HAROLD MANYAME
and
CHARLES MANYAME
versus
EMILY KARIMAZONDO
and
PROPERTY PARADISE REAL ESTATE (PVT) LTD
and
NOBERT H. C. CHIROMO
and
NATIONAL EXECUTOR AND TRUST SERVICES (PVT) LIMITED
and
MESSRS CHIGWANDA LEGAL PRACTITIONERS
and
CHRISTIAN PETUS SCHOLTEMEIJER N.O.
and
MESSRS MANDIZHA AND COMPANY
and
HARARE LEGAL PROJECTS CENTRE
and
CHITUNGWIZA TOWN COUNCIL
and
THE REGISTRAR OF DEEDS N.O.
and
THE REGISTRAR OF HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 16 September 2015 & 23 September 2015

Opposed Application

T. Marume, for the applicants
The 1st respondent, indefault
Ms *O. Nyamanhindi*, for the 3rd respondent

MATHONSI J: The first applicant, who claims without any documentary proof to have been 'appointed a co-administrator' of the estate of the late Obert Manyame, has sued virtually everyone who has had dealings with that estate including those 'who at one point were associated with', those 'who are associated with' and those 'who at one point represented the interested parties' in the estate. It is not clear why he has done so but whatever it is he has done, it has been done with the second applicant, his brother, firmly in support and right behind him.

The application is made in terms of r 449 of the High Court of Zimbabwe Rules, 1971, for the rescission of a judgment which the applicant says has 'a patent error of inclusion' of himself when he was not a party to the proceedings in HC 2788/02. The first applicant is the first born son of the late Obert Manyame who died testate on 29 November 1994. The deceased must have been a polygamist because, while married to the first applicant's mother who died in 2003, he had also married the first respondent in 1985.

The estate of the late Obert Manyame was distributed in terms of his last Will and Testament and in terms of the first and final distribution Account dated 27 April 1998, the immovable property known as stand 1871 Kurauwone Street, Unit A, Seke Chitungwiza was "awarded to the Administrator of the Obert Manyame Testamentary Trust". By Deed of Assumption dated 19 April 1995 the first applicant was appointed by the testamentary administrator as co-administrator of the trust created by the Will. It is that house in Seke Chitungwiza which is the subject of this matter. Surprisingly those that appointed the first applicant co-administrator, renounced their administration on 19 March 1998 before the appointment. In HC 2788/02 the first respondent made an application in this court seeking authority to sell the house. Although he was not a party to that action, the applicant says that in the judgment which was handed down, his name was inserted as "H. Manyame, National Executor and Trust" even though he was never served with the application.

When he made the discovery the applicant says he made an application for rescission of that judgment in HC 4988/02 and sought a joinder in HC 4987/02 which files he says later went missing. After sometime he leant that the house had been sold to the third respondent. In response he instituted a flurry of applications being HC 1425/06, HC 1683/06 and HC 1343/06 which however did not stop the third respondent from obtaining an order for the first applicants'

eviction in HC 1058/06, although he says he was never served with the application but only received a notice of set down.

The first applicant acknowledges that the first respondent was appointed executrix of the estate administered under DR 2043/96, that although the house was not sold in terms of the will, it was sold in terms of a court order authorizing such a sale and that the purchaser of the house obtained a court order for his eviction which was later carried into execution.

The third respondent has questioned the appointment of the first applicant as administrator insisting that it is the first respondent who was appointed executor and given authority to sell the house. He maintains that he purchased the house after he had seen a newspaper advertisement flighted by Property Paradise Real Estate and later took transfer by Deed of Transfer number 738/2006. He has since sold the house to one Onias Mukanyangi who is not a party to this application.

I must mention that although the second applicant is cited in the application his interest has not been disclosed. In his own affidavit he merely adopts the affidavit of the first applicant as his. So he must stand or fall with the first applicant.

The history of this matter is quite interesting and one is left surprised why it has been brought the way it has. The applicants seek a rescission of a judgment handed down on 8 May 2002 in HC 2788/02, a reversal of the sale of House No. 1871 Unit A Seke Chitungwiza and a declaration that the transfer of that house be declared invalid.

In HC 2788/02 the first respondent had approached the court seeking an order against the executor of the estate of her late husband after her step children, mainly the first applicant, had not only shared the proceeds of that estate to the exclusion of her own children one of whom was 9 years old at the time, but had also chased her away from her home where she used to reside with her late husband. She sought and obtained a court order in the following:

> "IT IS ORDERED THAT:
> 1. The 1st respondent be and is hereby ordered to sell the rights held and interest in house No. 1871 Unit 'A' Seke in accordance with current market prices.
> 2. Should the 1st respondent fail to comply with paragraph 1 above the master is to appoint an Independent Estate Agent to proceed with the sale of the said property in the manner described in paragraph 1.
> 3. The net proceeds from the sale of the property shall be distributed in terms of the Will of the late Obert Manyame.
> 4. The costs of this application shall be paid out of the funds of the Estate of the late Obert Manyame".

It is that court order which the applicants would want to have rescinded 13 years later. I have taken the trouble to request all the old court records referred to in this application in order to understand what the matter is all about because of the tenuous state of the application itself.

The application in HC 2788/02 was filed by the first respondent as a self-actor. The first applicant was not a party to the application neither does his name appear in the original court order, granted by Omerjee J on 8 May 2002. The first respondent was "National Executor Services". The name of the applicant may have found its way to the court order because the binding cover containing the consolidated index now had the first respondent as "H MANYAME EXECUTOR & TRUST". Presumably that is what tricked the typist to incorporate that name in the order granted by the court, an order which does not have that name.

