

RUMBIDZAI MUSHONGA (NEE MAMBARA)
and
IRVINE KUDAKWASHE MUSHONGA
and
RUTENDO BASIL MUSHONGA
and
WINNET NYADZAYO
and
ERNEST NYAHANANA
and
PATRICK ZIMHUNGA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 11 April 2025 and 13 June 2025

Urgent Chamber Application for an anti-dissipation interdict.

Ms P Mwandura, for the Applicant
H K Muza, for 1st and 2nd Respondents
T Mukawa, for 3rd Respondent
No Appearance for the 4th and 5th Respondents

TAKUVA J:

The anti-dissipation interdict sought in this case contains the following terms:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this court why a final order should not be made in the following terms –

1. The Applicant’s legal practitioners be and are here by directed to deal with the rentals received from a certain piece of land situate in the District of Salisbury called the Remainder of Lot 1 of Stand 24 of Lot C of Borrowdale Estate measuring 6952 square metres and held under Deed of Transfer number 4815/12 also known as 133A Crowhill Road Borrowdale, Harare, in accordance with the order of the court in case No. HCH 40/25.
2. First Respondent shall say costs of suit for this application.

INTERIM RELIEF GRANTED

“Pending determination of the dispute in case under HCH 49/25, the Applicant is granted the following relief –

1. First, Second and Third Respondents be and are hereby barred from collecting rentals from stand number 133A Crowhill Road Borrowdale, Harare, from the Fourth and fifth Respondents and /or any other tenants that may be substituted for the Fourth and Fifth Respondents or any other tenant that may take occupation of the property.
2. The fourth and fifth Respondents be and are hereby directed to pay all rentals due for their occupation and use of 133A Crowhill Road Borrowdale, Harare into the Trust Account of the legal practitioners of the Applicant who shall hold the said rentals in trust pending the finalisation of the claim filed under case No. HCH 40/25 and shall deal with such money in accordance with the direction of the court.
3. The first, second and third Respondents be and are hereby ordered and directed not to take action to terminate the right of occupation of the fourth and fifth Respondents and/or to replace them with any other tenants. Should it become necessary for such action to be taken, it shall only be taken in consultation with the Applicant and/or her legal practitioners.

SERVICE OF PROVISIONAL ORDER

The Applicant’s legal practitioners are granted leave to serve the provisional order on the Respondents.”

BACKGROUND FACTS.

The first Respondent is Applicant’s former husband, having divorced by order of the Dubai Court sitting at Dubai under case No. 162/2018 on 20 January 2019. The first Respondent and the Applicant are joint owners in a certain piece of land situate in the District of Salisbury called the Remainder of Lot 1 of stand 24 of Lot C of Borrowdale Estate, measuring 6954m², held in equal and undivided shares under Deed of Transfer No. 4815/2012 also known as 133A Crowhill Road, Borrowdale, Harare (the property)

Since both Applicant and Respondent were residing outside Zimbabwe, the property was rented out for their mutual benefit. The rentals were deposited into a joint account held at CBZ Bank Ltd. Applicant and the children of the marriage still reside outside Zimbabwe. The first Respondent has been in control of and collecting rentals due from the tenants in the property for his own account.

In January 2025, Applicant caused to be issued out of this Court a summons seeking *inter alia*;

- “(a) the termination of the parties joint ownership in respect of the property
- (b) an order for the first Respondent to render an account of all rentals received from the property from 1 August 2018 to the date of the order and the debatement of such account.
- (c) an order that the properties be sold to the best advantage of both parties and the proceeds be shared equally between the first Respondent and the Applicant.

(d) an order for the payment of 50% of the net rentals established in accordance with para (b) above together with interest on each amount from the date each sum was received by the first Respondent which sum shall be deducted from the first Respondent's share of proceeds from the sale of the property."

The first Respondent filed a plea in which he stated that rentals were collected by the second Respondent, his brother and that they are available for distribution between the parties. Further, he pleaded that the property currently attracts between US \$500 00 and \$600-00 in rentals. Applicant, subsequently discovered that the amount being collected per month is in excess of US \$1150-00, an amount much more than the amount first Respondent mentioned in his plea.

