good and sufficient grounds to stay execution, which the applicant has failed to establish.

In the result it is ordered:

1. That the application be and is hereby dismissed with costs.
2. That first respondent be and is hereby authorized to execute the order he obtained under case number HC 1292/03.

Muzawazi & Partners, the applicant's legal practitioners.

Mandizvidza & Partners, 1st respondent's legal practitioners.