

AMOS EDINGTON MATENGAMBIRI  
versus  
NEWTON ELLIOT DONGO

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE 10 November 2020 and 10 February 2021

### **Opposed Application**

*V. Vengayi*, for applicant  
Respondent, in person

TAGU J: This is a court application for a Decree of Perpetual Silence against the respondent who is a very litigious individual and has instituted several court processes whose result has been to frustrate the applicant.

The applicant indicated in his founding affidavit that the respondent has become a nuisance both to the court and to himself, having continuously filed court processes in a bid to retain occupation of a property which does not belong to him but to the applicant. The respondent is said to have filed case number HC 4076/10 wherein he sought an order declaring him to be the owner of the property known as Number 17/18535 Culverwell Road, New Arcadia, Harare. On 26 July 2011 the respondent consented to judgment after he conceded that the agreement of sale of the said property had been cancelled and that he had been refunded his money. The judgment is extant. The respondent then filed case number HC 7734/12 wherein he claimed a declaration that he was the owner of the same property. A default judgment was granted in his favour after he had not disclosed that there was an order under case number 4076/10 where he had been refunded his money after the agreement of sale of property was cancelled and he was refunded his money. As that was not enough the respondent filed on the 28<sup>th</sup> of October 2013 under HC 4840/13 an application seeking an upliftment of bar when he failed to enter appearance to defend. That application was dismissed. On 29 November 2016 the applicant obtained a rescission of judgment which respondent had obtained in HC 7734/12. The respondent then filed yet again an application under HC 2636/15 in an attempt to have the judgment entered against him under HC 5251/14

rescinded. Respondent withdrew that application. On 18 July 2018 the respondent through the back door obtained a default judgment in HC 10482/13. HC 7734/12 was set down on 1 June 2017 and applicant obtained a judgment against the respondent. In HC 5726/17 applicant was granted rescission of judgment against respondent on 8<sup>th</sup> October 2018. Respondent again filed HC 7456/17 seeking stay of execution of HC 7734/12 pending finalization of HC 5726/17. Then under HH 551/17 the respondent filed an urgent chamber application seeking the stay of execution of judgment applicant had obtained in HC 7734/12. After the order made under HC 4076/10 the respondent had the guts to approach the Honourable Court seeking the applicant's eviction from the same property. According to the applicant these claims filed by the respondent were all in bad faith and taking the court for a ride since they refer to the same property.

The applicant is now praying for an order in the following terms-

“IT IS ORDERED THAT

1. Respondent be and is hereby ordered to maintain perpetual silence against the Applicant, that is to say, the Respondent be and is hereby barred and interdicted from instituting any litigation/claim/application/action against the Applicant.
2. The Respondent shall pay the applicant's costs of suit on a legal practitioner and client scale.”

The respondent opposed the application. He raised a preliminary point that the relief that the applicant seeks in this application is an action in rem as he was not party to the illegal agreement of sale which he entered with Clever Mahohwa, in which Ward Two Housing Cooperative was also not a party and even if it was a party, the sale has to be sanctioned by the approval of the Registrar in terms of section 80 of the Cooperative Societies Act. for the reason of this illegality he then accepted the sale to have been cancelled on 24 May 2010 and then confirmed to be lawfully cancelled through clause I as stated on the order HC 4076/10. He therefore claims that in our law a party cannot be bound by a contract to which it is not a party. He submitted that it is only the parties to that contract who can claim a decree of perpetual silence.

The applicant opposed the point *in limine* submitting that the Doctrine of Privity of contract does not apply in this matter. The applicant contented that it is the respondent who keeps on bringing applicant before this court. He referred to page 9 where there is an order obtained by the applicant after a consent order was issued. He said the applicant was dragged as a 3<sup>rd</sup> respondent despite the consent order. Therefore, the applicant was dragged in as a party to the following litigations. For these reasons the applicant has the right to institute the present application.

The respondent insisted that he should not be stopped because HC 7734/12 has not yet been determined. He said the judgment was granted in error, it was urgent but was decided on merits and some papers were removed from the record.

It is indeed correct that the applicant has been dragged in this case by the respondent. It is the respondent himself who cited the applicant as a third respondent in case HC 7734/12 so the point *in limine* raised by the applicant does not have any merit and it is dismissed.

Coming to the present application it is trite that courts are open to all. In *City of Harare v Masamba* HH 330-16 (HC 9428/14) this court stated that-

“Courts of justice are open to all. Section 69 (3) of the Constitution says that every person has the right of access to the courts, or to some other tribunal or forum established by law, for the resolution of any dispute. But this right is not absolute. In exceptional cases the courts will draw the line. They will shut their doors. They have an inherent right and power to prevent an abuse of their processes. They have inherent powers to protect their integrity. Frivolous, vexatious or burdensome litigation; incessant lawsuits that chum out pesky bills of costs which remain unpaid, dirty hands; abuse of judicial officers in any manner; contempt of court; non-disclosure of material facts, and so on, are some of the intolerable infractions that may lead the courts to shut their doors. The closure may be temporary. But it can be perpetual. It all depends on the circumstances. The doors may not be reopened without leave.”

In the present case there has been repeated and persistent litigation between the same parties with the respondent filing more than seven applications fighting tooth and nail to have himself declared the rightful owner of the property although he knew he does not have a legitimate claim. The behavior of the respondent is befitting that of a vexatious litigant. His behaviour clogs the courts and put the applicant under unnecessary legal expenses.

In *Carderoy v Union Government (Minister of Finance)* 1918 AD 512, the South African Appellate Division held that:

“when there has been repeated and persistent litigation between the same parties in the same cause of action and in respect of the same subject matter, the court can make a general order prohibiting the institution of such litigation without the leave of the court but that power extended only to prevent abuse of its own process without being concerned with the process of other courts.”

In *Ignatius Masamha v Secretary, Judicial Service Commission* HH-283/17 it was held that:

“courts have a duty to guard the abuse of the court process and where there is unmitigated abuse as in this case, it is only reasonable, expected and indeed proper for the court to shut its doors to the abuser and/or place such abuser on terms with regards how he may be allowed to exercise his rights of access to the courts.”

Finally, in *Elliot Newton Dongo v Amos Edington Mutengambiri & Another* HH 551-17 commenting to the behavior of the same Respondent in this matter CHAREWA J stated that:

“I must state that the Applicant is rather abusing the system to frustrate the first Respondent and retain occupation of premises which he is not entitled to. There have been no less than ten Applications on this matter, including this Application, seven of which were instituted by the Applicant....I have traversed this litany of litigations to show that contrary to his assertions, these various cases do not in fact operate as a bar against first respondent. Rather they suggest that Applicant actually is abusing the court. That is so because, for instance, had the judge’s attention been drawn to the existence of the order in HC 4076/10, he would never have granted the default order he did on 28 October 2013. And having looked at all records, particularly HC 4076/10 and HC 7734/12, I am of the view that Applicant has no prospects of success whatsoever, and may in fact be a proper candidate for an order of perpetual silence with regard to this matter...”

I am therefore fortified in my belief that the respondent is a vexatious litigant who has clogged the courts with a litany of groundless litigation in a bid to retain occupation of property which does not belong to him. The respondent has become a nuisance both to the court and the applicant. The application for perpetual silence will be granted.

IT IS ORDERED THAT

1. Respondent be and is hereby ordered to maintain perpetual silence against the Applicant, that is to say, the Respondent be and is hereby barred and interdicted from instituting any litigation/claim/application/action against the Applicant.
2. The Respondent shall pay the Applicant’s costs of suit on a legal practitioner and client scale.

*Warara and Associates*, applicant’s legal practitioners.