

WISDOM CHITURA

And

HELEN MAUREEN MUSHORE

Versus

NEVER NYAKALE

And

LUCIA NYAKALE

And

PORTIA NYAKALE

And

CITY OF BULAWAYO

And

ASSISTANT MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 21 July 2023 & 14 September 2023

Court application

S. Siziba, for the applicant

K. Ncube, for the 1st, 2nd and 3rd respondents

DUBE-BANDA J:

[1] This is an application to dismiss case number HC 69/21 (“main action”) in terms of r 75(1) of the now repealed High Court Rules, 1971. This application was filed before the promulgation of the High Court Rules, 2021. Rule 75(1) is now r 31(1) of the High Court Rules, 2021. The applicants seek that the main action be dismissed on the grounds that it is frivolous and vexatious.

[2] For ease of reference and where the context permits, the parties shall be referred to as in the main action, or by their names, or merely their first names. For reasons that will appear later in this judgment, the application is only opposed by the third respondent. The first and the second respondents are barred.

The background facts

[3] This application will be better understood against the background that follows. On 9 March 2021 Never Nyakale, Lucia Nyakale and Portia Nyakale (plaintiffs) sued out a summons in case HC 69/21 against Wisdom Chitura and Helen Maureen Mushore (defendants) seeking a declaratory order that: the agreement between Mushore and Chitura be declared to be of no force and effect on the grounds that it was illegal and invalid; and that Chitura be evicted from the property known as U28 Mzilikazi, Bulawayo (“the disputed property”).

[4] Joyce Nyakale (Joyce) had the following children: Betty Nyakale; Morris Nyakale; Sherpard Nyakale; Stephen Nyakale; and Dennis Nyakale. Joyce has a number of children, who include the plaintiffs and Mushore. Joyce died on 5 March 1996. In her life time she was the owner of the disputed property in that she had rights, title and interest in it. The plaintiffs contend that in her life time she had made a declaration that the disputed property should not be sold, but should be used for the benefit of generations of her grandchildren. Dennis was appointed the executor dative of the estate of Joyce, and he too died on 4 March 2015. Mushore is a daughter of Dennis, and she was appointed the executrix of the estate of her father. On 4 February 2020 Mushore sold the property to Chitura for US\$12 000.00, and received payment.

[5] In the main action the plaintiffs contend that the property was not part of the estate of Dennis, and that Mushore had no right to sell the disputed property to Chitura. They contend further that they have a real and substantial interest in the disputed property as they are the ultimate beneficiaries of the estate of Joyce. In her plea in the main action Mushore contends that the first and final distribution account for the estate of Joyce was confirmed on 2 February 2011, and it has not been re-opened to date. The disputed property was awarded to Dennis and it became part of his estate. That the Master issued authority in terms of s 120 of the Administration of Estates Act [Chapter 6:01] for the sale of the property to Chitura. And that

the plaintiffs are not beneficiaries in the estate of Dennis. In his plea Chitura avers that the agreement he sealed with Mushore was lawful. Her avers that he is an innocent purchaser who observed the requirements of the law in the purchaser of the disputed property.

[6] In their replication in the main action the plaintiffs aver that the distribution account for the estate late Joyce was done fraudulently by Dennis and he awarded the disputed property to himself, to the exclusion of the other children of Joyce. He was not the only beneficiary to the estate of Joyce. Therefore, Mushore had no right to sell the property as it did not form part of the estate of Denis. It is averred that the Master did not apply his mind when he issued the s 120 authority. It is averred further that the s 120 authority is not genuine as it was obtained through fraud.

[7] The defendants (applicants herein) seek that the main action be dismissed on the grounds that it is frivolous and vexatious. It is against this background that they launched this application.

Points in limine

[8] In this application the applicants attacked the *locus standi* of the respondents in the main action, and argued that the claim in the main action has prescribed. It was argued that the main action is frivolous and vexatious for the reason that the respondents therein lack *locus standi* by virtue of not being beneficiaries to the estate of the late Joyce. In respect of prescription, it was argued that a claim or challenge against the distribution of estate must be brought within three years of the Master's confirmation. It was submitted that failure to bring a challenge within a three-year time-line, the claim prescribes, and that in this case the claim in the main action has prescribed.

