

HERMYSH KATSANDE
*(In his capacity as Executive Dative of Estate
Late Denford Katsande)*
and
SYLVESTER MAFUSIRE
and
EPHRAIM MURWIRA
and
TATENDA MUZIRWA
versus
NETPLACES ENTERPRISES (PVT) LTD
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 20 & 30 December 2022 & 5, 10
& 19 January & 24 March 2023

Urgent Chamber Application – Stay of Execution

S M Bwanya, for 1st, 2nd & 3rd applicants
N J Jakara, for 4th applicant
K Kachambwa, for the respondents

KWENDA J: On the 29th June 2022 the first respondent became the registered owner of stand No. 18080 measuring 2.2676 hectares held by it under Deed of Transfer 3606/2022 dated 29 June 2022. Subsequent to that it sued second, third and fourth applicants and one Lovemore under case no HC 6679/22 for what it termed:

- (a) “vacant occupation of Stand No. 18080 Tynwald Township of Lot 12 of Tynwald measuring 2.2676 hectares;
- (b) an order that the defendant and anyone claiming occupation through them be and are hereby ordered to vacate, forthwith, Stand No. 18080 Tynwald Township of Lot 12 of Tynwald measuring 2.2676 hectares failing which the Sheriff of Zimbabwe be and is hereby ordered to eject the defendants and anyone claiming through them from Stand No. 18080 Tynwald Township measuring 2.2676.”

The second, third and fourth applicants and the said Lovemore entered appearance to defend but it appears they failed to plead whereupon the first respondent successfully moved this court to enter judgment against them, which it did on the 30th November 2022. The first respondent is now taking steps to execute the judgment.

The applicants filed separate urgent chamber applications against the respondents being case numbers HC 8602/22 and HC 8577/22 for stay of execution of the default judgment. I ordered consolidation of the applications at the request of the parties because both applications seek stay of execution of the same default judgment. The order for consolidation reads as follows:

“IT IS ORDERED BY CONSENT THAT:

1. Case Nos. HC 8602/22 & HC 8577/22 be and are hereby consolidated.
2. Tatenda Muzirwa shall be the 4th applicant in the consolidated matter.
3. Hermysh Katsande having withdrawn his application against Tatenda Muzirwa and Lovemore the parties to the consolidated matter shall be cited as follows: -

Hermysh Katsande	1 st applicant
in his capacity as Executor Dative of Estate Late Katsande	2 nd applicant
Slyvester Mafusire	3 rd applicant
Ephraim Murwira	4 th applicant
Tatenda Muzirwa	1 st respondent
Netplaces Enterprises (Pvt) Ltd	2 nd respondent.”
The Sheriff of Zimbabwe	

BY THE JUDGE”

The first applicant is the duly appointed executor dative of the late Denford Katsande whose date of death is not revealed. Nothing turns on the date of death because the first applicant’s appointment and standing as executor is not disputed. He was/is not a party to the default judgment but avers that the default judgment was sought and granted in error. He avers that while the default judgment does not cite him and target him personally, its execution will affect him. He therefore prays that execution of the default judgment be stayed pending confirmation by this court, on the return date, that the writ issued pursuant to the default judgment is not enforceable against him. The first respondent knew at the time of issuing summons aware that the 1st applicant was in possession and effectively in control of the disputed property in his capacity as executor dative of the Estate Late Denford Katsande. The first respondent knew that the first applicant has a real and substantial interest in the piece of land which the estate occupies but neglected to cite the executor and yet obtained default

