LOICE MUNYIKWA
versus
LOVENESS JIRI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 3 March and 1 April 2015

Opposed Application

L Uriri, for the applicant
Respondent in Person

TSANGA J: This an opposed application in which the applicant, Loice Munyikwa seeks to evict the respondent, Loveness Jiri and all those claiming title through her, from stand 3429 Unit D Seke, Chitungwiza. This follows confirmation under matter **HC166/10** by Chiweshe J (as he then was) that the respondent's claim to the property was indeed dismissed for want of prosecution in the matter **HC 1920/08** by Omerje J as he then was.

The applicant's lawyers having written to the respondent's practitioners on 27 January 2011 seeking that she vacates the property which she has failed to do, this application is accordingly brought for her court sanctioned eviction. In addition the applicant seeks payment of a ZESA bill for US $641.00 and a bill for rates and water for US $299.00 giving a total of unpaid bills of US 940.52. She also seeks interest on this amount and costs on a legal practitioner and client scale.

The respondent resists the applicant's quest for eviction on the basis that the dismissal of her case for want of prosecution in **HC 1920/08** was on a technical basis and that at the root of the matter remains the reality that the sale upon which the applicant bases her claim for eviction was a fraudulent one. As such the respondent's basis for resisting eviction is that if the matter is heard on its merit she has no doubt that the sale would be set aside as it is fraudulent. She appears as a self-actor. There is no evidence that following confirmation that her case was dismissed for want of prosecution, any measures have been taken to properly apply for reinstatement of her case to allow her claims to be effectively heard.

The context within which the respondent's claim was dismissed for want of prosecution is as follows: Sometime in 2003 the respondent's brother, one Lovemore Jiri who is now in the United Kingdom sold his late father's house to the applicant in his capacity as heir. The house was however not transferred by him to the seller before his departure to the UK. Under the circumstances, the applicant obtained a default judgment in her favour under case **HC 8614/03** which compelled Lovemore Jiri and for the relevant authorities to transfer the house into her name. The order was granted on 29 October 2003. The first respondent was Lovemore Jiri and the second respondent was the Municipality of Chitungwiza.

Following the granting of this order, some three years later Loveness Jiri, a sister to the seller and who is the respondent in this present matter, applied for rescission of default judgment under **HC 6937/06**. As she was out of time she also made an application under **HC7410/06** for condonation for late filing for rescission. In essence the basis of her claim in seeking rescission was that her brother had misrepresented to the buyer the applicant that he was the owner of the property in question and that the sale was in fact illegal as he had obtained a fraudulent certificate of authority authorising him to deal with the estate of his late mother and father. To bolster this claim, she put forward a judgment that she had since obtained from the magistrate court dated 3 August 2006, confirming that the certificate of authority had indeed been forged, and that the authorised transfer of the house from the late Manuel Jiri to Lovemore Jiri was null and void.

Since the order ceding the house to the applicant Loice Munyikwa had been made in 2003, it was and remains extant unless and until rescinded. It was in this context that the application for condonation and rescission was made to try and set it aside. It is applicant's contention that the application for condonation **HC 6937/06** appeared before Justice Kamocha who directed that the matter be postponed pending service by Loveness Jiri, of process on her brother Lovemore Jiri, by way of edictal citation since he was now resident in the UK.

When no action appeared to have been taken by the respondent to act according to instructions to serve by way of edictal citation, applicant avers that she made an application under in **HC 1920/08** for an order compelling her to do so. In this regard she obtained an order whereby Justice Omerjee ordered that the respondent had 14 days within which to file a chamber for edictal citation where upon failure to do so the two cases HC 7410/06 for condonation and HC 6937/06 for rescission would on the 15th day be dismissed for want of prosecution.

The order granted on the 19th day of November 2008 read as follows:

1. Respondent be and is hereby ordered to file a chamber application for edictal citation within 14 days of service of this order upon 1st Respondent.
2. Should Respondent fail to comply with the direction the applications made under case HC 7410/06 and HC 6937 shall on the 15th day be dismissed for want of prosecution.

According to the applicant's papers the respondent was served with the order on 15th January 2009 and the 14 day period elapsed on the 5th of February 2009 and that the applications duly fell away for want of prosecution on the 6th of February 2009. Regardless of this eventuality, the respondent still proceeded to set the matters down for hearing, and, when a point *in limine* was raised that the matters were improperly before the court and could not be heard, Justice Chiweshe confirmed in **HC 166/10** on the 20th of July 2010 that both matters had indeed been dismissed for want of prosecution. In a brief judgment disposing of the matter he made the following observation regarding the order to file a chamber application for edictal citation that was not complied with.