[9] Mr. *Ncube* counsel for the plaintiffs argued that in respect of issues of *locus standi* and prescription the defendants should have filed a special plea in the main action, and not to raise these issues in this application. I agree. The issues of *locus standi* and prescription do not arise in this matter, they can only be determined in the main action. In this application the applicants must show that the main action is frivolous and vexatious on the merits. It is not open to a

litigant to launch such an application for summary dismissal in terms of r 75 and start to raise special pleas and points *in limine* in attacking the main action. The special pleas and points *in limine* must be taken and argued in the main action and be determined therein. Therefore, I cannot determine the issue of *locus standi* and prescription in this application.

[10] At the commencement of the hearing, Mr. *Siziba* counsel for the defendants submitted that it was only Portia who filed a valid notice of opposition. Never and Lucia did not file opposing affidavits, and counsel contended that they are barred. I agree. It is a peremptory requirement of the rules that notice of opposition must be filed together with one or more opposing affidavits. Without an opposing affidavit, there would be no valid opposition. A respondent who has failed to file a valid notice of opposition in terms of the rules shall be barred. In the circumstances, Never and Lucia are barred. However, Portia filed a valid notice of opposition, therefore the fact Never and Lucia are barred is in essence inconsequential. It is of no moment. The matter must still be determined on the merits by virtue of a valid notice of opposition filed by Portia.

Merits

[11] This application is in terms of r 75(1) of the High Court Rules, 1971, the repealed rules. It is so because it was filed before the promulgation of the High Court Rules, 2021. The rule says:

“(1) Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious.

(2) A court application in terms of subrule (1) shall be supported by affidavit made by the defendant or a person who can swear positively to the facts or averments set out therein, stating that in his belief the action is frivolous or vexatious and setting out the grounds for his belief.

(3) A deponent may attach to his affidavit filed in terms of subrule (2) documents which verify his belief that the action is frivolous or vexatious.”

[12] The rule is clear that a litigant in such an application may attach documents which verify his belief that the action is frivolous or vexatious. In this case the applicants attached, amongst others, copies of the following documents: Letters of Administration showing that Dennis was

appointed the executor in the estate of Joyce and awarded the disputed property; a First and Final Liquidation and Distribution Account in the estate of the late Joyce; Letters of Administration showing that Mushore was appointed executrix in the estate of Dennis; affidavits deposed by the beneficiaries in the estate of Dennis consenting to the sale of the property; a memorandum of agreement between the Municipality of Bulawayo and Chitura in respect of the disputed property; a memorandum of agreement between the Municipality of Bulawayo and estate Joyce dated 4 February 2020; memorandum of cession between Mushore and Chitura; and a s 120 authority dated 20 December 2019. These documents are properly before court and must be considered in the determination of this application.

[13] It was stated by TAGU J in *Moyo v Ecobank Zimbabwe Ltd* 2018(2) ZLR 580 (H) that r 75(1) is designed to assist a defendant by enabling him to apply to court to dismiss a frivolous and vexatious action. That for an application for dismissal to succeed, the applicant should show and prove the following: that he filed a plea; and that the claim against him is frivolous and vexatious. It was held that such an application is the converse of an application for summary judgment and much the same considerations apply, namely whether the plaintiff has an arguable case. See *Medclinic Medforum Hospitals (Pty) Ltd v City of Harare* 2019 (3) ZLR 943 (H). The court will not dismiss an action under this rule unless it is satisfied that the likelihood of the case succeeding stands outside the realm of probability altogether. It was held further that an action is deemed frivolous and vexatious if it is impossible to succeed. The court said the word “frivolous” in its ordinary and natural meaning connotes an action characterized by lack of seriousness, as in a case of one which is manifestly insufficient. An action is in the legal sense “frivolous and vexatious” when it is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation.

