

OTILIA MPEPEREKI
versus
DIANA NYARADZO MPEPEREKI
(In her capacity as executrix testamentary of the Estate of the
Late Sheunesu Mpepereki DR 1631/21
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 10, 12 & 3 November 2022

Urgent Chamber Application

Mrs *R Mutswiri*, for the applicant
Ms *H M Makonese*, for the 1st respondent
No appearance for the 2nd and 3rd respondents

MUCHAWA J: This urgent chamber application was initially set down for the 10th of October and I heard the parties on the points *in limine*, reserved my ruling and thereafter dismissed the points raised with a notification that reasons would follow. I give my very brief reasons for dismissing the points *in limine*.

Points In Limine

The first point raised is that this matter is not urgent as the sale was concluded in January 2022 and nothing was done to challenge the sale even in June 2022 when applicant's counsel represented the tenants when they were evicted. Such proceedings are said to have closed in June 2022 and applicant is alleged to have become aware of the identity of the purchaser. Ms *Makonese* argued that it is common cause that where a sale is concluded, then the next thing is transfer and there is nothing illegal about the sale and transfer. Particularly as the letters of administration

issued to the first respondent were never withdrawn. The XN caveat placed in June 2022 was said to be known as temporary and the applicant was alleged to be forum shopping as she first brought the same issue as review and another process which were both withdrawn. It was argued that the applicant did not act when the need to act arose.

Ms *Mutswiri* submitted that the matter is indeed urgent and the point has been raised just to avoid going to the merits. She pointed to the pending summons matter under HC 2782/22 in which a declaration is sought that the will in issue appointing first respondent as executrix testamentary is forged. It was contended that if the first respondent was to continue acting as executrix to the estate her actions are voidable as their validity depends on the validity of the will. The criminal proceedings against the first respondent and the placement of the XN caveat were pointed to, to argue that the applicant acted in time and this application was brought when information was received from the second respondent that transfer was imminent.

It was my finding that given all the actions taken by the applicant, it cannot be said that she refrained from acting when the need to act initially arose.

The second point raised was that the relief sought is incompetent as the Administration of Estates Act only provides for removal of an executor which would result in a replacement and not suspension of executor as this would be akin to leaving no one representing the estate which might prejudice any creditors available. Mrs *Mutswiri* submitted that this court is endowed with inherent jurisdiction and there is nothing to stop it ordering a suspension of the executrix. The argument about creditors was alleged to be speculative.

It is my finding that there is nothing amiss with the court ordering a suspension of the first respondent pending finalization of the matter in HC 2782/22 and it is noteworthy that what is sought is not the removal of the executrix. These are different. In fact in the case of *Guwa & Anor V Willoughby's Investments* 2009 (1) ZLR 380 (S) it is stated that the High Court will do everything unless it is forbidden to do so by law;

“The High Court, on the other hand, has the jurisdiction to hear all matters except where limitations are imposed by law. In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid.”

A third point taken by Ms *Makonese* is that the house in issue is in fact not the matrimonial home of the applicant and the deceased as it was bought in 1988 by the late and his former wife whom he was married to from 16 August 1984 to 27 November 2013 when they divorced. Such

property was jointly registered in the names of the two in 1998. It was alleged that the applicant and the deceased never lived at this house in issue but were tenants of one Tapiwa Zhou from November 2010 to June 2021 at house number 474 Addylin Township, Westgate Harare.

Further, it was submitted that after the divorce, the property was registered in the name of the late Sheunesu Mpeperekwi but he elected not to live there with the applicant. The sale of the property was said to have been done in order to satisfy creditors as directed in the will particularly as the property was encumbered by three mortgage bonds.

This issue taken as a preliminary point was in fact delving into the merits of the matter and would best be dealt with under the merits.

