

ERASMUS NKULULEKO NDLOVU

APPLICANT

And

ISHMAEL KUSAFUNGA KAGURU

1ST RESPONDENT

AND

HUMBLE ESTATE (PVT) LTD

2ND RESPONDENT

AND

REGISTRAR OF DEEDS N.O

3RD RESPONDENT

AND

SHERIFF FOR ZIMBABWE

4TH RESPONDENT

IN THE HIGH COURT OF ZIMBABWE

M. DUBE J

BULAWAYO 8 NOVEMBER 2024 AND 28 MAY 2025

Opposed Application

Mr K. Ngwenya for the Applicant

Mr N. Ndlovu for the 1st Respondent

No Appearances for the 2nd to 4th Respondents.

Introduction.

DUBE J: This is an application for cancellation of a title deed issued pursuant to a default judgment which has since been rescinded. Albeit the 1st respondent not having opposed the application for rescission, still insists that title remains in his name pending litigation in the main, to determine to whom ownership should lawfully vest.

Brief Facts

The applicant herein is seeking an order for cancellation of a Deed of Transfer Number 765/23 registered in the name of the 1st respondent (Ishmael Kusafunga Kaguru) on the 27th of June 2023. Applicant further seeks an ancillary order that Deed of Transfer No. 1027/ 98 registered in the name of the 2nd respondent (Humble Estate (Private) Limited) be revived, and that the

3rd respondent (Registrar of Deeds) makes the appropriate endorsement on Deed of Transfer Number 1027 / 98 and Deed of Transfer Number 765 / 23 and entries in the registers kept at its offices. The court application is made in pursuance of the provisions of Section 8 of the Deeds Registries Act [*Chapter 20:05*]

The background of this matter is as follows; on the 10th November 2022, the 1st respondent filed summons under case number HC2254 / 22 seeking relief penned in the fashion herein under:

(a) An order declaring himself to be the owner of a certain piece of land registered in the name of the 2nd Respondent (herein) being Lot 2 Lavendon situate in the District of Bubi measuring 364, 21 10 hectares held under Deed of Transfer No. 1827/ 98 by virtue of prescription , he having openly possessed the property as if he was the owner from 1986 to the date of summons being a period in excess of 30 years.

(b) An order directing the 2nd Respondent, failing which the 3rd Respondent to sign transfer papers and do any other necessary act to pass the transfer of Lot 2 Lavendon situate in the District of Bubi measuring 364 210 hectares held under Deed of Transfer No. 1827/98 into the 1st Respondent's name with ten (10) days of the granting of the court order.

(c) The costs of the application to be borne by the defending party at an attorney and client scale.

The facts that became common cause during the hearing of this application are as follows:

1. The disputed farm is commonly known as Water Witch in Inyathi District.
2. It belonged to one Niel Stuart John Stone.
3. Stone was acquainted to the 1st Respondent herein Ishmael Kusafunga Kagura.
4. 1st Respondent carried out some prospecting or mining works at Water Witch.
5. In his lifetime Stone donated Water Witch farm to Humble Estate (Pvt) Limited a company whose director is Catriona Stone a daughter to the now late Stone.
6. Humble Estate Pvt Ltd sold the farm to one Edgar Ndlovu now also deceased.
7. After the death of Edgar Ndlovu Water Witch devolved to Nkululeko Erasmus Ndlovu the Applicant herein.

8. 1st Respondent knew all the other parties including the now deceaseds during their lifetimes including their whereabouts.
9. On the 10th November 2022 1st Respondent issued out summons claiming ownership of the farm through prescriptive acquisition claiming that he had been in undisturbed possession of the farm since 1986.
10. Judgment was granted in his favour in default.
11. Applicant upon discovering the judgment filed an application for rescission of judgment under case number HCBC645/24, among others alleging deliberate misrepresentations by the 1st respondent.
12. Most importantly that his family has been in occupation and possession of the farm since its purchase from 2nd Respondent by his late father in November 1998.
13. The current director of 2nd Respondent gave a statement to the police which was attached to Applicant's rescission application stating in no uncertain terms that 1st Respondent deposed to falsehoods when he claimed prescriptive acquisition.
14. Quite conspicuously 1st Respondent did not oppose such application and was duly granted.

The question now is; can 1st respondent continue to hold title he acquired through undisputed falsehoods bordering very closely on fraud? Can title continue to vest in the 1st Respondent when he obtained it via a rescinded court order? The Applicant does not pray for an order vesting title into his name. Rather his prayer is that title should revert back to 2nd Respondent while litigation in the main takes place. Should the outcome favour him, then transfer can be done in the normal course of conveyancing. If not, of course title can revert to the 1st Respondent.

Counsel for the Applicant and 1st Respondent both cite the matter of *Patience Mafu v Freeman Biba Ncube and Anor* HB 4-16. Even though they seek to interpret it differently the position expostulated in that judgment per Mathonsi J, as he then was is very clear. I quote him as follows:

“Interlocutory matters are pronouncements on matters incidental to the main dispute and ordinarily would not have a final and definitive effect on the main cause. What a rescission of judgment does is to re-start the whole process of litigation by allowing, in

the interim, the parties to go back and plough through the dispute on the merits in order to resolve it. It takes away the advantage given to one party in default and places both parties on par, as it were. For that reason, it is interlocutory in nature as it does not decide the rights of the parties or have the effect of disposing of the whole or portion of the relief claimed by one of them. It is merely a procedural ruling paving way for a determination of the main dispute.” (My own underlining for emphasis)

The Learned Judge cited with approval the matter of *Gillespies Monumental Works (Pvt) Ltd v Granite Quarries (Pvt) Ltd* 1997 (2) ZLR 436 (H) 438(A) and his own earlier judgment in *Kwaramba v Winshop Enterprises (Pvt) Ltd and Others* HC 788/15.

The 1st respondent wants this court to interpret the Kwaramba and Mafu judgments *supra* to mean he was very considerate in not opposing applicant’s rescission application under case number HCBC 645/24, as he wanted to pave way for a hearing on the merits. What he however misses are that the averments made therein are so damaging to his cause in the main matter. By not challenging such averments he is taken to have admitted them. The outcome could have been different if he had deposed to an affidavit and clearly stated that while disputing the averments alluding to his falsehoods bordering on fraud, he nonetheless would not oppose the interlocutory application for the sake of paving way to a hearing in the main dispute. As things stand, he has no good reason to want to hold fast on registered title he obtained under those circumstances. Having said that I am persuaded to quote the concluding words of Mathonsi J (as he then was) in Mafu *supra* to the following effect:

“There is no basis for the applicant to retain transfer obtained on the strength of an order that has been rescinded.”

Similarly, I come to the conclusion that the 1st respondent herein has not proven a good cause to remain clinging to title onto Water Witch farm. He accordingly should suffer grief.

In the result, the application succeeds with costs.

T.J Mabhikwa & Partners Legal Practitioners for the Applicant.
Cheda and Cheda Legal Practitioners for the 1st Respondent.