NAOMI NETSAI WEKWETE (NEE JEKA)
versus
JOSEPH PHILIME
and
TESNET INVESTMENTS (Pvt) Ltd
and
MESSENGER OF COURT CHEGUTU

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 19 March & 15 November 2024

J Mambara, for the applicants
S Noormohamed, for the 1st respondent

TAKUVA J: Applicants filed what they termed an urgent chamber application for Stay of Execution. The relief sought is couched as follows;

TERMS OF THE FINAL ORDER SOUGHT

"That you show cause to this Honourable court if any, why a final order should not be made in the following terms;

1. First respondent be and is here by interdicted from filing any eviction court processes against the applicant pending the finalization of HCH 6299/23.
2. The first respondent shall pay the costs of this application on the scale of legal practitioner and client.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicant is granted the following relief;

1. Second respondent, be and is hereby interdicted from evicting the first and second applicants from farm No 125 Msengezi, Chegutu pending the final order to be issued on the return date.
2. In the event that the warrant of execution has already been effected the second respondent be and is hereby ordered to restore possession of Farm 125 Msengezi, Chegutu to the first and second applicants within 7 days of the granting of this order.
3. In the event that the first and second respondents fail, refuse and or neglect to comply with para 2 above, the Sheriff for Zimbabwe be and is hereby empowered and directed to effect compliance of this order.

4. Each party shall bear its own costs".

The application was opposed by the respondent.

BACKGROUND FACTS

The first respondent purchased the farm in dispute from Samara Taons (Pvt) Ltd, a company that had purchased the farm from the executor for Estate Late Maxwell Jeka. Applicants claims that Maxwell Jeka fraudulently acquired title when Darlington Jeka (first applicant's father) passed on. Darlington Jeka had inherited the farm from his father on 24 February 1972. The alleged fraud by Maxwell Jeka started in 1983 when Darlingston Jeka passed away. As a result of these numerous misrepresentations, Farm 125 Msengezi Chegutu was registered under Maxwell Jeka under Deed of transfer No. 02543/94 on 20 April 1994. Maxwell Jeka died on 21 September 2008 and his estate was registered with the Master's office under DR 11/10. Despite several claims being lodged against the estate the executor of the estate sold the farm to Samara Talons Pvt Ltd who in turn sold it to the first respondent who with full knowledge of the pending litigation to determine the validity of the transfers purchased it nevertheless.

APPLICANTS' CASE

The first respondent applicant averred that the matter is urgent because if eviction is not halted, she will be driven out of the land which should have been inherited by her father's estate. It was further contended that such an event will cause harm to her family.

It was also contended that the balance of convenience favours the granting of the relief in that first applicant has always been inoccupation of the land in issue. The first respondent will not suffer any prejudice if the messenger is stopped from evicting applicant's employee (second applicant) until the matter is resolved by the courts. It was submitted that the first respondent is already in occupation of the farm.

Finally on this point first applicant submitted that if she is evicted, case no HCH 6299/23 would be rendered moot and nugatory and at worst *brutum fulmen.*

First applicant argued that she has no other available remedy apart from making an application for an interdict pending the resolution of HCH 6299/23 on its merits. It is only this court that can declare the validity or otherwise of the transfers.

As regards a well-grounded apprehension of irreparable, harm first applicant argued that there will be such harm in that she will be evicted from the farm using an order against her employee and not herself. The first applicant argued that her *prima facie* right in the farm in dispute arises from the fact that she is Darlington Jeka's daughter and hence a

beneficiary to his estate. Had it not been for Maxwell Jeka's fraud first respondent and her siblings would have inherited the farm. This is the reason she has instituted proceedings under HCH 6299/23. Its primary objective is to have the issue of ownership of farm 125 Msengezi Chegutu.

FIRST RESPONDENT'S CASE

The first respondent raised the following points in *limine;*

1. The matter is not argent

The argument here is that the second applicant was aware of the eviction as early as the 18th of January 2024, and is only now belatedly on the 9th March 2024 file this present urgent chamber application after a period of 50 days have lapsed. The messenger of court Chegutu's warrant of Exectnent was served on the second applicant on the 18th of January 2024. On this basis it was submitted that the applicants have created a self-made urgency in a clear and belated attempt to mislead this court.

