

ATHOS PROESTOS  
versus  
CHRISTALLEN PROESTOS  
and  
CHRISTALLEN PROESTOS (in her capacity as Executrix Dative for)  
ESTATE LATE DINOS EROKROITOU CONSTANTINOS DR 4429/21  
and  
CHRISTALLENI PROESTOS (in capacity as Executrix Testamentary for)  
ESTATE LATE ELEN DINOU PROESTOS- DR 4428/21  
and  
PRATIBHA PATEL  
and  
MASTER OF THE HIGH COURT  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 21 & 27 July & 11 August 2022

### **Urgent Chamber Application**

*V Vera*, for applicant  
*B A Dzingirai*, for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents  
*T R Mugabe* with *S Macheridza*, for 4<sup>th</sup> respondent

### **TAGU J: INTRODUCTION**

This is an Urgent Chamber Application in terms of Rule 57 (2) (a) of the High Court Rules 2021, for an interdict against the respondents pending the finalization of the matter under HC 2528/22.

### **THE PARTIES**

The applicant and the first respondent are children of the late DINOS EROKROITOU CONSTANTINOS PROESTOS and the late ELENI DINOU PROESTOS and they are both

beneficiaries of the estate of their parents. The second respondent is ESTATE LATE DINOS EROKROITOU CONSTANTINOS PROESTOS, which is the registered estate of the applicant and first respondent's late father and is being represented by the first respondent. The third respondent is ESTATE LATE ELENI DINO PROESTOS, which is the registered estate of the applicant and first respondent's late mother and being represented by the first respondent. The fourth respondent is PRATIBHA PATEL a female adult whose further particulars are not known to the Applicant but residing at 94 Churchill Avenue, Gunhill, Harare, the property. The fifth respondent is the MASTER OF THE HIGH COURT cited in his official capacity as the official who is responsible for overseeing administration of deceased estates among other duties. The sixth respondent is THE REGISTRAR OF DEEDS, cited in his official capacity as the official responsible for the registration and register of immovable properties in Zimbabwe.

### **BACKGROUND FACTS**

The Second Respondent owned an immovable property known as certain piece of land situate in the District of Salisbury Called Stand 12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe (herein referred to as "the property"). The second respondent passed on, on 6 May 1992 and he left a Will through which he appointed his wife ELENI DINO PROESTOS as his Executrix Testamentary and sole beneficiary to his estate. The second respondent further provided in his Will that in the event of ELENI DINO PROESTOS pre-deceasing him or dying simultaneously with him, both of their children, that is, the applicant and the first respondent were to be beneficiaries to his estate in equal shares. ELENI DINO PROESTOS then registered the Estate of her late husband in 1992 under DR 1531/92 but the estate was never wound up. During her lifetime, the late ELENI DINO PROESTOS also had a Will in which she had bequeathed her estate to both of her children in equal shares (i.e. applicant and first respondent). The first respondent was not happy with this Will as she wanted the whole property to herself. The first respondent then tore apart this Will sometime in 2020 when the third respondent was still alive in the presence of their domestic worker. Immediately before the late ELENI DINO PROESTOS's death while she was terminally ill and of unsound mind and ill health, the first respondent subjected the late Eleni DINO PROESTOS severe duress and coerced the late ELENI DINO PROESTOS to sign a different Will, in which Will the first respondent

made herself the Executrix Testamentary and sole beneficiary to the third respondent Estate. It was on the strength of her fraudulent Will that the first respondent was appointed the Executrix Testamentary for the third respondent and she also had herself appointed as the Executrix Dative for the Second Respondent and was issued with letters of administration on 7 February 2022. On the same day the 7<sup>th</sup> of February 2022 the first respondent was issued with the fifth respondent's consent to sell the second and third respondents' property. On the same day the second respondent entered into an agreement of sale of the property with the fourth respondent for the sum of US\$300 000.00.

