CHIPO MUWANI
versus
OBERT MUGUMWA
and
LOVEMORE CHIKONYORA
and
DIRECTOR OF HOUSING AND COMMUNITY SERVICES
-CITY OF HARARE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 25 February 2022 & 20 April 2023

Opposed application – Dismissal of action in terms of rule 31 High Court Rules, 2021

Mr L T Muringani, for the applicant
Mr T Masenda, for the 1st respondent
Mr C M Mushayi, for the 3rd respondent

MUSITHU J: The present application is an offshoot of proceedings that are pending before this court involving the same parties in HC 3911/21. In that matter, the first respondent herein is the plaintiff, while the applicant herein is the first defendant. The second and third respondents herein are the second and third defendants in that matter. At the centre of the dispute is an immovable property known as Stand Number 3462-9th Crescent, Dzivarasekwa Township, Harare (the property). In HC 3911/21, the plaintiff (first respondent herein), seeks the following relief:

> "a. Cancellation of the Cession of Stand Number 3462-9th Crescent, Dzivarasekwa Township-Harare in favour of Chipo Muwani effected by the Director of Housing and Community Services-City of Harare issued on 18 June 2001.
> b. Third Defendant be ordered to execute the order under Case Number HC 8462/01
> c. First Defendant shall pay costs of suit on an attorney to client scale."

It is those proceedings that the applicant in the present application wants dismissed in terms of r 31 of the High Court Rules, 2021 (the Rules) on the basis that they are frivolous and vexatious. The applicant ultimately seeks the following relief in the current proceedings:

> "IT IS HEREBY DECLARED THAT:
> 1. The Application for dismissal of the action brought under HC 3911/21, for being frivolous and vexatious be and is hereby granted, and applicant be absolved from the instance.
> 2. Costs of suit on an attorney and client-scale."

The present application was opposed by the first respondent.

Background to the application and the applicant's case

The applicant claims to have rights, title and interest in the property following a cession into her name by the City of Harare on 18 June 2001. The first respondent also claims to have rights, title and interest in the same property derived from an order of this court that he obtained against a party described as the 'Director of Housing and Community Services N.O.'. That order was granted in default by this court in HC 8462/01 on 9 July 2008. The second respondent herein was the first respondent, while the applicant herein was the second respondent. The third respondent herein was the third respondent in that matter. He was cited in that order as the "THE DIRECTOR OF HOUSING & COMMUNITY SERVICES N.O. The applicant claims that the party so described does not exist at law.

The applicant obtained an order for the eviction of the first said respondent from the property out of this court under HC 4574/16 on 25 March 2021. The first respondent approached this court for stay of execution. This court per CHINAMORA J granted an interim order for stay of execution under HC 3327/21 on 6 July 2021. That order was discharged by consent before the same Judge on 28 July 2021.

The applicant claims that the first respondent conceded before the Judge that the original order that he was relying on had long superannuated. The other reason was allegedly that the same order was a *brutum fulmen* as the third respondent herein against whom primary relief was sought was a non-existent party at law. Yet another reason according to the applicant was that the first respondent ought to have sued the executor to the estate of the late Phillip Chikonyora, instead of the second respondent herein who happens to be the son to the original seller. Philip Chikonyora was originally the holder of rights, title and interest in the disputed property.

According to the applicant, the first respondent conceded that the order of the court as structured, was unenforceable. The first respondent appealed against the consent order granted by CHINAMORA J. Following the appeal, the applicant, through her legal practitioners of record filed an objection with the Supreme Court citing some irregularities in the notice of appeal. The first respondent allegedly withdrew his appeal following those objections by the applicant.

The applicant also claims that the first respondent filed numerous cases out of this court against her. She cites the following: HC 332/21 which she claims to be an application for

rescission of judgment against her; HC 3327/21 which she claims to be an application for the revival of a matter that had superannuated; HC 4083/21, which is an application for condonation for late noting of an application for rescission of judgment that was made belatedly; HC 3911/21 which is the summons case that the applicant wants dismissed. The applicant contends that in view of the plethora of cases instituted by the first respondent and pending before this court, the summons case that she wants dismissed is frivolous and vexatious.

