PREMIUM PROPERTY DEVELOPMENT
versus
MARY MUTSONZIWA
and
THE REGISTRAR OF DEEDS N.O.
and
DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 17 February 2020 & 29 May 2020

Opposed application

T Goro, for the applicant
M H Chitsanga, for the 1st respondent

MANGOTA J: I heard this application on 17 February, 2020. I delivered an *ex tempore* judgment in which I dismissed the same with costs.

The following day, the Registrar of this court received a letter from the applicant. It requested reasons for my decision. These are they:

The application has its foundation on the agreement which the applicant and the first respondent concluded between them on 31 January, 2015. The first respondent, in terms of the contract, agreed to transfer four (4) hectares of her subdivision C of Ine Farm, Haydon ["the property"] to the applicant. The transfer was in exchange of the applicant's payment of legal expenses for the first respondent's litigation.

The property is registered under Deed of Transfer 508/50. It is 25.2970 Morgan in extent. It is situated in the District of Salisbury.

On 29 June, 2016 the applicant and the first respondent translated their above mentioned agreement into a consent paper. The same resulted in a consent order which MUREMBA J entered in favour of the applicant on the mentioned date.

The consent order appears at p 15 of the record. It reads"

"IT IS ORDERED THAT:

1. The 1st Respondent be and is hereby ordered to transfer 4 hectares of land to be deducted from certain piece of land in extent twenty-five decimal point nine seven nought 925.2970) morgan being subdivision 'C' portion of Ine Farm Haydon as per annexed diagram "C1" filed of record
2. 1st Respondent is obliged to sign all relevant documents pertaining to transfer of same and failure Deputy Sheriff is authorised to do so.
3. No order as to costs".

The above order constitutes the applicant's cause of action. It alleges that it cannot enforce it owing to developments which occurred after the order had been granted. It claims that the developments relate to the first respondent's subdivision of the property into one hundred and fifty-five (155) stands. The subdivision occurred after the order had been granted to it, according to it. It states that it engaged land surveyors who depicted that some stands fall within the four (4) hectare piece of land which the court ordered the first respondent to transfer to it. It moves me to correct the order which the court entered in its favour under HC 5105/16. It anchors its motion on r 449 (1) (b) of the High Court Rules. 1971. The correction, it alleges, would enable it to enforce HC 5105/16.

The first respondent opposes the application. The second and third respondents who are cited in their official capacities did not file any notice of opposition. My assumption is that they intend to abide by my decision.

The first respondent raised two *in limine* matters which, in my view, have little, if any, bearing on the application which is before me. Her statement on the substance of the application is that the order of MUREMBA J is so clear that there is no basis for its correction. She insists that the same is devoid of any clerical or mathematical errors. She alleges that the applicant is seeking to alter the substance of the order and not to correct it. She moves me to dismiss the application with punitive costs.

I, as a starting point, proceed to consider the two preliminary points which the first respondent raised. It is evident that, after HC 5101/16 had been entered for the applicant, the first respondent filed HC 5364/18 which seeks to set aside HC 5105/16 on the alleged ground of fraud. HC 5364/18 is at the pre-trial conference stage, according to her. She places blame on the applicant for not having disclosed the existence of HC 5364/18 in its application. The non-disclosure of HC 5364/18 constitutes her first preliminary point.

The applicant's position in respect of the above-mentioned matter is that the order which it seeks to be corrected is extant. It states that the same has neither been set aside nor satisfied. It insists that her challenge of the order does not bar it from seeking its enforcement.

It was, in my view, prudent for the applicant to have made mention of HC 5364/18 in its application. However, its non-mention of it cannot be fatal to its application. Disclosure or non-disclosure of the existence of HC 5364/18 does not have any bearing on the present application. It is not before me. It is a case for another day. Its non-disclosure will not, therefore, be held against the applicant. The first respondent's *in limine* matter is without merit and it is dismissed.

The other preliminary point which the first respondent raised centres on the persons to whom she sold the stands after she had subdivided her farm. She alleges that the application adversely affects their rights. She insists that they should have been cited so that they are afforded the opportunity to be heard.

The applicant holds a contrary view on the issue. It states that the agreements of sale create personal rights only. Such rights, it insists, are enforceable against the first respondent. It avers that the first respondent cannot evade her obligation in terms of the court order by selling land to third parties.