The applicant having noted the anomalies and the illegal and fraudulent activities by the first respondent issued summons which was filed under Case Number HC 2528/22 on 13 April 2022 (herein referred to as the main matter) against the respondents seeking the following relief:-

1. A declaration to the effect that the last Will and Testament dated 19 June 2020 which was tendered to the fifth respondent in respect of the third respondent Estate is null and void.
2. A declaration to the effect that the last Will and Testament signed by the late Eleni Dinou Proestos dated 24 July 2000 is the valid last Will and Testament in respect of the third respondent Estate.
3. Revocation of letters of administration granted to the first respondent by the fifth respondent in respect of the second and third respondents Estates.
4. Setting aside and cancelling the sale by the first respondent of an immovable property known as certain piece of land situate in the District of Salisbury Called Stand 12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe to the fourth respondent.
5. Costs of suit on a legal practitioner client scale from the first respondent.

The summons were served on the respondents and in particular the fourth respondent was served on 14 April 2022. The rest of the respondents entered appearance to defend and the matter is now at Pre-Trial Conference stage but the fourth respondent despite being served did not bother to enter appearance to defend the action in the main matter.

What then jolted the applicant to file the present Urgent Chamber Application on 15 July 2022 is that on 12 July 2022, as the applicant was driving past the property she was astonished to realize that the fourth respondent, through her agents or employees, is already taking down trees on the property which applicant's grandmother had kept and reassured for so many years. The manner in which the trees were being taken down makes it clear that the fourth respondent has

already taken charge of the property and is already working on making permanent changes on the same. This is despite the fact that the property is being litigated over in the main matter. The fourth respondent is behaving as if there is no action in respect of the property that is pending before this Honourable Court. The applicant is afraid that if the fourth respondent is not interdicted pending the finalization of the main matter, she may cause irreparable damage and changes to the property which will prejudice the applicant and render any judgment favourable to the applicant that the court in the main matter nugatory. It is for this reason that the applicant filed the present application seeking the following interim relief:

**“TERMS OF 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 fourth respondent be and is hereby ordered not to sell, alter or otherwise dispose in any manner whatsoever an immovable property known as certain piece of land situate in the District of Salisbury Called Stand 12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe until the matter under HC 2528/22 is finalized.
2. The first to fourth respondents be and are hereby ordered not make any developments or physical changes on an immovable property known as certain piece of land situate in the District of Salisbury Called Stand 12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe until the matter under HC 2528/22 is finalized.
3. The sixth respondent be and is hereby ordered not to sign any transfer papers in respect of an immovable property known as certain piece of land situate in the District of Salisbury Called Stand 12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe until the matter under HC 2528/22 is finalized.
4. The First and fourth respondents shall pay costs of suit on a legal practitioner client scale.

**INTERIM RELIEF GRANTED**

Pending finalization of this matter an interim order is hereby granted in the following terms;

**IT IS ORDERED THAT**

1. The fourth respondent be and is hereby ordered to immediately cease construction works, destruction of any walls, cutting down of trees, digging, trenching, excavation, developing or in any way making any physical changes and is ordered to maintain the status *quo ante* of an immovable property known as certain piece of land situate in the District of Salisbury Called Stand

12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe.

2. Notwithstanding any appeal that the respondent may file against this order, the operation of this order shall not be suspended by the filing of such an appeal.

#### SERVICE OF PROVISIONAL ORDER

This Order may be served on the respondents by the applicant, applicant's legal practitioner, or any attested member of the Zimbabwe Republic Police.”