The other point raised *in limine* was that of the failure of the applicant to cite the first respondent in her personal capacity. This was said to be fatal. Ms *Mutswiri* referred the court to page 6 of the application paragraph 1. 2 which shows that the first respondent is sued in both her personal and official capacity. This point *in limine* is therefore of no moment

Ms *Makonese* took a further point that the Registrar of Deeds was improperly cited as the applicant is alleged not to have described the third respondent accurately and with clarity so as to ensure ease of enforcement. She undertook to provide the reference to the law she relied on but did not. Ms *Mutswiri* submitted that the third respondent has been properly cited as the party responsible for the transfer of property. Without the promised legal authority to support Ms *Makonese* on this point, the court is therefore constrained to make a finding in her favour on this point.

The application was further impugned for failure to join the purchaser in this application as an innocent purchaser who has substantial interest in the matter. Ms *Mutswiri* submitted that non-joinder does not render the application fatally defective as the issue does not touch on the innocence of the purchaser. Ms *Mutswiri* said that there is nothing stopping the purchaser from applying for joinder as first and second respondent are aware of the proceedings. Indeed it is open to the purchaser to apply for joinder at any stage of these proceedings and there is no relief sought against him. I therefore dismissed this point too.

The last point *in limine* was that the applicant should have brought an application for review instead of sneaking that review which is out of time as an urgent application. I already found that this matter is urgent and find no merit in Ms *Makonese's* argument.

The Merits

Due to the urgency of the matter I then heard the parties on the merits and advised them that I would take time to consider their submissions and issue an appropriate order. This is it with brief reasons for it.

The brief background to the matter is that the applicant is the surviving spouse whilst first respondent is the only surviving child of the late Sheunesu Mpeperekhi who died in July 2021 and his estate was registered with the first respondent under DR 1631/21 in terms of which a will was lodged and accepted and the first respondent was appointed as executrix testamentary. The said will directed, *inter alia* that an immovable property known as 22 Dulverton Drive, Glen Lorne Harare, be sold and applicant be given USD 50 000, 00 to purchase a property of her own. The property was duly sold in January 2022 following the second respondent's consent to sale. What is outstanding is the transfer of the property to the purchaser.

The applicant has been spurred into action following a telephone call made to her legal practitioners regarding the registration of a caveat over the property on 3 October 2022 about an impending transfer.

The terms of the order sought by the applicant are as follows;

“TERMS OF THE FINAL ORDER SOUGHT

It be and is hereby declared that:

1. Pending the determination of the action for a declaratur, filed out of this Honourable Court by the applicant under cover of case number HC 2782/22, first, second and third respondents be and are hereby permanently interdicted and prohibited from transferring the property known as 22 Dulverton Road, Glen Lorne held under deed number DT 3316/16 to the first respondent or any third party.
2. Pending the determination of the action for a declaratur filed out of this Honourable Court by the applicant under cover of case number HC 2782/22, the Letters of Administration issued to the first respondent are temporarily suspended. The first respondent is interdicted from performing any functions as the executrix testamentary to the estate of the Late Sheunesu Mpeperekhi held under DR 1631/21.
3. Pending the determination of the action for a declaratur, filed out of this Honourable Court by the applicant under cover of case number HC 2782/22, first, second and third respondents be and are hereby interdicted and prohibited from performing any administrative functions on the estate of the Late Sheunesu Mpeperekhi held under DR 1631/21 in pursuance of the letters of administration issued to the first respondent. For the avoidance of doubt all consents to sale issued by the second respondent are hereby suspended.
4. The first respondent is hereby ordered to pay costs of this application

INTERIM RELIEF GRANTED

It is hereby declared that:

1. Pending determination of this matter, first, second and third respondents be and are hereby temporarily interdicted from transferring the property known as stand 22 Dulverton Road, Glen Lorne held under deed number DT 3316/16 to the first respondent or any third party.
2. Pending determination of this matter the letters of administration issued to the first respondent are temporarily suspended. The first respondent is interdicted from performing any functions as the executrix testamentary to the estate of the Late Sheunesu Mpeperekhi held under DR 1631/21
3. Pending the determination of this matter, first, second and third respondents be and are hereby interdicted and prohibited from performing any administrative functions on the estate of the Late Sheunesu Mpeperekhi held under DR 1631/21 in pursuance of the letters of administration issued to the first respondent. For the avoidance of doubt all consents to sale issued by the second respondent are hereby suspended.”