judgment without alerting him intending to enforce the judgment against him. The failure to disclose the first applicant's interest to court which granted the default judgment was an omission which qualifies as an error in obtaining judgment. This court would not have granted the judgment in default had it been made aware of his interest in the property. The first applicant's claim to the piece of land is confirmed by an order of this court dated 16th November 2022 wherein the court ordered one Martin Sibindi to transfer certain 7.3 hectares being shares 3, 7, 8, 9, 23, 24, 28, 28A, 43, 44, 97, 98, 99, 9 5, 1 00, 146, 147, 148, 150 and 151 of the remainder of Lot 12 Tynwald Harare. The order in the first applicant's favour pre-dates the first respondent's Deed of Transfer. The first applicant contends that the writ of execution is therefore not enforceable against him. The second and third applicants are mere tenants who are in occupation through him. The first respondent did not make him a party to the case deliberately. He asserts that the order which he relies on confirms his right and interest in the disputed piece of land which the deceased estate for which he is executor occupies. The order is extant and predates the date on which the first respondent claims to have assumed ownership of the disputed piece of land.

The second and third applicants did not submit founding affidavits. They are not properly before me.

I will deal with 4th applicant's application later in this judgment after disposing of the dispute between the 1st applicant and the 1st respondent.

In its opposition to the application for stay of execution, generally, the first respondent avers that it is vindicating its title over the piece of land owned by it and held under case No. 6744/22 dated 16 November 2022. It avers, further that the first applicant does not dispute its title and therefore does not, at law, have any defence to the eviction. I have perused the Deed of Transfer and observe that it describes itself as a Sheriff's transfer by the then Sheriff, Macduff Madega pursuant to a High Court order. Curiously, the case number and date of the court order which was the basis of the Sheriff's transfer does not appear in the preamble of the Title Deed.

The first applicant and first respondent have competing claims to the land presently occupied by the first respondent. The 1st applicant is in possession and control of the property while the 1st respondent says it is in the owner and wants to evict the 1st applicant. Both claims are backed by court orders.

In argument my attention was drawn to other decided court cases and orders involving Lot 12 of Tynwald, the area of the dispute. I have perused the court records and the orders therein. I would have perused the court orders, anyway, because this court can properly refer to its court records where appropriate.

The past cases reveal that Lot 12 of Tynwald was held by Martin and Monica Sibindi or one of them and held under Deed of Transfer 4209/86. The piece of land has been subject of unending disputes and litigation dating back, as far as the papers before me reveal, to the year 2015 following the decision by Martin and Monica to subdivide it into residential and commercial stands for sale. By way of illustration, one of the judgments I perused is no HH 177/19, which placed before me by the first respondent's counsel and was an urgent chamber application arising from a dispute in Lot 12 of Tynwald dealt with by MATHONSI J, AS HE THEN WAS. It had numerous references namely; case numbers HC 1465/19, HC 8498/18, HC 8563/18, HC 867/19, HC 677/19 and HC 5182/15. Another file placed before me is case no HC 1804/20 which was another land dispute arising from Lot 12 of Tynwald. The dispute involved the 1st applicant as one of the parties wherein a certain construction company known as Overflow Zone Enterprises (PVT) (LTD) sued one Jesse Takanadi, Hayes Construction, first applicant, Martin Sibindi, Monica Sibindi, the Sheriff of the High Court of Zimbabwe, Registrar of Deeds and the Master of the High Court for an order interdicting them from transacting, developing, constructing or selling stands 18026, 18033 and 18038 of Lot 12 pending finalisation of cases HC 1122/20, HC 1243/200 and HC 130/20. I dealt with the matter and granted the order which remains extant.

The numerous court cases reveal that the problem bedeviling Lot 12 started a long time ago when Martin Sibindi and Monica Sibindi decided to develop a huge piece of land belonging to them and held under Deed of Transfer 4209/86. They did not have the funds to service the land and servicing stalled culminating in the judgment of this court per MATANDA MOYO J under Case no. HC 5182/15 dated 14 November 2016 in a matter involving Ian Musango and Rudo Musango as applicants and Martin Sibindi, City of Harare and Registrar of Deeds as respondents which reads as follows:

- “1. The application is granted.
2. The first respondent be and is hereby ordered to complete the development per the subdivision permit within three months of this order and effect transfer of a certain piece of land situate in the District of Salisbury known as Share 74 of the remainder of Lot 12 of Tynwald measuring 488m² to the applicants.