The application is opposed by the first, second, third, and fourth respondents. The first, second, third and fourth respondents raised a point *in limine* to the effect that this matter is not urgent. The contention by the first to the third respondents is that the applicant ought to have exhausted domestic remedies provided for in Section 30(2) and 43 of the Administration of Estates Act [*Chapter 6.01*]. Further, they submitted that urgency in this matter is self-created and that the requirements for an interdict have not been met. They said the fourth respondent obtained title way before the applicant filed its lawsuit in HC 2528/22. That the matter is not urgent is supported by the fourth respondent whose contention was that the need to act arose on at least five occasions before the applicant eventually acted by filing the instant application on 15 July 2022, more particularly as follows:

1. On 8 February 2022 -when applicant allegedly discovered that on 8 February 2022 another Memorandum of Understanding was entered into by first respondent and fourth respondent. (discovery was way after 8/2/22).
2. On 29 March 2022 –when the applicant’s legal practitioners wrote to the fourth respondent per applicant’s Annexure AP4. (informing forth respondent of the illegalities surrounding their agreement of sale of the property with the first respondent.)
3. On 5 April 2022 –when first respondent’s legal practitioners replied to applicant’s Annexure AP4 (first respondent’s legal practitioners unjustifiably defended first respondent).
4. On 5 April –when fourth respondent took transfer of the disputed immovable property by virtue of deed of transfer 1872/22 (applicant discovered this through fourth respondent’s plea) and
5. On 13 April 2022 –when Applicant filed summons in HC 2528/22 instead of current urgent chamber application.

The fourth respondent submitted at length that Title confers ownership and real rights hence the fourth respondent was and is entitled to deal with her property in any manner she deems fit. To that extent she said one cannot interdict something done lawfully.

In opposition to the point *in limine* counsel for the applicant maintained that this matter is urgent and urged the court to take note of the conduct that is being complained of which is the development at Stand 12895 before the determination of HC 2528/22.

As to what constitutes urgency, and the need to act was determined in the famous case of *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 and many more. In the present case the shenanigans done by the first respondent leading to her getting letters of administration, entering into an agreement of sale with the fourth respondent, and the subsequent transfer of the Title of the property to the fourth respondent were discovered by the applicant well after the transactions had taken place. Having noted these the applicant wrote letters to the first and fourth respondents highlighting the illegalities involved. Having received no joy, the applicant filed summons in HC 2528/22 on the 13 April 2022 seeking declarators, revocation of letters of administration, setting aside and cancellation of the sale by the first respondent of an immovable property known as certain piece of land situate in the District of Salisbury Called Stand 12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe to the fourth respondent. The summons was served on all the Respondents. In particular fourth respondent was served on the 14 April 2022.

On 12 July 2022 the applicant realized that the fourth respondent, through her agents or employees, was already taking down trees on the property. This was despite the fact that the property is being litigated over in the main matter HC 2528/22. The fourth respondent is behaving as if there is no action in respect of the property that is pending before this Honourable Court.

The court in determining when the need to act arose in this case has to take note of the conduct complained of. From the papers the conduct complained of is that the fourth respondent is now on the property and carrying out some developments before the determination of Case HC 2528/22. The applicant became aware of this conduct on 12 July 2022. The question is when did the need to act arise to curb the conduct complained of? The answer is 12 July 2022 and the present application was filed on 15 July 2022. So it can safely be said that the applicant acted

when the need to act arose. In urgent matters the question is what is the harm that need to be curbed? The harm in this case is the unauthorized development at the property.

It was said that applicant ought to have utilized Section 30(2) of the Administration of Deceased Estates Act, but the complaint is not about the administration, but the development at the property hence there was no need to approach the Master of the High Court. Section 30(2) of the Administration of Estates Act say:

**“Revocation of letters of administration**

(2) Any letters of administration granted to any person as executor dative shall be at all times subject to be revoked and annulled by the Master, on production to him of any will or codicil by which any other person, who is then legally capable and qualified and who consents to act as executor, has been legally nominated testamentary executor to the estate which such executor dative has been appointed to administer,.”

This relief was sought in paragraph 3 in HC 2528/22 before the discovery of the developments being done by Fourth Respondent on the property. Such a relief can be competently claimed in the High Court in terms of Section 30(1) of the Administration of Estates Act.

Equally, Section 43 of the Administration of Deceased Estates Act, does not apply in this case as this section deals with the publication in the Gazette and Newspapers for debtors and creditors. This is not the issue before the Court. Using section 43 does not bar the conduct complained of as the Master of the High Court has no power to interdict the conduct that is being complained of. That applicant should have acted when advertisements were made, it should be noted that the applicant resides outside the jurisdiction of this Court hence could have not seen the advertisements timeously.

