

FRANCIS KEITH MASEKO
versus
FORBES MAROWA
and
FRANK MAROWA
and
MELANIA GWAIKA N.O
and
THE ASSISTANT MASTER OF HIGH COURT N.O

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 14 October 2021 and 16 May 2022

Opposed Application

T Midzi, for the applicant
B Balamanja, for the third respondent
No appearance, for the fourth respondent

WAMAMBO J: A chamber application was filed with this Court by the second and third respondents under HC 186/21. The application was granted as follows: -

- “1. The application for appointment of curator and litem be and is hereby granted.
2. MELANIA GWAIKWA be and is hereby appointed curator ad litem for and in respect of FORBES MAROWA a mentally ill person in litigation under Zvishavane case number 98/21 and in any such case as may relate to Forbes Marowa’s disposal of house number 4009 Mandava Township Zvishavane.
3. The office of the said curator ad litem shall terminate upon finalisation of any such litigation as the applicant or curator ad litem as the case may be will have instituted in connection with the property.
4. There shall be no remuneration of the curator ad litem.
5. There is no order as to costs.”

The above order was granted on 28 July 2021. The instant application has its basis on applicant’s interest in House no 4009 Mandava Township Zvishavane which applicant avers he bought from first respondent.

Second respondent is first respondent’s biological father. Third respondent is married to first respondent under a customary law union. The fourth respondent is cited in his official capacity. Applicant filed the instant application pursuant to Rule 29(1) (a) of the High Court Rules 2021.

The basis of the application is more fully adverted to by the applicant as follows:

Before the order, sought to be impugned was filed applicant had bought House No. 4009 Mandava Township Zvishavane. He duly paid the purchase price of US\$ 15000. An agreement of sale was entered into. First respondent also deposed to an affidavit confirming the said sale. The agreement of sale was signed on 31 March 2021. Thereafter a number of cases were filed before the Magistrates Court between the first to third respondents and applicant as follows: - Under case no. PO 24/21 an application for interim relief was successfully applied for by third respondent against applicant. The order was granted on 7 May 2021 and it reads as follows: -

“Pending the return date, first respondent be and is hereby ordered as follows: -
First respondent be and is hereby ordered to keep peace with the applicant. First respondent be and are (sic) hereby ordered not to go within 10 kilometres of the applicant’s place of residence”

The above order was predicated upon third respondent alleging that applicant was harassing her over a debt owed to him by her now mentally ill husband, the first respondent. Further that applicant had ferried bricks and a water tank into her yard. The house or place of residence at the centre of PO 24/21 is House No. 4009 Mandava Township Zvishavane. Apparently on the return date the order granted was discharged.

Under Case no. PO 98/21 it was the applicant who filed an application for the eviction of first respondent and same was granted in default. Thereafter first respondent filed two applications one for rescission of the default judgment and another for stay of execution of the judgment pending the application for rescission of judgment. The two applications were filed on 14 July 2021. An order couched as follows was granted in the Magistrate Court:-

“Default judgment granted on the 9th of July 2021 in case no. 98/21 is hereby stayed” Applicant is not satisfied about the manner in which the order is couched. He is of the view that it should more fully read Executor of the default judgment granted in case no. 98/21 is hereby stayed”

While pleadings were being exchanged in the rescission application before the Magistrates Court the second respondent filed the chamber application under HC 186/21.

The applicant argues that the chamber application launched under HC 186/21 contains untruths. More specifically that first respondent is not mentally ill at all. That he is in employment at Mimoso which institution carries out regular medical check ups. I note here that this averment is not opposed by the first to third respondents. Further that first respondent launched and responded to applications before the Magistrates Court thereby implying that he is of sound mind.

The Doctor's contribution encapsulated in a document appended to the chamber application is flawed in many respects.

The point is made that first respondent's contribution is but merely formal. Had the Judge who granted the order known of the above circumstances he would not have granted it. The applicant alleges that second respondent made misrepresentations in the chamber application. Further that the said chamber application was deliberately, not served upon applicant.

First to third respondents oppose this application. They argue as follows:
Applicant lacks *locus standi*. He is moreover not even a party to the chamber application. Applicant is not a medical practitioner who is in an esteemed position to assess first respondent and declare him as disqualified from being declared mentally ill. There was no need to join applicant to the proceedings. In any case applicant would have contributed nothing to the outcome of the application. The applicant has not demonstrated how his rights have been affected by the order granted under HC 186/21.

