

AGREANAH KANGARA
versus
DARLINGTON KANGARA
and
CLEVER MADZIVA
(In his capacity as the neutral executor
of the estate late Kudzanayi Kangara)
and
MASTER OF HIGH COURT N.O

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 23 December 2021 and 13 January 2022

Urgent Chamber Application

Mr M B Lunga, for the applicant
Mr N Maringe with *Mr J Nemaisa*, for the 1st respondent
No appearance for the 2nd and 3rd respondents

DEME J: The applicant approached this court seeking the following provisional order:

“TERMS OF FINAL ORDER SOUGHT

1. That order restoring the applicant’s undisturbed and peaceful occupation of stand number 193, Fleetwood, Bindura be and is hereby confirmed.

The 1st respondent to pay costs of suit.

TERMS OF TEMPORARY ORDER ISSUED/GRANTED

1. Pending the finalisation of the estate late Kudzanai Kangara DR. NO. 4168/21 the 1st respondent is ordered to restore undisturbed and peaceful possession and occupation of house number 193 Fleetwood, Bindura.
2. The 1st respondent is ordered to allow applicant an undisturbed and peaceful access to house number 193 Fleetwood, Bindura.
3. The 1st respondent is ordered to remove forthwith all the granite stones rubles that he illegally dumped at the gate of house number 193 Fleetwood, Bindura or any other material including cement and bricks that the 1st respondent is threatening to bring to the said premises.
4. The 1st respondent is ordered to stop forthwith any purported renovations that he is intending to make at house number 193 Fleetwood, Bindura.
5. The 1st respondent and anyone acting through him is ordered to stop make any death threats including use of firearms to the applicant.
6. The 1st respondent is ordered not to set foot at house number 193 Fleetwood until the estate is finalised.
7. The 1st respondent to pay costs of suit on a legal and practitioner scale.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioners are granted leave to serve this Provisional Order on the 1st and 3rd respondents."

A brief summation of the facts is as follows. The applicant resides at 193, Fleetwood, Bindura. The late Kudzanai Kangara bought the property in question. According to the applicant, the property was bought by the late Kudzanai Kangara for the late Rachel Kangara as a replacement of property known as number 3046, Aerodrome, Bindura. However, to date, the Fleetwood property is still registered in the name of the late Kudzanai Kangara. The first respondent is the son of the late Kudzanai Kangara while the applicant is the sister of the late Kudzanai Kangara. The Aerodrome property at one time belonged to the late Rachel Kangara. The late Rachel Kangara was the mother to the applicant and the late Kudzanai Kangara. The late Rachel Kangara passed away on 12 January 2021, two days after the death of the late Kudzanai Kangara. At the time of her death, the late Rachel Kangara was residing at the Fleetwood property.

The late Kudzanai Kangara changed the aerodrome property into his name without the knowledge of his late mother according to the applicant's averments. The applicant further averred that the late Rachel Kangara and the late Kudzanai Kangara later settled that the late Kudzanai Kangara was to find a replacement property for the late Rachel Kangara and the Fleetwood property was found to be a suitable property. According to the applicant's averments, the Fleetwood property was supposed to be transferred into the name of the late Rachel Kangara. However, the late Rachel Kangara passed on before the transfer of the property.

On 16 December 2021, the first respondent violently ejected the applicant from house number 193, Fleetwood, Bindura, according to the averments by applicants. The first respondent blocked the entrance to the Fleetwood property. The applicant also averred that she was forced to stay at alternative property until 19 December 2021. The first respondent removed the blockage to the entrance of the Fleetwood property on 18 December 2021 after receiving legal advice.

At the hearing, the applicant withdrew its case against the second and third respondents. Parties, by consent, agreed that the provisional order be granted as follows:

“Pending finalisation of the estate late Kudzanai Kangara DR NO. 4168/21, 1st respondent is ordered to restore undisturbed and peaceful possession and occupation of House Number 193, Fleetwood, Bindura.”

The applicant and the first respondent could not agree on the issue of costs. The applicant was insisting on the issue of costs on a higher scale. The basis of the claim was that the first respondent acted in a manner that prejudiced the applicant by his conduct. The applicant’s counsel, Mr *Lunga* submitted that the applicant suffered prejudice financially as she was forced to file the present application. The applicant was also forced to look for alternative accommodation at her own expense according to the submissions made by Mr *Lunga*.

On the other hand, Mr *Nemaisa* submitted on behalf of the first respondent that the first respondent co-operated with the applicant by agreeing to an order by consent and hence he did save the time and resources for the applicant. He further submitted that the first respondent swiftly removed the rubbles at the gate of the Fleetwood property after receiving legal advice. Mr *Maringe* submitted on behalf of the first respondent that the applicant are relatives. Costs on a higher scale may negatively affect the relationship between the applicant and the first respondent according to the submissions advanced by Mr *Maringe*. Mr *Maringe* further submitted that an order that each party must bear its own costs is just and appropriate in the circumstances.

Textual authorities and case law have dealt with the issue of costs in a variety of ways. Hebbstein and Van Winsen¹, have this to say, in relation to costs:

“The award of costs in a matter is wholly within the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues in this case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties...”

*A.C Cilliers*², postulated that the following issues are key for the consideration of costs on a higher scale:

- “(a) Vexatious and frivolous proceedings.
- (b) Dishonesty or fraud of litigant.
- (c) Reckless or malicious proceedings
- (d) Litigant’s deplorable attitude towards the court

¹ *Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5th Ed, Vol 2 p 954

² *The Law of Costs*, 2nd ed, p 66

(e) Other circumstances.”

In *Nel v Waterberg Landbouwerkers Kooperatie Vereeniging*³, the following was stated in relation to costs on an attorney and client scale:

“The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that , by reason of special consideration arising either from the circumstances which give rise to the action from the conduct of the losing party , the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but it is not chargeable in the party and party bill. See *Hearle and McEwan v Mithcell’s Executor* (1922 TPD 192), Therefore in a particular case the Court will try to ensure , as far as it can, that the successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party...”

The conduct of the first respondent is less than that contemplated by textual authorities and case law cited before. The first respondent saved the resources of the applicant by agreeing to an order by consent. The present application was filed on 18 December 2021. It is common cause that the first respondent removed the rubble from the Fleetwood property on the same day. The initial agreement between the parties was that he was supposed to have removed the rubble by 10 A.M. on 18 December 2021. According to Mr *Lunga* the first respondent failed to remove the rubble at the agreed time which forced the applicant to file the present application. However, Mr *Lunga* could not ascertain the exact time of removal of the rubble. On that basis, I will give the first respondent benefit of doubt particularly in light of the fact that the first respondent had to hire other vehicles to remove rubble. The hiring was likely to take time.

I am of the considered view that costs on a higher scale are not just in the circumstances. Costs on an ordinary scale are just and appropriate in the circumstances. Such costs are reasonably sufficient. The costs will discourage the first respondent from taking the law into his own hands.

Resultantly, it is ordered as follows:

- (a) Pending the finalisation of the estate late Kudzanai Kangara DR. No. 4168/21 the first respondent is ordered to restore undisturbed and peaceful possession and occupation of house number 193 Fleetwood, Bindura.

³ 1946 AD 597 at 607

(b) The first respondent shall bear the costs of this application on an ordinary scale.

T. Kadhau Law Chambers, applicant's legal practitioners
Maringe and Kwaramba, first respondent's legal practitioners