

JOSEPH MANJENGWA
versus
UNICE MAPUNGWANA

HIGH COURT OF ZIMBABWE
MUREMBA & MANZUNZU JJ
HARARE, 19 November 2020 & 15 April 2021

Civil Appeal

J Koto, for the appellant
L Ziro, for the respondent

MUREMBA J: This is an appeal against the decision of the Magistrates Court which granted the respondent's claim for appellant's eviction from Stand 4733 Ushewokunze, Harare. Despite the appellant's opposition to the eviction claim on the basis that this stand was allocated to his wife Pelagia Nyemba, the court *a quo* made a finding that the respondent who was the plaintiff in the matter was the rightful owner of the stand in question. It ordered the eviction of the appellant and all those claiming occupation through him.

We will first deal with the point *in limine* that was raised by the respondent to the effect that the appellant approached this court with dirty hands. The respondent averred as follows. The applicant's hands are dirty because despite the court *a quo* having ordered him and all those claiming occupation of Stand 4733 Ushewokunze through him to vacate the stand, the appellant has remained in occupation. The filing of this appeal did not suspend the operation of the order of the court *a quo*. The respondent's counsel referred to the cases of *Ritenote Printers (Pvt) Limited v Adam and Company & Anor* SC15/11 and *Martin Nhapata v Christopher Maswi and Another* SC 38/16 in urging the court not to grant audience to the appellant until such a time that he purges his contempt by vacating the stand, removes the one roomed structure that he erected on the stand and allows the respondent to take possession of the stand. It was submitted that the appellant's acts are clearly contemptuous and his hands are not clean. The respondent applied that the appeal be struck off the roll with costs on a higher scale.

Mr *Koto* for the appellant submitted that the point *in limine* should be dismissed for two reasons. Firstly, the case of *Martin Nhapata v Christopher Maswi and Another* SC 38/16 that

Mr *Ziro* referred to does not say that it is a rule of thumb that a person should not be heard on appeal before they comply with the judgment of the court *a quo*. He argued that in that case the court said that a litigant who frustrates the administration of justice by refusing to cooperate with the Sheriff with the assistance of the police cannot come to court seeking its indulgence. The applicant in the matter was seeking condonation and not an appeal. The court held that he was in contempt by conduct.

The second reason that Mr *Koto* advanced was that the order of the court *a quo* ordered the appellant to vacate Stand 4733, Ushewokunze and the appellant is not in occupation of that stand as he resides at a different stand. He submitted that the persons who are in occupation of Stand 4733, Ushewokunze are the appellant's first wife and children. If the Messenger of Court goes to that stand he can evict them.

In response Mr *Ziro* argued that if the appellant was not in occupation of the said stand he would not be here on appeal. He further argued that contempt arises from refusal to comply with the court order. He insisted on the point *in limine* being upheld.

As was correctly submitted by Mr *Ziro*, the noting of an appeal does not suspend the operation and effectiveness of the order or judgment of the court *a quo*. For a suspension of the judgment or order of the court *a quo*, one would need to apply for stay of execution of that judgment or order first. See *Ritenote Printers (Private) Limited v Adam and Company & Anor* SC 15/11. In *casu* it is common cause that no application for suspension of the order or the judgment of the court *a quo* was ever made. Therefore, the order of the court *a quo* was operational at the time of filing of the present appeal. And it is still operational up to now, which means that it should be complied with.

The circumstances in the case of *Martin Nhapata v Christopher Maswi and Another supra* are more or less the same as the circumstances in the present case. In that case, the matter before the court was an application for condonation of the late filing of and extension of time within which to note an appeal against a decision of the High Court. A point *in limine* was raised by the respondent to the effect that the applicant should not be heard, since he was approaching the court with dirty hands. It was alleged that the applicant had not complied with a lawful order of the High Court which ordered him and all those claiming occupation through him to vacate the farm that had been allocated to the respondent. The applicant did not dispute that he had for some time not complied with the court order for eviction. His legal practitioner however submitted that his client had instructed him, that very morning of the hearing that he had now vacated the premises, but his workers were still at the premises. The Supreme Court

held that even if the applicant had vacated the farm house, he still had not fully complied with the order which compelled him and all those claiming occupation through him to vacate the premises. His workers were held to claim occupation through him and they were still in occupation of the farm. In upholding the point *in limine* GWAUNZA JA (as she then was) had this to say;

“To the extent that a court order has the force of law, it is the ‘the law’ that requires the applicant to comply with the order in question before approaching this court for the type of release that he seeks.

