LOVENESS ACXILLIA GANDA
versus
CLAUDIUS MASUKU
and
IGNATIUS PAMIRE
and
STANLEY MTETWA
and
THE SHERIFF N.O

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 15 May 2018 & 4 October 2018

Urgent Chamber Application

C Damiso, for the applicant
F. M Katsande, for the 1st respondent
L Uriri, for 2nd respondent
T.S Chinopfukutwa, for the 3rd respondent

MANZUNZU J: The applicant filed an application on urgency against the four respondents under the heading "Urgent Chamber Application for stay of execution pending determination of applicant's compensation for improvements on the property forming the subject matter of the dispute between the parties and her Supreme Court application for condonation of late filing of appeal and extension of time within which to appeal."

All the parties were legally represented save the Sheriff who was sued in his official capacity and ordinarily will abide by the decision of the court as a neutral party.

The application was heavily contested on the issue of urgency and after hearing counsels on this issue I delivered an *ex-tempore* ruling and made the following order;

"IT IS ORDERED THAT:

1. The matter is not urgent
2. The matter is struck off the roll with costs on the ordinary side."

This means the application remained on the roll for ordinary applications. This was on 15 May 2018. On 23 May 2018 the applicant requested for written reasons on the ruling. These are they:

The applicant sought a provisional order in the following terms:

"TERMS OF FINAL ORDER SOUGHT

A. That you show cause why a final order should not be made in the following terms:
   1. That the eviction of the applicant and all those claiming occupation through her of the property known as 7 Doves Crescent, Vainona, Harare pursuant to judgment HH 192/18 be and is hereby stayed pending resolution of the applicant's matter in SC 384/18.
   2. That the eviction mentioned in para 2 above is further stay pending resolution by the court of the issue of the applicant's improvement lien on the property in question.
   3. First respondent to pay costs of suit on an attorney and client scale.

INTERIM RELIEF SOUGHT

B. Pending confirmation or discharge of this provisional order, the applicant is granted the following interim relief;

   4. The fourth respondent, or his lawful deputy, be and is hereby ordered not to remove applicant, her chattels and all those claiming occupation through her from the property know as 7 Doves Crescent, Vainona, Harare."

The background to this application according to the applicant's founding affidavit is that applicant bought from the third respondent a property known as stand 14040 Salisbury Township also known as No 7 Doves Crescent, Vainona, Harare (hereafter referred as "the property").

This was in May 2014. She took occupation of the property in November 2014. Unbeknown to the applicant this same property was sold to the first respondent in 2003. Prior to

the sale of the property to first respondent by second respondent, the same property had initially been sold to third respondent in 1997.

This former agreement of sale to the third respondent was cancelled in 2000 by consent of the parties.

However, under unclear circumstances, but through court process the third respondent had taken title of the property after confirmation of a provisional order by default.

The third respondent had immediately after taking title of the property from first respondent, sold it to the applicant and within 2 months transferred title to the applicant.

In case No. HC 3716/16 the first respondent successfully challenged the agreement of sale between the applicant and third respondent leading to the change of title to first respondent. In case No. HC 3716/16 the applicant was cited as a party. In a detailed judgment MANGOTA J, although he found the applicant to be an innocent purchaser, castigated the third respondent for what he referred to as his "unwholesome conduct."

Despite the unfortunate situation in which the applicant finds herself in the issue was whether the application should be treated as urgent.

The requirements of urgency are well known. Counsels referred to a plethora of authorities on this issue. While previous decisions give guidelines each matter must be decided on its own merits. I refer with approval what CHATIKOBO J, as he then was, said in the *Kuvarega* v *Registrar General & Anor* 1998 (10 ZLR 188 at 193 case. He had this to say:

> "There is an allied problem of practitioners who are in the habit of certifying that a case is urgent when it is not one of urgency… What constitutes urgency is not only imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arrives, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay."

The judgment in HC 3716/16 which gave rights of ownership to the property to the first respondent was on 3 April 2018. The applicant failed to file her appeal against the judgment on time hence the filing of an application with the Supreme Court for condonation of late noting of appeal on 8 May 2018. In that judgment MANGOTA J at p 7 remarked:

> "She (applicant) cannot continue to cling onto the property. It is not hers. It belongs to the

> applicant (first respondent). She (applicant) was defrauded of her hard-earned money by a deceitful person. She had, therefore, to let go the property to its lawful owner."

The same judgment at p 6 had this to say;

> "It goes without saying, therefore, that the third respondent (applicant) has every right to claim from the second respondent (now third respondent) all the money which she spent following his deceitfulness. She (applicant) is at liberty to claim from him (third respondent) the purchase price for the property and all the improvements she made on the same."

After judgment in HC 3716/16 was delivered on 3 April 2018 the applicant did nothing. She only started to act after she was served with a notice of eviction on 8 May 2018. It was on that same day that she filed an application for condonation with the Supreme Court and later filed the present application on 10 May 2018. She now seeks to stay the eviction on an urgent basis pending determination of her application for condonation and a matter yet to be filed for improvement lien. Ms *Damiso* who argued the matter for the applicant said the need to act arose on 8 May 2018 when she was served with a notice for eviction. I disagree, this was the day of reckoning.

It was inevitable that her continued stay in the property would be visited with eviction. The need to act arose when judgment was passed in favour of first respondent on 3 April 2018. The applicant even failed to file her appeal on time which would have suspended the operation of the judgment.

I am not even convinced, despite the absence of urgency, that applicant would suffer any irreparable harm. In any event irreparable harm alone is no measure for urgency.

The applicant failed to discharge the onus upon her to prove urgency. For these reasons, I ordered that the matter was not urgent and struck the matter off the roll of urgent matters.

Although costs were prayed for on a higher scale by the respondents, I did not find the circumstances warranting such a punitive order so I allowed costs on the ordinary scale.

Gill, Godlonton, Gerrans, applicant's legal practitioners
F.M Katsande & Partners, 1st respondent's legal practitioners
Muronda Malinga Legal Practice, 2nd respondent's legal practitioners
Kadzere Hungwe & Mandewere, 3rd respondent's legal practitioners