The purchasers whom the first respondent suggests should have been joined to the application are not parties to HC 5105/16. They are not connected to that order. They have, therefore, no business with the same. All they have are personal rights which they can enforce against her. Their misjoinder cannot defeat the application which is before me. Rule 87 of the rules of court is very clear on the stated position of the case. The *in limine* point is devoid of merit. It is dismissed as well.

The application is premised on r 449 (1) (b) of the High Court Rules, 1971. The rule offers a discretion to me to, *mero motu* or upon an application such as the present one, correct, rescind or vary any judgment or order–

(a) …….;

(b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission.

It follows, from the foregoing that, in order for me to correct the order which is sought to be corrected, I must be satisfied, on the papers which the applicant placed before me, that the order is ambiguous or that it contains a patent error or omission.

The applicant bears the *onus* to show the ambiguity, patent error or omission. Where he proves that to my satisfaction, the order will invariably be corrected without much ado. Where, on the other hand, he fails to do so, the order remains undisturbed.

The applicant does not point out the ambiguity which allegedly exists in the order which MUREMBA J granted to it under HC 5105/16. Nor does it point at any patent error or omission in the same. It states that it has no problem with the order as it was granted to it.

The order of MUREMBA J is as clear as light follows day. It is not susceptible to any misinterpretation at all. It is better left as the learned judge issued it than disturbed.

The application suffers a misconstruction of r 449 (1) (b) of the rules of court. The applicant's complaint lies in the alleged enforcement of the order. It states that the events which took place after the order was issued make it impossible for it to enforce the same. The events, and not the order, constitute its challenge which it should address not through the route which it has taken. The remedy for the challenge which it allegedly faces lies outside the purview of r 449 (1) (b) of the rules of court. It should do its homework and come up with a solution to the same. The court will not do that for it.

The long and short of the applicant's cause is that it wants the clear and unambiguous order which is devoid of any patent error or omission to be in consonant with the developments which took place after the order was granted to it. The challenge which it faces, in my view, appears to lie on the suggestion that the first respondent and it did not describe, in their agreement, the area in which the four (4) hectares which the court granted to it are circumscribed. Their agreement is conspicuously silent on that matter. If it defined the same in specific terms as should have been the case, it would have had no difficulty at all in enforcing what the two of them agreed upon and which the court sanctioned.

It is not the business of the court to make a contract for parties. Parties make their own contract. They come to court for enforcement of the same. Where, as *in casu*, they leave a material term of the contract undefined or unmentioned, none of them can approach and request the court to insert that term into the contract for him. He will have to find another way of having what he wants inserted into the contract. He cannot use the court to do that for him.

The applicant and the first respondent, it is common cause, signed a consent paper which they turned into an order of court. The consent paper which they signed did not define the position of the farm where the four (4) hectares were or are located. The court recorded the consent paper as the parties presented the same to it. The error, if there be one, is not that of the court. It is that of the parties who remained oblivious to a material term of their contract.

The same does not, therefore, fall under r 449 of the rules of court for its correction. It lies in the domain of the parties to correct it if such is deemed necessary by them or by the applicant as *in casu*.

It is an abuse of the court and its process for the applicant to have applied for correction or amendment of a clear and unambiguous order of court. Where, as is evident, the parties failed to define the portion of the farm on which the four hectares were, or are, located, the applicant should have sued for specific performance or returned to the first respondent with a request to her to identify the four (4) hectares to it. Its suit of the first respondent would have compelled her to parcel out from her farm the four (4) hectares and pass the same to it.

It is an exercise in futility for a party who knows that the order which the court granted to him is devoid of ambiguity or any patent error or omission to apply for its correction under r 449 (1) (b) of the rules of court. A *fortiori* when the party is ably legally represented as the applicant was. It is a known fact that developments which take place after a clear and unambiguous order has been issued cannot turn the clear order into one which is ambiguous, or one which contains a patent error or omission.

The applicant's legal practitioners should have remained alive to the stated fact. They should have known that a clear order which has been issued by the court does not suddenly become unclear or ambiguous on the allegations of what occurred after it had been issued.

The legal practitioners suffered a serious dereliction of duty when they applied for correction of a very clear order under r 449 (1) (b) of the rules of court. Their conduct which constitutes a waste of the court's time leaves a lot to be desired. They did a lot of dis-service to the applicant which placed a lot of trust in them.

The application is devoid of merit. It is, accordingly dismissed with costs.

Mbidzo, Muchadehame & Makoni, applicant's legal practitioners
Mutandiro, Chitsanga & Chitima, 1st respondent's legal practitioners