ESTHER MWANYISA
versus
ENETI JUMBO
and
ISABEL SAMURIWO
and
MTIKUMBURA MOFFAT
and
THE DIRECTOR OF HOUSING AND COMMUNITY SERVICES
CITY OF HARARE
and
THE MASTER OF THE HIGH COURT
and
THE DEPUTY SHERIFF.

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 8 and 13 October 2009 and 13 January 2010.

OPPOSED APPLICATION

B Machengete for applicant.
J Mambara for 1st and 2nd respondents.
3rd, 4th, 5th and 6th respondents in default.

MAKARAU JP: Judges are public servants and as such they are not to complain about what lands on their plates. They must do justice always no matter the state of the case that is placed before them. I must however confess that the above matter is a dog's breakfast. The parties have been to this court on at least five occasions and may have appeared before the magistrate courts once or twice before. The dispute between them has not been put to rest up to now and I now have to unravel the orders and counter-orders that this court has given on the issue over the years. A lot of red herrings have crept into the case due to the time the matter has taken to be resolved and also due to the manner in which the parties have prosecuted their respective claims to date. Allegations of improper behavior have been traded as between the parties and some conduct by the parties remains unexplained and unexplainable. I have

however taken a robust stance to resolve this matter once and for all and to do justice as between the parties.

The whole matter started when one Moffat Phiri, originally from Malawi, passed away in Harare on 17 September 1996. He died intestate. In his estate was a piece of land, commonly known as number 22 Hunyani Road, Mabvuku, (the property), which he was purchasing under a suspensive deed of sale from the City of Harare. Moffat Phiri was at the time married to the first respondent. The couple had three children whose names and ages, if given in the papers, I cannot now establish.

It would appear that after the death of Moffat Phiri, the first respondent and her children were evicted from the property by one Lekinala Moffat, a brother to the Late Moffat Phiri. Lekinala Moffat was in due course appointed heir to the estate of the late Moffat Phiri and had the property transferred into his name.

In February 2002, Lekinala Phiri also passed away and on 3 May 2002, the third respondent, who had traveled from Malawi for the purpose, was issued with Letters of Administration by the Master of this Court to wind up the estate of the late Lekinala Moffat. At this time, the immovable property was now registered in the name of Lekinala Moffat. The third respondent was also authorised to transfer the property into her name.

Following the issuance of the Letters of Administration to her, the third respondent sold the property to the applicant on 30 May 2002. The purchase price was paid in full and the rights in the property were transferred to the applicant on 31 May 2002. This date is however disputed by the first respondent.

The first respondent did not contest her eviction from the property in 1996. It was only after the death of Lekinala Moffat in 2002 that she made her moves.

On 4 June 2002, she approached the office of the Provincial Magistrate who wrote to the fifth respondent, advising him that there was a dispute concerning the immovable property in the estate of the late Lekinala Moffat. The Provincial Magistrate directed the fifth respondent not to effect any transfer of rights in the property until the dispute had been resolved. He undertook to advise the fifth respondent of the fact of the resolution of the dispute.

Perhaps not having much faith in the efficacy of the letter, the first respondent then approached this court on 17 June 2002 under a certificate of urgency, citing the third, fourth

and fifth respondents, in a chamber application wherein she alleged that she was the surviving spouse to the late Moffat Phiri and objected to the appointment of the third respondent as executrix dative in the estate of the late Lekinala Moffat and the transfer of the property into the third respondent's name.

The application did not cite the applicant who by then had purchased the property from the third respondent and was in the process of receiving cession of rights in the property or had already received cession of rights in the property.

The application was granted and a provisional order was issued on 17 July 2002, declaring the immovable property as forming a part of the estate of the late Moffat Phiri and not that of the late Lekinala Moffat. Cession of rights in the property in favour of the third respondent was set aside and the fourth respondent was directed to register the first respondent as the holder of rights in the property. The order also evicted the third respondent and all those occupying through her. I shall refer to this application as the main matter as it was the first court action between the parties to the dispute relating to the property.

In my view, the first legal error occurred with the granting of this provisional order. I shall return to this in detail.

On 21 August, 2002, the applicant caused her legal practitioners to address a letter to the office of the Provincial Magistrate, advising him that the dispute between the parties had now been resolved. This was clearly a misrepresentation calculated to make the Provincial Magistrate act to facilitate the transfer of rights in the property to the applicant.

It is also not clear why the letter was regarded necessary as by that date, cession of rights in the property was allegedly now registered in the name of the applicant. This may give some credence to the first respondent's assertion that cession of rights in favour of the applicant was effected well after the date appearing on the cession forms which were backdated to frustrate the first respondent's claims. While this is ex facie a dispute of fact, I have considered it to be non –material and that it should not deter me from disposing of this matter on some other basis.

