MATHEW MATIVENGA MUSASA & 67 Ors
versus
KATI CONSTRUCTION P/L
(DIVISION OF PLANNING AND DESIGN STUDIO
CONSULTANTS P/L) & 3 Ors

HIGH COURT OF ZIMBABWE
**TAKUVA J**
HARARE; 24 June 2024 and 12 February 2025

**Opposed Court Application**

*N Mugiya*, for the applicants
*J B Matandire*, for the 1st respondent
No appearance for the 2nd respondent
No appearance for the 3rd respondent
No appearance for the 4th respondent

TAKUVA J: This is a court application for stay of execution of a default judgment under HC 4909/18.

BACKGROUND FACTS

The history of this matter is long winding and confusing. Astonishingly, what comes out with clarity is the trading of insults between the two legal practitioners. Costs *de bonis propies* have been sought by both lawyers.

I will endeavour to state the essential facts of the matter. On 29 May 2018 first respondent obtained a default judgment under HC 4908/18 declaring that it is the owner of a certain piece of land known as subdivision A of Stoneridge Farm Subdivision A of Nyarunga District Salisbury. The first respondent did not cite some of the applicants. An application for rescission of the default judgment was granted under HC 9316/19 and the current applicants applied for joinder under HC 4909/18 which application is still pending.

However, sometime in 2018, applicants obtained an order under HC 3106/18 for an interdict against the first respondent and its directors – See Annexure A. The first respondent and its directors were ordered not to interfere with applicants' right on the disputed piece of land. Due to this order, first respondent logically can not set in motion eviction proceedings under HC 4909/18.

Undeterred first respondent kept on attempting to set down the matter in HC 4909/18 until this court under HC 5964/20 issued an order to the effect that no evictions against the applicants must be done by the first respondent and that all matters connected and ancillary to HC 4909/18 were consolidated – See Annexure E. The first respondent has since set down the same matter and on 24 October 2022 obtained another default judgment against the applicants – See Annexure F.

Upon becoming aware of the existence of the order, applicants filed am application for contempt of court against the first respondent under HC 7752/22 which is still pending. Later on 23 November 2022, applicants filed an application for rescission of default judgement under HC 7882/22 which application was dismissed on 7 July 2023 -See Annexure 'G'.

Dissatisfied, applicants appealed to the Supreme Court under case No. Draft SC 749/23 on 28 July 2023. The appeal was deemed to have been filed out of fine. The applicants filed an application for condonation of late noting of an appeal to the Supreme Court under Case No. SC 459/23. The Supreme Court per UCHENA JA struck the matter off the roll for the reason that there were no reasons for the order upon which the court could make an informed decision on. The applicants then approached MUSITHU J for his reasons. MUSITHU J is yet to give reasons and until that is done the applicants are unable to move their matter on appeal. On the other hand, the first respondent wants to execute the default judgment in HC 4909/18 as there is nothing stopping it from executing, hence this application.

The first respondent raised a number of points *in limine*. The first point is that the application is *frivolous and vexations.* What constitutes a *frivolous and vexations* application was laid down in the case of *Maric Storm Gikes pic* v *Sikengele Msema* (HC 3035/17) where it was held that;

> "It has been stated that an action is *frivolous or vexations* if it is obviously unsustainable, manifestly groundless or utterly hope less and without foundation."

In the present matter, it can not be concluded that the application is manifestly groundless or utterly hopeless in that the first respondent was interdicted from evicting the applicants and could not put into effect the order in HC 4909/18 because the order in HC 3106/18 stands in its way as the order is still extant to this date. Notwithstanding orders from this court stopping it from evicting applicants, the first respondent has continued to obtain default judgments against the applicants – See HC 5964/20 and HC 1909/18. It dawned on the applicants that perhaps the only way to stop first respondent is to apply and obtain an order for "stay of execution" hence this application.

I take the view that in light of the above averments, this application can not be described as *frivolous and vexations*. The order can be executed by the first respondent at anytime he chooses. In any event the first respondent is still pushing for the eviction of applicants – See HCH 8283/19.

