MATILDA VAMBE
versus
PARADZAI VAMBE
and
DIRECTOR OF HOUSING AND COMMUNITY
SERVICES MUNICIPALITY OF HARARE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 4 December, 2015 & 28 June 2017

Opposed Court Application

F M Katsande for the applicant
T Machaka for the 1st respondent
No appearance for the 2nd respondent

CHITAPI J – There has been an ordinate delay in the preparation and handing down of judgment which l reserved on 4 December, 2015. The delay was occasioned by my re-assignment to the Criminal Division. The delay is regretted.

The applicant in this application filed on 20 March, 2015 prays for an order as set out in her draft order in the following terms:

It is ordered that:

1. Within 10 (ten) working days of the payment to him US$3 000.00 the first respondent shall attend at the offices of the second respondent and sign such documents necessary to cede the right, title and interest in stand 2489, 31st Crescent Glen View 1 Harare in favour of the applicant.
2. Failing compliance, the Sheriff or his lawful deputy be and is hereby directed to sign such documents.
3. The second respondent shall process such cession.
4. The first respondent shall pay the costs of this application.

The first respondent opposed the application. The second respondent did not file any opposing papers despite its having been served with the court application.

The application concerns a dispute between the applicant and her son who is the first respondent, over rights of ownership to a property called house no. 2489 – 31st Crescent, Glen View 1. The dispute has degenerated into a family feud. Mother and son are fighting over who should be declared the owner of the property. The applicant, first respondent and four children who are siblings of the first respondent convened a meeting to try and resolve the dispute. A son in law of the applicant also attended the family meeting. The meeting failed to resolve the dispute. Faced with the impasse, the dispute has spilled to the courts for resolution.

The first respondent in his opposing affidavit raised a point *in limine*. He argues that there are material disputes of fact which cannot be resolved on the papers. He points out to the paucity of evidence presented by the applicant and avers that the court cannot reasonably be expected to resolve the dispute outside of action procedure in which parties can lead evidence, produce documents of ownership and development of the property and speak to the documents. The first respondent in her answering affidavit averred that there were no material disputes which the court could not robustly resolve on the papers.

In amplification of her position that there were no material disputes of fact warranting a trial, the applicant listed a number of facts tending to show that there were no material factual disputes. Some of the pointers were that it was not disputed that she effected improvements on the property, that the first respondent did not reside on the property nor enjoy what she called the "universal owner's right of use, occupation and enjoyment of improvements, that she collected rentals from the tenants on the property, that the first respondent did not have building plans for the property and did not know the name of the inspector(s) who approved the stage building progress." I observe that the listed pointers were bald allegations.

In order to be able to properly determine whether or not the court can resolve the dispute on the papers even upon adoption of a robust approach, it is necessary to set out a summary of the applicant and first respondent's averments as contained in their founding, opposing and answering affidavits.

Applicant's case is that she is an octo-negenasian born in the 1930s. She used to be married to her husband one Zindikilani Vambe, an alien who deserted her after siring 8 children

with her, the eldest of whom is deceased. The first respondent is one of two sons of the relationship. The husband deserted the family before the country's independence, that is, before 1980. The applicant went to school up to standard 6. She was left to fend for the children and saw to their needs, including sending them to school and paying for their education.

The applicant averred that she acquired stand 2489 -31st Crescent as a vacant piece of land measuring 200 square metres. As regards the time of acquisition, she said that it was during the Muzorewa era when "the Muzorewa administration set aside undeveloped pieces of land in Glen View for distribution to home seekers." The court will take judicial notice that prior to 1980 when the country attained independence, there was a time that politicians like Abel Muzorewa participated in the governance of the country, then under the Smith regime, so called. What is critical to note is not so much how the Muzorewa administration or Smith regime governed the country but that the applicant's assertion is that she acquired the property or vacant piece of land prior to 1980.

