RODWELL CHITIYO N.O
versus
EMMANUEL MANDIPA CHIGUBA
and
DAVID KADZERE
and
DORREN KADZERE
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 21 April and 27 April, 2017

Urgent Chamber Application

T. Zhuwarara for applicant
L. Madhuku for 1st respondent
M. Mtlongwa for 2nd and 3rd respondents

CHITAKUNYE J: On 27 April 2017, I granted a final order with the consent of counsel for all the parties in the following terms:

It is ordered by Consent that:

1. The applicant to remain in occupation pending determination of the application for joinder and application for rescission to be made within three days of this order.
2. The costs be costs in the cause.

The reasons leading to that order were as follows.

This is an urgent chamber application in which the applicant seeks a temporary suspension of the operation of a writ of ejectment issued on 23 March 2017 under case number HC 11049/16.

The second and third respondents where the original persons in whose names the property in question was registered before transfer to the first respondent.

The applicant is a son to the late E T Chitiyo who died on 9 October 2016. Upon the demise of his father he was appointed executor dative on 4 April 2017. It is in that capacity that he filed this application.

The first respondent purchased the property in question in a judicial sale and has since obtained transfer into his name. The first respondent proceeded to obtain an eviction order against the second and third respondents and all those claiming occupation of the property through them on 22 March 2017.

The writ of ejectment was served on the applicant hence this urgent chamber application for a suspension of the writ of ejectment.

The first respondent contended that the matter is not urgent and that the application had no merit.

On the question of urgency, the first respondent contended that the matter is not urgent because the applicant knew about the change of ownership in the property over 6 months ago and ought to have taken action then and not now. The applicant on the other hand argued that he only came to know of the action for eviction upon being served with the writ of ejecment by the Sheriff.

The question of what constitutes urgency has been debated in these courts for long and what emerges is that each case must be taken on its own circumstances. The broad circumstances were enunciated in such cases as the *Kuvarega* v *Registrar & Anor* 1998 (1) ZLR 188; *Dextiprint Investments (Pvt) Ltd* v *Ace Property Investment company* HH 120/2002. In this latter case court alluded to the fact that:

> "For a court to deal with a matter on an urgent basis it must be satisfied of a number of important aspects. This court has laid down the guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with that matter on an urgent basis. Further, it must also be clear that the applicant did on his own part treat the matter as urgent. In other words if an applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis."

See also *Madzivanzira & Ors* v *Dexprint Investments (Pvt) Ltd & Anor* 2002 (2) ZLR 316 (H).

In *Document support Centre (Pvt) Ltd* v *Mapuvire* 2006(1) ZLR 240 (H) at 244C -D MAKARAU JP (as she then) was opined that:

> "In my view , urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

In *casu*, the writ of ejectment which is sought to be stayed was granted against the second and third respondents. The applicant's ejectment is on the rider that "all those claiming occupation through them".

Having perused the application and the reference files pertaining to the dispute on this matter, I am inclined to hold that the matter ought to be treated as urgent. The circumstances involve the eviction of the family of the late E T Chitiyo from a property they claim to have been occupying since 2004. If court were not to treat such a situation as urgent , the applicant may well be justified in thinking that court has failed to do justice and so why not resort to other means that may not augur well. Indeed when a person comes puffing and panting to the doorsteps of the court claiming some irregularity in their eviction from premises they have been occupying for long and which they call their home, it is only proper to give them a hearing. If after being heard the decision does not go their way, they will at least be satisfied that they were heard but court decided against them.

I thus conclude that the circumstances of this case warrant the treatment of this case on an urgent basis.

The next issue pertains to the merits of the application itself.

A reading of the papers filed of record and a perusal of reference files in HC 11577/15 and HC 9225/16, confirms that the present applicant, though he approached court in his capacity as executor of the estate late Edmore Tererai Chitiyo, is also alleging that he and other family members of the Chitiyo family have been in occupation of the property in question since 2004 to date. In this regard in para 13 of his founding affidavit he brings this out when he states that:

> "I or any of Mr. Chitiyo's dependants and assignees contend that we cannot be evicted on the back of a Court Order that does not apply to us and was not born of our participation."