Accordingly, the failure of the applicant to comply with or allow the Sheriff to fully enforce a lawful order of the court has the effect of tainting his hands with legal dirt. Such dirty hands can only be cleansed upon his compliance with the court order in question. It hardly needs emphasizing that, even if one may not agree with a court order and as long as it is extant, and execution thereof has not been stayed, one is obliged to comply with it before seeking to pursue other legal remedies. This is a point emphasized in the case of *Econet Wireless (Private) Limited v The Minister of Public Service Labour and Social Welfare and Others*,^[1] where BHUNU J (as he then was) correctly explained the rationale for a party to obey the law (court order) pending the determination of its validity. It is simply that the impugned court order enjoys a presumption of validity until declared otherwise by a competent court of law. This has not happened *in casu*. Further rationale for applying the dirty hands doctrine is succinctly articulated by CHIDYAUSIKU CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Ors*, as follows:

“This court is a court of law and, as such, cannot connive at or condone the applicant’s open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. . . For the avoidance of doubt the applicant is not being barred from approaching this court. All that the applicant is required to do is submit itself to the law and approach this court with clean hands on the same papers.” (my emphasis)

The same principle is persuasively stated thus, *albeit* in different words, in the case of *Naval Phase Farming (Pvt) Ltd and Ors v Min of Lands and Rural Resettlement and Ors*:

“... (the dirty hands principle) ... is a principle that people are not allowed to come to court seeking the court’s assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. The kind of conduct which the court penalizes by withholding its protection is conduct involving moral obliquity.....”

I find no reason to depart from the position that was taken by the Supreme Court. *In casu* the court *a quo* ordered “immediate ejection of the appellant, its manpower and all those who occupy through it from stand number 4733 Ushewokunze, Harare....” Even if it is true that the appellant is in occupation of a different stand, the fact that he admits that his first wife and children are in occupation of Stand 4733 Ushewokunze, means that he has not fully complied with the court order. Obviously his first wife and children are his family. They claim occupation through him hence he lodged this appeal to protect them. The order of the court *a quo* affects him as well as his family. The whole family ought to have vacated from the stand in question for full compliance with the court order.

It cannot be disputed that by failing to comply with an order of the court which has not been set aside, the appellant's hands are tainted with dirt. He cannot come to the courts for their assistance when on the other hand he is not willing to comply with court orders that are not favourable to him. The refusal to comply with a court order is an open defiance of the law and a contemptuous disrespect for the authority of the court. If the appellant has no respect for the orders that are passed by the courts, the simple question that arises is, why should he be heard by the same courts? He cannot refuse to comply with court orders, but expect to be heard by the same courts. The message that he gives is that he is only willing to comply with those orders that are only favourable to him. He cannot have his cake and eat it. It does not work that way. Until such a time that the appellant purges his contempt by vacating Stand 4377 Ushewokunze, Harare as ordered by the magistrates Court, this court will not grant him audience to argue his appeal. The rule of law demands obedience and submission by the appellant to the dictates of the law.

The appellant prayed for costs on a higher scale and his counsel, Mr *Ziro* argued that punitive costs are warranted because of the appellant's attitude of refusing to comply with a court order since 2018 when the order was granted. Mr *Koto* for the respondent did not respond to this issue. We are in agreement with Mr *Ziro* that the appellant needs to be visited with costs on a higher scale as an expression of the court's displeasure to the appellant's contemptuous behaviour and his open defiance of the law.

In the result, it is ordered as follows.

1. The point in *limine* raised by the respondent be and is hereby upheld.
2. The appeal is struck off with costs.

MANZUNZU J agrees

Koto & Company, appellant's legal practitioners
Dzoro & Partners, respondent's legal practitioners