

MAJORY MADYA
and
25 ORS
versus
HARARE SOUTH UNION COOPERATIVE SOCIETY Ltd
and
TANGANYIKA HOUSING COOPERATIVE SOCIETY Ltd
and
VADZIDZI HOUSING COOPERATIVE SOCIETY Ltd
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 8 May & 14 January 2025

Urgent Chamber Application

T Chaza, for the applicant
No appearance for the 1st respondent
S Chihombe, for the 2nd respondent
No appearance for the 3rd respondent
No appearance for the 4th respondent

TAKUVA J: The 26 applicants filed this application seeking urgent relief in the following terms;

TERMS OF FINAL ORDER SOUGHT

“That the respondents should show case to this Hon Court why:-

- a) The fourth respondent be and is hereby ordered to permanently stay execution of the writ of ejection issued in favour of the first and second respondents against the third respondent under case No. HC 10103/14.
- b) First, second and third respondents shall pay costs of suit in the event that they oppose this application.”

INTERIM RELIEF GRANTED

Pending the final determination of the application for joinder which applicants are filing within 5 days from the date of this provisional order. Applicants be and are hereby granted the following relief:-

a)The fourth respondent be and is hereby ordered to stay execution of the writ of ejectment issued in favour of the first and second respondents against the third respondent under case No HC 1010/14.

SERVICE OF PROVISIONAL ORDER

Service of the Provisional Order shall be effected by the Sheriff of Zimbabwe.”

SALIENT BACKGROUND FACTS

First to twenty-sixth respondents are members of the third respondent a Cooperative Society. They claimed to have been allocated the stands in dispute by the third respondent. The allocated stands range from 6540 – 6589 of stand 315 Retreat Township Waterfalls, Harare. Applicants took occupation of the stands and started developing them.

Later, first and second respondents instituted summons against the third respondent under case No. HC 10103/14. First and second respondents sought to evict the third respondent and anyone claiming right of occupation through firm. According to the order under HC 10103/14 only stands 6543 and 6598 were affected. However, first and second respondents obtained a writ of ejectment of third respondent from stand number 6543 to 6598 Retreat Township Waterfalls Harare. This is how applicants got caught in the dragnet.

APPLICANT’S CASE

The applicants’ arguments go like this:

The Sheriff intends to evict them using a writ that does not apply to all of them because the court order speaks to stand 6543 and 6598 while the writ, speaks to stand “6543 to 6598”. The difference is massive. Applicants further stated that they were not cited as parties to the summons and court order despite that they are interested parties. Also, applicants submitted that they were lawfully allocated the stands. Applicants professed ignorance of the matter until the second of May 2024 when they were served by the Sheriff with the notices of ejectment. It is their argument

that they have a right to be heard and they intend to apply for a joinder in HC 10103/14 and thereafter to seek a rescission of the judgment granted against third respondent. As regards urgency, applicants argued that the matter is urgent in that they are facing imminent eviction with no alternative accommodation. Finally, it was submitted that it is in the best interests of justice that execution be stayed to enable applicants to defend themselves.

Respondents' Case

The second respondent opposed the application on the following grounds.

1. The matter is not urgent

Listed here under are the reasons why this submission was made;

- (a) Applicants have always known of the existence of the Court Order since time immemorial. For example, on 16 and 17 December 2020, the writ which was already in existence was executed against the 7th, 9th, 20th, and 25th. Applicants were successfully evicted. As such, applicants can not allege that they only became aware of the process on 2 May 2024.
- (b) All the applicants were duly served with notices of eviction in 2020 and some of them were successfully evicted only to force themselves in to regain occupation. They just sat and did nothing during the last 14 days of 2020, the whole of 2021, 2022, 2023 and almost half of 2024. Respondents contended that there is no urgency that can arise in 2024 for eviction process which began in 2020.
- (c) To demonstrate that applicants are lying under oath and that they have always been aware of the impending process, the 9th, 13th, 14th and 23th applicants were in attendance when an Urgent Chamber Application HCH 441/24 was heard before KWENDA J. The application was filed by their Housing Co-operative in a bid to stop execution. The same applicants were also in attendance when another Urgent Chamber Application HCH 649/24 was heard before MUSITHU J. Again, the application was filed by their Housing Cooperative in a bid to stop execution. Also, the same applicants were in attendance when yet another Urgent Chamber Application HCH 952/24 was heard by MHURI J in an attempt to stop execution.
- (d) Applicants' story upon which urgency is premised starts on 2 May 2024. They forgot that all of them were served with eviction was partially carried out on some

applicants. Also, they forgot that in January and February 2024, some of them attended Court when their housing cooperative unsuccessfully filed 3 Urgent Chamber Application to stop eviction.

2. THE MATTER IS RESJUDICATA

Respondents' point here is that under case number HCH 441/24, HCH 649/24 and HCH 952/24, applicants' cooperative filed applications for stay of execution. The parties are the same, the causa is the same and the relief sought is the same. All three urgent applications were found not to be urgent. Having seen that they failed to succeed through their housing cooperative, applicants have reconstituted their plan and decided to go solo despite that it is the same issue and that they were represented by their cooperative in the previous unsuccessful applications. It is the same case except that this time around applicants have dumped the idea of acting through their cooperative and sue as individuals.

It was also submitted that *resjudicata* applies even in cases where a proxy acts on behalf of someone. The Cooperative was acting on behalf of its members, the applicants.

3. APPLICATION IS IMPROPERLY BEFORE THE COURT BECAUSE THERE IS NO APPLICATION OR JOINDER THAT IS PENDING

The applicants have described their application as a chamber application for stay pending joinder. However, there is no joinder application that is spending. Applicants simply want execution to be suspended pending nothing. This is incompetent.

Respondents argued that the application must fail on one or more of the points taken *in limine*.

ANALYSIS

I take the view that the first point *in limine* that of urgency is dispositive of this matter. The applicants' founding affidavit contains falsehoods. I find that it is not true that applicants only became aware of the eviction process on 2 May 2024. I also find as a fact that all applicants became aware of the eviction in December 2020 upon being served with notices of eviction. For three and half years, applicants sat on their laurels and did nothing. The urgency *in casu* is self-created. The use of the cooperative's individual members *in casu* is a ploy calculated to mislead the court. Clearly applicants are not candid with the court and the court can not be sympathetic to

such dishonest conduct. Circumstances surrounding their case show that applicants are guilty of lack of probity.

In light of the above, to say that the present matter satisfies the requirements of urgency is akin to saying the sun rises from the west and sets in the east. There is no urgency in this matter as applicants together with their Housing Co-operative have always been aware of the impending process. In view of this finding, there is no need to consider the rest of the points in limine.

DISPOSITION

1. The matter is not urgent.
2. The matter be and is hereby removed from the roll of urgent matters with costs.

TAKUVA J:.....

Biti Law Chambers, applicant's legal practitioners
Saunyama, Dondo Legal Practitioners, second respondent