This application is predicated upon Rule 29(1) of the High Court Rules 2021. Same reads as follows:

“29(1) The court or a judge may, in addition to any other powers it or he or she may have on its own initiative or upon the application of any affected party correct, rescind or vary –
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected party or

I find that applicant is an affected party as per Rule 29(1)(a) for the following reasons: -
The order granted under HC 186/21 is directly related to proceedings under PO 98/21 wherein the applicant is a party. The case PO 98/21 has House No. 4009 Mandava Township Zvishavane at its centre. Applicant is armed with an agreement of sale between himself and first respondent. Applicant in this case is also the applicant in the main case under PO 98/21 wherein he sought the eviction of first respondent.

Perhaps apart from first to third respondents and their dependants the next most interested person in the outcome of PO 98/21 is the applicant. He stands to succeed or lose the ownership of House No. 4009 Mandava Township or its occupation at the end of the day. The order under HC 186/21 already affects PO 98/21 as it is specific to that extent.

I associate myself with the remarks made in the case of *Mashingaidze v Chipunza* HH 668-15 by CHITAKUNYE J (as he then was) who had this to say at p 4:

“Under R 449(1) (a) one does not need to have been a party to the application for default judgment for one to be able to apply for the setting aside of the judgment. The applicant is only required to show that its affected by the judgment or order and that such order was erroneously sought or granted.”

I note here that Rule 449(1) of the High Court rules 1971 is basically the same as Rule 29(1) of the new High Court Rules 2021.

I find that there is a proper basis for impugning the order granted under HC 186/21 for the following reasons:-

When the order was made the Learned Judge was unaware that the first respondent had deposed to two founding affidavits on 13 July 2021 under PO 98/21. These are clearly the actions of a sane person. The learned judge was unaware that there was an agreement of sale signed between first respondent and applicant on 3 March 2021. The agreement of sale is at pp 25 to 28 of the record. The learned Judge was unaware that first respondent had deposed to an affidavit confirming the sale of House No. 4009 Mandava Township to applicant. The said affidavit is dated 3 March 2021 and appears at p 29 of the record. The learned judge was unaware that second respondent had filed a case under PO 24/21 for a peace order against applicant in relation to him accessing House No. 4009 Mandava Township pursuant to an agreement of sale as adverted to earlier.

The irresistible conclusion is that PO 24/21 was filed to frustrate applicant from gaining access to the house which second respondent was keen to resist. The other allied allegations of harassment appear to have been red herrings thrown to mislead the court.

The learned judge was unaware that the application under PO 24/21 was made solely by second respondent without the particulars or citation of first respondent who is the registered owner of the said house.

I find further support that the order under HC 186/21 was made in error upon closer examination of the application itself. The doctor’s report (appearing at p 192 of the record) that was used by the first to third respondents to launch the chamber application appears flawed. It does not in any way allege that first respondent is mentally ill. The doctor’s report talks about first respondent being H.I.V. positive and him having a deteriorated mental status flowing from his H.I.V. positive status.

Second respondent alleges in his founding affidavit on para 3 that first respondent has been mentally ill since April 2020. This much is not borne by the doctor’s report.

The doctor's report does not disclose that he is a psychiatrist doctor or a doctor with skills to assess the presence or otherwise of a mental illness. The draft order eventually encapsulated into an order of court describes first respondent as a mentally ill patient which is not supported anywhere on the documents filed in support of the application.

I am cognisant that the effect of first respondent being adjudged a mentally ill person in terms of a High Court order effectively binds the lower court in relation to Case No. 989/21 which is specifically mentioned in the report.

For the reasons given above I find that the order granted under HC 186/21 was granted erroneously and should be rescinded. I have duly amended the draft order for clarity and effectiveness. To that end I order as follows:

1. The application for rescission of the court order under HC 186/21 is be and is hereby granted.
2. The court order issued by the court under case No. HC 186/21 be and is hereby set aside.
3. First to third respondents are to pay costs of suit jointly and severally the one paying the others to be absolved.

H Tafa & Associates, applicant's legal practitioners
Hlabane Law Chambers, first respondent's legal practitioners