

ELIAS KASEKE
and
WAFAWANAKA KUCHERA
and
SIBUSISO GLORY-ANNE NCUBE
and
THE MASTER OF THE HIGH COURT
versus
MAVIS CHIZENGENI
(In her capacity as Executrix Dative of Estate
Of Late Jessie Zengeya)

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 31 January 2012

Chamber Application

L F Mageza, for the 1st applicant

MAWADZE J: This is a chamber application in which the first applicant seeks an order in the following terms:

“IT IS ORDERED THAT:

1. Case Number HC 5867/10 be and is hereby dismissed for want of prosecution;
and
2. The plaintiff be and is hereby ordered to pay costs of suit.”

There is need to set out the brief facts of the matter which give rise to this chamber application.

Background facts

The first, second, third and fourth applicants herein are the first, second, third and fourth defendants respectively in the main action in which the respondent herein is the plaintiff. This chamber application is made by the first applicant Elias Kaseke only and the second to fourth applicants have not made any application. I shall revert to that aspect later.

In the main action the respondent (plaintiff in the main action) issued summons out of this court on 25 August 2010 claiming the following relief against the first to fourth applicants (the first to fourth defendants in the main action):

“Wherefore the plaintiff claims against the defendants;

- a) An order declaring the sale and transfer of 1458 shares in Kennedine Investments (Pvt) Limited together with attendant rights in property known as Number 22 Kennedine Court, corner 7th and Central Avenue, Harare, from the third defendant to the second defendant and subsequent sale and transfer of same shares and rights from the second defendant to the first defendant held under share certificate number 98 to be null and void, and of no force or effect.
- b) An order setting aside the sale and transfer of 1458 shares in Kennedine Investments (Pvt) Limited under share certificate number 98, together with attendant rights in property known as Number 22 Kennedine Court, corner 7th street and Central Avenue, Harare, from the third to second defendant, and the subsequent sale and transfer of the same shares and rights from the second defendant to the first defendant held under share certificate number 98.
- c) An order for eviction forthwith, of the first defendant and any persons claiming occupation through him from certain premises known as stand number 22 Kennedine court, corner 7th Street and Central Avenue, Harare.
- d) Costs of suit.”

The basis of the claim in the main action is that the respondent (the plaintiff in the main action) was appointed the Executrix dative of the Estate of the Late Jessie Zengeya who died on 22 September 1992 as per Letters of Administration Number 2597/92.

In *casu* the first applicant (the first defendant in main action) resides at Number 25 Armadale Road, Borrowdale, Harare. The second applicant (the second defendant in the main action) is a male adult residing at Number 5 Plymouth Road, Chadcombe Hatfield, Harare, the third applicant (the third defendant in the main action) is a female adult residing at Number 34 Longford Road, Queensdale, Harare and the fourth applicant (the fourth defendant in the main action) is the Master of the High Court cited in his official capacity.

The dispute in this matter involves certain immovable property known as Number 22 Kennedine Court situated at corner 7th Street and Central Avenue, Harare. It is a unit within a

block of flats which block is registered in the name of Kennedine Investments (Pvt) Ltd and is fully known as a certain piece of land situate in the District of Salisbury called No 1137 Salisbury Township measuring 892 square metres and ownership therein being evidenced by the issue of a share certificate in the aforementioned company corresponding to a particular unit in the block. The property in dispute belonged to the late Jessie Zengeya who during her lifetime did not dispose of this property according to the respondent (the plaintiff in the main action) who was later appointed the Executrix dative of the same Estate and also did not dispose of the property (hereinafter known as No 22 Kennedine Court).

On 26 September 2006 the third applicant (the third defendant in the main action) claiming to be the rightful owner of shares and rights pertaining to No 22 Kennedine Court purported to sell the share and rights in question to the second applicant (the second defendant in the main action) as per an agreement of sale Annexure D to the respondent's (the plaintiff in the main action) declaration. The respondent (the plaintiff in the main action) contends that the third applicant (the third defendant in the main action) did not have authority of the Executrix dative (the respondent) of the Estate of the late Jessie Zengeya to dispose of the property hence her purported sale of the shares and rights of the property pertaining to No 22 Kennedine Court was not only unlawful but fraudulent. Further, the respondent contends (the plaintiff in the main action) that the relevant consent from the fourth applicant (the fourth defendant in the main action) the Master of the High Court was not obtained for the disposal of the shares and rights in the property in issue. The point made by the respondent in the main action is that the third applicant (the third defendant in the main action) had no title in the shares and therefore could not pass title to the second applicant (the second defendant in the main action). In fact the first and final administration and distribution account was filed by the respondent (the plaintiff in the main action) in DR 5597/92 on 23 September 1994 indicating that the property No 22 Kennedine Court was still the property of Estate late Jessie Zengeya.

