DR KIMANI GECAU
and
NGINYA MUNGAYI LENNETYE
versus
MACDONALD NDEREMANI
and
MOLINE NDEREMANI
and
DOUGLAS NYAUDE
and
GRAHAM & DOUGLAS REAL ESTATE (PVT) LTD

HIGH COURT OF ZIMBABWE
GOWOWRA J
HARARE, 5 November 2009

K Ncube, for the applicants
R Chivaura, for the respondents

GOWORA J: The applicants, as may be summarized from the brief facts, were engaged in property development in the Tynwald area of Harare. Around February 2002 the third respondent executed an agreement of sale with the first and second respondents in respect of one of the stands being developed by the applicants and which the third respondent had been mandated to sell. Arising out of that agreement one Peter Dzingirayi issued out summons under case number HC 456/07 against the first applicant and the third and fourth respondents herein. Those proceedings were withdrawn subsequent to a pre-trial conference.

Thereafter the same legal practitioner who had acted for Peter Dzingirayi instituted proceedings by way of summons under case number HC 2383/08 this time with the first and second respondents as the plaintiffs and the two applicants herein and the third and fourth respondents as the defendants.

The applicants have approached the court to have the automatic bar uplifted on the basis that they were not served with the summons.

The founding affidavit was deposed by the applicant who narrates the history of the proceedings filed on behalf of the respondents. He avers, which averment is not contradicted, that on 29 April 2008, Messrs Chivaura & Associates forwarded a fresh summons under cover

of a letter to the applicants' legal practitioners. The summons for obvious reasons were returned under cover of a letter dated 6 May 2008. On 4 august 2008, he received a telephone call from his legal practitioners who asked if he had been served with summons. He replied in the negative but subsequently received a letter from his legal practitioners confirming that Messrs Chivaura & Associates were in the process of applying for a default judgment.

In answer to the averment in the opposing affidavit that summons had been served upon Max his son at Plot 17 Kirkman Road, he stated that he had never resided at Plot 17 Kirkman Road and further that Max was his son, and not his agent. He has given his residential and business addresses which are not Plot 17 Kirkman Road, Tynwald.

The legal practitioner for the applicants has also deposed to an affidavit which is primarily concerned with the written and telephone communication with Messers Chivaura & Associates regarding the service of the summons.

The service of process is provided for in the Rules of this Honourable Court, and in particular Order 5 r 39(2) provides:

Subject to this order process other than process referred to in subrule (1) may be served upon a person in any of the following ways –

a) by personal delivery to that person or his duly authorized agent;
b) by delivery to a responsible person at the residence or place of business or employment of the person on whom service is to be effected or at his chosen address for service.

The claim being pursued by the first and second respondents is based on an agreement of sale signed by their agent on their behalf and by Nyaude as a registered estate agent. There is no signature for the sellers. It is important to note that in terms of that agreement of sale the *domiciluim citandi et executandi* allegedly chosen by the applicants as sellers is Suite 208, 2nd Floor Margolis Plaza, Harare Street/Speke Avenue. There was no attempt to serve the summons at the alleged chosen address. The first and second respondents have not even attempted to address the issue of why service was not effected at the allegedly chosen address for service.

The applicants have contended that they do not reside at Plot 17 Kirkman Road Tynwald. An examination of the agreement of sale being sought to be enforced reveals that the stand which the subject matter of the dispute is located at Plot 17 Tynwald. It is common cause

that this is an undeveloped stand which has been subdivided for purposes of sale to willing buyers.

The applicants neither reside at Plot 17 Tynwald nor are they employed there. Thus the only manner in which service could be effected at that address was on that authorized agent. There can be no doubt that service upon the first applicant's son at that address cannot constitute service on the second applicant. Max Gecan was served with summons in respect of the second applicant at an address where the second applicant neither lived nor worked. It is thus not proper service. The respondents do not state in the opposing affidavit filed on their behalf why service on Max Gecan is good service on the applicants. In the head of argument it is submitted that the return of service described Max Gecan as the first applicant's son and that this was evidence that the first and second applicants had an interest at Plot 17 Kirkman Road Tywald. In my view this submission does not go far enough to show that there was compliance with the rules. The deliberate specification of places that process is served is meant to ensure that process is served at a place where the defendant or respondent, as the case may be, is likely to be found. In the circumstances of this case Plot 17 Kirkman Road is not a place that either the applicant was likely to be found. A place in the occupation of another person at which defendant occasionally visited, had meals and slept is not his residence. The only reason to serve the summons at Plot 17 Kirkman Road Tynwald would therefore be if Max Gecan was an authorized agent for the applicants. There is no suggestion by the respondents that service was effected upon Max Gecan on that basis.

I find the explanation for the failure to enter appearance reasonable in the circumstances.

The first applicant defended the earlier proceedings up to pre-trial conference stage at which stage the action was withdrawn. The first applicant has challenged the validity of the agreement of sale being sought to be enforced.

There has been no reckless disregard of the rules, in that the first and second respondents cannot claim that the summons were served upon the applicants who then willfully decided not to enter appearances to defend as provided for in the High Court Rules.

The first and second respondents rely on a written agreement of sale which was allegedly entered into by the parties. The applicants deny that an agreement was concluded. In the declaration filed under case number HC 456/07 the averment is made that the applicants were represented by the third respondent. There is no averment that the applicants signed the

agreement. In an application of this nature, all an applicant has to show is that he has a defence to the claim. The court cannot at this stage subject that defence to close scrutiny as long as *prima facie* there appears to the court sufficient reason for allowing the defendant to lay before the court the facts he thinks necessary to meet the plaintiff's claim.

In this matter there is no signed agreement between the parties, the agreement having been signed by the purchasers and the estate agent. The applicants deny that they concluded an agreement of the sale of the stand and from the inception of the dispute they have adopted this stance. They have shown a *prima facie* defence and should be given an opportunity to place facts before the court on which their defence is reliant.

Although the first and second respondents have defended these proceedings I do not consider that a punitive order for costs is warranted. An initial mistake was made in sending the summons under cover of a letter. Thereafter summons was served by the Deputy Sheriff which service may have been mistaken as being proper. A punitive order for costs is warranted where a litigant has instituted process of a frivolous nature or is abusing court process. In the instant case I do not find that the conduct of the respondents is so unreasonable in defending the proceedings as to warrant a punitive order for costs.

In the result the applicant is entitled to an order in terms of the draft with costs on an ordinary scale. I will therefore issue an order in the following terms:

IT IS ORDERED THAT:

1. The automatic bar operating against the applicants as a result of their not having entered appearance to defend the summons issued against them in case No HC 2383/08 be and is hereby uplifted.
2. The first and second respondents be and are hereby ordered to arrange service of the summons referred to in para 1 above at their correct addresses or upon their legal practitioners of record.
3. The costs of this application shall be borne by the respondents jointly and severally, the one paying the other being absolved.

Gill, Godlonton & Gerrans, 1st & 2nd applicants' legal practitioners
Chivaura Associates, 1st & 2nd respondents' legal practitioners.