The applicant, not being a party to the application, did not oppose confirmation of the provisional order issued in favour of the first respondent and this was duly done on 21 August 2002.

A belated attempt was made by one Blackson Chimutondo, to oppose the confirmation of the provisional order. He filed his notice of opposition and opposing affidavits on 4 November 2002, well after the provisional order had been confirmed. His *locus standi* to do so remains a mystery. His position was never debated before court as the court was functus offico when he filed his affidavit.

On 11 November 2002, the applicant caused her legal practitioners to write to the first applicant's legal practitioners highlighting that the provisional order obtained in July 2002 was a *brutum fulmen* as rights in the property had already been transferred to her. There was no response to this letter.

In January 2003, the first respondent attempted to evict the applicant from the property using the order that she had obtained from this court in June 2002 and which had been confirmed in August 2002. The applicant successfully resisted eviction, arguing that she was not occupying through anyone but in her individual right as the registered tenant in respect of the property. In the provisional order issued in her favour, the operation of the order in favour of the first respondent was stayed pending the filing and determination of an application for joinder by the applicant in the main matter in which the eviction order had been obtained and an application to have that order set aside. When she applied for joinder under case no HC 1131/03, her bid to be joined in the main matter was dismissed. The provisional order in her favour prohibiting the first respondent from evicting her from the property also fell away.

The first respondent tried once again to evict the applicant from the property using the order in the main matter. The applicant in turn approached this court under a certificate of urgency and her bid to stay the eviction was unsuccessful. The applicant then wrote to the deputy sheriff pointing out that the writ of eviction was not operational against her as she did not occupy the property through the third respondent. She remained in occupation of the property.

The first respondent approached the magistrates' court and obtained a rule nisi authorizing her to evict the applicant. The applicant was duly evicted from the property.

Aggrieved by the state of affairs, the applicant filed this court application on 21 July 2008, seeking an order declaring her to be the sole holder of rights in the immovable property in question and also declaring that the first respondent did not acquire any rights in the

property at any stage and that the eviction order obtained by the first respondent under the main matter cannot be used to evict her.

The application was opposed.

In opposing the application, the first respondent argued that the relief sought by the applicant in this application is the same relief that she failed to obtain on the merits in HC 1131/03, the application for joinder. In the same vein, the first respondent submitted that once she had failed to be joined to the main action, the applicant became non –suited and the issue of her rights in the property became *res judicata*.

Finally and still *in limine*, the first respondent argued that the applicant had approached the court with dirty hands as she had had the property transferred into her name despite the existence of an order prohibiting her from so doing.

Regarding the merits of the application, the first respondent maintained her stance that she is the surviving spouse to the late Moffat Phiri and that the property in question is her property, which should not have been dealt with without her knowledge and consent. She further argued that the order that she obtained from this court in the main matter must take precedence over all other processes that the applicant took in allegedly acquiring rights in the property. It is her case that until that order is set aside, the applicant cannot assert rights to the property as the court has granted those same rights to her.

The first respondent also highlighted how after 2003, the applicant mounted two other attempts to have the order in the main matter set aside. In the first instance, her application was ruled as being not urgent and in the second, as an abuse of process.

Despite having been lawfully evicted by an order of the magistrates' court, the applicant re-took possession of the property without having first set aside the order evicting her. After being evicted for the second time, the applicant obtained a writ from the magistrates' court restoring her possession of the property. The writ is allegedly not based on any order issued by the court and served on the other parties. The legal practitioners who purportedly acted on behalf of the applicant in obtaining this order never assumed agency in the matter and have not acted for the applicant subsequently.

At the time of the hearing of the matter, it emerged that the first respondent had proceeded to have the property registered in her name in terms of the order in the main matter.

She in turn had sold the property to the third respondent who was co-applicant in the main matter.

As indicated above, the applicant approached this court for a declarator to the effect that she is the holder of rights, title and interest in the property known as stand number 8417 Mabvuku Township. In the second paragraph of her prayer, the applicant prays for an order declaring that the first respondent did not acquire any rights in the property. In the third and fourth paragraphs of the order, the applicant prays that it be declared that the order in the main matter does not operate to set aside the cession of rights in her favour and cannot be used to evict her from the property.

In my view, the essence of the declarator sought by the applicant is that the order granted by this court in the main matter did not and could not at law have taken away the rights that she had acquired in the property by another legitimate but quasi –judicial process in the form of intestate inheritance and subsequent sale by the executrix dative.

The legal issue that falls for determination in this matter appears to me to be the effect of the order in the main matter on the rights that the applicant had acquired in the property prior to the issuance of that order.