It is important to mention that the Master submitted a report in support of the court order sought in terms of r 248 which reads in part:

> "I concur with paragraphs 5 and 9 of the founding affidavit. I also state that applicant has on two occasions complained of harassment perpetrated by deceased's children with is former wife. Naturally it is difficult for step children to stay peacefully with stepmothers. I therefore have no objection to the relief being sought as it would also be in the interests of the children".

That way the order was then granted for the house to the sold and the proceeds shared in accordance with the will. The first applicant has never been the executor and has never held such a letter, he having only been clandestinely appointed the "administrator of the estate" by a retiring executor.

It is significant that the first applicant became aware of that court order immediately after it was granted and he filed a court application for rescission of judgment on 12 June 2002, HC 4988/02, claiming to be the "co-administrator of my father's estate" and that the first respondent had gone behind his back to obtain the order. He was not the executor and his non-joinder could not have been fatal to the application. He also filed an application for joinder in HC 4987/02 precisely because he was not a party. None of the two applications was prosecuted.

Meanwhile the third respondent who had purchased the house from the first respondent after she had been appointed executrix and issued with letters of administration dated 4 July 2002, instituted summons action against the first respondent and all tenants occupying the house in HC 1058/06 for eviction. He had taken transfer of the house by Deed of Transfer No

738/2006. That action was also supported by the Master's report dated 25 April 2006 issued in terms of r 248 the relevant part of which reads:

> "According to information filed of record indicates (sic) that the property under dispute was sold to plaintiff in terms of the court order dated 30 May 2002 (sic) which copy I beg leave to attach as annexure A. I further submit that in terms of the same order the Master issued consent to sale (sic) the immovable property in question to plaintiff in terms of section 120 of the Deceased Estates Act Chapter 6:01 …… It should be noted that one of the deceased's children namely Harold Manyame attempted without success to petition the courts to have the sale of the house rescinded See Annexure C."

The eviction order was duly carried into execution despite a flurry of applications made by the first applicant - HC 1343/06; HC 1428/06. In fact HC 1425/06 was an urgent application seeking nullification of the first respondent's letters of administration, the sale of the house among other related relief. It was rejected on 14 March 2006, per Guvava J (as she then was), on the basis that it was not urgent given that the judgment had been given in May 2002. HC 1343/06 was withdrawn in court. Since then the applicants have not challenged the eviction and the house has already been sold by the third respondent to someone else. They would however like the order authorizing the sale of the house, with the consent of the Master by the appointed executrix, set aside courtesy of r 449.

Interestingly after failing to prosecute the rescission of judgment application filed in 2002, the applicants returned to court 4 years later on 29 September 2006, seeking the same relief. If, by their own admission, they were aware of the judgment 4 years earlier, how could they possibly launch this application after that period without any explanation as to what happened to the first application and what transpired in the intervening 4 years?

That is not all, although heads of argument were filed as far back as 2007, the set down of the application has only been sought now, some 8 years later. This court is now being asked to retrieve and dust up stale records dating back 13 years without any explanation as to why the applicant failed to prosecute the application all along.

Rule 449 is silent on the time frame within which an application made under it should be brought but that does not mean that a party relying on that rule is at liberty, without more, to come to court anytime seeking a rescission of judgment. The application should be made within a reasonable time after knowledge of the offending judgment. In my view 4 years is not a reasonable time.

In terms of r 449 (1):

> "The court or a judge may, in addition to any other power it or he may have, *mero motu,* or upon the application of any party affected, correct, rescind or vary any judgment or order –
> (a) that was erroneously sought or erroneously granted in the absence of any party affected thereby, or
> (b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission, or
> (c) that was granted as a result of a mistake common to the parties"

That rule is a procedural step to correct an obviously wrong judgment or order. The court is given discretionary power which it must exercise judiciously. The rule is meant to correct errors made by the court itself and is not an omnibus through which new issues and new parties are brought before the court for trial: *Tiriboyi* v J*ani & Anor* 2004 (1) ZLR 470 (H) 472E – H; *Theron N.O* v *United Democratic Front & Ors* 1984 (2) SA 532 (c) 536 D – F; *Grantully (Pvt) Ltd* v *UDC Ltd* 2 000 (1) ZLR 361(S).

Mr *Marume* for the applicant submitted that he relies on r 449(1)(a), namely, that there was an error on the part of the court in granting the order in that the applicants had not been cited in the application when they had an interest in the matter. He initially took the view that the first applicant should have been cited as "a co-administrator" of the estate. When his attention was drawn to the fact that he was never appointed executor and held no letters of administration, Mr *Marume* capitulated.

In my view, there was no error on the part of the court in making the order that was made against the then appointed executor of the estate having regard to the interests of the deceased's widow and her children. It directed the executor to dispose of the house in order to share the proceeds in terms of the will. As a r 449 application is not a licence to bring in new matters like the issue of how the proceeds were later shared as attempted by Mr *Marume* from the bar, there can be no basis for interfering with the discretion of the court other than as provided for in that rule.

The only error that I have noted was in the typing of the court order, which as I have said was the mistake of the typist and not the court, in incorporating the name of the first applicant when it does not appear on the heavily annotated order granted by Omerjee J on 8 May 2002. I will direct that the order be corrected accordingly as the first applicant was never party to the

proceedings. He did not have to be as he was not the executor, the estate custodian who was duly supervised by the Master.

In the result it is ordered that:

1. The application is hereby dismissed with costs.
2. The registrar of this court is directed to correct the court order issued on 8 May 2002 by the deletion of the name "H Marume Executor & Trust" as the first respondent and the substitution of the name: "National Executor Services" which is the name appearing on the original court order as the first respondent.

Matsikidze & Mucheche, applicant's legal practitioners
Muringi Kamdefwere, 3rd respondent's legal practitioners