RUTH FOYA
versus
CAPTAIN POLITE
and
MAKARI JAMES
and
MILIVIC HOUSING TRUST
and
LILIAN CHITANGA

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE; 29 October 2024 & 18 March 2025

Court application

Z. Dumbura for the applicant
H.N. Tirivavi for the respondent

DUBE-BANDA J:

[1] The applicant seeks a declaratory order to the effect that she is the lawful and sole owner of stand number 1025 Strathaven, Harare, ("stand") and that any sale or disposal of the stand unlawful, null and void.

[2] The application is opposed by the first, third and fourth respondents. The third respondent is Milivic Housing Trust for convenience it shall be hereinafter as the "Trust". The second respondent ("Makari James") filed an affidavit, whose net effect is in support of the application. After hearing arguments and at the stage of writing this judgment, it occurred to me that the procedural appropriateness of the affidavit filed by the second respondent needed to be addressed. I invited the parties and informed them of my concerns. My concerns arose from the following premise; the affidavit filed by the second respondent is neither an opposing affidavit nor supporting affidavit. I say so because it cannot be an opposing affidavit because it was not filed with a notice of opposition. In terms of r 59 (7) an opposing affidavit is filed with a notice of opposition. In addition, it does not oppose the relief sought by the applicant, it, actually supports it. See *Chamisa v Mnangagwa & 24 Ors* CCZ 21/19. It neither be a supporting affidavit because in term of r 59(1) a supporting

affidavit is filed with the application. In addition, in terms of r 59(3) no affidavit which has not been served with a court application shall be used in support of the application. It cannot simply be a stand-alone affidavit. In the circumstances the second respondent has not filed a notice of opposition as required by the rules of court and in terms of r 59(9) he is barred. The applicant's counsel submitted that the second respondent's affidavit must be expunged from the record. I agree. In the result, the second respondent's affidavit is not properly before the court, and is expunged from the record. In addition, the submissions he made are expunged from the record.

[3] The application is premised on the contention that on 30 March 2021 she entered into an agreement of sale with the third respondent, Milivic Housing Trust ("Trust") in respect of the stand. It is contended that James Makari was involved in the sale. It is said in the agreement of sale he used the name James Moyo. The applicant attached a copy of the agreement of sale and avers that the purchase price of USD$27 000 was paid in full. She attached proof of payment and an affidavit in longhand deposed by one Misheck Nyamubayiwa acknowledging receipt of payment. It is averred further that the sale was sanctioned by board resolution and the sale was beyond impeachment. It is contended that the fourth respondent resigned as a founder and trustee of the third respondent, and everything that she signed as chairperson of the Trustee is fake.

[4] In her opposing affidavit, the fourth respondent avers that the matter is saddled with material disputes of fact which could not be resolved in motion proceedings. It is contended that *viva voce* evidence is required to resolve the issue whether the fourth respondent resigned as the founder and trustee of the Trust. It is averred further that the Notarial Deed of Trust depicting the second respondent as the new founder is not authentic and is a counterfeit. Further it is averred that there is a dispute whether the signatures on the allocation letter of stand number 1025 Strathaven are genuine and whether the property was allocated to one Lucky Marowa.

[5] On the merits it was contended that the agreement of sale between the applicant and the second respondent is a nullity in that the latter was not authorized to dispose of the stand on behalf of the third respondent. The resolution of the fourth respondent authorizing the third respondent is said to be fake. The agreement of sale is said to be fraudulent and that the second respondent misrepresented his name as James Moyo to obscure his identity. No one in the Trust answers to the name James Moyo. It is contended further that the agreement of sale, receipts and acknowledgment of receipts are all fake. It is contended further that

the purchase price was never received by the third and fourth respondents. It is contended that the Addendum Notarial Deed of trust is defective and was not lodged with the Deeds Registry office, and it is neither endorsed nor stamped by the Registrar of Deeds. It is further averred that the fourth respondent did not resign from her capacity as a founder and trustee, and the allocation letter for the late Lucky Marowa is genuine.

[6] The first enquiry is to determine whether or not there are real dispute of facts which cannot be resolved in motion proceedings. As was observed by MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) at 136F-G:

> "A material dispute of facts arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

[7] In *Muzanenhamo v Officer In Charge CID Law and Order* CCZ 3/13 the court said as a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party. See *Room Hire CC (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 11633 -11634.

