

THERESA NDAMBAKUWA
versus
RANGARIRAI MUTAPURI
(In his capacity as the curator
Ad Litem of Ezekiel Mutapuri)

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 20 and 29 July, 2016

Urgent Chamber Application

Z Macharaga, for the applicant
J Dondo, for the respondent

MANGOTA J: On 28 May 2014, Ezekiel Mutapuri (Ezekiel) sold the Remainder of Zuvaranyika Lot 3, Waterfalls, Harare (the property) to the applicant. The applicant attached the parties' agreement of sale to her application. She called it Annexure A.

The *merx* which is mentioned in the annexure is the subject of this application. Ezekiel is the owner of the *merx*. He holds it under title deed number 11505/2000. The *merx* is 8.5 hectares in extent.

On 14 August 2014, the respondent filed an application with this court. He sought to cancel the agreement, Annexure A. He did so in his capacity as Ezekiel's curator *ad litem*. His application was under case number HC 7665/15.

On 9 June 2016, default judgment was entered in the respondent's favour. The judgment cancelled the agreement of sale of 28 May 2014.

The sale having been set aside, the respondent wrote to the occupants of lot 3, Zuvaranyika, Waterfalls, Harare. He advised the occupants ["addressees"] who were nine (9) in number that:

- (i) he was Ezekiel's curator *ad litem*,
- (ii) he was the lawful owner of the property – and

(iii) they were illegally, and without his consent or approval, occupying structures which they erected on the property. He instructed the addressees and all those who claimed occupation, possession or ownership of the property through them to leave the same within five (5) days of their receipt of the letter. He threatened legal action against any addressee who did not leave the property within the stipulated period of time. He said he would evict them through the court. He instructed the addressees to demolish the structures which they constructed on the property at the time of their vacation of the same.

The respondent's letter of 7 July, 2016 triggered the present urgent chamber application. The applicant stated that she subdivided the property which she purchased from Ezekiel and sold stands from the same to the addressees. She contended that the letter which the respondent wrote, if implemented, would cause untold suffering to the addressees and members of their families. She said these would be exposed to the vagaries of the cold weather when they parted with their hard earned money as they purchased the stands from her. She insisted that she was not in willful default when the judgment of 9 June 2016 was entered against her. She gave what may be regarded as a chronology of events which, according to her, led to the default judgment. She said she had since applied for rescission of the default judgment. She remained of the view that her prospects of success in regard to the rescission application which she filed under case number HC 6803/16 were very high. She moved the court to interdict the respondent from interfering with the occupants of Lot 3, Zuvaranyika, Waterfalls, Harare pending the hearing and determination of her application for rescission of judgment.

The respondent fired from all directions in his opposition to the application. He raised many *in limine* matters. He said the interim order which the applicant prayed for was incompetent. He said the order of 9 June 2016 [HC 7665/15] was a declaratur which could not be enforced. He averred that the letters which he wrote to the addressees did not confer any right upon the applicant to interdict anyone. The applicant, he said, did not have any *locus standi* to react to the letters which were not addressed to her; *a fortiori* as she was not a guardian or a curator *ad litem* to the addressees. He contended that the applicant could not bring a class action on behalf of the addressees who, he insisted, had legal capacity to protect their own interests. He stated that the applicant was improperly before the court. He drew the court's attention to case number HC 7911/04 in which Ezekiel was declared a prodigal person who could not conclude

any transaction without the respondent's consent, approval and/or assistance. He stated that the agreement of sale which the applicant concluded with Ezekiel on 28 May, 2014 was a nullity. He insisted that the agreement was unenforceable at law. He moved the court to dismiss the application.

Evidence filed of record showed that the applicant became aware of the letters which the respondent wrote to the addressees on 13 July, 2016. She filed this application on 15 July, 2016. She, without doubt, acted with serious haste to protect the interests of the addressees.

The respondent's statement which was to the effect that the applicant did not have *locus standi* to sue as she did could not hold. She purchased the property from Ezekiel. She subdivided the purchased land into stands which she sold to each of the addressees. She had, therefore, a contractual duty to ensure that those to whom she sold the stands should not be interfered with in their occupation or possession of the stands which they purchased from her. The fact that the purchasers drew her attention to the existence of the respondent's letters says it all. They called upon her to protect their interests in terms of their contract with her. She, therefore, had *locus standi* to file this application as she did.

The default judgment which was entered in the respondent's favour was not as a result of willful default on the part of the applicant. The applicant's unchallenged statement on that matter was that the respondent's application for cancellation of the agreement of sale was served upon her on 28 August 2015. She took it to her legal practitioners who advised her that a notice of opposition would be filed within the time which the rules of court prescribe. She said, for reasons which were not explained to her, the notice of opposition was filed on 1 October 2015 and, therefore, out of time. She said she would, in due course, apply for upliftment of the bar. She said she requested her legal practitioner to file an affidavit explaining the delay in filing the notice of opposition.

According to the applicant, the application was set down for 17 March, 2016. She said on 15 March, 2016 the clerk of the presiding judge wrote advising her legal practitioners that the judge would not be present to hear the application on 17 March, 2016. The application, she said, would be set down for a future date which the parties would be advised of. She stated that, on 16 March 2016, her legal practitioners' renounced agency. They did not, however, advise her of their renunciation of agency. These, she said, erroneously gave stand number 8525 Southlands

Park, Waterfalls, Harare as her last known address. She stated that her correct address was stand number 8726 Southlands Park, Waterfalls, Harare.

