

SHILLAH MANYEWU (in her capacity as the Executrix Dative
of Estate Late Sharai Chizema DR number 2309/19)
and
JACKSON CHIKOORE
versus
CALVIN MPOFU
and
MINISTER OF NATIONAL HOUSING & SOCIAL AMENITIES
and
AROSUME PROPERTY INVESTMENTS (PVT) LTD
and
SALLY MUGABE HOUSING COOPERATIVE
and
THE REGISTRAR OF DEEDS N.O
and
THE SURVEYOR GENERAL N.O

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 15 & 21 March 2023

Urgent Chamber Application

Mr *J Marange*, for applicants
Mr *P Mutukwa*, for 1st respondent
Mr *S Bwanya*, for 3rd respondent
No appearance for 2nd, 4th, 5th & 6th respondent

MHURI J: Applicants have approached this Court on an urgent basis seeking an interdict. The interim relief being sought is as follows: -

That pending the return date of the provisional order,

- a) The first respondent, his assigns, agents and employees be and are hereby interdicted from visiting stand number 226 Carrick Creagh Township, Borrowdale Harare to show purported purchasers the immovable property aforesaid and interdicted from selling any portion of the said property.
- b) The fifth respondent be and is hereby ordered and directed to place a caveat on the immovable property known as stand 226 Carrick Creagh Township, Borrowdale,

Harare held under deed of transfer number 7403/22 registered in favour of first respondent.

- c) the sixth respondent be and is hereby ordered not to accept any papers in relation to surveying of stand number 226 Carrick Creagh Township, Borrowdale, Harare and not to conduct any physical surveying of the aforesaid stand.
- d) No order as to costs

The final relief being sought is as follows: -

- 1. That respondents show cause why a final order should not be made as follows: -
 - a) Pending the finalisation of the case under HC 3993/20, the first respondent be and is hereby interdicted from dealing in any manner with the immovable property known as stand 226 Carrick Creagh Township Borrowdale, Harare held deed of transfer No 7403/22 registered in the name of the first respondent that may cause encumbrances or dispose same by selling it to the third parties.
 - b) Pending the finalisation of the case under HC 3993/20 the Caveat placed by the fifth respondent on the immovable property known as stand 226 Carrick Creagh Township, Borrowdale, Harare held under deed of transfer number 7403/22 registered in favour of first respondent shall remain in force.
 - c) The first to fourth respondents to pay costs on a legal practitioner and client scale only if they oppose this application

The first and third respondents oppose the application and have raised preliminary issues, to wit,

- 1. That there is no urgency in this application as the applicants became aware that first respondent obtained title to the property as far back as November 2022 and it is then that the need to act arose, and if they were not aware of the transfer by November 2022, they became aware on 30 January 2023 when first respondent instituted eviction proceedings against them, the Title Deed having been attached to the summons.
- 2. That there was miscitation of second respondent and non-joinder of the appropriate Minister, in that the second respondent ought not to have been brought to court at all. The party who ought to have been cited is the Minister of Local Government Public Works and National Housing as it is the Minister responsible for local authorities and under whose ambit the land in question falls and who entered an agreement of sale with first respondent and also that this point equally applies to third respondent who is cited

as Arosome Property Investments (Pvt) Ltd instead of Arosome Property Development (Pvt) Ltd.

3. That second applicant as a tenant has no *locus standi* to institute these proceedings as he has no direct interest in the matter

Over and above addressing me on the points *in limine*, I directed that the parties address me on the merits as well and if I find the points *in limine* well taken my ruling will end there but if I find the points to have been ill-taken, I will proceed to determine the application on the merits.

In response to the points *in limine* raised, applicants' submissions were that the need to act arose as from 4 March as a result of the events that happened on 4, 6 and 12 March 2023 when some people who indicated were first respondent's agents came in the company of certain people to view the stand 226 as prospective purchasers. On the sixth of March two groups again visited the property and started clearing the land by slashing grass indicating that they wanted the demarcations to be easily identifiable. On 12 March even after being served with this application, first respondent's agents or those claiming rights through him brought a bulldozer machine and started clearing the land and, in the process, slashed the second applicant's maize crop.

It is common cause that there is litigation pending in this Court under HC 3993/20 in which first applicant is counter claiming and challenging the allocation of stand 226 Carrick Creagh and subsequent transfer of the property by the Minister of Local Government, Public works and National Housing to first respondent.

It is common cause that the property in question was transferred to first respondent on 25 November 2022, (Deed of Transfer No 7403/2022). It is also common cause that on 30 January 2023 first respondent issued eviction summons against applicants in the Magistrate's court under case No Hre C-CG 290/23, this was on the strength of the Deed of transfer in his favour.

The events of 4, 6, and 12 March are also common cause. These are the events that jolted applicants into action and filed this application seeking an interdict. I am persuaded by applicants' submission that the need to act arose on these days. Applicants are seeking interim relief interdicting first respondent from doing the events such as those it did on these days.

I am not persuaded by first respondent's submission that the need to act arose as soon as applicants became aware of the Title Deed, that is in November 2022 or by 30 January 2023,

and also that by virtue of the Title Deed, applicants ought to have known that he was in a position to freely deal with the property and to dispose it to third parties.

The need to act arose on 4 March 2023 and applicants did not sit on their laurels but filed this application on a few days later that is on 10 March 2023. The point *in limine* on urgency is therefore dismissed.

