MARGARET RUGARE TICHAREVA
versus
LEWIS CHIROZVANI
and
MINISTRY OF LOCAL GOVERNMENT
PUBLIC WORKS & NATIONAL HOUSING
and
INNOCENT GEORGE MUTSETSEMA
and
REGISTRAR OF DEEDS HARARE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 12 September 2020 & 31 March 2021

Opposed Court Application

N Mahenga, for the applicant
A.K Maguchu, for the 1st respondent
No appearance, for the 2nd respondent
No appearance, for the 3rd respondent
No appearance, for the 4th respondent

FOROMA J: The applicant considers that the judgment of the High Court by DUBE J in HC 4734/17 was granted as a result of a common mistake of both herself and first respondent in that it was argued and determined as an opposed application when it ought to have been dealt with and determined as a trial cause. For this reason, applicant applied for the rescission of the said judgment in terms of Order 49 r 449 subrule (1) (b). Applicant cited first respondent as well as second, third and fourth respondents. Only the first respondent opposed the application. Second, third and fourth respondents did not oppose the application. It must be assumed that they were content to abide the order of the court. The second respondent was the owner of the house in

dispute between applicant and first respondent which second respondent sold to first respondent. Third respondent was the purchaser of the house in dispute sold to him by the first respondent.

The back ground to this matter is given below. Applicant initially filed a court application under HC 4734/07 in terms of which she sought cancellation of an agreement of sale purportedly entered into between her spouse (the first respondent) and the third respondent for the sale of House No. 5560 Kuwadzana 7 Harare without her consent. The said application was opposed by first respondent assisted by Dube Manikai and Hwacha (Mr *Maguchu*). The matter was referred to OMERJEE J (as he then was) to handle it as an opposed application. In opposing the application respondent raised a number of factual disputes which he argued were not capable of resolution on the papers. On the date of hearing of the opposed application OMERJEE J who accepted that there were indeed a number of material factual disputes referred the matter to trial on the papers filed by the parties and directed that the parties proceed to convene a pre-trail conference as the next step towards preparing the matter for trial. Before a pre-trial conference was convened before OMERJEE J a number of abortive round table conferences had been held by the parties.

On 18 September 2008 a pre-trial conference held before ONERJEE J resolved that

1. the matter would be referred to trial after the parties failed to settle the matter at the pre-trial conference
2. parties were ordered to effect full discovery
3. plaintiff was to call 5 witnesses and defendant to call 4 witnesses at the trial
4. a joint pre-trial conference memorandum to be filed
5. it was estimated that the trial would occupy 3 days

Sometime after the pre-trial conference the parties expressed a desire to settle the matter with first respondent offering to pay applicant 50% of the purchase price of the property in dispute. The matter was not resolved and took another 9 years before it finally came before DUBE J for determination as an opposed application. The matter was set down before DUBE J as an opposed application and DUBE J handed down a judgment HH 134/18 in terms of which applicant's main application was dismissed with no order as to costs among other orders made.

After DUBE J handed her judgment applicant consulted and was advised that DUBE J's judgment was made in error and that she needed to seek its rescission in terms of Order 49 r 449 (1) (b) of the High Court Rules.

The reason why it was considered that the judgment had been granted in error was pleaded as follows – that once OMERJEE J had referred the opposed application to trial and a pre-trial conference had been held at which the matter was referred to trial after the parties' failure to settle the matter at the pre-trial conference it was no longer competent for the matter to be referred to the opposed roll for determination as an opposed application.

Applicant accordingly proceeded to file the current application in terms of which she sought to have DUBE J's judgment aforesaid rescinded in terms of Order 49 r 449 as aforesaid.