The applicant averred that at the time that she acquired the vacant piece of land, women were considered minors and could not own property. It was for this handicap that she chose the first respondent to act as her front. This, according to the applicant is how the first respondent came into the picture *vis-à-vis* the property. The applicant averred that she then selected from amongst her two sons the first respondent who was then registered as "the holder of the right, title and interest in stand 2489-31st crescent, Glen View." The applicant deposed that she engaged a bricklayer who constructed a 7 roomed brick under tile house comprising 5 bedrooms, a kitchen and lounge. She also constructed an external toilet with shower. She has been paying rates and other charges levied on the property over the years. She values the improvements which she made on the property at US$35 000.00.

When the applicant constructed the property, her aim was to cater for the whole of her family. She envisaged that even after the children had grown up and had their own families, misfortunes could befall anyone of her off spring thus creating a need for such person to be helped and accommodated. As fate would have it, one of her daughters called Florence experienced a failed marriage. Florence and her children took occupation of the house. Florence also looks after the applicant's grandchildren being children of the applicant's deceased daughter called Georgina.

Sometime in 2014, she rumourly gathered that the first respondent was claiming exclusive rights of ownership over the property. He was further said to be bragging that he could do as he wished with the property including disposing of it. The rumours placed the applicant in panic mode. On 13 October 2014, the applicant deposed that she called a family meeting whereat the first respondent was supposed to confirm or deny the rumours. Applicant avers that the first respondent was ducking and diving. The first respondent's attitude made the applicant apprehensive that the first respondent intended to clandestinely deal in the property or even sell it and in the process leave the applicant destitute. The applicant considered that a recompense of US$3000.00 representing the "current market value of the land alone" paid to the first applicant against the first respondent signing a cession of his registered rights to the applicant would constitute a way out of the problem. In the alternative, the applicant proposed that the first respondent compensates the applicant a sum of US$32 000.00 for the improvements. In short the above summarizes the applicant's case and suggested compromise solution to resolve the matter.

On his part, the first respondent vehemently denied the applicants assertions. In his opposing affidavit, he averred that contrary to the applicant's deposition that women could not own fixed property pre independence, the applicant in fact acquired and still owns a residential property called stand 5711 New Canaan Highfield in the 1960s.

As regards the property in dispute in this application, the first respondent averred that he purchased it in 1979 through a scheme run by his employer then. His employer was Futton & Evans (Pvt) Ltd. He stated that he worked for this company between 1970 and 1981. He also worked for George Templeton Industries (GDI) and Edgars Stores.

He retired in 2010. During his period of employment he also worked part time as a session guitarist for the late musician James Chimombe. His employment aforesaid provided the source of funds which he used to purchase and develop the stand.

The first respondent attached as annexure 'A' to his opposing affidavit, copy of the sale agreement for the purchase of the property. Annexure 'A' aforesaid shows the seller as Municipality of Salisbury. The Purchaser is the first respondent. The property is described as "a certain piece of land, shown on the plan annexed hereto, situate in the township of Glen View in the district of Salisbury and being Stand No 2489 therein, together with a permanent ablution block comprising N.C. shower and tap (the whole hereinafter called 'the stand')'. The purchase

price was fixed at $582.00 payable by way of a deposit of $30.00 and thereafter monthly instalments of $4.65 to include interest and other administrative charges. The agreement was to enure for thirty years from 1 June 1979 to 31 May 2009. The purchaser and seller signed the agreement on 29 and 30 May 1979. There is therefore no dispute that the first respondent is the person who executed the written sale agreement for the property in issue in his name with the Municipality.