The applicant avers that the summons case under HC 3911/21 is frivolous and vexatious for the following reasons. She was an innocent third party who obtained vacant possession by consent. At the time that she purchased the property, no other person had claimed rights in the property. The property is also registered in her name, and as such she acquired rights that entitle her to take any action against any party that seeks to encroach into such rights. The order that the first respondent seeks to rely on to assert his rights in the property superannuated a long time ago. Further, the said order was a *brutum fulmen* since it was calling upon the second respondent to sign all relevant documents to facilitate cession into the first respondent's name, when the second respondent no longer had such rights to sign such documents.

The applicant further averred that in cases of double sales, an innocent purchaser was protected by the law. A court order had to be obtained specifically cancelling ownership rights and binding the applicant's rights, title and interest in the property.

The first respondent's case

In his notice of opposition, the first respondent averred that the applicant obtained her rights, title and interest in the property using an order that was granted in default. The first respondent claims that he purchased the property from one Phillip Chikonyora in 1986. Phillip Chikonyora apparently died before ceding the property to the first respondent. The first respondent further averred that the order that he obtained under HC 8462/01 rescinded a default judgment that had been obtained against him by the applicant under HC 1996/01 on 21 March 2001. That order granted in default had resulted in the cession of the property into the applicant's name.

The first respondent denied that the citation of the third respondent was irregular. The third respondent was cited in his official capacity which was proper. The applicant also dismissed the alleged order by consent as having been improperly obtained without his instructions. He only got to know of its existence following his eviction from the property. The

first respondent also denied that the order that he obtained under HC 8462/01 had superannuated. He contends that the law on superannuation was repealed under the new rules of this Court. He further averred that at any rate, the nature of the order that he relied on was one that did not superannuate.

The first respondent also denied that it was necessary for him to sue the estate of the late Phillip Chikonyora in HC 8642/01. This is because after the registration of the estate, Lovemore Chikonyora transferred the property into his own name. The first respondent also contended that the applicant obtained cession on the basis of a court order that was granted in default. That court order was rescinded, and by operation of law, the third respondent was required to cancel the resultant cession. Since it was not cancelled, the first respondent was therefore obliged to approach the court for cancellation of the cession. The first respondent contends that following the rescission of the court order, there was no foundation for the cession and it had to be cancelled. That made the respondent's claim sound in law and fact.

The first respondent denied the applicant's contention that she was an innocent purchaser. He averred that after purchasing the property in 1986, he immediately took occupation of same. The applicant only purchased the property in 2000, some fourteen years after he took occupation. The first respondent further denied that the applicant ever came to view the property before purchasing it. He claims that when the applicant approached the City of Harare's Dzivarasekwa District offices, she was advised that the property had already been sold to the first respondent. Council refused to effect cession into her name and she then approached this court for relief. She did not cite the first respondent in those proceedings even though she was aware of his interest in the property. The first respondent claims that she therefore snatched judgement and then rushed to effect cession on the basis of that default judgment.

The first respondent claims that the order for his eviction granted in favour of the applicant under HC 4574/16 did not confer ownership rights on the applicant. Further it was only granted in default without a consideration of the merits. The first respondent further contended that the said order had no bearing on the pending matter that the applicant wanted dismissed.

The Submissions and the analysis

Rule 31 (1) of the High Court Rules, 2021 in terms of which this application was made provides as follows:

"***31. Application for dismissal of action***
(1) Where a defendant has filed a plea, he or she may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious and such application shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his or her belief the action is frivolous or vexatious and setting out the grounds for such belief and a deponent may attach to his or her affidavit documents which verify his or her belief that the action is frivolous or vexatious and whereupon the court may—
(a) grant the application in which event it shall dismiss the action and enter judgment of absolution from the instance; or
(b) dismiss the application in which event the action shall proceed as if no application was made; and
(c) make such order as to costs as it considers necessary in the circumstances."