[8] In this case, there are real and material disputes of fact. The disputes turn on whether the fourth respondent resigned as the founder and trustee of the Trust; whether the Addendum to the Notarial Deed of Trust depicting the second respondent as the new founder is not authentic and a façade; whether the second respondent had authority to sign the agreement on behalf of the Trust; whether the signatures on the allocation letter of stand are genuine and authentic; and whether the same stand was allocated to one Lucky Marowa. These issues go to the heart of this matter, e.g., if the agreement of sale is not authentic, the applicant's entire case crumbles. In fact, the applicant in her heads of argument contend that it is in dispute whether or not she bought the stand from the third respondent, and whether or not the sale was fraudulent. However, she still submits that the application must succeed. It is important underscore that in general motion proceedings were designed for the resolution of legal disputes based on common cause facts. They cannot be used to resolve material factual disputes because they are not designed to determine the probabilities. See *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26; *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E - 635C.

[9] In light of the authorities, it is not possible for me to make any determination on the papers as to the relief sought by the applicant. In fact, the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E - 635C. Moreso in this case, where the applicant did not file an answering affidavit to meet the still of the allegations made by the first, third and fourth respondents. In *casu* it is impossible to resolve these issues in motion proceedings without causing a grave injustice to either party to this litigation.

[10] Where the facts are in dispute the court has a discretion as to the future course of the proceedings. See *Berkowitz & Anor v Vico & Ors* 2019 (3) ZLR 980 (H). In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA I 155([) at 1162,* the court said that if a dispute cannot be resolved in motion proceedings, it may either be referred to evidence or to trial, or may be dismissed with costs, "particularly when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop". See *Conradie v Kleingeld* 1950 (2) SA 594 (0) at 597.

[11] The first, third and fourth respondents contend that the applicant ought to have known that material disputes of facts would arise in this matter. I agree. This is so because in the founding affidavit the applicant incorporates by reference HCH 5993/23 a matter between the same parties as in this case. She avers that the fourth respondent masquerades as the chairperson of the Trust, in that in her notice of opposition in HCH 5993/23 she alleged that she was a founder and trustee. Furthermore, she avers, relying on the amended deed of trust that the fourth respondent resigned as a founder and trustee. She contends further that an allocation letter for one Lucky Marowa is fake because it was signed by the fourth respondent after she had resigned. It is further averred that the fourth respondent masquerades as a trustee so as to grab and sell a stand that belongs to a Trust.

[12] In view of the facts in HCH 5993/23 the applicant ought to have realized when launching this application that a serious dispute of fact was bound to develop. In my view, to simply refer the matter to trial when the shoe pinches in motion proceedings, would be to condone irregular procedure. See *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (H); *Makamure v Mutongwizo & Ors* 1998 (2) ZLR 154 (H). The applicant elected to proceed

by way of motion proceedings when it ought to have been clear to her and her legal representatives that a dispute of fact was bound to emerge, which a court would not be able to decide on the papers. As stated earlier, a reading of the founding affidavit conveys a clear impression that HCH 5993/23 alerted the applicant of serious factual disputes that was bound to develop in this matter. None of these disputes could conceivably be resolved on the papers.

[13] This situation could have been averted by the applicant proceeding by way of an action. The proper order which must follow, having regard to the circumstances, is that the application should be dismissed.

[14] There remains to be considered the question of costs. No good grounds exist for a departure from the general rule that costs follow the event. The respondents are clearly entitled to their costs. The first, third and fourth respondents sought costs on a legal practitioner and client scale. It is trite that costs of suit on a legal practitioner and client scale are not merely for the asking. Something more underlies the practice of awarding costs on a legal practitioner and client scale than the mere punishment of the losing party. The operative principle is whether a litigant's conduct is frivolous, vexatious, manifestly inappropriate or amounts to abuse of the process of the court. See *Kangai v Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H). My view is that on the facts of this case, proceeding by way of motion amounts to abuse of the process of the court.

[15] In view of the facts in HCH 5993/23 the applicant ought to have realized when launching this application that a serious dispute of fact was bound to develop, disputes which could not be resolved in motion proceedings. However, proceeded to file this application regardless of this realization. This amounts to abuse of court process and warrants costs on a legal practitioner and client scale.

In the result, I make the following order:

i. The point *in limine* that there is material dispute of fact which cannot be resolved in motion proceedings is upheld.

ii. The application is dismissed with costs on a legal practitioner and client scale.

DUBE - BANDA J: …….

Zimudzi & Associates, applicant's legal practitioners

Zvavanoda Law Chambers, 1st, 3rd & 4th respondents' legal practitioners