> "This order was not complied with and consequently the present application was dismissed in terms of that order for want of prosecution. **No application for reinstatement has been filed and until that is done and an order to that effect granted, the application cannot be entertained."** (My emphasis)

He went on further to remark as follows regarding the request to take instructions on the point in limine by the practitioner then representing the respondent on an *informa pauperis* basis:

> "Mr Mukwachari for the applicant made an application for postponement of the hearing to enable him to take instructions on this point *in limine*. No tangible reasons were given as to why those instructions had not been taken prior to the hearing and more so as Omerjee's order was made as far back as May 2008. Needless to say, I refused the application and ordered as follows:
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> 1. That the application to postpone the matter be and is hereby dismissed.
> 2. That the matter be and is hereby struck off the roll."

Cleary therefore with no action having been taken to reinstate her matter, the order dismissing her case is extant. In resisting this application for eviction, the respondent a self-actor avers, that the dismissal of her matter should never have been ordered as she had already complied with the court's directive even before the applicant brought her application. Her version according to her papers is that after Justice Kamocha postponed the application for condonation to allow her an opportunity to serve her brother the court process, she filed

an application for substituted service under **HC 5971/07** before Justice Hlatshwayo. This order was granted on 5 March 2008 directing that Lovemore Jiri, be served by way of substituted service. This order was granted. She accordingly inserted an advert in the Herald published in April 2008. The gist of her argument is that by the time the applicant obtained her order for justice Omerjee giving a definite time line for making an application for edictal citation, she had in essence already complied by obtaining an order to proceed by way of substituted service. She also argues that the judgment by Chiweshe J merely struck the matter off the roll. She maintains that the issues raised in **HC 6937/06** and **HC 7410/06** have yet to be determined first.

In response the applicant argued in its papers that substituted service under the circumstances was of no effect since the direction given was that he be served by way of edictal citation. She stated that the applicant used the wrong procedure given that it was common cause that Lovemore Jiri was resident in the UK and therefore could not be served by way of substituted service. Thus the argument went that the order that she obtained was a nullity which is why the Justice Omerjees's order was upheld by the court.

The applicant is correct that order 6 Rule 46 of the High Court Rules, 1971 which relates to substituted service is reserved for a person within the jurisdiction of the court. The respondent tried to justify its actions by arguing that she does not know where her brother is. This is not true as throughout the documents it emerges from her own submissions that he is in the UK. Indeed service on him by way of substituted service would not have sufficed. Order 6 Rule 44 (1) is the applicable provision for service of process where a party is outside the court's jurisdiction.

It states as follows:

> "(1) Save as is provided in rule 45 or in any Act relating to the service of process on a reciprocal basis in any territory, no process or document whereby proceedings are instituted shall be served **outside Zimbabwe** without the leave of the court or judge".

Subsection (3) of Rule 45 sets out the contents of the application. In *Westhood* v *Westhood* 1997 (1) ZLR 295 Robinson J clearly set out the import and application of this rule in terms of the contents of an order including an elaboration of the fact that if an address is not known then service must be effected by way of a publication in a newspaper circulating in that area.

Where a party as in the case of the respondent's brother is in the UK, and his address is not known, then certainly the publication must be in a newspaper in the UK. It cannot

suffice as an argument that substituted service locally will suffice since as a result of technology, local newspapers are available on line and can be accessed anywhere in the world.

She also rallies to her support in resisting this current application for eviction the fact that she also obtained an order from Justice Bhunu under **HC 6295** for stay of eviction pending the finalisation of the application for rescission in **HC 8614/06**. It is applicant's position that this order for stay has been rendered dysfunctional and overtaken by events since the matter in HC 8614/06 was dismissed for want of prosecution.

In resolving this mater of significance in my view is that no application has been made to reinstate the matter following the ruling by Chiweshe J whereby he had made it clear that until that was done, and an order to that effect granted, no reliance can be placed on the matters which remain dismissed for want of prosecution.

The respondent cannot rely on the argument that the applicant will be gaining an eviction as a result of a technicality in the dismissal of her case for want of prosecution. The ball was squarely in her court to act appropriately to reinstate the matter if she felt that the dismissal was not warranted. Whilst there is some merit in her argument that that the findings of the magistrate in 2006 regarding the fraudulent nature of the sale would indeed have a bearing in deciding whether the High Court order that was obtained in 2003 should be set aside, this argument largely depended on the order being rescinded through concrete steps to have the matter heard to its logical conclusion. That the matter has been stillborn was to a large measure due to the respondent's' own intransigence and inertia in prosecuting her claim and failing to abide with the rules of the court. This matter has dragged on since 2003 when it could easily have been propelled towards resolution since the respondent had legal assistance for most her claims.

With various facets of this matter having now been placed before six different judges, it is understandable that the applicant seeks absolute finality to the matter. She set the ball rolling towards this end by making a chamber application before Justice Omerjee which gave the respondent identifiable time frames for making an application for edictal citation, coupled with seeking dismissal for want of prosecution if the order was not adhered to.