[14] MALABA JA (as he then was) in *Rogers v Rogers and Another* 2008 (1) ZLR 330 (S) at 337 C-D made the following remarks:

“Summary dismissal of an action in terms of rule 79 (2) of the Rules is an extraordinary remedy to be granted in exceptional cases. The reason is that granting the remedy has the effect of interfering with the elementary right of free access to the court. The object of the rule is to enable the court to stop an action which should not have been launched.”

[15] A plaintiff who commences an action in a court of law when he or she has no reasonable grounds to do so has no cause of action and an action which has no cause of action is obviously unsustainable. It has been held that it is an abuse of the process of the court to prosecute in it any action which is groundless that no reasonable person can possibly expect to obtain relief. However, summary dismissal of an action in terms of r 75 is an extraordinary remedy to be granted in exceptional cases. It affords a defendant a cheap and expeditious method of disposing of a vexatious and frivolous claim. See Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th ed) 718-719.

[16] It is against the backdrop of these legal principles that I consider and determine this application for a summary dismissal.

[17] For completeness I called for the record in the main matter i.e., HC 69/21 from the Registrar's Office. A court is entitled to refer to its own records and proceedings and take note of their contents. See *Mhungu v Mtindi* 1986 (2) ZLR (S) at 173A-B. In the main action that is sought to be dismissed the plaintiffs therein seek a declaratory order that the agreement of sale between Mushore and Chitura be declared of no force and effect; and that Chitura be evicted from the property.

[18] The cause of action is that during her life time Joice had rights, title and interests in the disputed property. It is averred that during her life time she made a declaration that the property should not be sold but must be used for the benefit of generations to come, including the plaintiffs who are her grandchildren. Mushore as the executrix of the estate of Dennis sold the property to Chitura. It is pleaded that the plaintiffs have a real and substantial interest in the property as they are the ultimate beneficiaries of the estate of the late Joice. And that Mushore had no right to sell the property. Cut to the bone, it is averred that fraudulent schemes were committed leading to the sale and ceding of the property to Chitura.

[19] In her plea Mushore contends that the first and final distribution account for estate Joice was confirmed on 2 February 2011. The property was awarded to Dennis and it became part of his estate. The beneficiaries to the estate of Dennis consented to the sale of the property, and the Master issued authority for the sale in terms of s 120 of the Administration of Estates Act [Chapter 6:01]. And that the estate of Joice has not been reopened.

[20] It is common cause that Dennis was appointed the executor of the estate Joyce. The distribution account in the estate of Joyce was confirmed on 2 February 2011. In terms of the confirmed distribution account the disputed property was awarded to Dennis. I cannot say on the papers before court that the property was ceded to Dennis, and it appears that it remained in the name of Joyce. Therefore, the memorandum of agreement of cession signed on 2 June 2019 between Mushore as the executrix of the estate of Dennis and Chitura might require some interrogation. I say so because at the time the cession agreement was signed the property does not appear to have been in the name of Dennis.

[21] Again, it is unclear the basis upon which the Master authorized the disputed property to be sold by private treaty in terms of the provisions of s 120 of the Administration of Estates Act [Chapter 6:01]. The persons who deposed to affidavits consenting to the sale of the property were all beneficiaries in the estate of Dennis. However, the s 120 authority issued by the Master on 20 December 2019 relates to the estate of Joyce. The DRBY number relates to the estate of Joyce; and the s 120 authority actually says “in the estate of the late Joyce Nyakale,” and authorizes the executor dative to sell the property. The estate of Joyce was closed on 30 December 2010, and on 20 December 2019 there was no executor in her estate. All these issues need to be interrogated at the trial in the main action.

[22] Furthermore, there is a copy of a memorandum of agreement between the Municipality of Bulawayo (Municipality) and estate Joyce which is dated 4 February 2020, and the agreement purports to cancel the agreement of sale of the property between the Municipality and Joyce dated 6 April 1984. The cancellation agreement bears the signatures of the Municipality and its witnesses, however no one signed on behalf of the estate late Joyce, although they are signatures of witnesses. The effect at law of this cancellation agreement is unclear, these are issues that might well be determined in the main action. Questions might arise as to the reason for the cancellation of the agreement after the death of Joyce, and after her estate had been administered and closed. Again, the cancellation agreement refers to the estate late Joyce, but the DRB number is 831/15 that of the estate of Dennis. These issues are unclear and cannot be determined on the papers.