3. Failing which the Estate Agent Council be and is hereby authorised to appoint a developer to complete and supervise the project development to completion at the expense of first respondent.
4. In the event of the 1st respondent failing to sign all transfer papers the Sheriff be and is hereby authorised to sign all transfer papers the Sheriff be and is hereby authorized to sign all necessary papers for the said transfer to be effected to dispose of 1st respondent's properties to finance the project.
5. The 2nd and 3rd respondents be and are hereby ordered to give effect to para(s) 2 and 4 above.
6. The 1st respondent shall pay costs of suit.”

Purporting to be authorised by the order of this court per MATANDA MOYO J, Macduff Madega, the then Sheriff of Zimbabwe applied for what he termed Rationalisation and Regularisation of subdivision of the Remainder of Lot 12 of Tynwald Township Harare stands 17722-18080 Tynwald Township. The City of Harare granted the application under Permit No. SD/WR/172/18. During the rationalisation interest in the subdivided stands ceased to be identified through shares. Shares appear to have been abandoned and replaced by stand numbers.

After the rationalisation, in February 2020, Macduff Madega, gave or donated or allocated two hundred and twenty-eight (228) stands to certain entities known as Rawson Properties and Hayes Construction. In doing so he purported to be authorised by the aforementioned order of this under HC 5182/15 (quoted above). His sworn statement declared as follows:

“I, the undersigned, Macduff Madega, in my capacity as Sheriff of Zimbabwe, duly authorised in terms of a High Court Order No 122049 case No 5182/15 dated 14th November 2016 in the matter between *Ian Musango and Rudo Musango v Martinn Sibindi* and two others attached hereto do hereby make oath and state that:

1. I confirm that Rawson Properties and Hayes Construction are the owners of the undermentioned stands although the property is registered under Martin Sibindi”

[underneath the oath is a list of 228 stands awarded by Maduff Madega to Rawson Properties and Heyes Construction].

2. Rawson Properties and Hayes construction obtained ownership upon developing the remainder of Lot 12 Tynwald Township on the 11th December 2019 see copy of order attached hereto”

The first respondent bought one of the stands from the donees and received transfer. This was the genesis of my problem. 1st applicant's counsel argued that Macduff Madega acted *ultra vires* the court order which he said authorised him. The order in question did not authorise

Mr Macduff Madega to give or confer ownership of land to anyone but to dispose of land owned by Martin Sibindi to raise fund required for servicing. The order did not authorise him to 'rationalise' the subdivision by allocating stand numbers. Further, the rationalisation omitted to cater for beneficiaries of earlier land sales who were clinging to land shares. The Sheriff normally executes such orders through auction sales and after applying the proceeds as ordered by the court, accounts for the residue to former owner whose property was sold in execution. Instead Macduff Madega, while purporting to execute the judgment of this court issued a declarator confirming that Rawson Properties and Hayes Construction are owners of the stands he listed in his affidavit. Bolstered by the declarator, Rawson Properties and Hayes Construction sold the stands while prior purchasers of shares in the property, like the first applicant, have clung to pieces of land which they claim to have bought as shares. Hayes Construction and Rawson Properties have enforced Macduff Madega's declarator and rely on it in this matter. Macduff Madega's competence and power to issue the declarator is questionable.

In another case, the first applicant also holds an order under case No. HC 130/20 granted against Rawson Properties and Hayes Construction and Martin Sibindi and others reserving certain portions of Lot 12 pending resolution of an ownership dispute. The first applicant further contends that the title held by the first respondent which he got in the year 2022 is defective in many ways. It was obtained in the contrary to the interdict in case nos. HC 130/20 and HC 1804/20. The cause of the transfer to the first respondent was contrary to the order per MATANDA-MOYO J because the Sheriff simply gave the land to a land developer who sold it to the 1st respondent. The issuance of the Deed of Transfer is impeachable also because it did not follow the sequence envisaged in the peremptory provisions of s 11 of the Deeds Registry Act [*Chapter 20.05.*] and invalid due to tax evasion by Rawson Properties and Hayes Construction who never took title.