The words frivolous and vexatious are not defined in the rules. In *Fisheries Development Corporation of SA Ltd* v *Jargensen & Anor; Fisheries Development Corporation of SA Ltd* v *AWJ Investments (Pty) Ltd & Others*[1], the court described those terms as follows:

> "In its legal sense 'vexatious' means 'frivolous', improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant……Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; 'abuse' connotes a misuse, an improper use, a use mala fide, a use for an ulterior motive."

The procedure in rule 31 above is designed as a means to thwart those proceedings that are instituted for the purpose of causing unnecessary harassment or annoyance to a defendant. The court has an inherent right to prevent an abuse of its processes by halting proceedings that are instituted for other ulterior motives other than to seek justice between the parties. It is a measure that should be invoked sparingly and only in those deserving cases where it is clear that a plaintiff's motive is to cause unnecessary harassment and discordance to the defendant. It must all be recalled that at this stage, the court is being invited to put a seal of disapproval on the plaintiff's action before it has even heard the parties' evidence. Every citizen has a constitutional right to approach the courts for the adjudication of their disputes where they believe that their rights have been infringed upon. In short, the doors of the courts are open to all.

Mr *Muringani* for the applicant decided to abide by the heads of argument filed in support of the applicant's claim. He however submitted that the first respondent's claim was frivolous and vexatious because the cause of action was poorly pleaded. The relief that the applicant was

[1] 1979 (3) SA 1331 (W) at 1339E-F

seeking did not effectively close the door in the first respondent's face. He could always come back to court once he had put his house in order.

In his response, Mr *Masenda* for the first respondent submitted that the application was mischievous for the simple reason that the applicant obtained cession of the property into her name through an order of this court that was subsequently rescinded by the same court. Dismissing the first respondent's claim under HC 3911/21, would not resolve what was essentially a live dispute between the parties.

This matter presents what is commonly referred to as a double sale that unfortunately never got to be determined by the court on its merits. The first respondent claims to have purchased the property from the late Phillip Chikonyora sometime in 1986. He claims to have taken occupation of the property immediately after the sale. Unfortunately Phillip Chikonyora died before the first respondent took cession of the property. The applicant took cession through an order of this court that was granted in her favour under HC 1969/21. On 22 June 2001, the first respondent's then legal practitioners, Chihambakwe, Mutizwa & Partners wrote to Lovemore Chikonyora, the second respondent herein, as follows:

> "Re: O MUGUMWA –vs- LATE PHILIP CHIKONYORA
> Now that Stand 3462-9th Crescent, Dzivarasekwa Township, Harare has been ceded into your name in your capacity as the heir of your late father we now call upon you to cede your title, rights and interests in the said property to our client Mr Obert Mugumwa or his nominee immediately.
>
> We demand that this be effected within sixty (60) days from the date of this letter failing which our client's instructions are to apply to court to compel the said cession without further notice. This will unnecessarily result in your incurring further costs
> ……."

That letter from the first respondent's legal practitioners prompted a response from the City of Harare's Director of Housing and Community Services. The response dated 23 July 2001, reads as follows:

> "RE: STAND 3462 DZIVARASEKWA TOWNSHIP O. MUGUMWA VERSUS LATE PHILIP CHIKONYORA
>
> I am in receipt of copy of your letter dated 22 June, 2001 addressed to Lovemore Chikonyora.
>
> Please be advised that the above stand/house has already been processed to change the name from Lovemore Chikonyora to a Chipo Muwani.
>
> Chipo Muwani got a judgment in her favour: case no. HC 1969/2001.
> ……."

The above communication demonstrates that both applicant and the first respondent have competing claims to the same property. It is not in dispute between the parties that the said order under HC 1969/01, which yielded the cession of the property into the applicant's name was then set aside on 9 July 2008 under HC 8462/01. If that order was rescinded, by the same court that granted it, then what became of the cession of the property into the applicant's name, if it was the product of the rescinded order?

