CATHERINE MUVUNGANI
versus
NEWHAM FINANCIAL SERVICES (PVT) LTD
and
CLAUDIOUS NHEMWA
and
GEORGE FUNGANJERA
and
CRAIG CHOBONDA
and
MAXWELL TENDAYI
and
SHERIFF OF ZIMBABWE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 16 September 2016 & 1 February 2017

Opposed Matter

T Biti, for the applicant
T Zhuwarara, for the 1st, 2nd and 5th respondent
N Mhlolo, for the 3rd respondent

MATANDA-MOYO J: The applicant sought the following relief before this court;

1. That Deed of Transfer 2344/14 dated 16 May 2014 in favour of the fifth respondent be and is hereby cancelled.
2. That mortgage bond number 3021/2016 dated 23 August 2012 in the first respondent's favour be and is hereby declared null and void ab initio and is therefore cancelled.
3. That the order of this court in HC 9505/12 be and is hereby rescinded.

4. That the applicant be and is hereby restored into possession of the above immovable property. The fifth respondent be and is hereby ordered to vacate that property within 30 days of this order; and
5. That the second, third and fourth respondents shall, jointly and severally, pay the costs of suit on the scale of legal practitioner and client.

The respondents raised points *in limine* that;

a) The applicant's affidavit was not properly before the court. Such affidavit was commissioned without the commissioner of oaths having had sight of the annexures. Rule 227 (4) (a) of the High Court rules was not complied with.
b) The applicant delayed in bringing the present court application. She has failed to explain the reasons for her delay. A delay of more than two years is inordinate and portray lack of seriousness on the part of the applicant. Whilst r 449 does not prescribe a time period within which such application is to be brought to court, an applicant is still required to do so within a reasonable time.

   The prejudice on the fifth respondent is huge as the fifth respondent is an Innocent purchaser, who bought the property at an auction. The fifth respondent took occupation after eviction of the applicant from the property by an order of court. This application is meant to harass the fifth respondent and is an attempt to retrieve property legally sold.
c) The procedure taken by the applicant is wrong. This matter has disputes of facts and should have proceeded by action procedure as opposed to application procedure. The order sought require ventilation of evidence. The matter ought to be dismissed at this stage with costs on a higher scale.

Mr *Biti* for the applicant opposed the preliminary points taken. Firstly he took issue with Mr C Nhemwa appearing on his own behalf in view of serious fraudulent allegations levelled against him involving this matter. There are allegations that he obtained the order by concealing material facts to the court. In that application HC 905/12 the allegations are that he deliberately ommitted to cite the applicant.

On the issue of the applicant's affidavit not having been properly commissioned, Mr *Biti* argued that there is no law nor rule which demands that a commissioner of oaths in commissioning affidavit ought to certify each and every document attached.

An affidavit is the one which is sworn before a commissioner of oaths. He argued that even if the court rules that the attachments, were not properly commissioned, the documents attached remained public documents which can be admitted anytime. In any case the respondents have adopted the documents in their own affidavits and therefore the documents remain before the court.

On the issue of delay he submitted that r 449 of the High Court Rules do not provide for time limits within which to file an application. The only consideration is whether good cause has been shown to set aside the order.

Mr *Biti* argued that he sees no merit on the point taken that there are material disputes of facts. He submitted that the applicant's case is simple and ascertainable. She complains that she was dispossessed of her property without having been cited in the matter. The issue is simply whether one's property can be disposed of without one's citation in the proceedings? The persons cited were simply debtors who did not own the property. However, the applicant alleges the judge was misled into believing the debtors were the owners hence the order. The mortgage bond passed was a fraud. In order to determine the issues there is no need to lead further evidence.

The respondent argued that he applicant's affidavit was not properly commissioned as the annexures were not part of the affidavit at the time of commissioning. An affidavit has been legally defined as a written statement of facts, sworn to and signed by a deponent before a commissioner of oaths or some other authority having the power to witness an oath. An affidavit is the statement and not the documents attached. There is no requirement that annexures must be annexed to the statement before the taking of the oath. I do not therefore believe that the mere fact that the statement was commissioned without the annexures is fatal to the validity of the affidavit. Even assuming I am wrong in that proposition I agree with Mr *Biti's* submissions that all the annexures are public documents. The same annexures also represent the defendants' evidence.

Rule 2227 (4) of this court rules provides;

"4. An affidavit filed with a written application

(a) shall be made by the applicant or respondent, as the case maybe, or by a person who can swear to the facts or averments set out therein; and

(b) maybe accompanied by documents verifying the facts or averments set out in the affidavit, and any reference in this Order to an affidavit shall be construed as including such documents."

An affidavit is not rendered fatal by lack of attachments or annexures. An affidavit can be complete without the annexures in terms of the rule above. Once attached such documents form part of the affidavits.

The respondent also challenged the late bringing of this application. The respondent argued that a delay of two years is inordinate. The applicant is enjoined to bring such application within a reasonable time. This application has been brought in terms of r 449 which provides:

> "(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 nay 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 ……"

It is true that r 449 does not provide time limits within which such application must be made. Under r 449 once the court is satisfied that an order was erroneously granted in the absence of any party affected thereby then that is the end to the matter. The court should rescind the matter. See *Banda* v *Pithuk* 1993 (2) ZLR 60 (H). However, if the applicant brings the application late such factor must be taken into account in determining whether to rescind the judgment. Such is not a point to be taken *in limine*.

