

THERESA JAIROSI
versus
JEFFRY LUCAS
and
DEPUTY SHERIFF, HARARE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 1 February 2013

G Nyandoro, for the applicant
B Machengete, with him *A Gurira*, for the first respondent

Urgent Chamber Application

ZHOU J: This is an urgent chamber application for stay of execution of a judgment given in favour of the first respondent against the applicant in case number HC3126/11. After hearing submissions from counsel representing the applicant and the first respondent I gave an *ex tempore* judgment dismissing the application with costs. The background to the dispute between the parties is as follows:

The first respondent is the registered owner of an immovable property described in the papers as Stand 4756 Salisbury Township of Salisbury Township lands, also known as number 15 Campbell Road, Braeside, Harare (hereinafter referred to as “the property”). He purchased the property from the applicant’s former husband, one Peter Jairosi. On 8 June 2011 the first respondent obtained an order against the applicant in case number HC3126/11. The order was for ejectment of the applicant and all persons claiming occupation through her from the property. The order was given in default of the applicant. A writ of ejectment was issued pursuant to that judgment. The applicant was ejected from the property in terms of the writ. She made an urgent chamber application as well as an application for rescission of the default judgment given in HC 3126/11. The urgent application, filed under case number HC 6054/11, was granted on 30 June 2011. The order granted was for the applicant’s occupation of the property to be restored pending determination of her court application for rescission of judgment which she had filed as case number HC 6056/11.

The first respondent made a chamber application in terms of the Rules of this Court for the dismissal of the application for rescission of judgment for want of prosecution. The application was filed under case number HC 14050/12. An order dismissing case number HC 6056/11 was granted in chambers on 2 January 2013. That order is extant.

After the dismissal of the application for rescission of judgment the first respondent caused another writ of ejectment to be issued in January 2013. The urgent chamber application in *casu* was instituted in response to that writ of ejectment. The applicant prays that the execution be stayed pending determination of an application which she intends to institute for the reinstatement of her application for rescission of judgment which was dismissed for want of prosecution.

Execution is a process of the court. The court has an inherent power to control its process and procedures. In the exercise of that power the court has a wide discretion to stay or even set aside the execution of a judgment if real and substantial justice so dictates. See *Mupini v Makoni* 1993 (1) ZLR 80(S) at 83B-D; *Muchapondwa v Madake & Ors* 2006 (1) ZLR 196(H) at 199C-E; *Chioza v Independent Property Development (Pvt) Ltd & Anor* HH 76-94 at p.3; *Murimbechi v Townsend* HH 185-90. The discretion of the court must be exercised judicially, bearing in mind the general rule that a party who has obtained an order against another is entitled to execute upon it.

In *casu* the first respondent has a judgment for the ejectment of the applicant from the property. That judgment was given in default of the applicant. Her application for rescission of that default judgment was dismissed as a result of her default in that she failed to prosecute it. No acceptable explanation has been tendered as to why the application for rescission of judgment was not prosecuted. The applicant did not even know at the time that she filed the instant application that her application in case number HC 6056/11 had been dismissed. Given that the applicant was seeking the indulgence of the court one would expect her to be more diligent in the prosecution of her application for rescission of judgment. It is not without significance, too, that the applicant is not contesting the first respondent's title in the property. There are no proceedings pending in which the first respondent's ownership of the property is being challenged.

For the above reasons, I do not believe that the applicant has discharged the *onus* to show that real and substantial justice demands that she be allowed to remain in occupation of the property. Not only is the first respondent the owner of the immovable property; he also has an order of this court which entitles him to take occupation of it.

In the result, the application is dismissed with costs.

Hamunakwadi, Nyandoro & Nyambuya, applicant's legal practitioners
Nyamushaya, Kasuso & Rubaya, first respondent's legal practitioners