APPLICANT'S CASE

Applicant contended that first Respondent is not being truthful in alleging that the property is fetching rentals between US 500-00 and US \$600-00 per month. This is meant to allow first Respondent to keep a Lion's share of the income. In a bid to establish the truth, Applicant through her legal practitioners addressed a letter to the first Respondent's legal practitioners requesting that all rentals collected from March 2025 be paid into her legal practitioners or his legal practitioner's trust accounts for the benefit of both parties until the finalisation of the pending litigation in case no HCH 40/25. The first Respondent did not respond favourably to the proposal hence the present application.

URGENCY

Applicant submitted that this matter is urgent in that the need to act arose on 25 March 2025 when it became apparent that first Respondent had no intention of acceding to her request. It is also averred that Applicant treated the matter as urgent in that she quickly put together documents, flew into Zimbabwe and filed this application timeously.

PRIMA FACIE RIGHT

Applicant contended that she has established a *prima facie* right to the net rental income derived from the jointly owned property which right is admitted by the first Respondent in his plea under HC 40/25. However, first Respondent conducts himself in a dishonest manner by misleading the court on the actual amount he collects as rentals. Further whatever he collects he has taken and converted to his personal use without regard to Applicant's share. Currently the rentals are being collected by his proxies, the second and third Respondent. Applicant's fear is that pending the determination of the main dispute between the parties, the first Respondent will use and dissipate the rental income to Applicant's prejudice.

BALANCE OF CONVENIENCE

It is Applicant's contention that the balance of convenience favours the granting of this application in that should it fail Applicant will be prejudiced irreparably as her 50% portion of rental will be dissipated. On the other hand, the provisional order will not prejudice the first Respondent at all in that according to a e-mail from his Lawyers dated 27 March 2025, he suggests that he is not spending the rentals.

ADEQUATE ALTERNATIVE REMEDY

The submission here is that Applicant does not have an adequate alternative remedy to prevent the imminent prejudice that will result if this court declines to grant interim relief.

At the hearing Applicant raised a point *in limine* namely that the opposing affidavit was not properly authenticated in accordance with r 85 of SI 202/202. The criticism was that this application is defective in that it does not show the place it was signed and there is no name of the officer or his/her designation. All that it shows is the law firm's name, it was further submitted that the matter should proceed as unopposed since the second respondent did not file a notice of opposition.

In my view this defect is not fatal in that I am satisfied that it is indeed the first Respondent who signed the opposing affidavit. See r 85(6) of SI 202/2021. In the circumstances, I find that the first Respondent's opposing affidavit is properly before the court. The point *in limine* is therefore dismissed for lack of merit.

RESPONDENT'S CASE

Urgency

First Respondent submitted that this matter is not urgent in that it can wait for the court's determination in the main matter. Also, the Applicant has not been receiving rentals since 2018. It was further contended that Applicant has since 2018 been collecting rentals from the Warren Park property without accounting to the first Respondent. For this reason, it was argued that the urgency *in casu* is self-created. As regards the opposing affidavits, it was submitted that they are properly before the court.

MERIT

Respondents argued that there is no valid basis for this application as the Applicant's apprehension is self-created. Applicant's belief that rentals will be dissipated is unfounded in that no insinuation or threat of dissipating rentals by the first Respondent has been shown. It is further submitted that Applicant has neither demonstrated a likelihood or propensity to dissipate, nor has Applicant stated what amount is likely to be dissipated. Applicant must show cogent proof leading to the underminable conclusion that first Respondent will dissipate

rentals. In the absence of such proof. There is no fear of irreparable harm to talk about. It was also argued that the Applicant's claim is rooted squarely in conjecture and speculation" since the *status quo* regarding the collection of rentals has not changed and the amounts collected are still being kept safely.

According to the first Respondent, the depositing of rentals into trust is an issue he is "still considering" This is because during the subsistence of the marriage, the Applicant never took an interest in either of the properties. Upon the finalisation of the divorce, first Respondent continued managing the Borrowdale property while Applicant managed the Warren Park property. Since the first Respondent is domiciled in the United Arab Emirates, the parties agreed that they execute a power of attorney in the second Respondent. This power of attorney was revoked shortly before the divorce was finalised. The second Respondent has kept the funds in trust after necessary deductions such as utilities, annual rates, maintenance, the gardener's salary and so on.