The applicant seeks to impeach the order under HC 8462/01 on several bases. Firstly she contends that it has since superannuated and has consequently lapsed and of no legal force. That with respect cannot be a basis for seeking the dismissal of the pending matter. Whether or not the order has superannuated is a question of law which needs to be properly ventilated by this court at the appropriate stage. Secondly the applicant contends that the first respondent cited a non-existent party. By this, the applicant is referring to the citation of the third respondent who was cited in that order as "DIRECTOR OF HOUSING & COMMUNITY SERVICES N.O". That citation clearly shows that the said director was cited in his official capacity. Whether or not the said respondent was properly cited and whether any rights accrue to the first respondent from the said order by virtue of the citation of the director in such fashion is a legal issue that again needs to be properly ventilated. That citation cannot be a basis for the dismissal of a matter on the basis that it was frivolous or vexatious.

The applicant also averred that the first respondent ought to have sued the estate of the late Philip Chikonyora instead of citing the second respondent herein. On his part the first respondent countered by averring that the property had since been transferred into the name of the second respondent. That position is also confirmed by the aforementioned letter from the City of Harare to the first respondent's erstwhile legal practitioners. If that is indeed the correct position, then there was no need to have dragged the estate of the late Phillip Chikonyora into the proceedings, since the property had already been transferred into the second respondent's name.

The applicant made reference to the order in HC 4574/16 which led to the eviction of the first respondent from the property. The first respondent got a temporary reprieve in the form of an interim order that was granted by CHINAMORA J under HC 3327/21. The interim order was discharged by consent. The first respondent sought to appeal against the consent order to the Supreme Court, but somehow abandoned that appeal. It was further contended that the reason why the provisional order was discharged by consent was because the learned Judge

expressed reservations about the validity of the order under HC 8462/01. In the absence of a written judgment explaining what led to the discharge of the said provisional order by consent, this court cannot, on the basis of mere conjecture, accept that the sentiments attributed to the learned Judge caused the discharge of the order by consent.

Besides, the eviction order under HC 4574/16 did not resolve the question of title in the property. It merely ordered the eviction of the first respondent from the property. The order was granted in default on 25 March 2021. This is some 20 years after cession was passed to the applicant. This case raises so many questions that should be properly resolved at a trial where the court has benefit of hearing evidence from all interested parties. For instance how did the first respondent acquire possession of the property in the first place before he got evicted? Why was he allowed to remain in occupation for the past 20 years if the applicant genuinely received cession of the property in 2001? If the court order that gave birth to the said cession of the property into the applicant's name was rescinded, then what is the applicant's status?

It is also important to note that the much maligned order under HC 8642/01 remains extant as it has not been set aside. An order of this court cannot be undermined by merely criticising it as the applicant's counsel sought to do. Seeking to impugn an order of court on account of its imperfections without having it set aside does not render it ineffectual. It still remains an order of court with all its imperfections. It still has to be complied with. Whether or not that order has superannuated is also an issue that should be addressed in this matter. It should ideally be dealt with by the trial court in which it is sought to be used as a basis for seeking relief against the applicant. In any case, the first respondent argues that the said order is one that does not superannuate. This court must be careful not to deal with the very issues that the trial court must determine.

For the foregoing reasons, this court is not satisfied that the first respondent's case is frivolous or vexatious. If the first respondent's claim was not properly pleaded as submitted by Mr *Muringani*, then the applicant adopted the wrong procedure altogether by approaching the court for the dismissal of the first respondent's claim in this fashion.

The path that the first respondent pursued through the institution of action proceedings, which the applicant wants dismissed, is in fact what the parties need herein. It will give the court an opportunity to interrogate all the grey areas that I have alluded in order to effectively determine the question of title as between the applicant and the first respondent. All the pending

matters involving the parties must preferably be consolidated and heard at the same time. After all they involve the same parties and the same subject matter. The application is devoid of merit and it stands to be dismissed.

Costs

This is an application that should not have been made in the first place. In fact, one is excused from remarking that it is this present application that was frivolous and vexatious. It was ill-conceived as it unnecessarily delayed the progression of a matter that seeks to resolve the substantive dispute between the parties. An adverse order of costs is clearly justified.

DISPOSITION

Accordingly it is ordered as follows:

1. The application be and it is hereby dismissed with costs.
2. The applicant shall pay the first defendant's costs of suit.

L T Muringani Law Practice, legal practitioners for the applicant
R Murambasvina Law Chambers, legal practitioners for the 1st respondent