

CECILIA KASHUMBA
versus
AAROLA TAKUDZWA TENDAYI IDEHEN
and
AMOSORGE RUDO IDEHEN
and
OSARETIN TANAKA DEMI IDEHEN
and
SHORAI MAVIS NZARA
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 17 & 24 May 2018

Urgent Chamber Application

T. Zhuwarara, for the applicant
P. Chiutsi, for the 1st, 2nd, 3rd and 4th respondents

MUSAKWA J: This is an urgent chamber application for stay of execution pending the determination of action proceedings instituted by the applicant in case number HC 3331/18.

It is common cause that in case number SC 18/18 the applicant lost in an appeal that had been lodged with the Supreme Court by the respondents. Judgment in case number SC 18/18 was granted on 18 March 2018.

The background to the saga is that the applicant's late husband (Dzingai Kashumba) and the fourth respondent entered into an agreement of sale in respect of stand number 552 of Quinington Township of Subdivision A of Subdivision F of Quinington Borrowdale Estate. The fourth respondent instituted proceedings for confirmation of cancellation of the agreement on the basis that Dzingai Kashumba had not paid the purchase price in full. The applicant became a party to those proceedings upon substitution following the death of Dzingai Kashumba. At some stage the applicant sold a portion of the land to one Tafirenyika Kambarami.

In SC 18/18 the Supreme Court held that title in the land had not lawfully passed to Dzingai Kashumba and consequently, to the applicant. As a result the applicant could not

lawfully alienate the property. It was also observed by the Supreme Court that when the applicant disposed of the land she had misrepresented that it was free of disputes.

Ultimately, the Supreme Court made the following order:

1. The Registrar was ordered to cancel the deed of transfers in favour of Tafirenyika Kambarami and the late Dzingai Kashumba.
2. The first appellant was entitled to keep as *rouwkoop* payments made to her by the late Dzingai Kashumba.
3. The first respondent (the present applicant) and the fourth respondent were ordered to vacate stands 552 and 553 Quinington Township of Subdivision A of Subdivision F of Quinington Borrowdale Estate within thirty days of the order, failing which the Sheriff or his lawful deputy or assistant deputies were authorised and directed to evict the respondents and all those claiming occupation through them.
4. The Registrar was ordered to reinstate title to the second, third and fourth appellants (first, second and third respondents in the present application).

In opposing the application the respondents raised preliminary points touching on urgency, jurisdiction and *res judicata*.

The respondents' argument concerning jurisdiction is that this court has no authority to suspend an order of the Supreme Court. Mr *Zhuwarara* countered this argument in a two-fold manner. Firstly he submitted that the High Court has power to control execution of judgments emanating from it. In support thereof he cited the case of *The President of The Republic of Zimbabwe v Abednico Bhebhe and Others* HH-400-12. His other submission was that s 74 of the Constitution should be respected.

In *The President of The Republic of Zimbabwe v Abednico Bhebhe and Others supra* CHIWESHE JP made a distinction between a Supreme Court order which confirms the order of the High Court and that which alters the order appealed against materially. The Judge President further reasoned that where the High Court order is confirmed by the Supreme Court it essentially remains an order of the former court. Since I am not going to grant the relief sought for other reasons I need not occupy myself with the question of whether or not I have jurisdiction to stay the order of the Supreme Court.

On *res judicata* Mr *Chiutsi* submitted that the relief being pursued by the applicant was effectively disposed of by the Supreme Court when it held that the relief of *rei vindicatio*

overrides a plea for mercy. Mr *Chiutsi* was emphatic that once a case of *rei vindicatio* was upheld in favour of the respondents, any occupier of the premises must vacate them.

On the other hand Mr *Zhuwarara* submitted that the defendants' defence in the pending case is not known. The main concern is that the applicant will be rendered homeless if eviction is carried out. In addition to that, if the applicant is not protected from eviction the pending case would be rendered *brutum fulmen*. Mr *Zhuwarara* further submitted that even if the applicant's late husband acted illegally the applicant is still entitled to sue for the improvements done to the property. As authority in support of this proposition Mr *Zhuwarara* cited the cases of *Fantasia Farms (Pvt) Ltd and Others v (A) F.T. Manyeruke and Others (B) (1) Hippo Valley Estates Limited (2) Triangle Limited (Additional Respondents) SC-65-07* and *Quarry Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd and Others 1985 (1) ZLR 77 (HC)*.

Even if the applicant is entitled to claim compensation for improvements, this is not a matter for determination before me. Whether or not the applicant has a valid claim is irrelevant. This is because the Supreme Court ordered her eviction from the premises. That puts paid to the applicant's claim of retention of the property pending determination of the claim for compensation for improvements.

This brings me to the issue of whether the matter is urgent. The applicant claims to have become aware of eviction when notice of removal was served her on 10 May 2018. Surely, that cannot be the time when the need to act on her part arose.¹ The impression given is that the applicant was not aware of when the Supreme Court handed down its judgment. She sought to sanitise the purported ignorance of the order of eviction by making the following innocuous averment in the founding affidavit-

“On the 12th March 2018 the Supreme Court in SC 18/18 issued out an order in terms of which the 1st to 3rd respondents were adjudged to be the lawful owners of a certain property being stand 552 of Quinington Township of Subdivision A of Subdivision F of Quinington Borrowdale Estate measuring 4002 square metres. Attached is a copy of the attendant determination.”

And yet in the pending claim for compensation (HC 331/18) which was filed on 25 April 2018, the applicant made the following averment about the Supreme Court order in her declaration-

“.....It altered the judgment of this court and ordered the plaintiff's vacation of the property.”

¹ *Kuvarega v Registrar General 1998 (1) ZLR 188*

Therefore, as of 25 April 2018 the applicant was aware of the order for her eviction. The order for eviction was made on 12 March 2018. Therefore, the applicant was sluggish in treating the matter as urgent. The matter did not become urgent on account of the service of the notice of removal on the applicant on 10 May 2018. This is a clear case of self-created urgency.

In the result, the matter is adjudged not to be urgent. The Registrar is directed to remove the matter from the roll of urgent matters. The applicant is ordered to pay the respondents' costs.

Kantor & Immerman, applicant's legal practitioners
P. Chiutsi Legal Practitioners, respondents' legal practitioners