

PUWAYI CHIUTSI
vs
ELLIOT RODGERS
and
BARIADE INVESTMENTS (PVT) LTD
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
Harare, 17, 31 March, 5 April 2023.

J.J Chirambwe, for the Applicant
T. Biti, for the 1st Respondent
T. Mpofo, for the 2nd Respondent

OPPOSED COUNTER APPLICATION

CHIRAWU-MUGOMBA J: On the 30th of August 2022, the applicant filed what he termed, “Court application for rescission of judgment in terms of common law on the grounds of fraud and error”. The application was strenuously opposed by the 1st and 2nd respondents. On the 18th of October 2022, the 1st respondent not only filed his notice of opposition and opposing affidavit. He also filed a counter application seeking an order for a decree of perpetual silence against the applicant. Both applications were set down for the 17th of March 2023. For ease of reference, I will maintain the same citation of the parties in the main application.

On the 14th of March 2023, the applicant filed a notice of withdrawal of his claim against the respondents and tendered wasted costs. This was however strongly opposed by the 1st and 2nd respondents. On the 17th of March 2023, after hearing argument on the withdrawal of the main matter, I gave an *ex tempore* judgment, dismissing the matter with costs on a higher scale. I now turn to the counter application.

The 1st respondent seeks a decree of perpetual silence against the applicant. He contends that as he has shown in his opposing papers to the main application, that the applicant has been abusing the court process. He seeks an order to bar the applicant from instituting legal proceedings by way of either summons or a court application in respect of a

debt that he owes in respect of which judgment was granted in HC2333/16 and HC11349/17. 1st respondent also seeks that applicant be prevented from instituting any proceedings against him in respect of a property known as subdivision C of Lot C of Lots 190,191,193, 194 and 195 Highlands Estate of Welmoed (the property) and the transfer of same to Bariadie Investments (Pvt) Ltd, the 2nd respondent.

The 1st respondent, in his opposing affidavit which he incorporated by reference drew the attention of the court to the numerous cases filed by the applicant in respect of the property. He averred that since 2014, he has been involved in running battles with the applicant running up to 20 that have either been dismissed or not pursued. The 1st respondent has incurred legal costs running to over US\$700 000. He has also not received the proceeds from the sale of the property that were misappropriated by the applicant.

The applicant filed a notice of opposition and opposing affidavit in relation to the counter application. He raised what he stated were objections *in limine*. He averred that the 1st respondent's legal practitioner had forged his client's signature and that the power of attorney being relied on was also not notarised. He accused the same legal practitioner of being deceitful and other unbecoming conduct. On the merits, he averred that no basis had been set out for applications of this nature. He then repeated his earlier averments relating to the forged power of attorney and non-notarisation as well. The 2nd respondent did not file any opposing papers to the counter application and as submitted by Mr *Mpofu* at the hearing, they were in full support of the counter application.

Whilst the 1st respondent filed heads of argument in support of the counter application, the applicant did not and he was accordingly barred. At the hearing, Mr *Biti*, for the 1st respondent made submissions in support of the counter application. Mr *Chirambwe* for the applicant only indicated after Mr *Biti's* submissions that he intended to seek a postponement of the matter since he wanted to file heads of argument. However, at that stage, the horse had already bolted. Perhaps realising his predicament, he sought to be 'excused' from appearing in the matter. The counter application proceeded on the merits.

In motivating the counter application as appears in the heads of argument and oral submissions, Mr *Biti*, for the 1st respondent submitted that there are more than 30 cases which the applicant has filed in order to regain the property that was sold in execution. Further, that the applicant has not been successful in all of them, It was brought to the attention of the

court that before filing a notice of withdrawal of the main application, the applicant has since issued summons in the High Court seeking a reversal of the sale in execution, essentially on the same allegations.

A decree of perpetual silence, *prima facie* flies in the face of the right to equal protection and benefit of the law and also the right to be heard. These are fundamental rights espoused in the Constitution of Zimbabwe. To that end I cannot express this more eloquently as was done by MAFUSIRE J in, *The City of Harare vs Masamba*, HH-330-16 as follows:

“Courts of justice are open to all. Section 69[3] of the Constitution says that every person has the right of access to the courts, or to some other tribunal or forum established by law, for the resolution of any dispute. But this right is not absolute. In exceptional cases the courts will draw the line. They will shut their doors. They have an inherent right and power to prevent an abuse of their processes. They have inherent powers to protect their integrity. Frivolous, vexatious or burdensome litigation; incessant lawsuits that churn out pesky bills of costs which remain unpaid; dirty hands; abuse of judicial officers in any manner; contempt of court; non-disclosure of material facts, and so on, are some of the intolerable infractions that may lead the courts to shut their doors. The closure may be temporary. But it can be perpetual. It all depends on the circumstances. The doors may not be re-opened without leave. INNES CJ put it this way in *Corderoy v Union Government [Minister of Finance]* 1918 AD, at 518