Further in para 17 he states that:

> "I and a family of 8 are in occupation of the property and have been in such open occupation since 2004. 182 Bradley Road Waterfalls Harare is our home and forms part of my father's estate."

It is clear that the basis for the occupation was not that they were riding on the back of the second and third respondents, but were occupying the premises in their own rights as innocent purchasers for value and who had reason to believe they had acquired rights of ownership. It is with that belief that the late Edmore T Chitiyo, upon learning of the

attachment and that the property was to be sold by the Sheriff caused interpleader summons to be issued. When his claim was dismissed in default in February 2016 he did not rest. Efforts were made to show that he had purchased that property.

On 12 September 2016 the late E T Chitiyo filed an urgent chamber application seeking to stop the transfer and disbursement of sale proceeds from the property. In clause 4.4 of the founding affidavit to that application, he stated that: in about April 2004 he moved from his Lochnivar home he had exchanged with the waterfalls home to start residing in the property in question.

What is important to note is that the late E.T Chitiyo made clear the basis of his claim and even provided documents in support thereof. Unfortunately, the urgent chamber application was deemed not urgent and so the merits of his case were never argued. Nevertheless the first respondent had been made aware through the interpleader proceedings and the urgent chamber application of the basis of the late Chitiyo's claim.

It was also apparent that the deponent to the first respondent's opposing affidavit, Dickson Mundia, was also the deponent to the judgement creditor's opposing affidavits in both the Interpleader proceedings and the urgent chamber application. He was thus fully aware that the late E T Chitiyo was not claiming occupation through the second and third respondents but as a *bona fide* purchaser in his own right. He was also aware that the late Chitiyo was claiming that this was his home since 2004.

Besides the above processes, there are also numerous correspondences between the applicant's legal practitioners and the first respondent's legal practitioner showing clearly that the first respondent was in no doubt as to the basis upon which the late Chitiyo was claiming rights to the property and occupation thereof. At one point there was even an offer for the late Chitiyo to pay off the debt that had led to the property being attached on behalf of the second and third respondents just so that he can save his home as he had acquired it in exchange with his previous house in Lochnivar.

It will not be farfetched to conclude that the basis upon which the late Chitiyo was claiming occupation was well known to both the first respondent and his legal practitioners. Despite this knowledge the first respondent and his legal practitioner sought to circumvent citing the late Chitiyo and cited persons they had been made aware that, serve for their names that were still on the title deeds, no longer had interests in the property.

It is common cause that as the first respondent was processing the eviction process the late Chitiyo died and as at the time eviction was attempted he was no more and his son had been appointed executor. As executor he was not favoured with the process seeking their eviction. Indeed, though the first respondent alleged that the address for service of the summons for eviction was the address for the property in question and so the applicant ought to have received the summons and noted its contents, no proof of service was tendered to confirm that service was in fact effected at this address. There is thus nothing to contradict the applicant's assertion that he never received summons for eviction. It is in that light that he approached court for relief. The question is should he be denied the relief in the given circumstances?

The basic requirements for an interim interdict may be summed up as follows:

(i) a *prima facie* right, even if it is open to some doubt;
(ii) a well-grounded apprehension of an irreparable harm if the relief is not granted;
(iii) that the there is no other remedy (absence of alternative remedy); and
(iv) that the balance of convenience favours the granting of the interim relief. See *Setlogelo* v *Setlogelo* 1914 AD 221 at 227; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (1) ZLR 28 (SC) at 391; *Farisai Nando and Recskill Investments (Pvt)* v *Prime Investments (Pvt) Ltd and Sheriff for Zimbabwe* HH 23/15.

