

BUSISO MTUNZI

And

SIHLE MTUNZI

Versus

SIPHATHISIWE MUCHIYANI MUDAWINI

And

HENRY MUCHIYANI

And

PATRICIA DARANGWA N.O

And

MASTER OF THE HIGH COURT N.O

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 7 FEBRUARY 2023 & 30 MARCH 2023

Opposed Application

S. Chamunorwa, for the applicants

Advocate Siziba, for the 1st respondent

MAKONESE J: This is a court application for leave to execute pending appeal.

The order sought is in the following terms:-

- “1. The applicants be and are hereby granted leave to execute the judgment of this court granted on 14th July 2022 for the ejectment of 1st and 2nd respondents and all those claiming ownership through them from number 11 Seymour Road, Montgomery, Bulawayo, pending the hearing and determination of the appeal filed under case number SCB 77-22.
2. The respondents shall pay the costs of suit on an attorney and client scale.”

The application is opposed by the respondents who argue that leave to execute pending appeal can only be granted under exceptional circumstances where an applicant has demonstrated that the respondent’s appeal is frivolous and vexatious.

FACTUAL BACKGROUND

On 14th July 2022 this Honourable Court delivered a ruling under case number HB 196-22 on the following terms:

- “1. The plaintiffs’ claim be and is hereby dismissed.
2. The 5th and 6th defendants’ counter-claims succeeds in part in that the order for holding over damages be and is hereby dismissed.
3. The 2nd and 3rd plaintiffs and all those claiming occupation through them are to vacate the property known as Subdivision H of Lot 11 of Montgomery situate in the District of Bulawayo and more commonly known as number 11 Seymour Road, Montgomery, Bulawayo within 7 days of this order failing which the Sheriff of the High Court of Zimbabwe or his lawful Deputy shall evict them.
4. The plaintiffs shall pay costs of suit at the ordinary scale, jointly and severally, the one paying the other to be absolved.”

In a detailed written judgment this court per KABASA J found that the applicants purchased the property known as number 11 Seymour Road, Montgomery, Bulawayo, (hereinafter referred to as the “property”). The court held that not only had the applicants purchased the property and paid for it in full but they had secured title to the property. The applicants were entitled to a *rei vindicatio*, as 1st and 2nd respondents were allegedly holding onto the property. The court established that applicants’ title to the property was not tainted and they were entitled to an order for the eviction of the respondents. The applicants had at the time of the judgment moved onto the property and were utilising the land and buildings save for the house where respondents are residing.

On these facts, the respondents mounted an appeal in the Supreme Court. Applicants contend that the appeal is frivolous and vexatious and designed to frustrate the execution of the judgment of this court.

SUBMISSIONS BY THE APPLICANTS

Applicants aver that in applications of this nature, this court retains a general discretion to grant or refuse leave, and if leave is granted to determine the conditions upon which such execution may be carried out.

Applicants further aver that this is an appropriate case to order execution pending appeal as the appeal has not been noted with a *bona fide* intention of seeking to reverse the judgment of this court. Applicants contend that there are no reasonable prospects of success on appeal whatsoever and that the appeal has been noted to simply delay the execution of the order of this court.

Applicants point out that the sale of the property to the applicants was done in accordance with a consent issued by the Master of the High Court. The Master's consent was never challenged and respondents have no legal basis for taking issue with the sale of the property to the applicants. As regards the issue of the actual sale of the property, the basis of the challenge by the respondents is that the sale was fraudulent. The court dealt with the issue adequately in its judgment and did not find in favour of respondents.

Applicants argue that the Supreme Court, sitting as an appellate court will not readily interfere with the factual findings made by the trial court unless there has been a gross misdirection.

Applicants contend that a proper case has been made for the exercise of the court's discretion in ordering that execution be allowed pending appeal.

