

ROY JAISON MARISA
and
HILARY MARISA
and
HENRY MARISA
and
MUSAFARA MARISA
and
STEVEN MARISA
versus
ALEX MARISA
and
AUXILIA MARISA
and
MEMORY MARISA
and
MIRIRAI MARISA
and
JENNIFER MUZANENHAMO

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 12 October 2022

Opposed Matter

Mr *J Makuku*, for the applicants
Mr *K Mabvuure*, for the respondents

MANYANGADZE J: After hearing submissions from both parties, I delivered an *ex tempore* judgment in which I dismissed the application. The applicants have requested reasons for judgment. These are they.

This is an application for rescission of judgment. It arises out of an order issued by GUVAVA J (as she then was) on 26 February 2007. It was an order by consent in which the respondents in the instant case appeared as plaintiffs, and the applicants appeared as defendants.

The order is as follows:

“At Harare this 26th day of February 2007.

Before the Honourable Justice Guvava

Mr Mhlanga for plaintiffs

Mr Kwenda for defendants

Whereupon after reading document filed of record and hearing Counsel;

It is ordered that;

- (i) By consent of the parties the defendants be ejected from Farm number 48 Zinyaningwe, Mashava;*
- (ii) The defendant shall vacate the aforesaid farm within three months reckoned from 1st March 2007, failing which the Deputy Sheriff is hereby authorized to evict the defendants; and*
- (iii) Each party is to bear its own costs*

CHIHAMBAKWE, MURIZWA & PARTNERS

*Plaintiff's Legal Practitioners
8th Floor, Regal Star House
25 George Silundika Avenue
HARARE [GM/ri]*

KWENDA & PARTNERS

*Defendant's Legal Practitioners
3rd Floor, Equity House
HARARE [MS GONESE]*

.....”
BY THE JUDGE

The background to the matter, briefly stated, is that the respondents issued summons against the applicants, in which they sought the applicants' ejection from Farm No 48 Zinyaningwe, Mashava. The respondents are the registered owners of the farm under Deed of Transfer No 2739/2001. The farm previously belonged to the late Jeremiah Marisa, the father to the first to fourth respondents, the fifth respondent being the widow of the late Jeremiah Marisa. The applicants are brothers to the deceased. The farm devolved to the respondents from the estate of the late Jeremiah Marisa by way of intestate succession.

Following the issuing of summons, the matter went through all the stages of pleadings until it was set down for trial, before GUVAVA J. It is at this stage that the parties apparently decided to bury the hatchet, resulting in the consent order in question.

On 3 June 2021, 14 years later, the late Jeremiah Marisa's brothers (the applicants *in casu*) filed an application for rescission of judgment. They seek to have the consent order rescinded.

Consent judgments are governed by r 21 of the High Court Rules, 2021. In the old Rules of 1971, which the applicants have referred to, the applicable provision was Order 8 Rules 54 and 55.

Rule 21 provides as follows;

- (1) "Save in actions for relief affecting status, at any time after service of summons a defendant may consent, in whole or in part to judgment without appearing in court and such consent to judgment shall be in writing and signed by the defendant personally or by a legal practitioner who has entered appearance to defend on his or her behalf and where the defendant has personally signed a consent to judgment, his or her signature shall either be witnessed by a legal practitioner acting for such defendant and not for the plaintiff or be verified by affidavit and upon filing a consent to judgment with the registrar the plaintiff may make a chamber application for judgment and thereafter a judge may give judgment according to the consent.
- (2) A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant, or to the plaintiff to prosecute the action and such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court considers just."

The main basis of the applicant's complaint is that the lawyers who appeared on their behalf before GUVAVA J did not have their instructions to sign the consent order. They also aver that they (the applicants) never signed the consent order.

According to the provision cited, a consent judgment "*shall be in writing and signed by the defendant personally or by a legal practitioner who has entered appearance to defend on his or her behalf.*"

The consent order filed of record is clear. GUVAVA J (as she then was) issued the order after hearing both Counsel. Counsel who appeared before her were Mr *Mhlanga* for the plaintiffs, from *Chihambakwe, Mutizwa & Partners*, and Mr *Kwenda* for the defendants, from *Kwenda & Partners*.

The two legal practitioners involved were senior and long standing officers of the court. It appears the applicants are not fully cognisant of the gravity of the allegations they are making. They are alleging that the two senior practitioners and officers of the court brazenly took it upon themselves to present a fraudulent consent order to a judge of the High Court for endorsement as a court order.

It is inconceivable that for 14 years the applicants were not aware of this order, that the parties' respective lawyers never communicated or updated their clients on this crucial development.

Added to this, the pleadings filed of record have a clear paper trail of how the estate of the late Jeremiah Marisa devolved to the respondents.

In the circumstances, it is an incredibly tall order for the applicants to invalidate the consent order as one that was fraudulently obtained. Their bald assertions, set against the well documented devolution of the late Marisa's estate to the respondents, fall far short of meeting the *good and sufficient cause* requirement stipulated in rule 21 subrule 2. This requirement must be satisfactorily met for a consent judgment to be rescinded. The applicant have failed to do so.

In the result, it is ordered that;

1. The application for rescission of a consent judgment be and is hereby dismissed.
2. The applicants shall bear the respondents' costs.

Ndlovu & Hwacha, applicant's legal practitioners
Chihambakwe Law, respondent's legal practitioners