

RODWELL CHITIYO N.O.  
versus  
EMMANUEL MANDIPA CHIGUBA  
and  
DAVID KADZERE  
and  
DOREEN KADZERE

HIGH COURT OF ZIMBABWE  
CHIWESHE JP  
HARARE, 14 November 2017 and 19 February 2018

**Opposed Matter**

Adv *T. Zhuwarara*, for the applicant  
Prof. *L Madhuku*, for the respondents

CHIWESHE JP: This is an application for rescission of judgment in terms of r 449 of the High Court rules.

Rule 449 (1) (a) reads as follows:

“(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”

The applicant is the Executor Dative of the estate of the late Edmore Tererai Chitiyo having been appointed as such in terms of Letters of Administration DR H 184/17 issued by the Master of this honourable court at Harare on 4 April 2017. During his life time the said Edmore Tererai Chitiyo had acquired, through an agreement of sale entered into between him as the buyer and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as the sellers, the immovable property described as 182 Midlands Township 2 of Upper Waterfalls Estate. The agreement of sale is filed of record. Para 2 thereof acknowledges that the purchase price had been paid in full at the time of signature of the

agreement. The agreement is dated 24 March 2004. Clearly this piece of land must be regarded as part of the Estate under the applicant's administration.

Unbeknown to the applicant this stand had subsequently been acquired by the 1<sup>st</sup> respondent through a judicial sale pursuant to a default judgment entered against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents under case number HC 11049/16 dated 22 March 2017. Apparently 2<sup>nd</sup> and 3<sup>rd</sup> respondents had also sold this stand to the 1<sup>st</sup> respondent who acquired title. This was a clear case of a double sale. Having acquired title the 1<sup>st</sup> respondent sought and was granted a default judgment to evict 2<sup>nd</sup> and 3<sup>rd</sup> respondents who were no longer in occupation.

Instead, it was the applicant and two other dependents of the estate who were in occupation of the stand. The applicant sought and was granted an order staying execution of the eviction order. In the present application the applicant contends that the eviction order was erroneously granted because the court had not been informed that the Estate was in occupation of the stand and that in addition it claimed ownership. It is further contended that the 1<sup>st</sup> respondent had been aware of that fact well before he took transfer of the stand. Indeed, the 1<sup>st</sup> respondent had been served with a chamber application to do with the applicant's rights as far back as 13 September 2016. Copy of the chamber application is filed of record.

The applicant's unassailable position is that the Estate was not cited in the application for eviction filed by the 1<sup>st</sup> respondent despite knowledge on the part of the 1<sup>st</sup> respondent that the applicant had a substantial interest in the matter. The eviction order was thus sought and granted in the absence of the applicant.

Had the court been aware that it was the applicant and the two dependents who were in occupation and not the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it would have either declined to grant the order sought or ordered the joinder of the applicant. For that reason, the judgment was sought and granted in error. I am in entire agreement with these averments. The default judgment cannot be allowed to stand.

The 1<sup>st</sup> respondent's defence is devoid of merit. He avers that he is the lawful owner of the stand and for that reason he is beyond reproach. The fact that is lost to him is that his title is being challenged on the ground that it is defective as it was derived under circumstances where

the applicant had obtained prior rights to the property. Clearly the applicant deserved the right to be heard. If the court had been aware of the true set of circumstances it would have declined to entertain the matter in the absence of the applicant who was not only in occupation but in addition claimed ownership of the stand. The 1<sup>st</sup> respondent admits that he was aware that the property he purchased was also being claimed by the applicant! Paragraph 5 of his opposing affidavit reads:

“The averments in these paragraphs are denied. While I was aware that the property I purchased was also being claimed by one Admore Tererai Chitiyo, I chose the route of the law. The property in question was lawfully offered for sale notwithstanding the said claims of the late Chitiyo. I bought it lawfully. I subsequently obtained ownership in accordance with the law.

It is not admitted that the late Edmore Tererai Chitiyo had any substantial interest in my property.”

Why then did he not cite the applicant? The bulk of the averments in the opposing affidavit hinge on the fact that the 1<sup>st</sup> respondent has title and the matter ends there. There is thus a failure by the 1<sup>st</sup> respondent to appreciate the import of the present application, which is that there is a *prima facie* case upon which that title is being challenged, that the eviction order was granted in error because he failed to disclose to the court the existence of the applicant who on his own admission had a substantial interest in the matter. Clearly the 1<sup>st</sup> respondent is not an innocent purchaser. In applications of this nature, in order to succeed, the applicant needs not show that he has a bona fide defence – it is sufficient if he establishes that the order sought to be rescinded was erroneously sought and granted in the absence of a party who had a substantial interest in the matter.

I agree with Adv *Zhuwarara* that in light of the foregoing, the 1<sup>st</sup> respondent should not have opposed this application, moreso in view of the findings of this court in *Chitiyo NO v Chiguba & 3 Ors* HH 292-17. I have no doubt that the applicant satisfies all the requirements for the grant of rescission under r 449 (1) (a). The import and purposes of r 449 (1) (a) are well traversed in a plethora of cases. (See *Kaiser Eng (Pvt) Ltd v Makeh Enterprises (Pvt) Ltd* HB 6-12, *Nyingwa v Moolman NO* 1993 (2) SA 508, *Mushoro v Mudimu* HH 443-13).

The applicant’s right to be heard derives from the rules of natural justice embodied in the *audi alteram partem* rule. These rules require that “a person be given reasonable notice to make representations where another takes action which adversely affects his/her interests or rights”- per

CHATUKUTA J in *Matizira v Epworth Local Board* HH 37-2011. See also *Mashike & Ross NO v Swenwesbel Limited and Anor* 2013 (3) All SA 20 (SCA).

For these reasons the application must succeed.

It is accordingly ordered as follows:

1. The default judgment granted against the applicant in favour of the 1<sup>st</sup> respondent in case HC 11049/16 be and is hereby rescinded.
2. The applicant be joined as the 3<sup>rd</sup> defendant in that case and is accordingly ordered to file his plea within seven days of his receipt of this order.
3. The 1<sup>st</sup> respondent shall pay the costs of suit.

*Takawira Law Chambers*, applicant's legal practitioners

*Mundia & Mudhara*, 1<sup>st</sup> respondent's legal practitioners

*Messrs Chambati Mataka & Makonese*, 2<sup>nd</sup> & 3<sup>rd</sup> respondents' legal practitioners