Finally, first Respondent submitted that this application is tantamount to a fishing expedition for information to bolster applicant's case in HCH 40/25.

The third Respondent strongly supported the first Respondent arguing that the Applicant has been in control of the rentals from the Warren Park property which she does not share with first Respondent. She argues that what is good for the goose is good for the gander. Third Respondent contended that from the file she was engaged in 2020 she has been collecting rentals from the Borrowdale property together with second Responded. According to her, these funds have always been held "securely in a traceable and accountable manner."

It is third Respondent's position that first Respondent believes that US\$500 - US\$600-00 is what is being collected as rentals and that first Respondent is not converting the funds to his own use in that all rentals are accounted for. This shows that dissipation is not a palpable reality.

Analysis

The Applicant has established a *prime facie* right to 50% of the net rental income derived from the jointly owned property. This is admitted by the first Respondent whose sole gripe is that Applicant should prosecute and finalise case No HCH 40/25 and that Applicant should restrict herself to the income derived from the Warren Park property. It is common cause that this Borrowdale property is generating income.

IRREPARABLE HARM

That Applicant has been deprived of rentals since 1 August 2018 is not in doubt. Currently the rental is being collected by first Respondent's proxies namely second and third Respondents who have openly admitted managing the property. They admitted collecting rentals and keeping it "safe". What is surprising is that they have not divulged firstly how much they have collected, secondly how the money has been utilized, thirdly the bank account in which it is banked. All that they revealed is that the money is safely kept somewhere and first Respondent is not converting the money to his own use. There is no documentary evidence to back up their bare assertions. Not surprisingly the first Respondent has (not in so many words) refused to proceed in the manner suggested by the Applicant.

Clearly first Respondent's view is that the *status quo ante* must prevail where he keeps the income from the Borrowdale property while Applicant restricts herself to the Warren Park property. He even refused to have lawyers receive the rentals and hold them in trust pending the finalisation of the matter pending in court in which the issue of the rental is central. From my understanding of the evidence, the Applicant is not focusing on income received in the past but about the current and future rentals pending the finalisation of the case NO HCH 40/25. I have no doubt that for this category of income Applicant will suffer irreparable harm if the application is not granted.

BALANCE OF CONVINIENCE

In light of the first Respondent's refusal to preserve the rental income, the balance of convenience favours the granting of this interdict. Applicant is likely to suffer irreparable prejudice in that first Respondent will dissipate Applicant's 50% share. On the other hand, the Provisional Order will not prejudice the first Respondent at all since he alleged in an email to his lawyers that he is not spending the rentals.

ALTERNATIVE REMEDY

From the circumstances Applicant has no adequate alternative remedy to prevent the imminent prejudice that will result in the event that the interim relief is not granted.

In view of the above, I find that Applicant has a well-grounded apprehension that the first Respondent will dissipate the rental income pending the resolution of the claim in case No HCH 40/25.

According, it is ordered as follows;

INTERIM RELIEF GRANTED

Pending determination of the dispute in case number HCH 40/25, the Applicant is granted the following relief;

1. First, second and third Respondents be and are hereby barred from collecting rentals from stand number 133A Crowhill Road Borrowdale, Harare, from the fourth and fifth Respondents and /or any other tenants that may be substituted for the fourth and fifth Respondents' or any other tenant that may take occupation of the property.
2. First, second and third Respondents be and are hereby directed to pay all rentals due for their occupation and use of 133A Crowhill Road, Borrowdale, Harare into the Trust Account of the Legal practitioners of the Applicant, who shall hold the said rentals in trust pending the finalisation of the claim filed under case No HCH 40/25 and shall deal with such money in accordance with the direction of the Court in that suit.
3. The First, second and third Respondents be and are hereby ordered and directed not to take action to terminate the right of occupation of the fourth and fifth Respondents and/or to replace them with any other tenants. Should it become necessary for such action to be taken, it shall only be taken in consultation with the Applicant and her Legal Practitioners.

SERVICE OF THE PROVISIONAL ORDER.

The Applicant's legal practitioners are granted leave to serve the provisional order on the Respondents.

TAKUVA J:.....

Wintertons, Applicant's legal practitioners
Muza Attorneys, first and second Respondent legal practitioners
Ndlovu and Dube Legal Practice, for third legal practitioner