AUSTIN MUNYIMI
v
ELIZABETH TAURO

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, GARWE JA & OMERJEE AJA
HARARE, SEPTEMBER 3, 2012 & SEPTEMBER 26, 2013

T Mpofu, for the appellant
Respondent in person

GARWE JA: The appellant in this case applied before the High Court for an order declaring one January Tauro, Elizabeth Tauro (the current respondent) and Fransisco Tauro to be in contempt of court and as a consequence that they be committed to prison until such time as they would have purged their contempt. The court *a quo* was of the view that the default judgment that formed the basis of the order for the ejectment of the respondents had been made in error. Consequently the court determined that this was a proper case for the setting aside of the default judgment and the order of ejectment issued consequent thereto. It is against that order that the appellant has now appealed to this Court.

In October 1999, the appellant entered into an agreement of sale for the purchase of Stand Number 2198 Chinamano/Maseko, Epworth for a specified sum of money. The agreement of sale read:

> "I, Francisco Tauro 63-649379 E63 have sold my stand 2198 B Epworth Maseko to Austin Munyimi (68-012753 E68) for $17 000."

The agreement was signed by both Fransico Tauro and the appellant. January Tauro and two other persons signed as witnesses to the sale transcation.

On 8 November 2004, the appellant issued summons against January Tauro and the Epworth Local Board seeking an order compelling January Tauro to cede his rights and interest in the stand in question and for the Local Board to approve the cession. January Tauro did not defend the action. As a result, the appellant applied for a default judgment which was then granted on 13 July 2005. This is the default judgment that forms the subject of this appeal. In November 2006, the stand was ceded to the appellant. Following the grant of the default judgment the appellant applied for the eviction of January Tauro and all those claiming rights through him. On 30 October 2008, January Tauro and other persons residing on the stand in question were evicted and vacant possession given to the appellant. However, almost immediately thereafter, the current respondent and others made their way back into the house as a result of which the appellant filed an application for an order declaring the respondents to be in contempt of court and for them to be sent to prison until they purged their contempt.

At the hearing of the application the court *a quo* noticed what appeared to be anomalies between the pleadings and the agreement of sale that formed the basis of the action. In particular the court was concerned that although the seller was reflected in the agreement as Fransisco Tauro and that January Tauro had only signed as a witness, the declaration reflected the seller as January Tauro and no reference had been made at all to Franscisco Tauro who is reflected as the seller of the property in the agreement of sale. Consequently the court reached the conclusion that the default judgment granted by

OMERJEE J had been granted in error and for that reason set aside both that judgment and the order of eviction in terms of rule 449 of the High Court Rules.

The appellant has attacked the determination on the basis that:-

"1. The Learned Judge a quo erred in making a finding that the Judgment issued by the Honourable Justice Omarjee in Case No. HC 11920/04 was granted in error and liable to be set aside, and on this basis consequently setting aside the order granted by the Honourable Justice Guvava in Case No. HC 2995/07 in that:

1.1 in both the Summons and Declaration and Application for Default Judgment in Case No. HC 11920/04 the full facts of the matter upon which the relief sought was founded were disclosed; and

1.2 the Honourable Justice Omerjee granted the Judgment in Case No. HC. 11920/04 with the full knowledge of such facts.

2. Further and in the alternative, the Court a quo erred in that the matter was not properly dealt with in terms of Rule 449 of the rules of the High Court in that:

2.1 No Application had been made by the Respondent in terms of the provisions of the rule; and

2.2 In any event it was inappropriate for the court a quo to act in terms of Rule 449 simply because it came to a different conclusion on the papers from the same Court in Case No. HC 11920/04."

In his prayer the appellant seeks an order setting aside the order of the court *a quo* and substituting it with an order that the respondent be held to have been in contempt of court and that she be committed to prison.

It is apparent from the record that at the time Justice OMERJEE granted the default judgment the agreement of sale in question was attached to the request papers. Indeed in his heads of argument the appellant accepts that the agreement of sale was part of the papers placed before the judge. That the agreement was attached to the papers placed before the judge is pertinent for reasons that follow shortly.

In his submissions before the court the appellant has argued that no error was made at the time the default judgment was granted. The court *a quo* did not make a finding that before the default judgment was granted Justice OMERJEE had been made aware of the interests of Franscisco Tauro but had nevertheless proceeded regardless of her interests in the matter. He further argued that the purpose rule 449 is not to introduce a vehicle through which new issues and new parties are included in existing proceedings before a court.

Rule 449 of the High Court Rules provides in relevant part:-

"449. Correction, variation and rescission of judgments and orders

(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

(b) ....

(c) ....."

It is a general principle of our law that once a final order is made, correctly reflecting the true intention of the court, that order cannot be altered by that court. Rule 449 is an exception to that principle and allows a court to revisit a decision it has previously made but only in a restricted sense.

Where a court is empowered to revisit its previous decision, it is not, generally speaking, confined to the record of the proceedings in deciding whether a judgment was erroneously granted. The specific reference in rule 449 to a judgment or order granted "in the absence of any party affected thereby" envisages a situation where such a party may be able to place facts before the latter court, which facts would not have been before the court that granted the order in the first place – see *Grantually (Pvt) Ltd & Anor v UDC Ltd* 2000 (1) ZLR 361(S), 364H – 365 A-B.

Further it is also established that once a court holds that a judgment or order was erroneously granted in the absence of a party affected, it may correct, rescind or vary such without further inquiry. There is no requirement that an applicant seeking relief under r 449 must show "good cause" – *Grantually (Pvt) Ltd & Anor v UDC Ltd*, supra at p 365, *Banda v Pitluk* 1993 (2) ZLR 60 (H), 64 F-H; *Mutebwa v Mutebwa & Anor* 2001 (2) SA, 193, 199 I-J and 200 A-B.