“Where there has been repeated and persistent litigation between the same parties on the same cause of action, and in respect of the same subject matter, a defendant should not be driven to file repeated pleas of *res judicata*, or to make a succession of applications to stay proceedings where prior costs have not been paid. **I think he is entitled to more effectual protection against long-continued unsuccessful onslaughts in respect of the same dispute. Such protection could only take the form of a general order curtailing, in some respects the plaintiff’s ordinary rights of litigation in that matter.**” [my emphasis].

See also *Western Assurance Co. v Caldwell’s Trustee*¹; *Mhini v Mapedzamombe*² and *Nehanda Housing Co-operative Society & Ors v Simba Moyo & Ors*³.”

In the *locus classicus* case in *Mapedzamombe*, in which the bone of contention as in *casu*, related to the sale of a property in execution, the court went through a painstaking process of citing all the cases that the respondent had filed. It recognised the fact that the conduct of the respondent amounted to an abuse of court process. It recognised the fact that an application for a decree of perpetual silence is recognised at law. The court not only granted an order prohibiting the filing of further applications but also dealt with applications already pending.

In my view, the courts ought to seek a balance between the constitutional rights of litigants and the need to also protect litigants from abuse of process by other litigants. Therefore, there is a fine line that the court ought to cross. What is critical though in my view is that courts can indeed curb the rights of a litigant that is deemed abusive of its processes.

¹ 1918 AD 262, at 273

² 1999 [1] ZLR 561 [H]

³ HH 987/15, at p 8

A reading of the applicant's opposition reveals that he did not dwell on the merits of the counter application. He did not dwell with the numerous applications that he has filed and their failures. Some of the related cases are SC24/22 in which the court reversed an order of this court relating to the sale of the property. In HC3413/22, the applicant filed an application seeking to essentially reverse the Supreme Court ruling. He then filed this matter whose net effect is the same. The applicant did not deny that he has filed more than 20 applications in relation to the property that have either not been concluded or dismissed. He did not deny that legal costs have mounted and that he has frustrated recovery of these. He is a self-actor who was barred from practising law. The 1st respondent gave a vivid and detailed affidavit of the numerous cases that have been litigated before the courts. These assertions were never responded to by the applicant. It leaves me in no doubt that the applicant is a serial litigator and unless he is stopped in his tracks in relation to the property, the courts will hear no end to them. His conduct in filing matter after matter even in the clear of a Supreme Court judgment amounts to an abuse of court process.

Accordingly, the 1st respondent is entitled to an order for a decree of perpetual silence. I will also take a cue from the *Mapedzamombe* case (*supra*) and order that any pending litigation filed by the applicant in relation to the property can only be set down with leave of the court. Mr *Biti* submitted that the 1st respondent is not averse to the addition of the phrase 'without leave of the court' as appropriate.

On costs, it is clear that the applicant has been on a path of abusing the court process, Numerous judgments have been written expressing concern against his wayward behaviour but he seems not to have learnt his lesson. Accordingly, an order of costs on a higher scale is appropriate.

DISPOSITION

1. The 1st respondent Elliot Rodgers' counter application for a decree of perpetual silence against the applicant Puwayi Chiutsi succeeds.
2. The applicant Puwayi Chiutsi be and is hereby barred in perpetuity from instituting any proceedings whatsoever and in whatever form against the 1st respondent in

respect of property known as subdivision C of Lot C of Lots 190,191,193, 194 and 195 Highlands Estate of Welmoed and any legal proceedings arising out of the execution of the property and any judgments issued by this honourable court and the Supreme Court of Zimbabwe in respect thereof without leave of the court.

3. Puwayi Chiutsi be and is hereby restrained from the date of this judgment from filing any further affidavits or pleadings or applying for the setting down of any matter in relation to the property described in paragraph 2 above, already filed or commenced with this court without leave first being applied for and obtained.
4. Any application for leave or notice of set down shall be made on notice to Elliot Rodgers.
5. Puwayi Chiutsi shall pay costs on a legal practitioner-to-client-scale.

Kachere Legal Practitioners, Applicant's Legal Practitioners
Tendai Biti Law, 1st Respondent's Legal Practitioners
Gill, Godlonton and Gerrans, 2nd Respondent's Legal Practitioners
Sheriff of the High Court, 3rd Respondent