It was also contended by the first respondent that the order sought by the applicants is incompetent. What constitutes an incompetent was spelt out by the Supreme Court in *Edward Madyavanhu* v *Reggie Francis Saruchera & 2 others* SC 75/17 in the following words,

> "Rule 29(1)(e) is specific in its language and requires that the relief sought be exact and competent so that the court is left in no doubt as to what exactly the appellant seeks."

In *casu*, a mere perusal of the draft order, clearly brings out what is sought by the applicants. In any event despite the fact that the order in HC 4909/18 was granted in default of the aplicants, they made an application for the rescission of that judgment under HC 7752/22 which was dismissed by this court and the applicants are in the process appealing the said judgment which appeal can not proceed due to the fact that reasons for the judgment have so far not been proferred to the applicants. What this means is that if the appeal is finally filed and succeeds, it will definitely affect the order in HC 4909/18.

For these reasons, the relief sought by the applicants can not by any stretch of imagination deemed incompetent. Therefore, the point *in limine* is dismissed.

MERITS

In an application of this nature the court considers the following principles;

> "1. An appellant has an absolute right to appeal and test the correctness of the decision of the lower court before he or she is called upon to satisfy the judgment appealed against.
> 2. Execution of the judgment of the lower court before the determination of the appeal will negate the absolute right the appellant has and is generally not permissible.

> 3. Where, however, the appellant brings, the appeal with no *bona fide* intention of testing the correctness of the decision of the lower court but is motivated by a desire to either buy time or to harass the successful party to execute the judgment notwithstanding the absolute right to appeal resting in the appellant." See *Nzara* v *Tshanyau and Ors* 2014(1) ZLR 674.

Also, in *Subsahara Management P/L* v *Surutita Investments* and Ors (HH 249-12), it was held that;

> "The whole purpose of stay of execution proceedings pending an appeal is to prevent irreparable prejudice from being suffered by the prospective appellant. In an application of this nature the court must be satisfied that injustice would be caused if stay is not granted. In considering whether injustice might be occasioned, the court would also have regard to the prospects of success on appeal, the potentiality of irreparable harm or prejudice to either of the parties and the balance of hardship or inconvenience."

Applicants contend that they will suffer irreparable harm or prejudice should stay of execution pending appeal be dismissed. Where the probability of irreparable harm is high, the court has a discretion to stop execution. Applicants have developed their stands by building homes where they live with their families. Also, the first respondent is threating to demolish these structures leaving applicants and their families homeless. Therefore, the only protection is an order for a stay of execution. I find that there is potential of irreparable harm or prejudice being suffered by applicants should stay of execution pending appeal be dismissed.

Can the same be said about the first respondent? It is trite that in considering whether or not to grant an application of this nature the court will assess whether or not the respondent will suffer any irreparable harm should the application be granted. I am convinced that first respondent will not suffer any irreparable harm for the following reasons;

1. First respondent was interdicted through HC 3106/18 from evicting applicants from the piece of land in dispute. The first respondent's rights to the piece of land has been diluted by the fact that its agreement with second respondent for infrastructure development had been cancelled.
2. The land is State land.

As regards prospects of success on appeal, I take the view that applicants have bright prospects on appeal in that the applicants were lawfully allocated the land by the Government. Further an agreement that gave the first respondent the right to occupy the land has since been terminated.

The balance of convenience favours the granting of the application in that if it is refused, applicants will be greatly prejudiced as they will be rendered homeless.

In the result, I find that the applicants have established all the requirements for an application for stay of execution.

Accordingly, it is ordered that;

1.The execution of the order of this court in HC 4909/18 granted in favour of the first respondent against the applicants be and is hereby stayed pending the finalization of the appeal process against it by the applicants as regulated below;

1.1 The applicants are ordered to file their application for condonation of late noting the appeal in the Supreme Court within 14 days upon the reasons being furnished for the order in HC 4909/18.

1.2 Thereafter, the conclusion of that matter referred in para 1:1 above will determine the conclusion of this matter and regulate the execution of HC 4909/18.

2. The first respondent is ordered to pay costs of suit on the ordinary scale.

*Mugiya Law Chambers*, applicants' legal practitioners
*John Mugogo Attorneys*, first respondents' legal practitioners