

BEATRICE MAKANYARA (Nee TASARA)
versus
TAPIWA WAMAMBO
and
REGISTRAR OF DEEDS HARARE
and
REGISTRAR OF DEEDS BULAWAYO
and
KWEKWE CITY COUNCIL
and
MASVINGO CITY COUNCIL
and
NORTON TOWN COUNCIL
and
GWERU CITY COUNCIL

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 9 JUNE 2022

Urgent Application

P Mukumbiri, for the Applicant
F Wamambo in person
2nd, 3rd, 4th, 5th, 6th and 7th Respondents, In Default

MUNANGATI-MANONGWA J: This matter came to me on an urgent basis. I struck the matter from the roll on the basis that there was no proper service. I hasten to say that service of process is central to the realization and enjoyment of the right to be heard. A respondent or a defendant has to be aware that there is a matter before the court especially where the relief sought materially affects his rights. Whilst the rules provide for exceptions to service in certain instances, justification has to be provided for not serving an interested party on the first instance. Nonetheless the rules provide for subsequent notification on the defendant or respondent. This matter not falling within the exceptions, the relief sought having a material bearing on the rights of the first respondent, the service thereof being inadequate, I struck the matter off the roll.

The facts of the matter are that: The applicant is married to the first respondent. Both parties are not resident in Zimbabwe at the moment. The applicant has sued for divorce and the matter is

pending before this court. On 6 June 2022 the applicant approached this court on an urgent basis seeking the following order:

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this honourable court why a final order should not be made in the following terms.

1. The first respondent, his assignees and representatives be and are hereby permanently interdicted from disposing through a sale or any other way or attempting to dispose in or in any way encumbering or attempting to encumber the immovable property listed below pending the outcome of proceedings under case No HC 2517/22 where the applicant is claiming a share thereof;
 - a) Stand No lot 9 of 7A Chicago, Kwekwe
 - b) Stand No 7595 Section 4 Mbizo, Kwekwe
 - c) Stand No 6650, Newtown, Kwekwe
 - d) Stand No 6123 Ngwe Street Southview,
 - e) Stand No 7061 Chigwagwagwa Stret, Target Kopje, Masvingo
 - f) Stand No 3305 Mandera Close Rujeko Masvingo
 - g) Stand No5811, Knowe, Norton.
 - h) 1 bedroom flat at No 47 Calder Gardens 2nd Street/Cnr Josiah Tongogara, Harare
 - i) 97 Stanks Drive Leeds, LS14 5NS England, United Kingdom
2. The first respondent to pay costs of suit on an attorney and client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicant is granted the following interim relief:

1. That in the interim the first respondent, his assignees and representatives be and are hereby temporarily interdicted from disposing through a sale or any other way or attempting to dispose or in any way encumbering or attempting to incumber the immovable property listed below pending the outcome of proceedings under case No HC 2517/22 where the applicant is claiming a share thereof;

- j) Stand No lot 9 of 7A Chicago, Kwekwe
 - k) Stand No 7595 Section 4 Mbizo, Kwekwe
 - l) Stand No 6650, Newtown, Kwekwe
 - m) Stand No 6123 Ngwe Street Southview,
 - n) Stand No 7061 Chigwagwagwa Stret, Target Kopje, Masvingo
 - o) Stand No 3305 Mander Close Rujeko Masvingo
 - p) Stand No5811, Knowe, Norton.
 - q) 1 bedroom flat at No 47 Calder Gardens 2nd Street/Cnr Josiah Tongogara, Harare
 - r) 97 Stanks Drive Leeds, LS14 5NS England, United Kingdom
2. The first respondent to pay costs of suit on an attorney and client scale

SERVICE OF THE PROVISIONAL ORDER

That the applicant's legal practitioners be and are hereby given leave to serve by way of delivery to the offices of the Respondents or their legal Practitioners.

The applicant's legal practitioners directed that the Sheriff serves the urgent application on the first respondent's brother one Fanuel Wamambo at No 705 Challottes Brooke, Goromonzi. The respondent's brother attended court and advised that the applicant's legal practitioners had initially arrived at his home when he was at work and he had spoken to them over the phone advising them that respondent does not reside at his home. He later found out that divorce papers had been left at his home despite his protest. Now the Sheriff had served this urgent application at his home. He stated that his home was not the litigants' home and that the husband and wife had left Zimbabwe in 2007 heading for United Kingdom. At that time he was within their care and he was he was still at University. The parties' last known Zimbabwean address then was in Tynwald South.

Mr Fanuel Wamambo further stated that he had completed his studies and had a life of his own and he had established himself at his new home in Challottes Brooke. He emphasized that his brother and wife had never stayed at his place and hardly knew his address. His brother the respondent, was last in Zimbabwe in 2018 after they lost a sister. Most important he has never allowed anybody to use his address, in fact, he had no authority to receive this application or any other documents for that matter. He did not want to be involved in the pair's affairs. It

was his stance that he had attended court merely out of courtesy after his legal practitioner advised him to attend and state his position. He told the court that he did not know the address of his brother in the United Kingdom neither was he in touch with him. He was only hearing it for the first time from the applicant's papers that his brother was now in Finland. The only detail he had was an email address to which he sent the initial documents after scanning them and had not received any response. He was not sure whether the respondent had received the documents or not.

