TAWANDA TICHIVANGANI
versus
LOVEMORE BULEYA
and
NEHANDA HOUSING CO-OPERATIVE
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16 and 29 June 2022

**Urgent Chamber Application**

Mr. *Muguwe,* for applicant
Mr. *J.B. Matandire,* for respondents

TAGU J: This urgent chamber application for stay of execution was prepared and filed by a self-actor. At the hearing of the urgent chamber application the applicant was now represented by a legal practitioner Mr. Muguwe.

The facts of the matter are that on 1 December 2021 the Honourable Justice MAFUSIRE granted a default judgment against the applicant in HC 5154/21. A notice of removal was served on the applicant on 3 June 2022 and the date of ejectment was given as the 11 June 2022. On 8 June 2022 the applicant proceeded to file a Court Application for rescission of the default judgment in terms of order 27 (1) of the High Court Rules 2021. Pending the determination of the Court Application for rescission of the default judgment the applicant proceeded to file the present urgent chamber application for stay of execution of the under case HC 5154/2021. His basis for the application for rescission being that he was not aware of the court application and the order which was granted in default until on 6 June 2022 when the Sheriff served him with a notice of removal. On perusal of the court record HC 5154/21 OF THIS Honourable Court, he discovered that first respondent filed court application and the court granted an order against him in default yet the

certificate of service filed by the first respondent stated that service of the court application was made on 29 September 2021 at Nehanda Housing Co-operative Dzivaresekwa Extension Harare on Andrew Marauka the Chairperson of second respondent, hence he was not served with the court application HC 5154/21.

First respondent raised four preliminary objections. The first one being that the urgent chamber application is fatally defective for want of compliance with Rule 60 (6) of the High Court Rules 2021 which requires that it be accompanied by a certificate of urgency emanating from a legal practitioner.

The counsel for the applicant opposed the point *in limine* by saying that the court must take into account the circumstances of this application, in particular that the urgent chamber application was prepared and filed by ta a self-actor hence there was no need for a certificate of urgency from a legal practitioner.

Mr. J.B. Matanhire, insisted that in all urgent chamber applications irrespective of them having been prepared and filed by a self-actor there must be a certificate of urgency prepared by a legal practitioner.

Rule 60 (6) of the High Court Rules 2021 provides that-

> "Where a chamber application is accompanied by a certificate from the legal practitioner in subrule (4) (b) to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to the duty judge, handling urgent applications who shall consider the papers forthwith."

Subrule (4) (b) on the other hand provides that-

> "unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his or her belief that the matter is uncontentious, likely to attract perverse conduct or urgent for one or more of the reasons set out in subrule 3(a) to (e)."

Despite Mr. J.B. Matandire being drawn to the provisions of Rule 60 (6) and subrule (4) (b) of the High Court Rules 2021 by the Court and the fact that applicant prepared and filed the urgent chamber application as a self-actor, he insisted that the chamber application is fatally defective and must be dismissed for it is not accompanied by a certificate of urgency from a legal practitioner. My views are that where an urgent chamber application has been prepared and filed

by a self- actor, the certificate of urgency from a legal practitioner is not required. It is only required if the applicant is legally represented. In any case when I perused the file before I set it down for hearing having noted that the urgent chamber application had been prepared and filed by a self –actor, I noted further that the applicant on page 1 of the record had a subheading reading "GROUNDS OF URGENCY" and he listed six (6) reasons upon which he stated the reasons he thought this matter must be heard on an urgent basis. In my view there was sufficient compliance by the Rules, though strictly speaking a certificate of urgency from a legal practitioner was not required. He could have simply stated in his founding affidavit the basis he thought the matter should be heard on an urgent basis, but he thought of listing them separately. I will not uphold the first point *in limine*.

The second preliminary objection was that the urgent chamber application was overtaken by events since the judgment of this Court handed down by the learned Justice MAFUSIRE on 1 of December 2021 under case No. HC 5154/21 and the writ of execution issued out of this court pursuant to the order has already been lawfully executed by the third respondent. To that end the present application for stay of execution is now merely academic as if has been overtaken by events. So there is nothing to stay at this point as this Court's lawfully directives and processes have been executed and the Court is *functus officio* in that regard. In support of this contention the first respondent referred to the Sheriff's Return of Service attached as Annexure "01" to the Notice of Opposition. It states that action of ejectment took place on the 14/06/22 at No. 4849 Nehanda Housing Co-operative, Dzivarasekwa Extension Harare and that-

> "Defendant and all those claiming occupation through him were successfully evicted from the address for service. Plaintiff's representative Mr. Hamunyare Chinaka was given vacant possession."

Mr. Muguwe disputed the fact that the applicant has been evicted and said his instructions from his client are that the Sheriff was not there as he was threatened with assault hence he doubted the authenticity of the Sheriff's Return.