The fourth respondent submitted that she has Title to the property hence could deal with her property as she pleased. On that account she said lawful conduct cannot be interdicted. In deed that is the correct position of the law. But that argument can be advanced on the return day. In the present case the fourth respondent was served with the summons under case HC 2528/22 on 14 April 2022. While being aware that there was litigation going on in respect of the property, the fourth respondent was seen by DANIEL PROESTOS on 12 July 2022 having taken charge of the property and already working on making permanent changes on the property. At least the fourth respondent should have waited until Case HC 2528/22 has been finalized because the manner the

fourth respondent obtained Title to the property is being challenged on the basis of fraud. It is alleged that it is tainted with illegality that must be determined in the main matter.

In my view I find the points *in limine* to have no merit and I dismiss them.

On the merits this is an Urgent Chamber Application in terms of Rule 57 (2) (a) of the High Court Rules 2021, for a temporary interdict against the respondents pending the finalization of the matter under HC 2528/22. I have outlined the facts of the matter elsewhere in this judgment. The prerequisites of an application of this nature are well known. These are:

- (a) A *prima facie* Right, even if it is open to some doubt.
- (b) A well-grounded apprehension of irreparable harm if the relief is not granted.
- (c) That the balance of convenience favours the granting of an interim interdict.
- (d) That there is no other satisfactory remedy.

In the present case the applicant has a right to be protected at law as appears on Annexure “AP3” which appears to be the true and actual Will of the third respondent. In terms of the third respondent’s true Will the applicant is entitled to the following:

1. Half a share of the property; and
2. Being involved in every step of registration and administration of both second and third Respondents estates.

By reason of the first respondent’s fraudulent conduct the applicant has been deprived of his rights as an heir to both estates and it is only this Honourable Court that can protect the applicant’s rights pending the finalization of the main matter. The balance of convenience favours the granting of the relief sought more so because the property in issue is an inheritance to which both the applicant and first respondent must benefit. It is imperative that it be maintained as it is in order to maintain its value until the main matter is finalized. Should the fourth respondent be left to deface the property in the manner that she is doing, it is highly likely that by the time that the main matter is finalized, if indeed it is finalized in favour of applicant, the property would have lost considerable value to the applicant’s prejudice. To say the property can be repainted and or rebuilt to its original status, is hypothetical and unrealistic. There are well-grounded apprehension of irreparable harm. The trees that are being cut down and uprooted have been in existence for over one hundred years. Lastly, the applicant has no other remedy through which his rights can be protected. The manner the fourth respondent has ignored the warning letter and the summons

in this matter demonstrates that she is not a person that can be reasoned with without involving the Court. The granting of the present application is the only way to preserve the status *quo ante*.

In granting the order sought the court has taken into account the concerns raised by the counsel for the fourth respondent that paragraph (2) of the relief sought is final in nature and is constitution. The counsel for the applicant seemed to agree and she asked the court to grant an order it deems fit. In the result I will grant the order as amended.

**IT IS ORDERED THAT**

**TERMS OF 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 fourth respondent be and is hereby ordered not to sell, alienate or otherwise dispose in any manner whatsoever an immovable property known as certain piece of land situate in the District of Salisbury Called Stand 12895 Salisbury Township, also known as number 94 Churchill Avenue, Gunhill, Harare, Zimbabwe until the matter under HC 2528/22 is finalized.
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SERVICE OF PROVISIONAL ORDER

This Order may be served on the Respondents by the Applicant, Applicant's legal practitioners, or any attested member of the Zimbabwe Republic Police.

TAGU J.....

*Tamuka Moyo*, applicant's legal practitioners

*Chivoredzingirai Group of lawyers*, first, second and third respondents' legal practitioners

*Tafadzwa Ralph Mugabe*, fourth respondent's legal practitioners.