

NYLAND ENTERPRISES (PRIVATE) LIMITED  
versus  
NIKIDA INVESTMENTS (PRIVATE) LIMITED  
and  
DWELLWORTH INVESTMENTS (PRIVATE) LIMITED  
and  
CHEMIST SIZIBA  
and  
CHIEF REGISTRAR OF DEEDS NO.

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 26 July & 07 January 2020

### **Opposed application**

*Z Mlambo*, for applicant  
*S Office*, for respondent

TAGU J: This is a chamber application in terms of Rule 449 of the Rules of the High Court of Zimbabwe 1971 for the setting aside of the order of this Honourable Court on the 21<sup>st</sup> of March 2018 under Case Number HC 11 522/17. The order sought to be set aside confirmed the 1<sup>st</sup> respondent as the owner of stand 1586 of Lot 5 of Arlington Estate measuring 2065 square metres and stand 1585 of Lot 5 of Arlington Estate measuring 7630 square metres. Both of these stands are part of a certain piece of land situate in the District of Salisbury called Lot 5 of Arlington Estate (the property) held under Deed of Transfer Number 1029/12 in the name of 2<sup>nd</sup> respondent. The court order also directed 2<sup>nd</sup> respondent to transfer the said stands into the name of the 1<sup>st</sup> respondent.

It is the applicant's case that the order in case number HC 11522/17 was erroneously granted as there existed an order of this Honourable Court at the time of granting the order in HC 11522/17 which interdicts the 1<sup>st</sup> and 3<sup>rd</sup> respondents from dealing in any way with the Property

and which interdicts the 4<sup>th</sup> respondent from registering any transfers in respect of the property. The applicant says if the attention of the judge was drawn to the provisions of the interdict, then the order in case Number HC11522/17 would not have been made. Further, and in any event, at the time of granting the order in Case Number HC 11522/17, the property was *res litigiosa* as the applicant previously instituted proceedings in this Honourable Court to be confirmed as the true owner of the property. The applicant further said if the attention of the judge was drawn to the pleadings in case number HC 9051/13, then the order in case number HC 11522/17 would not have been made. Accordingly, the applicant avers that the order in Case Number HC 11522/17 was erroneously granted by this Honourable Court hence the applicant brought this application as a chamber application as it is purely of a procedural nature due to the circumstances of the matter. The application was opposed and in the Notice of opposition a preliminary point was raised. The preliminary objection was that there was no application before the court because the *proviso* to r 241 was not complied with. Reliance was made to the decision in the case of *Marick Trading (Private) Limited v Old Mutual Life Assurance Company of Zimbabwe (Private) Limited and The Sheriff for Zimbabwe* HH-667/15. The counsel for the respondents prayed that the matter be struck of the role since the provisions are peremptory.

In response counsel for the applicant apologized for using Form 29B instead of Form 29 with appropriate modifications. He further urged the court to invoke the provisions of Rule 4C and condone use of wrong Form in the interest of justice.

The court noted that indeed the applicant used Form 29B instead of Form 29 with appropriate modifications. I had occasion to read the case of *Marick Trading* referred to by counsel for the respondents *supra*. In the *Marick Trading case supra*, the court had to censor the applicant because neither Form 29 nor Form 29B was used. In that case a totally different Form had been used. In the present case Form 29B was used. I found that despite the use of Form 29B instead of Form 29 with appropriate modifications, the respondents were not prejudiced in any manner because they managed to file their Notice of Opposition within the stipulated time frame. In my view this is an appropriate case where the court can condone none compliance with the Rules in

terms of r 4C since there was substantial compliance with the Rules. In the result I dismiss the point *in limine* and proceed to hear the matter on the merits.

This is an application for setting aside an order of this Honourable Court in terms of R 449 on the basis that the order was erroneously granted. It is trite that for an application of this nature to succeed, the following requirements ought to be fulfilled:

- i. That there must be an order or judgment of the court.
- ii. The order or judgment must have been erroneously sought or erroneously granted.
- iii. That the error must not be on the part of the litigant but the court.
- iv. That there must be an injustice occasioned or likely to be occasioned by the order or judgment which can only be corrected by setting aside of the judgment granted in error.