The law applicable in considering an application for interim relief is well settled. In the case of *Telecel Zimbabwe (Pvt) Ltd v Postal and Telecommunications Regulatory Authority of Zimbabwe & 3 Ors* HH 446/15, MATHONSI J, as he then was, set this out succinctly. He said;

“What the applicant seeks is a temporary, interim or interlocutory interdict. HOLMES JA set out the requirements for the grant of such an interdict in *Ericksen Motors (Welkon) Ltd v Proten Motors, Warrenton and Anor* 1973(3) SA 685(A) 619 C – G (quoted with approval by SANDURA JA in *Charuma Blasting and Earthmoving Services (Pvt) Ltd v Njainjai and Ors* 2000(1) ZLR 85(S) 89E-H) as:

“The granting of an interim interdict pending an action is an extra ordinary remedy within the discretion of the court. Where the right it is sought to protect is not clear, the matter of an interim interdict was lucidly laid down by INNES JA in *Setlogelo v Setlogelo* 1914AD 221 at p 227. In general the requisites are:

- (a) a right which, ‘though *prima facie* established, is open to some doubt’.
- (b) a well-grounded apprehension of irreparable injury,
- (c) the absence of ordinary remedy;

In exercising its discretion, the court weighs *inter alia* the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. This is sometimes called, the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated, for example, the stronger the applicant’s prospects of success the less the need to rely on prejudice to himself. Conversely, the more the element of ‘some doubt’ the greater, the need for the other factors to favour him..... Viewed in that light, the reference to a right which, ‘though *prima facie* established is open to some doubt’; is apt, flexible and practical, and needs no further elaboration.”

In *casu*, Ms *Mutswiri* made submissions which were not controverted, that applicant is the surviving spouse of the late Sheunesu Mpeperekhi and may stand to lose her right to the matrimonial home on the basis of an alleged fraudulent will. There is an action pending in this court which

challenges the authenticity of the will. In my opinion, though her right is open to some doubt regarding whether this was in fact a matrimonial home and the authenticity of the will, she has established a *prima facie* right which is enough to sustain a prayer for an interim interdict as the law applicable in an interstate and testate estate is different.

Ms *Mutswiri* submitted that the applicant has a well-grounded apprehension of irreparable harm as most of the assets of the estate have been disposed of and this immovable property in issue is the only remaining asset, which, if transferred and the will is found to be fraudulent, would leave her grasping at nothing. The first respondent is alleged to be benefitting unlawfully from the estate and is said to have received the proceeds of the sale of the immovable property in issue.

It is averred that the applicant has no other remedy open to her outside temporarily stopping the transfer. Furthermore, it was averred that the balance of convenience favours the granting of the interim relief as the first respondent will merely be suspended from carrying out her executrix duties and the purchaser is already in occupation of the property and would be reimbursed the purchase price which should still be held in trust by the conveyancers pending transfer.

Ms *Makonese* was able to cast some doubt on the applicant's right and left it open to some doubt, particularly regarding whether or not this property was ever the matrimonial property of the parties. The dilatoriness of the applicant in challenging the will and prosecuting her action was questioned and the clear inconsistencies on the facts she gave as evidence regarding the reason why the spouses were renting instead of staying at the matrimonial home, whether there were any children born to the applicant and the deceased and when she first became aware of the will. In a case of this nature, however, all that is needed is a *prima facie* right.