On 15 July 2007 the second applicant (the second defendant in the main action) purported to sell the rights, title and interests in the property No 22 Kennedine Court to the first applicant (the first defendant in the main action) for Zimbabwe dollars \$450 000-00 as per an agreement of sale marked Annexure D to the respondent's (the plaintiff in the main action) declaration. As a result a share certificate (Annexure B) was produced in favour of the first applicant (the first defendant in the main action) purportedly showing that the first applicant had purchased 1458 shares in Kennedine Investments (Pvt) Ltd which shares

correspond to the use and enjoyment of No. 22 Kennedine Court. As already stated the respondent (the plaintiff in the main action) contends these shares belong to the Estate of Late Jessie Zengeya and the third applicant (the third defendant in the main action) could not pass title to the second applicant (the second defendant in the main action) who also consequently could not pass title to the first applicant (the first defendant in the main action). The respondent (the plaintiff in the main action) stated that she only became aware of these illegal transactions involving the first, second and third applicants (the first, second and third defendants in the main action) sometime in July 2010 upon attempting to serve a notice of eviction on the current occupant of the property. This compelled the respondent (the plaintiff in the main action) to issue summons out of this court against all the applicants (the defendants in the main action) on 25 August 2010.

It is common cause as per the record that the second, third and fourth applicants (all the defendants in the main action) did not enter an appearance to defend in terms of the rules and the presumption therefore is that they are all barred. It is only the first applicant (the first defendant in the main action) who entered an appearance to defend on 17 September 2010 after being served with summons on 30 August 2010. It would appear from the record the respondent (the plaintiff in the main action) did not seek any order against the second and third applicants (the defendants in the main action) after their failure to enter any appearance to defend.

The first applicant filed his plea in terms of the rules which was served on the respondent (the plaintiff in the main action) on 27 September 2010. The respondent (the plaintiff in the main action) in turn filed her replication on 11 October 2010. No further action was taken in the main matter/action. This means that from 11 October 2010 until 25 October 2011 a period of about 12 months nothing was done on the main action. This then prompted the first applicant to file this chamber application on 25 October 2011 seeking the dismissal of the respondent's (the plaintiff in the main action) claim in the main action for want of prosecution and costs of suit.

I was allocated the chamber application on 21 November 2011 and I directed the first applicant to file proof of service of the application and to cite the relevant rule/rules of this court upon which the application is premised. The counsel for the first applicant only responded to the issues raised on 20 January 2012 and attached the relevant proof of service. In relation to the issue of the rules of the court relied upon the response filed is as follows:

“We refer to your letter dated 5 December 2011 wherein the honourable Justice MAWADZE wanted clarification and confirmation of two issues viz:

- (a) Cite the rule or rules relied upon; and
- (b) Proof of service of this application.

In terms of Order 32 r 226 all applications for whatever purpose in terms of the High Court rules shall be made;

226(a) ...

- (b) As chamber application, that, is to say, in writing to a judge.

226 (2) An application shall be not be made as a chamber application unless;

(a) ...

- (b) These rules or other enactment so provide or

(c) The relief sought if procedural (omissions mine).

The relief that is being sought is procedural. The plaintiff issued summons out of this honourable court and were served on the applicant on 30 August 2010. The applicant filed a notice of appearance to defend on 17 September 2010. The application was subsequently filed on 24 September 2010. The plaintiff to date only filed a replication and no other pleadings in order to advance action.

In terms of Order 9 r 61, the defendant is given a right to make a chamber application to dismiss the action for want of prosecution.