In the present case the applicant seeks to set aside the court order obtained by 1<sup>st</sup> respondent under Case Number HC 11522/17. This order impacts negatively/directly on the proceedings under Case Number HC 9051/13 in which the applicant seeks to be confirmed as the true and lawful owner of the property in question.

In order to resolve this matter it is appropriate for this court to have regard to the proceedings that were pending before this Honourable Court at the time that the order in Case Number HC 11522/17 was made and the orders that were in existence at the time. It is common cause from the reading of the papers filed of record that the Honourable Mrs Justice MUNANGATI-MANONGWA was not made aware of these orders or proceedings. I will summarize these as follows-

- On 24<sup>th</sup> July 2012 an application was brought by the applicant under Case Number HC-8206/12 seeking to restrain various respondents, including 2<sup>nd</sup> and 3<sup>rd</sup> respondents from selling or in any way disposing of, inter alia, Lot 5 of Arlington Estate;
- Notwithstanding the proceedings in HC 8206/12 on the 19<sup>th</sup> of August 2013 the 1<sup>st</sup> and 2<sup>nd</sup> respondents entered into an agreement of sale for the stands aforesaid;
- On 19<sup>th</sup> September 2013 an interdict was granted in HC 8206/12;
- On the 29<sup>th</sup> October 2013 the applicant instituted action proceedings in Case Number HC 9051/13 in which it sought transfer to it of inter alia, Lot 5 of aforesaid;
- On 12<sup>th</sup> December 2017 the 1<sup>st</sup> respondent mounted case number HC 11522/17; and

- On 21<sup>st</sup> of March 2018 the 1<sup>st</sup> respondent obtained the order (being the order complained).

A perusal of the papers shows that when the Honourable Justice MUNANGATI-MANONGWA made the order on the 21<sup>st</sup> March 2018 there was in existence an order restraining 2<sup>nd</sup> respondent from doing the very thing that she was directing it to do in terms of her order. It therefore goes without saying that had the Honourable Mrs Justice MUNANGATI-MANONGWA been aware of the interdict she would not have made the order she did. Further, it is apparent from the chronology of events above that at the time that the order was made in HC 11522/17 stands 1586 and 7630 of Lot 5 of Arlington Estates were *res litigiosa* and were *res litigiosa* at the time that the agreement of sale was entered into. It is also apparent that when the order in HC 11522/17 was granted applicant had already instituted proceedings under case HC 9051/13 in which it sought to be confirmed the true and lawful owner of Lot 5 of Arlington Estate and these proceedings are pending before this Honourable court.

Recently in the case of *Nzara & Ors v Kashumba & Ors* HH-151-16 MAFUSIRE J was faced with a similar situation where transfer of property was passed after court proceedings had been instituted and at p 18 of the judgment the court held that-

“It is by the time the Late Dzingayi purported to take transfer, the original property had become *res litigiosa*. An object that is *res litigiosa* may not be disposed of after *litis contestatio*. See Ex parte Deputy Sheriff, Salisbury: In re *Doyle v Salgo* 1957 (3) SA 740 (SR); *Zimbabwe Banking Corporation Ltd & Anor v Shiku Distributors (Pvt) Ltd & Ors* 2000(2) ZLR 11 (H), at p 18F and *Chenga v Chikadaya & Ors* SC-7-13.”

For the above reasons I am convinced that the Order in HC 11522/17 was erroneously granted and must be set aside.

IT IS ORDERED THAT

1. The order granted by this Honourable Court on the 21<sup>st</sup> of March 2018 under Case Number HC 11522/17 be and is hereby rescinded.
2. There is no order as to costs.

*Manokore Attorneys*, applicant's legal practitioners  
*Moyo and Jera*, 1<sup>st</sup> respondent's legal practitioner.