Though submissions were made that the applicant would still benefit from the estate's free residue and the will specifies what her benefit is, that does not take away the likely harm which would ensue were the will to be found to be a fraudulent one. The one remedy open to the applicant is that of the action seeking to have the will declared null and void.

I am exercising my discretion and will weigh, *inter alia*, the prejudice to the applicant, if the interim interdict is withheld, against the prejudice to the respondent if it is granted. I am looking at the balance of convenience

In the circumstances, it is my finding that the balance of convenience favours the granting of the interim relief. I accordingly order as follows;

PROVISIONAL ORDER

TO: THE RESPONDENTS

TAKE NOTE that, on 12 October, 2022 the High Court sitting at Harare before the Honourable Mrs Justice MUCHAWA issued a provisional order as shown below.

The annexed Chamber application, affidavit/s and documents were issued in support of the application for this provisional order.

If you intend to oppose the confirmation of this provisional order, you will have to file a notice of Opposition in Form No. 29B, together with one or more opposing affidavit/s, with the Registrar, of the High Court at Harare within 10 days after the date of which this provisional order and annexures were served upon you. You will also have to serve a copy of the Notice of Opposition and Affidavit/s on the applicant at the address for service specified in the application.

If you do not file an opposing affidavit within the period specified above, this matter will be set down for hearing in the High Court at Harare without further notice to you and will be dealt with as an unopposed application for confirmation of the provisional order.

If you wish to have the provisional order changed or set aside sooner than the Rules of Court normally allow and can show good cause for this, you should approach the applicant/applicant's legal practitioners to agree, in consultation with the Registrar, on a suitable hearing date. If this cannot be agreed or there is a great urgency, you make a Chamber application, on notice to the applicant, for directions from a judge as to when the matter can be argued.

BY THE JUDGE

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. Pending the determination of the action for a declaratur, filed out of this Honourable Court by the applicant under cover of case number HC 2782/22, first, second and third respondents be and are hereby permanently interdicted and prohibited from transferring the

property known as 22 Dulverton Road, Glen Lorne held under deed number DT 3316/16 to the first respondent or any third party.

2. Pending the determination of the action for a declaratur filed out of this Honourable Court by the applicant under cover of case number HC 2782/22, the Letters of Administration issued to the first respondent are temporarily suspended. The first respondent is interdicted from performing any functions as the executrix testamentary to the estate of the Late Sheunesu Mpepereki held under DR 1631/21.
3. Pending the determination of the action for a declaratur, filed out of this Honourable Court by the applicant under cover of case number HC 2782/22, first, second and third respondents be and are hereby interdicted and prohibited from performing any administrative functions on the estate of the Late Sheunesu Mpepereki held under DR 1631/21 in pursuance of the letters of administration issued to the first respondent. For the avoidance of doubt all consents to sale issued by the second respondent are hereby suspended.
4. The first respondent is hereby ordered to pay costs of this application

“INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the provisional order, an interim order is granted on the following terms:-

1. Pending determination of this matter, first, second and third respondents be and are hereby temporarily interdicted from transferring the property known as stand 22 Dulverton Road, Glen Lorne held under deed number DT 3316/16 to the first respondent or any third party.
2. Pending determination of this matter the letters of administration issued to the first respondent are temporarily suspended. The first respondent is interdicted from performing any functions as the executrix testamentary to the estate of the Late Sheunesu Mpepereki held under DR 1631/21
3. Pending the determination of this matter, first, second and third respondents be and are hereby interdicted and prohibited from performing any administrative functions on the estate of the Late Sheunesu Mpepereki held under DR 1631/21 in pursuance of the letters of administration issued to the first respondent. For the avoidance of doubt all consents to sale issued by the second respondent are hereby suspended.”

SERVICE OF THE PROVISIONAL ORDER

Leave is hereby granted to the applicant to serve the respondents with the order.

Mafume Law Chambers, applicant's legal practitioners

Khupe, Chijara & Makonese Attorneys, respondent's legal practitioners