TANDIWE KODZWA
versus
THE PRESIDING MAGISTRATE N.O.
and
YAMBUKAI HOLDINGS (PVT) LTD T/A YAMBUKAI FINANCE
and
MOLLEN KUVIMBA
and
MEANS KODZWA
and
MESSENGER OF COURT HARARE N.O.
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 2 September 2014

Urgent chamber application

T. Muchineripi, for the applicant
Ms *T. Chiguvare*, for the 2nd respondent

MATHONSI J: This matter has a checkered history indeed. Fighting each other at the magistrate's court in Harare the parties have, since 17 May 2010 when the second respondent issued summons commencing action against the applicant and 3 others, succeeded in filing one application after the other all of which have been opposed with nothing to suggest any desire to achieve finality.

As I have stated, the second respondent sued the applicant and 3others in the magistrates court case number 7934/10 for payment of the sum of $30 171-54 in respect of money allegedly advanced to one of them with the others standing as sureties and co-principle debtors. Although the summons was issues on 17 May 2010 default judgement was only sought and obtained on 7 March 2011. It is not clear what was happening in between, although it has been suggested on behalf the second respondent that another default judgement was obtained in July 2010.

Be that as it may, on 27 April 2012, the applicant and those 3others approached the magistrates court seeking a rescission of the default judgement.

It is not clear what became of that application, but whatever it is, the applicant later filed another application for rescission of judgement on 11 April 2014, this time standing alone. At the same time she filed in that court an *ex parte* application for stay of execution and secured a provisional order staying execution of the default judgement.

The interim relief granted by the court then was to the following effect:

> "INTERIM RELIEF SOUGHT (SIC)
> 2. Pending the return date, the 2nd respondent be and is hereby ordered to stop executing the default judgement obtained against the applicant on 18th day of June 2010 forthwith pending the determination of the application for rescission of default judgement filed simultaneously with this application."

The inconvenience of that court order did not stop the second respondent and indeed the messenger of court who was cited in that matter as the fourth respondent from executing the judgement and selling the immovable property of the applicant on 2 May 2014. The strange reasoning of the messenger of court to justify his action is contained in a letter dated 14 May 2014 where, in response to a complaint raised by the applicant's legal practitioners as to why he went ahead with execution against a valid court order, he stated;

> "We refer to your letter dated 14th May 2014 in respect of the above mentioned matter. The contents have been noted. We feel this letter dated 14th May 2014 from your good office should have been directed to the legal practitioners concerned Messrs Muvirimi Law Chambers. However we write to inform you that the *EX PARTE* APPLICATION FOR STAY OF EXECUTION and ORDER all dated 11th April 2014 you are referring to did not stop the office of the messenger of court Harare to execute. The *Ex parte* application for stay of execution and the order STOPPED the 2nd respondent and not the office of the messenger of court- Harare."

If execution was stopped by a court order, it is difficult to fathom what the messenger of the same court was talking about and whose court order he was executing in the circumstances. As to how and when his office acquired autonomy to forge ahead with a sale even without a court order to execute we are not told. It is the kind of conduct which cannot possibly be tolerated as it not only appears to place the office of the messenger of court outside the authority of the court, but also brings the administration of justice to disrepute.

The sale of the house forced the applicant to return to the court on 16 May 2014 with an application for the setting aside of the sale in execution. Whatever happened to that application is again not clear but on 3 June 2014 the application for rescission of judgement was dismissed and the magistrate's reasons for doing so were given as:

> "The application is for rescission of default judgement being made in terms of O 30 of the Magistrates Court rules. It is trite that in applications of this nature (*sic*). Applicant failed to prove that default was not wilful and that applicant has a bona fide defence on the merits. Further to that the O30 and the Act provide for the applicant (*sic*) being made within 30 days of knowledge of the Judgement. Applicant has not addressed the court as regards when it became aware of the judgement; it (*sic*) has not rebutted submissions made by the respondent in addressing that point. Instead the applicant just tactfully addressed the issue. In the absence of condonation therefore the application is improperly before the court and will be dismissed."

The inevitable question which arises upon reading that judgement is: On what basis was the application dismissed? The magistrate speaks of the applicant failing to prove that default was not wilful or that she has a *bona fide* defence suggesting that the application was dismissed on the merits. He then speaks of the need to bring the application within 30 days. If it was brought outside that period and there was no condonation of the late filing, then it would be improperly before the court and would therefore fail on procedural impropriety. Whichever way the application was dismissed bringing the whole process to a crushing end. It was a final and definitive decision which entitled the applicant to appeal and appeal she did to this court on 5 June 2014.

In her appeal she questioned the finding on lack of condonation and insisted that an application for condonation had been made. She questioned the finding that default was wilful and disputed consenting to the hypothecation of her immovable property, issues which the court does not appear to have dealt with assuming the matter was determined on the merits.

The magistrates court granted an application for leave to execute pending appeal in favour of the second respondent on 16 July 2014 although the reasons were only made available on 28 July 2014. In arriving at that decision more confusion emerges. This is what the court said:

> "The applicant obtained a default judgement against the three respondents in July 2010 (the judgement was entered on 7 March 2011). Then in May 2014 the respondent's application for rescission was dismissed on a technicality (it was dismissed on 3 June 2014). The respondents were to first apply for condonation of the late filing. To this day no such application was ever made and accordingly the default judgment could be used (as) a final judgement.
> The respondents could not in my view appeal against the dismissal. The dismissal was not definitive and final. It was only but an interim judgement which did not finally settle the issues. The appeal thus was and is improper and defective."

Herein lies the problem. The judgement appealed against does not appear to be interim at all. I have already stated that it was final and this entitled the applicant to appeal. In addition the court did not specify the basis of the dismissal of the application, again entitling the applicant to seek recourse elsewhere. There is an added problem in that although the papers show that default judgement was entered on 3 March 2011, Ms *Chiguvare* for the second respondent states that the default judgement was granted in 2010. The first respondent does not clarify the confusion at all.

The applicant has now filed this urgent application seeking a stay of execution pending the hearing of the application for review calling into question the judgement of the first respondent allowing execution pending appeal. The review application was filed in this court as HC7424/14.

The application is opposed by the second respondent who is of the view that there is no merit in both the appeal noted in this court and the review application also filed in this court. According to the second respondent the processes filed by the applicant are designed by buy time and this application is also a perpetuation of that time wasting activity. The second respondent seeks a dismissal of the application on that score.

In addition, Ms *Chiguvare* for the second respondent submitted that the application is not urgent and should not be entertained as such. I do not agree. The second respondent applied for leave to execute pending appeal, a clear indication of an intent to act. The fact that action has not been taken yet does not disentitle a diligent litigant from approaching the court seeking to secure her rights. I also agree with the applicant that upon becoming aware of the judgement she took action to seek redress and urgency now stems from the outcome of the application for leave to execute pending appeal, an outcome which only came to fruition on 28 July 2014. It cannot be said that urgency stems from a deliberate absention from action until the day of reckoning.

I am of the view that the papers before me make an arguable case for the applicant in respect of both the appeal and the review application. In the result, I grant the provisional order in terms of the draft order.

Muchineripi & Associates, applicant's legal practitioners
Muvirimi Law Chambers, 2nd respondent's legal practitioners