There is no evidence that respondent was not served with the application that was placed before Justice Omerjee. Instead her argument is that there was no need to comply with the order because according to her standpoint she had already served her brother in the local newspaper.

As observed by Chinengo J in *Scotfin* v *Metwa* ZLR (1) 2001 249 at p250 D-E

> **"**The primary intention of the law maker is to ensure that matters brought to the court are dealt with due expedition. But in considering the application the judge can only make an order other than dismissal if the respondent has opposed the application and shows good cause why the application should not be dismissed."

Suffice it to say a problem will not go away simply because a litigant has neglected to follow it up in the hope that the matter will simply fizzle away or because it is to their seeming advantage to let sleeping dogs lie. Courts will not sympathise with a party where the indications are that a party has not taken a matter to its logical conclusion because of the hope that the other party will simply give up on them with the effluxion of time or that the problem will simply vanish. It is the responsibility of the party with a grievance and who brings the matter before the court to argue it to finality particularly as courts and public policy favour the resolution of cases on merits. Being that as it may, courts also take into account public interest and the speedy resolution of disputes and as such remain cognisant at all times of the risk of prejudice to defendants by non-prosecution of claims. The application for rescission was finally brought before this court some three years after the property was purportedly sold. Granted the respondent did manage to get an order in the magistrate's court regarding the true nature of the transaction. But the delay in bringing the matter to rest has been inordinate.

In casu ample room was granted to the respondent to seek to reinstate her matter by virtue of the pronunciation made by Chiweshe JP when he struck the matter off the roll in **HC 166/10** and indicated in the body of the judgment that reinstatement would be the basis upon which the matter would be heard. The unequivocal articulation in that case that it was then still open to the respondent to resuscitate her matter, put in place possibility of taking advantage of this thereby remedying the sanction of dismissal for want of prosecution that was in place. Respondent failed to take advantage of this opening and cannot be heard to cry foul that applicant is being advantaged by technicalities.

Unfortunately also the parties have not tried to meet each other half way in this matter in a manner that would resolve the dispute at least to the satisfaction of both parties. Even though the cession remains extant in that the High Court's decision has not been set aside, one cannot entirely ignore the reality that the sale was premised on fraud and that indeed on merits the High court order would most likely not have survived. (See *Katirawu* v *D Katirawu* 2007 (2) ZLR 64 for example where MAKARAU JP as she then was, held that the

appointment as an executor having been procured by fraud nothing legal could flow from it. Furthermore the rights which the purchaser in that case believed they had acquired were deemed to be tainted by the same illegality. As she put it:

> "It is as if there was never a sale between her and 1st Respondent and consequently no rights can flow from a non sale in her favour. The sale and consequent cession in her favour amount to nothing at law for nothing legal can flow from a fraud".

(See also *M Katsingo* v *H Charlie & Ors* HH 6-2009) The law's position on sales such as this is clear but legal processes to have to be followed in setting aside a decision that may have been made without awareness as to the true circumstances as has happened in this case.

The parties could have tried to find accommodative ground to tamper the sometimes harsh consequences that can flow in either direction from legal realities. For the respondent the house belonged to her parents and has been disposed of seemingly fraudulently by one greedy sibling. For the applicant she did pay for the house and there is no judgment that has confirmation of transfer aside. It is unclear whether any approach has ever been made to the applicant with a view to an amicable settlement given the sentimental value that the house has to family members who had a legitimate interest in the property and who were prejudiced by its sale.

The law that stands to be applied to the facts and developments as they stand is that an order of the court is valid until and unless it has been set aside. As such, the High Court decision holds and has not been set aside. It is therefore the applicant who stands on firmer ground.

Accordingly, in the absence of any application having been made for reinstatement of respondents' claim I am left with no choice but to observe that the order that was granted the applicant in 2003 in the matter **HC 8614** by which the property was ceded to applicant, remains extant. This order had been put in abeyance by the impending applications for condonation and rescission which have since been dismissed for want of prosecution.

On the issue of costs, I note that the respondent has previously been represented *in forma pauperis* and that she was a self-actor in the application before me. I do not think much purpose will be served by a punitive order as to costs. Therefore although punitive costs have been requested, they are not in my view entirely justified given the overall circumstances of this case.

Accordingly it is hereby ordered that:

1. The Respondent or any other person claiming occupation of the property through her shall give vacant possession of stand no 3429 Unit D Seke, Chitungwiza to the applicant within 7 days of the service of this order.
2. If the Respondent or any person occupying the property through her remains on the property after that date, the Deputy Sheriff be and is hereby authorised to remove her/ them and her/their possessions from the property.
3. The respondent be and is hereby ordered to pay the sum of nine hundred and forty United States dollars and fifty two cents ($940.52) being the total sum due for unpaid water and electricity bills.
4. Interest in (3) at the prescribed rate calculated from the date of the application.
5. Respondent to costs of this application on an ordinary scale.

Uriri Attorneys At Law, applicant's legal practitioners