It is evident that notice of set down of the application was not served upon the applicant. It was served on stand number 8525 and not on stand number 8726 which was her correct address. The fact that the applicant requested her legal practitioners to file a notice of opposition to the respondent's application to cancel the agreement showed that she always had the intention to oppose such. She must, therefore, have her day in court.

The applicant stated that she did not know that Ezekiel was a prodigal person when she concluded the agreement of sale of the property with him on 18 May, 2014. She said she became aware of that fact when the respondent wrote the letters to the addressees. She conceded that her agreement with Ezekiel would have been null and void if she concluded it without the knowledge and/or, consent of the respondent. She stated that the respondent was the man behind the sale which she concluded with Ezekiel. The respondent, she insisted, assisted Ezekiel in the sale of the property to her. She, in the mentioned regard, drew the court's attention to the affidavit of one Ellen Runyararo Mawire who worked as a principal examiner in the Department of Deeds, which is under the Ministry of Justice, Legal and Parliamentary Affairs. Ms Mawire stated under oath as follows:

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2. I was asked to comment on the status of the deed number 11505/2000 and comment on the removal of caveat number 185/13. The deed is currently registered in the name of Ezekiel Mutapuri. There is a caveat 185/2013 and an XN caveat 118/2014. Caveat 185/13 was once uplifted by caveat 193/2014 but it has since been reinstated as caveat 185/13.
 3. Rangarirai Mutapuri curator to Ezekiel Mutapuri applied for the upliftment of the caveat. He is the one who also applied for the reinstatement of the caveat on 16 June, 2014.
 4. Ezekiel Mutapuri was awarded the property in terms of the will dated 31st December, 1993."

An examination of title deed number 11505/2000 which the applicant attached to her application for rescission of default judgment shows that what Ms Mawire stated in her affidavit was or is on all fours with what appeared on the face of the deed. The applicant stated in her rescission application the contents of which she incorporated into her present application as follows:

“15.7. I realised that Respondent’s actions around the title deed of removing a caveat at a time he (sic) when I was negotiating for a sale was smacking of his desire to defraud me by making sure that:

- (a) When I go to the deeds office to check if there are any encumbrances on the property, I will not see anything.
- (b) When I paid the money he sought to make sure that I will not get transfer of the property by reinstating the caveat after I had paid but before I got transfer of the property.....

15.8. I reported the matter and as it stands right now the police had completed a full docket and Respondent is being charged with fraud.”

The respondent did not challenge the applicant’s abovementioned statement nor Ms Mawire’s affidavit. The statement read together with Ms Mawire’s affidavit showed that the respondent did not only assist Ezekiel to conclude the agreement of sale with the applicant. He also encouraged Ezekiel to enter into the agreement with the applicant. The agreement of the sale of the property is, therefore, valid. The respondent, in the court’s view, assisted the prodigal to conclude the sale for the respondent’s own benefit.

The respondent gave the court the distinct impression that he was a very resourceful person. He duped the applicant to enter into the agreement of sale with Ezekiel. He removed the caveat which was on the title deed of the property to induce the applicant to pay the purchase price for the property. When the price was paid, he reinstated the caveat so that title would not pass to the purchaser. He, as a final assault upon the applicant, applied for cancellation of a valid agreement of sale and proceeded to issue letters threatening the addressees who purchased stands in the property from the applicant with eviction. He demanded, in the alternative, that stand holders who wanted to retain their stands and structures on the same should pay to him instalments of \$150-00 per month. The supporting affidavit of one Godfrey Chivasa is relevant in this regard.

It was such conduct as appeared in Mr Chivasa’s affidavit that the applicant moved the court to put a stop to. The respondent’s actions bordered on nothing short of criminal conduct.

The applicant moved the court to stay execution of the default judgment which falls under case number HC 7665/15. The heading of the application was misplaced. The default judgment falls into the realms of a declaratur which, as the respondent correctly stated, cannot be enforced. What the applicant wants stayed is the respondent’s interference with the stand holders

pending finalisation of her application for rescission of judgment. She satisfied all the requirements of an interdict. She has a right to the property and the respondent threatened that right to her detriment as stand-holders who will be evicted would demand from her that she returns to them the money which they paid to her for the stands on which their structures stand.

Judgment is, accordingly, entered for the applicant as follows:

Interim Relief Granted

It is ordered that:

- (a) Pending the return day, the respondent be and is hereby interdicted from interfering with beneficiaries of stands in the property held under Title Deed Number 11505/00 measuring 8.5 hectares in extent.

Final order sought

- (b) Execution of letters which the respondent wrote on 7 July 2016 to beneficiaries of stands in the property held under Title Deed Number 11505/00 measuring 8.5 hectares be and is hereby stayed pending the hearing and finalisation of the application for rescission of judgment under case number HC 6803/16.

The respondent pays costs of the application.

Mugiya & Macharaga Law Chambers, applicants' legal practitioners
Dondo & Partners, respondent's legal practitioners