The applicant argued that he had met all the requirements for an interdict whilst the first respondent contended otherwise.

I am however inclined to hold that the applicant has shown a prima facie right to the relief he seeks. Clearly, as portrayed above, the first respondent deliberately avoided citing the applicant in a bid to avoid a contest. As the first respondent knew that the late E T Chitiyo (applicant) was not "claiming occupation through the second and third respondents, but as a *bona fide* purchaser, he ought to have cited him if he was seeking their eviction from the property they now called their home.

Further in terms of s 74 of the constitution, the applicant, even in his individual capacity could not be evicted without due process in which he was given opportunity to participate. That section provides that:

> "No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances".

In *casu*, the applicant and the other members of the late E T Chitiyo's family have known 182 Bradley Road, Waterfalls, Harare as their home since 2004.

Thus even from that angle I am inclined to hold that applicant has shown a *prima facie* right.

On the question of irreparable harm, an eviction of someone from their home inevitably prejudices them in that they are thrown onto the streets without being heard. The inconvenience to be suffered cannot be corrected.

In terms of alternative remedy, this is clear that the applicant has no alternative to resort to *vis-a-vis* the relief he seeks for himself and other members of the late Chitiyo's family who are in occupation of the property in question. As aptly noted by MAFUSIRE J in *Nando and Recskill Investments* v *Prime Investments* (*supra*):

> "for someone who is about to be evicted from the house that has been her only home for all the while, and who yearns for an opportunity to assert her right to that home, it becomes pedantic to talk about an alternative remedy to an interdict."

In terms of the balance of convenience this again favours the applicant. It is clear from the records of proceedings that the issue of the late Chitiyo's rights to the property in question has been ongoing for some time. The first respondent knew about this claim from the time the property was put on sale. When the property was sold despite the late Chitiyo's protestation, who ever bought it was taking a risk and must live by it. Equally the process of transfer was again a stage the first respondent must have realised the property he acquired had outstanding issues to be resolved. Given these circumstances the prejudice to be suffered by the first respondent in delaying the enjoyment of the property is something that was to be expected. What is of paramount importance at this stage is to ensure that parties are given the opportunity to ventilate their issues and a determination is made on the merits rather than on technical aspects and this should be done whilst the applicant has shelter and not living on the streets.

I do believe that had the claim by the late Chitiyo been determined on the merits rather than on technicalities, this application could have been avoided.

The first respondent contended that the applicant's final relief is incompetent and so the application should not be granted. Whilst appreciating the points raised, I am of the view that that would still not justify the breach of applicant's constitutional right in terms of s 74. In any case, the final relief is not for the nullification of the writ of ejectment only, but for joinder and an application for rescission of the Judgment wherein applicant was not cited

when he ought to have been cited. The participation of applicant in the process that seeks to evict him and those who claim occupation through the late Chitiyo is vital.

As the parties prepare for the final relief appropriate modifications can always be made to ensure justice is attained rather than dismiss the claim on such technical aspects. Further, r 246 (2) is to the effect that where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied. The relief sought can be varied in the interest of justice as long as that does not prejudice the other party.

Though the second and third respondents filed their notice of opposition, they were in fact in support of the application and confirmed the fact that the property had been sold to the late E T Chitiyo in 2004.

After I indicated to the parties that I will grant the interim relief in a varied form so as to give specific time frames for the applicant to expedite the process so that the matter is heard early, counsel for the parties had a consultation between themselves after which they agreed that I grant a final order. A final order in the following terms was thus granted with the consent of counsel for all the parties:

It is ordered by consent that:

1. The applicant to remain in occupation pending determination of the application for joinder and application for rescission of judgment to be made within three days of this order.
2. The costs be costs in the cause.

Takawira Law Chambers, applicant's legal practitioners.
Mundia & Mudhara, 1st respondent's legal practitioners
Chambati Mataka & Makonese Attorneys at Law, 2nd and 3rd respondents' legal practitioners