I was not convinced by Mr. Muguwe's explanation. I say so for two reasons. Firstly, order HC 5154/21 directs that the applicant be evicted from No. 4849 Nehanda Housing Co-operative,

Dziavarasekwa Extension Harare. The Assistant Sheriff's Return indicates that action was taken at this address on 14/06/22. Secondly, the Assistant Sheriff is an officer of this court. He is expected to act ethically and cannot issue a return of service when he was not on the premises. His Return of Service is quite detailed. Without anything more other than the counsel's mere say so basing on what his client told him without further proof, the Sheriff's return cannot be doubted. I therefore agree that this urgent chamber application for stay of execution has been overtaken by events. There is nothing further to stop as execution has been effected. Whatever this court may order after execution has been effected would be a *brutum fulmen*. I will uphold this point *in limine*.

The third point *in limine* was that of material non-disclosure and untruths. The first respondent submitted that the applicant in his founding affidavit stated that the service in HC 5154/21 was said to have been effected on one Andrew Mataruka the Chairperson of second respondent on 29 September 2021 at Nehanda Housing Corporative Dzivarasekwa Extension Harare. Submissions were made that in actual fact the applicant's where about was not known leading to the first respondent applying for substituted service which was granted and applicant was served through a publication in the Herald News Paper hence Justice MAFUSIRE court not have stooped so low as to grant a default judgment in the absence of proof of service.

In his response to this point *in limine* the applicant maintained that he was not served and referred the court to a return of service on page 24 of his application wherein there is a return of service of a court application under HC 5154/21 which indeed shows that service was effected on Andrew Marauka, chairperson of Nehanda Housing Co-operative who accepted service on behalf of the Co-operative. The court noted that the co-operative was cited as the second respondent while applicant was cited as the first respondent. Asked if he perused file HC 5154/21 counsel for the applicant said he did not do so but was relying on instructions from his client as he had just been briefed. So he could not refute the allegations by the first respondent that some information may not have been disclosed.

In order to resolve the dispute, the court since it can rely on its records had to peruse file HC 5154/21. The court found that Lovemore Buleya was the applicant in HC 5154/21. That

Tawanda Tachivangani (the current applicant) was cited as the first respondent. That Nehanda Housing Co-operative was cited as the second respondent. The Court Application for a Declaratory Order and Interdict was served on Andrew Marunda, the Chairperson of Nehanda Housing Co-operative who accepted service on behalf of the Co-operative as the second respondent. Further, the court noted that on p 17 of the record in case HC 5154/21 there is an order for substituted service granted by MANGOTA J. It reads as follows:

> "IT IS ORDERED THAT:
>
> 1. The application for substituted service be and is hereby granted.
> 2. Service of Court Application for a Declaratory Order and an interdict upon the first respondent in Case HC 5154/21 shall be done by way of publication in a newspaper widely circulating in Zimbabwe, being either "The Herald", The Chronical, Newsday or Daily news."
> 3. If the first respondent refuses, neglects and or fails to respond to the court application aforesaid within (10) days of such publication, the matter shall proceed in accordance with the Rules of this court."

Finally, at p 18 of the same record there is an advertisement published in The Herald at Harare on 4 day of September 2017 wherein the applicant in this case was served with the Court Application through substituted service in compliance with the Court Order granted by MANGOTA J. On p 4 para 12 of the applicant's founding affidavit he said-

> "I submit that there is nothing on the record to show that I was served with the court application HC 5154/21 and the certificate of service Annexure "F" hereto does not show that the said Andrew Marauka received the court application on my behalf hence service was not done to me."

Clearly, the applicant deliberately omitted to state the existence of the Order for substituted service as well as the advertisement from The Herald and proceeded to write falsehoods in his founding affidavit. The first respondent was right to say there are material non-disclosure and untruths in the applicant's founding affidavit. The attack on Justice MAFUSIRE that he granted a default judgment against applicant when there was no return of service was unwarranted. Such an applicant cannot expect sympathy from the court as he did not put the court into his confidence.

See *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith* HH-131-03, *Kufandada* v *Zimbabwe Revenue Authority & Anor* HB 27-17 and *Lerm* v *Hamandishe N.O. & Anor* 1983 (1) ZLR 196. I there uphold this point *in limine.*

As to the fourth and final point *in limine* the respondents alleged that the matter is not urgent mainly because of the lack of the certificate of urgency by a legal practitioner. Further they alleged that from the timed the applicant received a notice of eviction he decided to file an application for rescission without firstly seeking condonation and the file the present application some days later.

I need not detain myself much on this point. I have already stated that there is no need for a certificate of urgency in an application filed by a self- actor. Applicant was served with notice of removal on 03 June 2022, filed application for rescission on 8 June 2022 and filed the present application for stay of execution on 10 June 2022. As a self -actor he acted expeditiously. I will dismiss the last point *in limine*.

In view of the fact that I uphold the second and third points *in limine* I have no choice but to dismiss the applicant's application because the matter has been overtaken by events and that there are material non-disclosures and untruths. To express its displeasure of not being candid to the court, the court will order that applicant should pay costs.

IT IS ORDERED THAT

1. The application be and is hereby dismissed.
2. The applicant be and is hereby ordered to pay costs on an ordinary scale.

TAGU J……..

*John Mugondo Attorneys*, first respondent's legal practitioners