The applicant also took the point *in limine* that this matter should have been brought by way of trial and not by way of application as there are disputes of facts. Rule 449 is a single procedure where court has to simply decide:

1) Whether the judgment was erroneously sought and granted.
2) Whether the judgment was granted in the absence of the applicant and
3) Whether the applicant's right or interests are affected by the judgment.

Such factors can be determined through papers. There is no need for oral evidence to be led. Besides, the respondent has failed to point out to any material disputes of facts pertaining to this matter. I agree that herein the issue is whether one can be disposed of one's property without being cited in the proceedings. To me, this involves legal arguments. I do not believe there are any material disputes of fact not capable of resolution by an application procedure. I however, agree with the respondents that the issue of the mortgage bond cannot be resolved at this stage.

There is no adequate information before me to conclusively deal with the issue. Such issue will require oral evidence being led and cross – examination of witnesses to bring out the truth.

The brief facts of this matter are that on 22 August 2012 the first respondent issued summons against George Furanjera and Craig Chibanda for payment of $13 873-98 for capital amount for a loan borrowed by the two. It also claimed $12 231-90 as interest and sought an order declaring

> "a certain piece of land situate in the district of Goromonzi called Stand 2124 Ruwa Township specially executable, and an order declaring share No. 3 in certain piece of land being subdivision A of Upper Waterfalls situate in the district of Salisbury specially executable."

Attached to the summons was a mortgage bond number 0003021/2012 registered over stand 2124 Ruwa Township held under deed of transfer number 11234/1998 by the applicant.

The defendants in HC 9505/12 having been served with summons failed to enter appearances to defend resulting in the default judgment being granted on 6 February 2013.

Coming to the merits of the matter all parties are in agreement that the applicant was not cited in the proceedings before MATHONSI J. All parties are in agreement that the applicant was the registered owner of the property sought to be declared executable. It is however in dispute how a mortgage bond was registered over the property as security for a debt obtained by the fourth respondent who is the applicant's husband. I do not believe this is important for the determination of this matter.

The legal issue to be determined is whether it is lawful to order a property executable without citing the registered owner of the property. The law is very clear on the point. An owner of a property cannot be dispossessed of his/her own property without due process. The respondents herein dispossessed the applicant of her property without affording her a right to be heard. The applicant may well have opted to pay up for example and be able to save her property. However she was non-suited through failure by the respondents to cite her in the main case. See *Agro Chem Dealers (Pvt) Ltd* v *Gomo and Others* 2009 (1) ZLR 255 (H) where GOWORA J as she then was said at p 259 A;

> "The registration of title in a person's name constitutes the registration of a real right in the name of that person…"

What the above simply means is that the applicant as the registered owner of the property in question had real rights in that she had exclusive benefit indefeasible by any other person. It follows therefore that she could not be deprived of such property without due process.

The requirements for setting aside a default judgment in terms of r 449 are settled.

The applicant must satisfy

1) That the default judgment must have been erroneously sought or erroneously granted.
2) Such judgment must have been granted in the absence of the applicant and
3) Applicant must be affected by the judgment.

See *Mutebwa* v *Mutebwa and Another* 2001 (2) SA 193. *Munyimi* v *Tauro* 2013 (2) ZLR 291 (S).

A judgment is said to have been erroneously granted when a court commits an error. In the case of *Bakoven Ltd* v *GJ Howes (Pvt) Ltd* 1990 (2) SA 446 at 471 E to H the court said;

> "An order or judgment is erroneously granted when the court commits an error in the sense of a mistake in a matter of law appearing on the proceedings of a court of record. (The Shorter Oxford Dictionary). It follows that a court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal confined to the record of proceedings. In contradistinction to relief in terms of rule 312 (b) or under common law, applicant held not show 'good cause' in the sense of an explanation for his default and a bona fide defence (*Hardroad (Pvt) Ltd* v *Oribi Motors (Pvt) Ltd* (*supra*) at 578 F-G, De Wet (2) at 777 F-G *Tshabalala and Another* v *Pierre* 1979 (4) SA 27 (T) at 30 C-D. once the applicant can point to an error in the proceedings he is without further ado entitled to rescission."

The applicant herein pointed to the error that her property was declared executable without her being cited and accorded an opportunity to defend her real rights as the registered owner of the property. I have perused HC 9505/12 and indeed the applicant is not a party to those proceedings. The judgment given affected the applicant as she lost her property. From the pleadings there is no mention of the owner of the property resulting in the court making the error that the cited parties therein were such owners. The applicant has therefore satisfied the requirements for setting aside that order only as it relates to the order declaring her property executable.

In so far as the cancellation of the mortgage bond number 3021/2010, I agree with submissions by the respondent that this particular issue cannot be determined on papers as there are disputes of facts regarding the issue. Such issue must be determined by a full trial.

In the result I order as follows;

1. HC 9505/12 order granted by this court's para 3 is rescinded.
2. That Deed of transfer number 2344/20134 dated 16 May 2014 in favour of the 5th respondent be and is hereby cancelled.
3. That the 5th respondent be and is hereby ordered to vacate the above property within 30 days of service of this order.
4. That the applicant be and is hereby restored into possession of the above property.
5. That the 2nd, 3rd and 4th respondents shall jointly and severally pay costs of suit on a higher scale.

C Nhemwa And Associates, applicant's legal practitioners
Tendai Biti, 1st respondent's legal practitioners
Chinongwenya & Zhangazha, 2nd respondent's legal practitioners