

PRUDENCE CHIROVA
versus
NEVER PAVARI
and
DELATFIN CIVIL ENGINEERING (PRIVATE) LIMITED
and
FELIX MUNYARADZI

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18 and 28 March 2022

URGENT CHAMBER APPLICATION

Masango, for the applicant
P. Machaka, for the 1st respondent
D.K. Mutseno, for the 2nd and 3rd respondents

TAGU J: This is an urgent chamber application for a temporary interdict against first Respondent from constructing at Stand Number 3914 Westgate, Sandton, Harare.

The facts are that on 2 June 2019 the Applicant purchased a residential stand 3914 of state land situate in the district of Salisbury also known as Stand Number 3914 Westgate, Sandton, Harare measuring 1 376 square metres from Kupakwashe Wasara who had earlier purchased the same stand on the third October 2018 from the second Respondent Delatfin Civil Engineering (Private) Limited represented by the third Respondent Felix Munyaradzi. On 3 September 2020 the Applicant duly approached the second Respondent and entered into a cession Agreement wherein the second Respondent ceded all rights in the stand to Applicant. The Applicant proceeded to take occupation and constructed a wooden cabin on the stand. She therefore was in peaceful and undisturbed occupation of the stand since September 2020 through one Lonely Tenge Sugar a caretaker and no one claimed any rights over the stand.

The Applicant was shocked when on 9 March 2022 she learnt that first Respondent had sent builders on to the stand and they started digging a foundation and brought building material to

construct a cottage. Applicant confronted the first Respondent who told her that he had also bought the same stand from the second Respondent. On 10 March 2022 the third Respondent Felix Munyaradzi came to the stand and ordered the Applicant's caretaker to vacate the stand and to remove the wooden cabin.

The Applicant approached this court for a temporary interdict restraining the first Respondent from building on the stand. It only dawned on the Applicant that the second Respondent had earlier sold the same stand through the third Respondent to the first respondent on 2 February 2018 when the first Respondent filed his Notice of Opposition.

The relief sought by the Applicant is couched in the following terms-

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be granted,

1. That the Respondents be and are hereby finally interdicted from taking action which amounts to interfering with applicant's possession and occupation of stand 3914 Westgate, Sandton Harare.
2. Applicant be and is hereby declared the rightful holder of cession rights in stand 3914 Westgate, Sandton Harare.
3. first Respondent, his assignees or contractors and anyone claiming any rights through him be and is hereby ordered to remove any building material they brought on to the stand and to remove any structures they constructed on stand 3914 Westgate, Sandton Harare.
4. Sheriff high Court be and is hereby authorized to remove such materials and structures.
5. Respondents jointly and severally pay costs of suit on a legal practitioner scale.”

The first Respondent raised two points *in limine*. The 1st point being that the matter is not urgent because the Applicant made a report to the Police against Kupakwashe Wasara in February 2022 for fraud. Secondly, that there are material disputes of facts in that he purchased the said stand earlier than the Applicant. The second and third Respondents also raised two points *in limine*, firstly, that the matter is not urgent because the Applicant delayed to take action for a period of 5 days, and secondly that the order sought is defective in that the interim order and the final relief sought are synonymous.

The Applicant denied ever making any report to the police against Kupakwashe Wasara. She said the first respondent has not explained what report it was and its outcome. She maintained that cause of action did not arise in February 2022 but on or around 9 and 10 March 2022 when the first respondent brought building materials and chased the Applicant's caretaker from the Stand. As to the delay of 5 days stated in the second and third Respondents' notice of opposition she averred that a delay of 5 days is not inordinate under the circumstances.