[23] I repeat that the memorandum of agreement of cession between Mushore and Chitura requires some interrogation. At the time it was signed the property was still in the name of Joyce. The person who signed the memorandum is Mushore the executrix in the estate of Dennis, and how all this happened might be issues for determination in the main action. The memorandum of agreement between the Municipality and Chitura is anchored on the one between Mushore and Chitura, which itself requires some interrogation and explanation. I make no factual finding regarding all these issues; I just flag them merely to show that the main action is not a matter that may be summarily dismissed in terms of r 75.

[24] Mr. *Siziba* submitted that without the reopening of the estate of Joyce, the main action is utterly hopeless and with no chance of succeeding at the trial. I disagree. Although the plaintiffs are not listed as beneficiaries in the estate of Joyce, it is not disputed that they are her grandchildren. Furthermore, I observe without making a finding that it appears that certain processes and actions were made in the estate of the late Joyce long after it had been closed, e.g., the issuance of a s 120 authority in the name of her estate on 20 December 2019, when in fact her estate was closed on 2 February 2011. Whether the main action may *actually* succeed or not cannot be determined in this application, it must be determined in the main action itself. The question in this application is whether the main action is frivolous and vexatious and is impossible to succeed.

[25] Mr. *Ncube* submitted that fraudulent activities were committed leading to the disputed property being sold to Chitura. I make no finding on whether fraud was committed or not, all I can say from the papers before court at this stage of the proceedings is that these are issues that are ripe for determination in the main action. Summary dismissal is extraordinary and drastic. It makes inroads on a plaintiff's procedural right to have its case heard in the ordinary course of events, in that it permits the dismissal of a matter without a trial. Unless the respondent's case is utterly hopeless without chance of succeeding at trial, the court must lean towards allowing it proceed to trial. In this case the plaintiffs have shown that the main action is not utterly hopeless and the court must therefore lean towards allowing it to proceed to trial. I do not agree that the main action is frivolous and vexatious to warrant a summary dismissal. It is for these reasons that this application stands to fail.

Costs

[26] The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. In this case the third respondent sought costs on a legal practitioner and client scale on the basis that this application is frivolous and vexatious.

[27] The leading case regarding attorney client costs is the decision of the appellate division in *Nel v Waterberg Land-bouwers Ko-op Vereeniging* 1946 AD 597. In this case it was held that something more underlies the practice of awarding costs as between attorney and client than the mere punishment of the losing party. The operative principle in determining whether to award punitive costs is, whether a litigant's conduct is frivolous, vexatious or manifestly inappropriate. The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium. See *Public Protector v South African Reserve Bank* [2019] ZACC 29.

[28] In considering whether I should award costs on the scale of legal practitioner and client I factor the following into the equation: that the main action is not frivolous and vexatious and it is ready for a pre-trial conference hearing before a judge of the High Court. My view is that an application for summary dismissal must not be contrived for the purpose of avoiding a trial in the main action. This appears to be one such application contrived to avoid a trial in the main action. This to me explains the reason Mushore the main actor in these matters and the executrix of the estate of Dennis decided to shy away from deposing to a founding affidavit, only to let Chitura peddle hearsay evidence in his founding affidavit.

[29] An award of costs on an attorney and client scale is exceptional and is intended to be very punitive and indicative of extreme opprobrium. I consider this to be a borderline case in that the applicants did not actually cross the red-line to warrant costs on a legal practitioner and client scale. It is for these reasons that I will spare them such costs.

In the result, it is ordered that:

- i. The application be and is hereby dismissed.
- ii. The applicants to pay the costs for the third respondent on a party and party scale jointly and severally each paying the other to be absolved.

Ndlovu Dube & Associates, 1st and 2nd applicants' legal practitioners
Gill, Godlonton & Gerrans, 1st, 2nd and 3rd respondents' legal practitioners