THOMAS MORE MUDZVOVA
and
CRESSCENZIA MUDZVOVA
versus
PATRICK SANDE
and
ANGELINE MUPINDURA
and
DIRECTOR OF HOUSING AND COMMUNITY SERVICES
and
THE SHERRIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 22 July & 4 August 2021

Urgent Chamber Application

MUZOFA J: Upon receipt of this urgent chamber application on the 22nd of July 2021 I gave directions for the respondents to file their notices of opposition if inclined to do so. I also directed all parties to file heads of argument so that l may deal with the matter on pleadings filed of record.

The facts of this matter are common cause. The applicants purchased a property known as stand number 4317 Warren Park D, Harare 'the Warren Park property' from the 2nd respondent in February 2009.A dispute ensued between the 2nd respondent and her husband thus stalling transfer of title to the applicants. The 2nd respondent subsequently purchased stand number 5278 Highfield Township Harare 'the Highfield property'. The applicants allege the Highfield property was purchased from proceeds of the Warren Park property which averment is denied by the 1st respondent. When transfer of the Warren Park property could not be effected, the applicants filed an application under HC 3252/09 'the main matter' interdicting the cession or sale of the Highfield property. The matter is still pending. They claim a lien over the property.

In due course, the 2nd respondent sold the Highfield property to the 1st respondent. After paying the full purchase price, the 1st respondent processed the documentation for the cession of the property. The cession could not be effected since the property was subject of a dispute. Undeterred by this stumbling block, the 1st responded filed an application under HC 1838/21 to compel cession and the eviction of the 2nd respondent and all those claiming occupation

through her. The 1st respondent cited the 2nd and the 3rd respondents who did not oppose the application. He did not cite the applicants in the application. A default order was granted on 14 July 2021.By decree of the order the 2nd respondent was ordered to facilitate cession in favour of the 1st respondent. When the applicants became aware of the order, they approached the court on an urgent basis for stay of execution.

The 1st respondent opposed the application. Two issues were raised at the outset that the matter is not urgent and that there is no 2nd applicant in this case. Indeed there is no 2nd applicant in this case since she did not file a founding affidavit setting out her case. The court shall determine the matter in respect of the 1st applicant and the 1st respondent.

This court has held that an application is urgent when if at the time the cause of action arises, determination of the matter cannot wait. See *Kuvarega* v *Registrar-General* & *Another* 1998 (1) ZLR 188 (HC). The filing of an application with the court immediately the cause of action arises acts to underscore the urgency of the matter and the vigilance of the applicant. A delay may however occur between the cause of action arising and the filing of the application with the court. Where the urgency of the matter is a result of that delay, then unless the delay is satisfactorily explained, the non- action on the part of the applicant until his or her legal position is altered by some other vigilant person cannot constitute urgency for the purposes of the rules of this court per *Gulmit Investments (Private) Limited* v *Ranchville Enterprises (Private) Limited and Others* HH 94/04

According to the 1st respondent the need to act arose in February 2020 when the 2nd respondent and the 1st applicant entered into the sale agreement. It was reasonably foreseeable that cession would be effected after the sale. The applicant must have acted then. In defending the urgency of the matter, the applicant held on the point that the need to act arose on the 14th of July 2021 when the default judgment was issued and not in February 2020.

The court has to determine when the need to act arose .The need to act arises when the applicant becomes aware of the imminent harm or when the harm materialises. It is the cause of action. The question in this case is when the need to act arose for the applicant to protect his interest in the Highfield property.

When the applicant could not receive title in the Warren Park property and he became aware of the purchase of the Highfield property by the 2nd respondent it appears he was alive to the possibility that the 2nd respondent may sale the Highfield property. This explains why he filed the main matter. This was a preemptive measure to protect his perceived rights in the Highfield property. What the applicant feared most materialized in the sale of the Highfield

property to the 1st respondent in February 2020. The applicant did not bring the court into his confidence to explain why the main matter is still pending after almost 12 years. The little that the court could glimpse from the applicant's answering affidavit is that further litigation between him and the 2nd respondent including her husband was going on. It was not explained how the litigation impeded the finalization of the main matter. If the applicant needed to act with diligence to protect his interests in the Highfield property, he must have done so through a diligent prosecution of the main matter. He did not do so and no satisfactory explanation was given for the delay. I requested for the record in the main matter to fully appreciate its contents, there was no joy the file had already been sent to archives, that shows the extent of the applicant's nonchalance in the finalization of the main matter.

The second opportunity to protect the applicant's interests presented itself in the sale of the Highfield property. The applicant did not favour the court with information when he became aware of the sale. Despite that, I am convinced that the applicant did not become aware of the sale in July 2021 when the default order was granted. I say so because the applicant was aware that the 1st respondent had actually sought cession and it could not be effected because of the main matter. In my view the applicant was now seized with all the information and facts threatening his purported rights in the Highfield property, but he did nothing about it. It is common cause that every purchaser of property whether movable or immovable after paying the purchase price expects delivery. In this case cession is part of the delivery. So for the applicant to wait for a court application by the 1st respondent to be jerked into action to once more protect his interests in the Highfield property is the typical waiting for doomsday. This is what the court in the *Kuvarega* case (*supra*) had in mind when it said;

'Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules.'

I must comment on the applicant's attitude to the non-finalization of the main matter .In his founding affidavit he had the audacity to dismissively refer to the non-finalization of the main application as serving its purpose by its mere existence. It is not the existence that is relevant to protect the applicant's interests but the final determination. So by keeping the main matter pending the applicant intended to ward off any potential sale or cession. This approach to litigation must be condemned. Litigation must be filed for the court to settle disputes. In light of the applicant's attitude it can only be concluded that there is no intention to finalize the main matter but to use it as a buffer against the sale or cession of the Highfield property. This is wrong.

From the forgoing l agree with the 1st respondent that the need to act did not arise after the handing down of the default judgment. The default judgment was the day of reckoning. The need to act arose at the most in 2009 when the Highfield property was bought and he realized he had some interest to protect and at the least it arose at the time the applicant became aware of the sale agreement between the 2nd respondent and the 1st respondent. He failed to act and cannot seek to jump the queue ahead of other pending matters.

The matter lacks urgency. It is accordingly struck off the roll of urgent matters.

Mashizha &Associates, applicant's legal practitioners
Maseko Law Chambers, 1st respondent's legal practitioners