The first applicant therefore seeks stay of execution and confirmation on the return day that the writ of execution which seeks to evict him is not enforceable against him. If indeed he occupies the land in his own right and does not claim occupation through the second and third respondents, then the writ may not be used to evict him because the order from which it derives its power does not cite him. On the face of it the first respondent knew of his interest on the property and if so, its failure to disclose that to the court which granted the default judgment

was at the very least an error. The first respondent does not dispute the 1st applicant's real and substantial interest in the disputed land or that the order on which the 1st applicant relies is genuine.

There is therefore a real dispute between the first applicant and the first respondent who both lay claim to the piece of land which the first respondent occupies. While the first respondent holds title to some piece of land defined in the Deed of Transfer 1st appellant contends that the Deed of Transfer does not, on the ground, refer to the land he occupies. Such a dispute in my view the dispute involving the first applicant and second respondents can only be resolved at a trial with the aid of expert evidence.

Cases like this cause public disillusionment with our legal system which appears to fail to resolve disputes but prolongs them instead. I leave that to the parties.

For the reasons stated above, on the face of it, there is justification for granting the first applicant stay of execution pending determination on the return date whether the writ of execution is enforceable against him.

The fourth applicant claims that he is a tenant of one, Pito Kauma who bought the land he occupies from Martin Sibindi on 16 June 2016. He has, at best personal rights, against the said Pito Kauma and ought to have run to him to defend him. He cannot use his lease agreement with Pito Kauma to, as a defence to a vindicatory action by the first respondent

The law to be applied in an application for stay of execution is as follows.

THE LAW

The law regarding the exercise of this court's power to grant stay of execution is now settled. I will quote from *Humbe v Muchina & Others* SC 81 of 2021 at p 2 of the cyclostyled judgment:

“The execution of a judgment is a process of the court. The court therefore retains an inherent power to manage that process having regard to the applicable rules of procedure. What is required for a litigant to persuade the court to exercise its discretion in favour of granting a stay in the execution of the court's judgment has been stated in a number of cases.”

In *Mupini v Makoni* 1993 (1) ZLR 80(S) at 83 B–D this Court stated the position of the law quite clearly:

“In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act

where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejection or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen v Cohen* (1) 1979 ZLR 184(G) at 187C, *Santam Ins Company Limited v Paget* (2) 1981 ZLR 132(G) at 134 G–135B; *Chibanda v King* 1983(1) ZLR 116(H) at 119 C-H; *Strime v Strime* 1983 (4) SA 850(C) AT 852 A.”

Although the 1st applicant’s application is poorly drafted, he has managed to show, *prima facie*, that he has a legitimate claim to the piece of land which he occupies on Lot 12 which is backed by an order of this court. The first applicant could have invoked r 29 of the High Court Rules, 2021 but the thrust of his argument is that the default judgment does not affect him. He occupies the land in his own right and not through another person. The first respondent should sue him if he so desires. There is a sound legal basis to exercise my discretion in favour of granting the first applicant stay of execution. The fourth applicant cannot succeed.

I therefore order as follows:

1. The application by the 1st applicant for a provisional order is granted as amended with costs on the ordinary scale.
2. The application by the 2nd and 3rd applicants is struck off with costs on the ordinary scale.
3. The 4th applicant’s application is dismissed with costs on the ordinary scale.

Mudimu Law Chambers, first, second and third applicant’s legal practitioners
Mundia and Mudhara Legal Practitioners, fourth applicant’s legal practitioners
Masar Savanhu Legal Practitioners, first respondent’s legal practitioners