

ESNATH MANYIYO  
versus  
CHINATI CHIPIRINGU  
and  
JUWETTIE MANYIYO

HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 23 MARCH AND 30 APRIL 2015

### **Opposed Application**

Applicant in person  
Mr A *Madzina* for 1<sup>st</sup> respondent

**MAKONESE J:** This is application for rescission of judgment. On 22 August 2013, first respondent obtained default judgment in this court in the following terms:

“IT IS ORDERED THAT

1. An application for summary judgment be and is hereby granted against the respondent.
2. The respondent and all those claiming occupation through him be and are hereby evicted from house number 3063 Munhumutapa, Kadoma
3. Respondent is ordered to pay arrear rentals in the sum of US\$5.100.00 at the rate of US\$150 per month with effect from 1 June 2013 to date of eviction.
4. The respondent is ordered to pay costs of suit on an attorney and client scale.”

The first respondent issued a Warrant of Ejection pursuant to the default judgment on 5 September 2013. The applicant has filed an application for the rescission of judgment granted under case number HC 1346/13. In that matter first respondent initiated action against second respondent. Second respondent and applicant were married in terms of the then Marriage Act

[Chapter 37]. Applicant was not a party to the proceedings under case number HC 1346/13. Although applicant made attempts to be joined as a party in those proceedings, there is no order for joinder. In her founding affidavit applicant makes the following averments:

- “7. I applied to this Honourable Court to be joined as a party to the action but the action was concluded before I was joined as a party.
8. I only became aware of the order upon receiving a warrant of ejectment from the deputy sheriff.
9. I now seek rescission of the judgment.  
I was not a party to those proceedings although I have a strong case in the case.
10. First respondent is acting in cahoots with second respondent to deprive me of my matrimonial house as I will illustrate herein.”

#### Background

The factual background to this matter is as follows: Applicant and first respondent were married at Sanyathi in 1995 in terms of a civil marriage. The parties' marriage fell apart in 2000 when second respondent and the applicant separated. Second respondent abandoned the matrimonial home and started co-habiting with another woman, (now commonly known in this country as a “small house”). Applicant states that during the duration of the marriage the parties acquired house number 3063, Munhumutapa, Rimuka Kadoma. The applicant further states that she initiated divorce proceedings in the Harare High Court in 2006 and that the matter has not yet been finalized. For reasons that are not clear the divorce proceedings seem to be dragging in court and none of the parties seem keen to bring that matter to finality. In July 2010 second respondent entered into an agreement of sale in terms whereof he sold the rights, title and interest in house number 3063, Rimuka Township, Kadoma (hereinafter referred to as “the property”) to first respondent. Applicant alleges that the property was sold fraudulently and behind her back. She says she has a substantial interest in the property and that because of that reason the sale ought to be reversed or set aside. Applicant contends that the property is subject to distribution upon the granting of a decree of divorce.

### PROPRIETY OF THE APPLICATION

The first issue for determination by the court is whether the application before the court is competent. The judgment which is sought to be rescinded was entered on 22 August 2013. The applicant is not a party to that action. The Applicant has not been joined in that action. Applicant clearly has no right to seek to rescind a judgment to which she is not a party. On that basis alone, the applicant has no right of audience in this matter. The matter is evidently not properly before the court. The application is ill-conceived to the extent that a party cannot seek rescission of a default judgment to which he or she is not a party.

The second issue for consideration is whether the applicant would have a right to demand cancellation of the agreement of sale between second respondent and a third party. The third party has already obtained title deeds to the property but applicant had refused to vacate the property from December 2010 up to date. In the matter of *Muganga v Sakupwanyanya* 1996 (1) ZLR 217 (S) at page 219, the court held that it is for the aggrieved wife to prove that the third party is guilty of fraudulent intent. The same principle was applied in the case *Cattle Breeders Farm (Pvt) Ltd v Veldman* 1973 (2) RLR 261 where it was held that:

“Where there is a genuine transfer, there is no reason why the wife’s personal rights against her husband, which are derived from her status, should enter the field of real property law so as to clog the title of an owner.”

This principle also emerges from the following cases: *Pretorius v Pretorius and Another* 1948 (1) SA 250 and *Laws v Laws and others* 1972 (1) SA 321.

In the instant case, applicant makes the bold assertion that first respondent is acting in cahoots with second respondent to deprive her of her share in the matrimonial home. There is nothing on record to substantiate these allegations, and in any event no evidence has been placed before the court of the nature of applicant’s claims, which are said to be pending in the High Court. It seems to me that for as long as the applicant has physical possession and effective control of the matrimonial property she will not be in any hurry to have the divorce proceedings concluded. The applicant has failed to prove that first respondent was aware of applicant’s

claims in the property and proceeded to purchase the property in order to defeat such claims. See also *Violet Tewe v Anderson Hanoki and others* SC 55/03, page 4 where ZIYAMBI JA reasoned as follows:

“since the rights of husband and wife are personal and do not as a matter of law affect third parties, for the appellant to succeed against the second and third respondents she had to show not only that they were aware of her rights in the property but that they were attempting to defeat her rights therein.”

I am satisfied that the applicant has not satisfied the requirements for the rescission of the default judgment. The application before the court could not technically be brought by the applicant as she was not party to the proceedings. Furthermore, as has been illustrated if the applicant has any claims against the second respondent in respect of the matrimonial property, such claims ought to be pursued in the divorce action.

In the result, the application is hereby dismissed with costs.

*Mutatu & Partners*, 1<sup>st</sup> respondent’s legal practitioners