In his Notice of Opposition the first Respondent in para 8 said sometime after he purchased the stand in question from second Respondent, in particular in or around September 2020 he observed a wooden cabin that had been constructed just outside his stand on the front boundary thereof. He enquired as to the identity of the person who had constructed the wooden cabin adjacent to his stand but to no avail. He even contacted the second Respondent's Company which assured him that they had nothing to do with the person responsible for the wooden cabin. If indeed the wooden cabin was outside his stand one wonders why he was so concerned to know the identity of the person who had constructed the wooden cabin. Even if it is true that the Applicant made a police report at Malborough Police Station against Kupakwashe Wasara for fraud, the said Kupakwashe Wasara is not a part to these proceedings and it is not clear what that report was all about except first Respondent's mere say so. No documentary evidence has been availed to show that the report of fraud was about the same stand. In fact by the date mentioned the Applicant was not even aware of the identity of the first respondent. A reading of para 16 of the Applicant's founding affidavit is clear that she then obtained the contact details of the first Respondent after the events of 10 of March 2022 and she engaged him and learnt that the first Respondent had purchased the same stand from the second Respondent. She therefore could not have brought the application against the first Respondent in February 2022. The Applicant has managed to prove that the cause of action arose on or around 9 and 10 March 2022. The events of these two days jolted the applicant to file the present application. The second and third Respondents in their Notice of Opposition said the delay was for 5 days. It was their counsel who sought to depart from the averments in their Notice of Opposition by saying the delay was for a month. This obviously was being tailor made to suit the averments made by the first Respondent. On a balance of probabilities the Applicant convinced the court that the events of 9 and 10 March 2022 jolted her into action and the present application was filed on 14 March 2022.

As to material disputes of facts the Applicant was not even aware that the first Respondent had earlier purchased the same stand from the second Respondent. This only came to her attention after the events of 9 and 10 March 2022 and in particular after the first Respondent produced proof that he had purchased the same stand prior to her when the Agreement of sale was produced in court.

As to the second preliminary point raised by the second and third Respondents that a reading of the Applicant's final order being sought it shows there is nothing that the Applicant anticipates on the return day, my view is that the court is not concerned with the final order at this stage. What the Applicant is seeking is a temporary interdict. The Applicant is seeking a final order which is to be granted on the return day. Once the final order is confirmed there is no reason why Respondents and their assignees should remain on the stand as a declaratory order would have been made that the Applicant is the rightful owner of the stand.

For these reasons I will dismiss the preliminary points.

Coming to the merits of the application for a temporary interdict, it is not in dispute that the Applicant is a holder of rights if one considers Annexures "A" the agreement of sale and Annexures "D", the cession agreement. She has been in possession of the stand without disturbances. She constructed a cabin on the stand prior to first Respondent constructing his. As to whose rights will take precedents over the other this will be determined on the return day. She had hired a caretaker who was residing on the stand. She therefore has satisfied requirements for a temporary interdict. The first and third Respondents' actions are tantamount to taking the law into their own hands. Until her rights are cancelled she is entitled to a temporary relief. The court will on the return day decide whether it was proper for the second Respondent to sell the same stand to Applicant and let her obtain a cession agreement knowing fully well that the second Respondent had earlier sold the same stand to the first Respondent. As I said earlier in my judgment, I am not concerned with the rightful ownership of the stand at this stage, though I noted there was a double sale, but whether the balance of convenience favours the grant of a temporary interdict, and on a balance of probabilities, the Applicant has satisfied requirements for a temporary interdict.

IT IS ORDERED THAT

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be granted.

1. That the Respondents be and are hereby finally interdicted from taking action which amounts to interfering with Applicant's possession and occupation of stand 3914 Westgate, Sandton Harare.

2. Applicant be and is hereby declared the rightful holder of cession rights in stand 3914 Westgate, Sandton Harare.
3. first Respondent, his assignees or contractors and anyone claiming any rights through him be and is hereby ordered to remove any building material they brought on to the stand and to remove any structures they constructed on stand 3914 Westgate, Sandton Harare.
4. The Sheriff High Court be and is hereby authorized to remove such materials and structures.
5. Respondents jointly and severally pay costs of suit on a legal practitioner scale.

INTERIM RELIEF GRANTED

That pending the finalization of this matter,

1. The first Respondent, his agents and assignees or contractors be and are hereby interdicted from carrying out any construction activities on stand 3914 Westgate, Sandton Harare.
2. The first Respondent, his agents and assignees or contractors be and are hereby ordered to immediately cease occupation of stand 3914 Westgate, Sandton Harare.

SERVICE OF THIS ORDER

Leave be and is hereby granted to the Applicant's legal practitioners to serve a copy of this Provisional Order on the Respondents.

Muronda Malinga Masango, applicant's legal practitioners
GS Motsi, first respondent's legal practitioners