We respectfully submit that this matter falls within the provision of the rules cited above and we pray for an order dismissing the court action for want of prosecution. The plaintiff won't suffer any prejudice as it can relaunch the court action when it feels like.” (underlining is mine)

I received the above quoted response on 25 January 2012 and in view of the ambiguity with which the counsel for the first applicant had responded to the query raised I directed the first applicant's counsel to approach me in chambers and make further submissions. The counsel for the first applicant was only able to do so on 30 January 2012. The counsel first applicant Ms *Mageza* had no meaningful submissions to make except to insist that her response as filed of record was in order. She conceded that she was only representing the first applicant and was unable to explain why she had cited the second to fourth applicants as the applicants.

Let me now deal with the merits of the chamber application.

This chamber application has been filed by the first applicant only and therefore it is improper and irregular for the counsel for the first applicant to proceed to cite the second to fourth defendants in the main action as the applicants in this matter. The second to fourth defendants in this main action has not filed any application before the court nor any supportive affidavits. As already said the second and third defendants in the main action may

for an intents and purposes be barred for failure to enter an appearance to defend. See Order 7 r 50. It would therefore be incompetent in my view to cite the second to fourth defendants in the main action as applicants in this chamber application which is only made by the first defendant in the main action. The first applicant cannot stampede the second to fourth applicants to be part to the proceedings to which they have not expressed any interest.

I now turn to the response filed by the first applicant's counsel. It is disheartening to note that in many chamber applications filed with the court legal practitioners do not seem to appreciate the need to cite the relevant rules of the court upon which such an application is premised. Such an approach in my view would ensure that the legal practitioner from the onset is conversant with the rules of the court applicable. This would in turn save a lot of time wasted when queries are raised by the court on such mundane issues.

In *casu*, the first applicant's response is that this application is made in terms of Order 9 r 61 which provides as follows:

“Where the plaintiff has been duly barred from declaring or making a claim the defendant may, without notice to the plaintiff, make a chamber application to dismiss the action for want of prosecution, and the judge may order the action to be dismissed with costs or make such other order on such terms as he thinks fit.”

I totally disagree with the first applicant. The plaintiff in the main action has not been barred hence Order 9 r 61 is inapplicable in the circumstances of the case.

The first applicant also makes vague reference to Order 32 r 226. It is common cause that Order 32 of the rules relates to application procedure. The question which arises therefore is whether it is proper in the circumstances of this case for the first applicant to file a chamber application of this nature. Put differently can a defendant in a matter commenced by way of summons seek to have the plaintiff's case dismissed for want of prosecution after closure of pleadings. I am of the firm view that there is no direct provision in the High Court rules which provides for the dismissal of the plaintiff's case for want of prosecutions where pleadings are closed and the plaintiff has not been barred. Indeed the applicant has not been able to cite the relevant rule. In the case of *Anchor Ranching (Pvt) Ltd v Beneficial Enterprises (Pvt) Ltd & Anor* 2008 (2) ZLR 246 H BERE J had to deal with a similar question and had this to say at pp 248H – 249A:

“Does r 236 (3)(b) apply to actions commenced by way of summons?
It will be noted that Order 32 is headed ‘Application Procedure’. A simple reading of the whole of that order shows, in very clear terms that it is exclusively devoted to the

manner and form which applications must take. Order 236 (3) deals specifically with aspects of filing of a notice of opposition, opposing affidavit and answering affidavit. There is no reference to filing of pleadings in this rule. In my view, the legislature was clear in what was intended and it would be stretching it too far to argue that the same provision should cover pleadings. The legislature would have been clear if it so desired. The words used are clear and they require no further stretched interpretation.”

It is clear from the facts of this case that the respondent (the plaintiff in the main action) joined issue with the first applicant (the first defendant in the main action) after filing the replication in terms of Order 19 of the rules. This in essence would mean that the pleadings are closed in terms of Order 16 r 107 (b). It is common cause that the respondent (the plaintiff in the main case) took no action after closure of pleadings. The first applicant in my view should have resorted to the various options available to him in terms of the rules where pleadings are closed. These include the option to seek directions in terms of Order 23 or to compel discovery in terms of Order 24 r 160 or to trigger the curtailment of proceedings in terms of Order 26 by seeking a pre-trial conference. It is competent for the first applicant (the first defendant in the main action) to initiate any of these procedures in order to bring to finality the litigation commenced by the respondent (the plaintiff in the main action) by way of summons).

I am therefore satisfied that the procedure adopted by the first applicant is wrong and that the order sought by way of a chamber application in the circumstances is incompetent.

The application is dismissed with no order as to costs.

J Mambara & Partners, 1st applicant legal practitioners