First respondent opposed the application arguing that the matter did not fall for determination in terms of r 449 (1) (b). Before proceeding to address the merits of the application it is necessary to briefly give a background as to how the matter which had been referred to trial found its way back on the opposed roll. Briefly this is how that came about. About 9 years after the PTC and after first respondent could not get the matter settled out of court first respondent instructed its legal practitioners to take steps to expedite finalization of the matter. As a result, Mr *Maguchu* who appeared to have unsuccessfully applied for allocation of trial dates because the court record did not seem to contain OMERJEE J's notes referring the matter to trial addressed the Registrar of the High Court to whom he gave the background of the matter being referred to trial by OMERJEE J and enquired as to whether the matter could be referred to trial or alternatively whether the opposed application had to be provided a new hearing date.

As a result of this enquiry the Registrar determined that the matter had to proceed as an opposed application which the Registrar referred to the Judge President for allocation to a judge to handle the opposed application. The Judge President allocated the matter to DUBE J who proceeded to set the matter down and heard it and finalized it as an opposed application.

Mr *Maguchu* who has been the first defendant's legal representative from inception of the dispute represented the first respondent at the hearing of the current application. He vehemently argued that Order 49 r 449 cannot be used to seek a rescission of the judgment of DUBE J as there was no common mistake that affected the judgment. He argued further that it was not the parties' error that the matter (opposed application) was heard before DUBE J as an opposed application. The application had properly been set down after the registrar had determined that the matter be dealt with as an opposed application. While conceding that the Registrar ought not have directed that the matter proceeds as an opposed application, Mr *Maguchu* did not accept to take or share in the

responsibility for the Registrar's error of determining that the matter proceed as an opposed application. He submitted forcefully that when the first respondent appeared before DUBE J to argue the opposed application he was under no illusions as he was arguing a matter properly set down by the Registrar the official with the administrative responsibility for setting down cases brought before the courts. He also argued that the applicant had proceeded under the wrong rule as it did to categorise the sub-rule under which the application for rescission had been made.

It is common cause that at the hearing before Dube J both parties were in attendance with applicant appearing in person and first respondent duly represented by Mr *Maguchu*. Both parties made their respective submissions. It is surprising that the argument that there existed such material disputes of fact as could not be resolved on the papers appears not to have been canvassed by the first respondent's counsel before DUBE J. It is not easy to understand how Mr *Maguchu* allowed the matter to proceed as an opposed application without resolving the material dispute of fact an argument raised by and before OMERJEE J. As a result of an exchange between the first respondent's counsel and the court during the hearing was stablished as common cause that none of the parties had addressed DUBE J on the background of the matter (namely the determination by OMERJEE J that the matter be referred to trial as the material dispute of facts could not be resolved on the papers.)

The applicant's case was clear and straight forward. Ms *Manhenga* who appeared on behalf of the applicant submitted before me that by appearing before DUBE J to argue the matter as an opposed application against the background that the matter had been referred to trial twice by OMERJEE J (i.e. at the initial hearing of the opposed application and at the pre-trial conference (after the parties had failed to settle the matter) the parties had laboured under a common mistake. The result of the parties' common mistake was the judgment of DUBE J which was susceptible to rescission in terms of Order 49 r 449 1 (c) and not r 449 1 (b) as pleaded. I find the analysis of the factual position and legal argument to be eminently convincing and I fully agree with it. The first respondent's submission that it was the error of the Registrar in directing that the matter be set down as an opposed application clearly failed to take into account that the route which the matter had to take to final determination had lawfully and competently and definitively been decided by OMERJEE J. I find it somewhat inexcusable that Mr *Maguchu* chose to rely on the erroneous decision of the Registrar directing that the matter proceed as an opposed application (as if to review

OMERJEE J's decision) as an excuse for the error of commission on his part namely not resisting the registrar's administrative error (directing that the matter proceed as an opposed matter.)

There can be no excuse for the parties perpetuating the Registrar's error which perpetuation of error the parties ended up adopting as the parties' common mistake. The court is satisfied that applicant has successfully demonstrated that the judgment of DUBE J ought to be rescinded as it was granted as a result of a mistake common to the parties. I accordingly grant the application in terms of the draft order as amended in para one by deletion of r 449 (1) (b) and substitution of r 449 1 (c).

Takawira Law Chambers, applicant's legal practitioners
Dube, Manikai & Hwacha, 1st respondent's legal practitioners