Of note was this remark from him. "I have a number of relatives in the diaspora, does it mean that if ever anyone wants to divorce, I will receive their papers? My brother last visited me in 2013 and I have no active communication relationship with him." He emphasized he did not want to be involved in his brother's affairs. On the applicant's part, her legal practitioners insisted that this was the last known address for the parties. Ms Mukumbiri for the applicant argued that the service was proper as they did not know the whereabouts of the first respondent. Further they got an order for substituted service of the divorce summons which gave them authority to serve on Fanuel Wamambo as additional service apart from publishing the summons in a newspaper of wide circulation in Finland. She further submitted that it was important that the application be heard as the interim order sought was pertinent as it sought to protect the rights of the applicant.

The question to be determined is whether there is proper service of the urgent application? The Sherriff's return indicates that service was affected by affixing the urgent application on a sliding gate at Mr Wamambo's residence. The problem is, this is not the first respondent's home neither was it ever indicated as the address for service for the first respondent. I am aware that the applicant had gotten an order of court to the effect that the divorce papers could be served on his brother as additional service. The relevant part of the order reads:

"The Plaintiff shall serve a copy of the summons and declaration and all other processes in Case number HC2517/22 on Defendant's brother Fanuel Wamambo at Number 705 Charlotte Brooke, Goromonzi."

This has its own problems where the brother categorically stated that he was not willing to receive papers on behalf of his brother whose whereabouts he did not know. Of note is the fact that, the order for substituted service can not apply herein as this was for the divorce case which are different proceedings seeking different relief. This urgent application cannot therefore be

covered by the substituted service given in the divorce case which service is specifically applicable to Case No HC 2517/22. Thus, the clause which the applicant seeks to rely on in arguing that service was properly affected is not applicable.

Suffice to state that the practice of applying to additionally serve divorce papers on a relative of parties in a divorce matter where the party is not cited and is not served with the application is undesirable. It cannot be in accordance with real and substantial justice because one is dragged into proceedings without being made aware of the proceedings. One receives court papers and is expected at his own expense to contact his relative irrespective of whether or not he is in good terms with that relative let alone whether he or she knows their whereabouts. It is not legally correct to place obligations on a third party when he or she has not been given an opportunity to be heard especially in a case where he is neither a party nor an interested party. This is what obtains when an order allows service of documents on a relative of parties in a divorce to receive papers on behalf of one of the parties in absentia. It simply cannot be fair nor can it be legally correct.

The applicant's counsel further referred to Rule 15 subrule 13(b) of the High Court Rules 2021 to justify the manner of service effected. The rule reads as follows:

Service of any other process of court may be affected in one of the following manners-

(a).....

(b) by delivering a copy thereof on a responsible person at the place of residence or business or employment of that person, who shall be apparently in charge of the premises at the time of delivery being a person apparently not less than sixteen years of age

Reliance on this subrule is misplaced as the purported service was not affected at the place of residence of the first respondent. Neither was it served on a person but was affixed on a sliding gate. This was at the brother's home which brother is not prepared to accept service. The brother denies being an agent of the first respondent as contemplated in Rule 15 subrule 13(c). Neither is the address where service was affected, the chosen address for service for the first respondent.

The applicant's legal practitioner thus failed to justify the basis upon which service could be deemed proper in the circumstances. Proceeding to entertain the matter in the absence of proper service in a matter where service is required to be affected would amount to breaching the first

respondent's constitutional right to be heard as provided in s 69 of the Constitution of Zimbabwe. A litigant has to be properly informed of any proceedings before the court for them to enjoy their right to be heard before an impartial court of law. It is the duty of the court to ensure that a litigant's attention has been drawn to the proceedings before it, before the commencement of hearing, more so when the proceedings are not covered by the exclusionary rule as provided in r 60(3) of the High Court Rules 2021. Apparently, there has not been any submissions that this urgent chamber application falls within the matters where it is not necessary to serve before the matter is heard. The nature of the relief sought is far reaching as it affects the proprietary rights of the 1st respondent thus requiring proper service to be effected.

I thus find that the matter is not properly before me for want of proper service. Mr Fanuel Wamambo had to consult a legal practitioner on how to handle this case and ultimately had to attend court. It is just and proper that he recovers his costs as he was unnecessarily dragged to court by the applicant in proceedings he had no interest in.

Accordingly, the matter is struck off the roll and, the applicant is ordered to pay the costs of Mr Fanuel Wamambo.

Rubaya Chinuwo Legal Practitioners, for applicant
Masawi and Partners, for respondents