In addition to Annexure 'A' the first respondent attached correspondence between the seller and him. The correspondence consisted in Annexure 'B' being a letter from the Director of Community Services advising the first respondent that he was in breach of the sale agreement on account of his failure to build at least one room on the stand by May 1982. The letter put the first respondent on terms to furnish the Director aforesaid with his building programme within 14 days of 14 January, 1985 which was the date of the letter. The first respondent attached as Annexure 'C' to his opposing affidavit, a copy of a letter dated 21 January, 1985 which he wrote in response to Annexure 'B'. The response was received by the Director of Housing as evidenced by his date stamp franked thereon, on 23 January, 1983. In the response aforesaid, the first respondent stated that he had been out of employment but had now found new employment. He also stated that he had now engaged a builder and the building plans were underway.

The first respondent further attached copy of a loan agreement between him and Municipality of Harare dated 16 July, 1985 as Annexure 'D'. In terms of the agreement, the Municipality advanced a sum of $1000-00 to the first respondent for purposes of constructing a house on the disputed stand. The loan was repayable by the first respondent in instalments of $9.21 or more per month until fully discharged.

In her answering affidavit, the applicant stated that the first respondent never resided on the property and had no building plans. She also averred that the first respondent never collected rentals from tenants and did not even know the name of the inspector(s) who approved stage building progress. The applicant averred further that she only got the right of occupation of the Highfield property alluded to by the first applicant by virtue of her marriage to the first respondent's father and not in her own right.

The applicant sought to correct an anomaly between the first respondent's assertion that he obtained a loan, (see Annexure A) from his employer, yet it was advanced by the seller,

Municipality of Harare. I do not think that much turns on the anomaly for the simple reason that the first respondent is listed as the debtor and no explanation has been proferred by the applicant as to why the court should not hold the first respondent to be the legal debtor in the house construction loan agreement. The applicant has not provided any evidence that she is the one who repaid the loan.

The applicant deposed that she engaged the services of Jameson Mupanganyama as builder. She stated that she bought building materials. Again her assertions were bald allegations. She took exception to the first respondent's insinuation that she was the subject of manipulation by her daughters (first applicant's sisters) due her old age. She averred that the first respondent had no source of income to pay her for the improvements and that she had offered him one room to use at the property.

I must express surprise at how the applicant's counsel could ever have believed that the nature of the dispute could be resolved on paper without evidence being led. The nature of the dispute and its resolution by a court cries for *viva voce* evidence. To begin with the applicant simply sought to rely on bald allegations to rights of ownership to the property. She did not attach any documentary evidence of any sort to connect her to either the acquisition of the stand nor its development. On the contrary it was the first respondent who attached documents connecting him to the property in the form of official the sale agreement and loan records in the first respondent's name. There was no evidence placed before the court as to the alleged acquisition of building materials by the applicant and no explanation as to why such records of purchase of materials are not to hand was provided. In short, there are no contra documents which would provide extrinsic evidence that the first respondent was simply a front or *alter ego* of the applicant.

The applicant tried to introduce a supporting affidavit by Jameson Mupanganyama who purports to have effected improvements on "stand 3439 Glen View 1". Suffice that the stand in dispute is not stand 3439 but stand 2489 Glen View 1. The affidavit is therefore not helpful as it refers to another property different from the one in issue in this case. In any event the same was filed without the leave of the court or a judge as required by order 22 r 235. The supporting affidavit was filed on 27 November, 2015 well after the filing of the answering affidavit on 22 June, 2015 and heads of argument by both the applicant on 1 September, 2015 and the first

respondent on 28 September, 2015. Rule 235 is permissive of the filing of additional affidavits by either party to application proceedings subject the party intending to file a further affidavit to first obtaining the leave of the court or a judge. Such leave was not sought prior to the hearing. At the hearing, the first respondent opposed the filing of the additional affidavit by the applicant.

The right to file additional affidavits as already indicated is conditional upon leave being sought and granted. The court has a discretion in the interests of justice to allow or disallow the filing of additional affidavits in terms of r 235. See *ZCFU* v *Gambara* HH 375/15.