2. The matter is *Res Judicata*

   The submission here was that this matter is *res judicata* in respect of the second applicant as the second applicant as early as the 22 January 2024 filed an " Ex PARTE APPLICATION FOR STAY OF EXECUTION" in respect of the same eviction in the Magistrates Court in Chegutu. The application was duly determined and dismissed.

3. FOUNDING AFFIDAVIT NOT SIGNED BY FIRST APPLICANT

   It was submitted that the Founding Affidavit was not signed by the applicant as it is simply a handwritten 'word' that is different from first applicant's signature on p 35 of the record. The argument is that a simple visual comparison of these two signatures will clearly indicate that they are materially different. Therefore, so the argument went, there is no valid and proper urgent chamber application before this court.

4. Both Applicants have no *locus standi* or *prima facie* rights

   The submission is chat the second applicant was a person present at the farm who had no rights, entitlement, interest or legitimate expectation to the farm and therefore the first respondent had to evict him. In an affidavit filed in the Magistrates Court Chegutu,

the second applicant Stated that he has no claim oner the property. As regards first applicant, it was submitted that she also has no *locus standi* or *prima facie* rights for the simple reason that she never occupied the farm, never owned the farm, and above all she is not a party to or litigant in the Magistrates Court proceedings in Chegutu filed under case No. CHG CIV 320/23. It follows that she has no *locus standi* to apply for stay of execution in this matter.

ANALYSIS

RES JUDICATA

The requisites of *res judicata* are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded on the same cause of complaint. All three requisites must be satisfied. See GWAUNZA JA (as she then was) in *Gwaze* v *National Railways of Zimbabwe* 2002 (1) ZLR 679(S). This point was stressed by MULLER JA in *African Wanderers FC (PTY) Ltd* v *Wandereas* FC 1977 (Z) SA 38 (A) AT 45 e where the learned Judge was quoting VOET 44.2.3 (GANE'S Translation) while restating the requisites of a plea of *res judicata* as follows;

> " there is nevertheless no room, for this exception unless a suit which had been brought to an end is set in motion afresh between the same persons about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking."

In casu, there is no doubt that the two actions were between the same parties and chat they were founded on the same cause of complaint, i.e the alleged wrongful eviction of and about the same subject matter possession or ownership of farm 125 Msengesi Chegutu.

In light of the fact that the first applicant was not a party to the Chegutu Magistrates Court proceedings, the claim as regards the second applicant is *res judicata*. It can not be rescuscitated in subsequent proceedings like what the second applicant is attempting to do.

URGENCY

The crisp question is whether both applicants have made a case for urgency entitling them to jump the queue. The question of what constitutes urgency was answered by CHATIKOBO J as follows:

> "what constitutes urgency is not only the imminent arrival of the day of neckomng. A matter is also urgent if at the time the need to act arise the matter can not wait. Urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

Undoubtedly in the present matter the second applicant did not challenge the factual averments that he became aware of the eviction on 18 January 2024. He belatedly filed the current application on 9 March 2024. The delay of 50 days has not been explained in the Founding Affidavit.

As regards the first applicant, she insisted that she is in occupation and has always been in occupation of the farm during the entire period. The allegation that she at some point attended proceedings at the Chegutu Magistrates Court has not been denied. In my view, it is only natural and logical for first applicant to have an interest on why her employee (second applicant) was being evicted. I find therefore that first applicant became aware of the eviction on 18 January 2024 but only filed her application on 9 March 2024.

Disposition

In the circumstances I find that the matters is not urgent.

Order

1. The matter lacks urgency.
2. The matter be and is here by struck off the roll of urgent matters.
3. There is no order as to costs.

J . Mambara & Partners, applicant's legal practitioners
Ahmed & Ziyambi, first respondent's legal practitioners