On the second point *in limine* (mis citation of second and third respondents). The point was conceded that the citation of Minister National Housing and Social Amenities instead of Minister of Local Government Public Works and National Housing was not proper and so was the citation of third respondent as Arosome Property Investments (Pvt) Ltd instead of Arosome Property Development (Pvt) Ltd. The point was however made that the miscitation is not fatal as no relief is being sought in these proceedings against the two respondents. Reliance was also made on r 32 subrule (11) provides as follows: -

“No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

In this application, the issue is between the applicants and the first respondent, the fifth, sixth respondents are roped in for purposes of putting into effect the order of the court. In terms of the above subrule, this court can therefore properly adjudicate the issues between the applicants and first respondent despite the miscitation of the second and third respondents. I agree therefore with the applicants’ submission that the miscitation is not fatal.

To that end, the point *in limine* is dismissed. As regards, the third point *in limine* (second applicant’s *locus standi*), as stated earlier, it is common cause that maize crop was slashed. Second applicant is a tenant at this property. From the first applicant’s found affidavit, there is no mention of the maize crop being slashed. The second applicant’s supporting affidavit does not mention either that his maize crop was slashed. These two pleadings were filed together with the application on 10 March 2023 and this was before the maize crop was slashed. I do not therefore accept that as at the date of filing of the application second applicant had an interest in this matter. Further the interim relief sought does not include interdicting first respondent from slashing second applicant’s maize crop. The relief sought is to interdict first respondent or his assigns, agents and employees from visiting the property to show purported purchasers the immovable property, placing of a caveat on the

immovable property by the fifth respondent and for sixth respondent not to accept any papers in relation to the surveying of the property.

The final relief sought is to interdict first respondent pending finalisation of case HC 3993/20 from dealing with the property in a manner that may cause encumbrances or dispose the property by selling it to third parties and that the caveat remains in force pending finalisation of case HC 3993/20.

I therefore do not see what second applicant's interest is in this matter. He does not have *locus standi*. I agree with third respondent's submission in that regard.

The point *in limine* is therefore upheld.

Proceeding to the merits I find that applicant has established a *prima facie* right. The late Chizema was allocated the property in 2002 and in 2007 she constructed a seven roomed house. The fact of allocation was confirmed by third respondent when in July 2018, it issues summons against the late Chizema claiming development costs for development work done in respect of the property (HC7052/18/). In its declaration third respondent stated in para(s) 6, 7 and 8 that: -

6. in terms of clause 5.2 of the agreement the plaintiff is entitled to recover development costs from beneficiaries of the scheme.

7. the defendant is a member of the Sally Mugabe Housing Cooperative.

8. The defendant is a beneficiary of a stand in Carrick Creagh Borrowdale, Harare and is bound by the tripartite agreement.

It has not been put in contention that the allocation to Chizema was cancelled or not. Though open to doubt, it is my considered view that applicant has established a *prima facie* right. I also find that applicant has shown that there is apprehension of irreparable harm if the interdict is not granted.

1st respondent submitted that on the strength of the Title Deed, applicant knew or ought to have known that he was in a unique position to freely deal with stand and dispose of the property to the third parties. First respondent has by his actions of 4, 6 March shown that he intends to sell the property to third parties. The applicant will certainly be prejudiced if the property is sold particularly so when there is pending litigation in relation to the rights over the property. Applicant's fears are therefore genuine. Further if the property is sold whilst there is pending litigation, there will be no other remedy available to applicant. There will be

nothing to be transferred in the event that the property is sold. Its primary relief in the pending case is the cancellation of first respondent title and transfer of property to the estate of late S Chizema. In that regard the balance of convenience is in favour of granting interim relief.

In the circumstances I will grant the provisional order as per the Draft Order as follows:-

TERMS OF THE FINAL ORDER.

1. That the respondent show cause to this Honourable Court why a final order should not be made as follows: -
 - a. Pending the finalisation of the case under HC 3993/20, the first respondent be and is hereby interdicted from dealing in any manner with the immovable property known as stand 226 Carrick Creagh Township, Borrowdale, Harare held under deed of transfer number 7403/22 registered in the name of the first respondent that may cause encumbrances or dispose same by selling it to third parties.
 - b. Pending the finalisation of the case under HC 3993/20, the caveat placed by fifth respondent on the immovable property known as Stand 226 Carrick Creagh Township, Borrowdale, Harare held under deed of transfer number 7403/22 registered in favour of first respondent shall remain in force.
 - c. The first to fourth respondent to pay costs on a legal practitioner and client scale only if they oppose this application.

INTERIM RELIEF GRANTED

2. Pending the return date of this provisional order, the following interim relief is granted:
 - a. The first respondent, his assigns, agents and employees be and are hereby interdicted from visiting stand No. 226 Carrick Creagh Township, Borrowdale, Harare to show purported purchasers the immovable property aforesaid and interdicted from selling any portion of the said property
 - b. The fifth respondent be and is ordered and directed to place a caveat on the immovable property known as stand No. 226 Carrick Creagh Township, Borrowdale, Harare held under deed of transfer number 7403/22 registered in favour of first respondent

- c. The sixth respondent be and is hereby ordered not to accept any papers in relation to surveying of Stand No. 226 Carrick Creagh Township, Borrowdale, Harare and not to conduct any physical surveying of the aforesaid stand
- d. No order as to costs

SERVICE OF THE PROVISIONAL ORDER

The applicants' legal practitioners be and are hereby permitted to serve copies of this provisional Order upon the Respondents or their Legal Practitioners or employees.

Mberi, Tagwirei and Associates, applicants' legal practitioners
Mashizha and Mutukwa, first respondent's legal practitioners
Jiti Law Chambers, third respondent's legal practitioners