Additional affidavits should generally speaking not be allowed to be filed after the filling of the answering affidavit in order to supplement an applicant's case or respondent's defence or to introduce new matter. An applicant stands on his or her founding affidavit so that even if the court was to allow a further affidavit to be filed, it should not change the foundation of the case or defence as the case may be. An applicant who proceeds on application procedure and sets out a skeleton case not supported by evidence should not be allowed a second bite of the cherry to build his or her case. Additional affidavits should as a rule of practice be allowed to be filed to deal with a matter which has taken the party seeking to file an additional affidavit by surprise, it being a matter which such party would not have anticipated to be raised by the other party or was not known at the time of drawing up the affidavit(s) supporting the applicants case or respondents defence. See *Bayat* v *Hansa* 1955 (3) SA 547 (N) at 553 C-E.

In this application, I have already indicated that the affidavit was filed after heads of argument had been filed by the applicant. The applicants' counsel used a leverage of indirectly coercing the respondents' counsel into agreeing to the filing of the applicant's supplementary affidavit. The leverage was to raise the issue of the respondent being barred for filing heads of argument out of time. The respondent consented to the filing of the supplementary affidavit by the applicant as a *quid pro quo* or tradeoff for getting the applicants' consent to upliftment of bar. In the interests of justice and exercising my discretion under r 4C of the High Court Rules to condone a departure from compliance with the rules I uplifted the bar operating against the respondent and also admitted the applicants' supplementary affidavit. The discretion/exercised must be limited to this case and it should not be assumed that in every case where there has been non-compliance with the rules, the court should be expected to condone such non-compliance.

I have already indicated that the supplementary affidavit is not helpful; not leastwise because it refers to a different property but because it is so generalized as to be of no probative value. The deponent does not recall; the exact details of who paid him for the work and how much. All that he purports to remember is that he was dealing the applicant. There are no documents of quantities, plans or other tangible piece of evidence to back up the deponent's testimony.

The respondent raised the point that the applicant should have realized before filing the application that factual material disputes of fact not capable of resolution on paper would arise. The applicants' counsel argued that the disputes were fanciful and that the court could take a robust approach and determine the matter. I do not agree that this is a case where a court can take a robust approach. The affidavits and supporting documents of the applicant consist in a claim to a property registered in the name of the respondent. The authenticity of the documents is not disputed. The applicant however seeks to argue that the respondent was only her *alter ego* or a front. How a court could be persuaded to impugn written documents evidencing the respondents personal rights to a property on the mere say so of the applicant defies logic. I cannot envisage of a better case crying for proof by oral evidence than the present one. The facts averred by the applicant in her founding affidavit hardly establish her purported rights to the property on a balance of probabilities. I agree with the submission by counsel for the respondent that the applicant has not only failed to establish on a balance of probabilities, how she must be held to be the one who acquired the property, but she has failed to prove that she is the one who effected improvements on the property. It is trite that he who avers must prove see *Villon Family Trust* v *Kirby* (2012) ZAWCHC 45; *Matambanadzo* v *Zvavamwe* (2002) ZWSC 99. The respondent in the absence of prima facie raised against him has no onus or duty to prove anything. Documents pertaining to registration of his personal rights and interest in the property were attached by him to the opposing affidavit. The applicant seeks that these rights be transferred or ceded to her. She must establish a basis for her claim. She has failed to do so.

This is not a matter on which I would be inclined to refer it to trial or to allow for the calling of oral evidence. Calling of oral evidence would be a justiciable option where specific facts placed before the court on the affidavits needs to be clarified. The referral to trial route should not be employed to allow a party to introduce new evidence to build a case, which is not

properly founded on the founding affidavits or defence as the case may be. In any event Mr *Katsande* for the applicant did not suggest such a route. He was content to argue that the applicant had sufficiently established a case for the relief she was seeking. Clearly, the applicant failed to do so.

In the circumstances, my judgment is that the application be and is hereby dismissed with costs.

F.M. Katsande & Partners, applicant's legal practitioners
Pundu & Company, 1st respondent's legal practitioners