RESPONDENTS' SUBMISSIONS

1st and 2nd respondents aver that leave to execute pending appeal can only be granted in exceptional circumstances. Respondents contend that such a threshold is very high for the applicants to meet. Respondents argue that applicants are mere purchasers of the property in dispute. They are not privy to the underlying inheritance dispute that led to the sale. Respondents argue that applicants' rights of occupation and ownership are dependent upon whether the Estate of the Late Wilson Muchiyani Mudawini was correctly administered or not. Respondents aver that their appeal to the Supreme Court cannot be described as being hopeless and groundless as it raises genuine issues that must be considered by the appeal court.

Respondents aver that the potentially of irreparable harm and the balance of convenience favours the 1st and 2nd respondents who have always been resident at the disputed property. Respondents do however, concede that the applicants have partially taken occupation of the property.

As regards prospects of success, respondents submit that the applicants in an application of this nature are not only required to show that the appeal has no prospects of success, but must go further to demonstrate that the appeal is frivolous and vexatious.

APPLICABLE LAW

The law relating to applications for leave to execute pending appeal is settled in this jurisdiction. In *Kawa v Muzenda & Ors* HB 108-14, this court held that the court retains a general discretion to grant or refuse leave to execute pending appeal. In the exercise of its discretion, the court will consider the following factors;

- “(i) The potentiality of irreparable harm or prejudice being sustained by the applicant, if leave to execute were granted;
- (ii) The potentiality of irreparable harm or prejudice being sustained by the respondent if leave to execute were refused;
- (iii) The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has not been noted with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, for instance to gain time or harass the other party; and
- (iv) Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent and the balance of hardship or convenience as the case may be.”

See:- *Masimbe v Masimbe* 1995 (2) ZLR 31 (S) and *Econet P/L v Telecel Zimbabwe P/L* 1998 (1) ZLR 149 (H).

In *South Cape Corp (PTY) Ltd v Eng Mgmt Sves Pty Ltd* 1977 (2) SA 534 A at 543,
CORBETT JA, stated thus:

“The court to which application for leave to execute is made has a wide general discretion to grant or refuse leave In exercising this discretion, the court should, in my view, determine what is just and equitable in all the circumstances, and in do so, would normally have regard inter alia to the following factors:

(i) *the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were granted;*

.....

(4) *Where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be”*

Applying these principles to the facts of this case, there can be no irreparable harm or prejudice to the respondents. The respondents have filed an appeal against the judgment of this court, which has all the hallmarks of a scheme to delay and frustrate the execution of the order. The bulk of the grounds of appeal are aimed at attacking the findings of the court on the aspects of inheritance. There can be no doubt that applicants are *bona fide* purchasers of the Montgomery property. The applicants hold legal title to the property under dispute. The appeal court may not be asked to review the factual findings of this court, unless such findings are defiance of logic and common sense. It is trite that the Supreme Court will sit as an appellate

court and will not readily interfere with factual facts of a lower court. See: *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S).

The 1st and 2nd respondents do not allege the existence of a gross misdirection. 1st and 2nd respondents rely on the fact that their property evaluation shows that the property was valued for more than US\$60 000. This court dealt with that issue and showed the basis upon which it could not rely on the evaluation.

DISPOSITION

It is my view that the application for leave to execute pending appeal is well grounded on the facts and on the law. The appeal lodged by the 1st and 2nd respondents amounts to an abuse of court process. In applying the principles articulated in case law cited above there can be no doubt that the applicants have met the threshold for an order to execute the order of this court pending appeal.

In the result, the application succeeds.

It is ordered that:-

1. The applicants be and are hereby granted leave to execute the judgment of this court dated 14th July 2022 for the ejection of the 1st and 2nd respondents and all those claiming occupation through them from number 11 Seymour Road, Montgomery, Bulawayo, pending the hearing and determination of the appeal filed under SCB 77-22.

HB 51/23
HC 1588/22
XREF HC 526/19
XREF SCB 77/22
XREF DR 266/18
XREF DR 1511/95
CAPP 197/22

2. 1st and 2nd respondents are ordered to pay the costs of suit.

Calderwood, Bryce Hendrie and Partners, applicants' legal practitioners
Mhaka Attorneys c/o Majoko and Majoko, 1st and 2nd respondents' legal practitioners