The power of this court to issue a declaratory order in the matter is not in dispute. It is trite that where there is a concrete controversy involving the invasion of an applicant's rights, the courts will issue a declaratory order in the matter, whether it is exercising its inherent jurisdiction or acting under the specific powers granted it under section 14 of the High Court Act [Chapter 7.06]. (See *Nolan v Povall and Others*1953 (2) SA 202 (SR); *Barron v Greendale Town Managemnt Board* 1957 (2) SA 521 (SR); *Musara v Zinatha* 1992 (1) ZLR 9 (H) *Lupu v Lupu* 2000 (1) ZLR 120 (SC)).

It is my view that there is a concrete dispute between the parties in this application and one that has eluded resolution for some time.

In resolving this matter, I have taken a rather simplistic approach to the dispute. It appears to me that the provisional order granted by this court on 12 June 2002 and confirmed in August 2002 cannot stand. It was erroneously sought in the absence of the applicant who was by then known to the first respondent and had an interest in the rights and title attaching to the property in dispute. It was also erroneously granted as it sought to divest rights that had been properly vested in the third respondent by virtue of intestate succession.

Rule 449 (1) (a) of the High Court Rules 1971 provides that an order or judgment may be set aside if it was sought or granted erroneously in the absence of a party affected by the order or judgment. This specific power is give to the court or a judge by the rules in addition to the inherent to this court to correct injustices.

It is my further view that the error in seeking judgment in the main matter lies in the fact that by the time the first respondent approached the court as surviving spouse of the late Moffat Phiri, the property in dispute no longer formed part of the estate of the Late Moffat, it having been lawfully awarded to Lekinala Moffat under intestate succession of that time which allowed brothers to inherit from the estates of their brothers ahead of the surviving spouse as surviving spouses where not eligible to become heiresses. It worth noting that the first respondent did not seek to challenge the appointment of the late Lekinala Moffat as heir to her husband's estate. She accepted the position and only sought to assert her rights to the property after the death of Lekinala Moffat. For the court to reverse that state of affairs six years down the line amounted to applying the law retrospectively. More importantly in my view, the order was sought erroneously in the absence of the applicant who had acquired rights to the property through a lawful process. Her rights in the property could not be adversely affected in her absence and without affording her the right to be heard. So fundamental and paramount is this tenet of our justice system in my view that it will be remiss of me to overlook it or down play it in favour of any other feature of the case.

I am aware that in the main matter, the first respondent successfully challenged the falling of the property into the estate of the late Lekinala Moffat. In the order obtained by the first respondent on the 17 of July 2002, it was declared that the property did not form part of the estate of the late Lekinala Moffat among other orders that were made. At the time, rights in the property had already been ceded to the applicant. The property was no longer in the estate of the late Lekinala Moffat but had passed into the estate of the applicant. Had the applicant been served with the papers in the main matter, the court would have been appraised of the correct position regarding the property and would not have made the orders that it did.

I am further aware that the first respondent has sought to argue that by failing to be joined to the main matter, the applicant became non-suited in the application before me as the issue of her rights in the property became *res judicata*. With respect, the issue of the applicant's rights in the property was never adjudicated upon in the main matter as she was not

cited as a party in that matter. It is trite that the plea of *res judicata* applies inter partes where the same issue between the same parties has already been resolved.

I am also aware that the first respondent has argued that at the time the first respondent approached the court in June 2002, the applicant had not yet received cession o f rights in the property in her favour. In my view, this issue is neither here nor there. Even if registration of cession in her favour was completed in September 2002 as alleged by the first respondent, this does not cure the defect that attaches to the order granted in favour of the first respondent in June 2002. She did not cite the applicant who by then was in occupation of the property and had taken steps to have cession in her favour registered. She had an interest in the matter at the time and she had a right to be heard before the order was granted. Her absence at the hearing of the matter taints the entire proceedings which must be set aside simply on that basis.

Finally I note that the first respondent has strenuously argued that the applicant has approached this court with dirty hands in that she has retaken possession of the property after being lawfully evicted by the an order of the magistrates court. These courts take a serious view of such conduct as the integrity of the judicial system depends on the obedience of all court orders by all litigants.

In *casu*, I have sought to weigh the need to uphold the integrity of the court process against the need to correct manifest injustice. It appear to me that I can achieve both by denying the applicant her costs as an measure of my disapproval of her conduct even though she has been partly successful, yet setting aside the erroneously sought and erroneously granted order in favour of the first respondent.

In the result, I make the following order:

1. The provisional order granted in favour of the first respondent on 12 June 2002 and confirmed on 21 August 2002 is hereby set aside.
2. There shall be no order as to costs.

Mantsebo & Company, applicant's legal practitioners.
Mambara & Partners, 1st and 2nd respondent's legal practitioners.