The position may now be accepted as correct that a distinction should be drawn between a case where a court *mero motu* decides to rescind or vary an order and one where such an order is sought on the basis of an application. In this connection I would agree with the remarks of JAFTA J in *Mutebwa v Mutebwa & Anor* supra at p 201 A-H that:

> "… the error should appear on the record but only in cases where the Court acts *mero motu* or on the basis of an oral application made from the Bar for rescission or variation of the order. For obvious reasons, in such cases the Court would have before it the record of the proceedings only. The same interpretation cannot, in my respectful view, apply to cases where the Court is called upon to act on the basis of a written application by a party whose rights are affected by an order granted in its absence. In the latter instance the Court would have before it not only the record of the proceedings but also facts set out in the affidavits filed of record. Such facts cannot simply be ignored and it is not irregular to adopt such a procedure in seeking rescission. In fact, it might be necessary to do so in cases such as the present, where no error could be picked up *ex facie* the record itself. In my view, the failure to show that the error appears on the record of the proceedings before Kruger AJ cannot constitute a bar to the applicant being successful under Rule 42(1) *(a)*. It is not a requirement of the Rule that the error appear on the record before rescission can be granted. Therefore, I do not, with respect, agree with Erasmus J's conclusion that the Rule requires the applicant to prove the existence of an error appearing on the record and that the Court considering rescission is, like an appeal Court, confined to the record of the proceedings.
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> The Rule reads as follows:
>
> "42(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary –
>
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby…"

> (22) There is nothing in the language used in the Rule which indicates that the error must appear on the record of the proceedings before the power conferred could be exercised. The contention that the Rule is confined to cases where the error appears on the record cannot, in my opinion, be correct. Such an interpretation places an unwarranted limitation on the scope of the Rule. Decided cases show that relief may be granted under this Rule if: (i) the Court which made the order lacked competence to do so; (ii) at the time the order was made the Court was unaware of facts which, if then known to it, would have precluded the granting of the order; or (iii) there was an irregularity in the proceedings. See *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 417G-I and the authorities referred to therein."

In summary therefore, the position would seem to be settled that where a court or judge acts *mero motu* and decides to correct, rescind or vary any judgment or order, such court or judge is confined to the record of the proceedings and such error should appear *ex facie* such record. The court or judge cannot take into account other facts or circumstances that do not arise from the record itself or facts which become known later but which would not have been placed before the court whose order is sought to be varied or rescinded.

What amounts to an error has also been the subject of a number of decisions. In *Banda v Pitluk* (*supra*) a default judgment granted against an applicant who had filed an appearance to defend court but which appearance had not been brought to the attention of the judge entering the default judgment was held to be an error on the part of the court. In *Mutubwa v Mutabwa* (*supra*), a false return of service was filed by the Deputy Sheriff indicating that service had been effected personally when in fact no such service had been effected resulting in an order being made. The court had no difficulty in coming to the conclusion that the order had been erroneously granted in the sense that had the judge been aware that the summons had not been served on the applicant he would not have granted it. In *Banda v Pitluk* (*supra*), the possible failure on the part of the judge before whom the application for default judgment was placed "in failing to observe the notice of appearance to defend contained in the court rule" was held to constitute an error.

In the present matter, the papers placed before OMERJEE J clearly pointed to a discrepancy. The cause of action in the declaration was the agreement of sale between the appellant and one January Tauro. The agreement attached in support of that claim was an agreement signed between the appellant and Franscisco Tauro with January Tauro signing as a witness. Nowhere in the declaration is an attempt made to explain how this discrepancy had come about or why Franscisco Tauro who had signed as a seller had not been cited or why January Tauro who had been cited as the seller in the paper had signed as a witness. Had JUDGE OMERJEE been aware of these obvious discrepancies in the papers before him, he would not, in all probability, have granted a default judgment against January Tauro when the sale of agreement clearly indicated the seller to have been Fransisco Tauro. Had JUDGE OMERJEE been aware of these facts it is highly unlikely that he would have found it permissible or competent to make an order against a party that had signed the agreement simply as a witness. Indeed the court *a quo* correctly captured the difficulty when it remarked at p 4 of the cyclostyled judgment:

> "Turning to the first issue, it is my view that the cause of action in the main matter was a purported agreement between the applicant and the 1st respondent. This agreement was supported by a written agreement between the applicant and the 3rd respondent. The agreement furnished does not disclose that the 1st respondent had any rights and interest in the property. Nowhere in the pleadings, either in the main action or in the application for default judgment did the applicant allude to any other legal basis why it contended that the 1st respondent had any interest or right in the property. The 1st respondent's interest that appears on the sale agreement between the applicant and the 3rd respondent is that of a person merely witnessing the conclusion of the agreement. I am of the view that reliance on the agreement between the applicant and the 3rd respondent in support of a purported agreement between the applicant and the 1st respondent, in fact amounts to deceit not only by the applicant but also by his legal practitioners."

I agree with these remarks. The court *a quo* was correct in coming to the conclusion that the default judgment had been granted in error and that it had to be set aside.

In any event r 449 involves the exercise of a discretion. It has not been shown that the exercise of such discretion was in any way irrational. The appeal must therefore fail.

The appeal is accordingly dismissed with costs.

CHIDYAUSIKU CJ: **I agree**

OMERJEE AJA: **I agree**

Gill, Godlonton & Gerrans, appellant's legal practitioners