JONAS MUSHOSHO
versus
LLOYD MUDIMU
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
CHIGUMBA J
Harare, 4 &, 27 November 2013

Opposed application

T. Mudambanuki, for applicant
W. Pasipanodya, for 1st respondent
Non appearance for 2nd respondent

CHIGUMBA J: This is an application for rescission of judgment in two matters, HC 6627/10, and HC 3805/08, brought in terms of Order 49 rr 449(1)(a) of the High Court Rules, 1971. The relief sought by the applicant, is for an order in the following terms:

1. The judgments obtained by the 1st respondent against the applicant in case numbers HC3508/08 and HC6627/10 be and are hereby set aside.
2. The title deeds to stand number 2819 Bluffhill township, Bluffhill Harare which 1st respondent obtained as a result of an order granted to him in case number HC3508/08 be and are hereby nullified.
3. Applicant be and is hereby declared the sole owner of stand 2819 Bluffhill Township of Bluffhill held under Deed of transfer number 004804/98 in his favor.

4. 1st respondent and any person claiming occupation through him from stand number 2819 Bluffhill Township of Bluffhill be and are hereby ordered to vacate the property within seven days of the date of service of this order.
5. 1st respondent pay costs of suit on a legal-practitioner client scale.

In the founding affidavit, applicant averred that: he is the lawful owner of stand 2819 Bluffhill Township of Bluffhill, Harare; (hereinafter referred to as the Bluffhill stand) in terms of a deed of Transfer number 004804/98. On or about the 9 April 2007, he discovered that there was construction going on at this property, despite there not having been an agreement entered into by him, to sell this property to anyone. On making inquiry he found out that first respondent was responsible for the construction, on the basis that he had bought the stand from "an old man and pensioner Jonas Mushosho of Matepetepa in Mashonaland Central".

During an initial telecommunication with first respondent, he advised him that he was Jonas Mushosho; but that he had not sold the Bluffhill stand to anyone. First respondent in turn advised him that he had already taken transfer of the property, and referred him to his legal practitioners Messrs Dinha Bonongwe & Partners. On his instructions, his legal practitioners wrote to the first respondent on the 12 April 2007 advising him to cease construction on the Bluffhill stand, and to vacate within twenty four hours. He reported the matter to the police who accompanied him to the stand on 28 April 2007.

On 30 April 2007, the parties met at the Criminal Investigations Department at Ahmed House in Harare. According to applicant, first respondent admitted that he did not know him and had never had dealings with him, and that he had been cheated by a person impersonating applicant, the real 'Jonas Mushosho'. Applicant averred that first respondent voluntarily surrendered the keys to the property that he had built on the Bluffhill stand. Detective Sergeant Rodwell Mwandayi, the Investigating officer in this matter, deposed to an affidavit on 28 May 2007, in which he confirmed applicant's version of events.

On 8 May 2007, first respondent applied for, and was granted a spoliation order in the magistrate's court, under case number 3877/07. He attached to that application, an agreement of sale entered into by him and Jonas Mushosho, Identity card number NR 63-286395 J 18, of house number 37 Matepatepa, Bindura. The agreement is dated 28 June 2006, and it states that

Jonas Mushosho was the owner of stand 2819 Bluffhill Harare which he sold to the first respondent for ZW$1,2 billion. The agreement was signed and witnessed before legal practitioners. Attached to the agreement of sale was an affidavit in which Jonas Mushosho confirmed that he had sold the stand to the first respondent. The affidavit was commissioned before the same firm of legal practitioners. Deed of Transfer number 4804/98 was attached, which showed that the registered owner of the Bluffhill stand was Jonas Mushosho, born on 24 November 1958.

On 4 July 2007, under case number HC 3878/07, in the High Court, applicant filed for first respondent's eviction from the Bluffhill stand, and for a declaration that the agreement of sale relied on by him, was null and void. Judgment was entered in favor of the applicant, in default of filing a plea by first respondent. First respondent applied for rescission of this judgment, and applicant admits that he did not oppose this application. First respondent then applied for an order compelling applicant to sign transfer documents to transfer the Bluffhill stand into his name, under case number HC 2775/07. Applicant opposed that application. On 8 February 2008, under case number HC 538/08. It was ordered that:

1. First respondent be interdicted from carrying on further developments on stand 2819 Bluffhill Harare until the matter was finalized.

2. Applicant and the Deputy Sheriff stay execution of the default judgment granted in HC 3878/07.

3. Cases HC 2775/07 and HC 3878/07 be joined as one action.

The two matters which had been joined were eventually set down for a pre-trial conference on 8 April 2010. Applicant averred that first respondent's legal practitioners of record at the time, Messrs Manase & Manase, refused to accept service of the notice of set down of the pre trial conference (see paragraph 15 of the founding affidavit). It would appear, from the letter written to the Law Society by applicant's legal practitioners, that service of the notice was attempted to be made at 9;30 am indicating that a pre-trial conference was set down before JUSTICE HUNGWE at 12:30 pm that day. JUSTICE HUNGWE made the following order, on 8 April 2008, in case numbers HC 3878/07 and HC 2775/07:

1. Respondent with action in HC 2775/07 withdrew its case and tendered wasted costs on the 26th February 2008.

2. The Honorable F. CHATUKUTA J's order in case number HC 3878/07 is hereby revived thereby superceding the HONORABLE BHUNU'S order in case number HC 538/08.

IT IS ORDERED THAT:

(a) Respondent (Mudimu) and any person claiming occupation through him from stand 2819 Bluffhill Township Bluffhill Harare be and are hereby ordered to vacate the property within seven days of the date of this order.

(b) The agreements of sale between respondent and one impersonator "Jonas Mushosho" dated June 23 2006, and June 28 2006, be and are declared null and void.

(c) Applicant be and is hereby declared the sole owner of stand number 2819 Bluffhill Township, Bluffhill, Harare, held under Deed of transfer No 004804/98 in his favor.

(d) The spoliation order granted in case number 3877/07 be and is hereby set aside.

(e) Respondent pays costs of this suit on an attorney-client scale.

Applicant averred that his attempts to enforce this order were met with stiff resistance, and that first respondent refused to vacate the premises on the basis that he had since taken transfer, and now held the Bluffhill stand under Deed of Transfer number 0005304/09. First respondent then applied for rescission of the judgment made by HUNGWE J, and for stay of execution pending determination of the application for rescission of judgment. These two applications were filed under case numbers HC 6627/10 and HC 6794/10. Applicant opposed both applications, and filed a counter application to the application for rescission of judgment. On 11 October 2010, MAKONI J issued an order dismissing first respondent's application in case number HC 6794/10, the order to stay execution.

Applicant averred that he opposed first respondent's application for rescission of HUNGWE J's judgment granted in the joined cases HC 3878/07 and 2775/07. Applicant's notice of opposition to the application for rescission appears to have been filed of record on or about 6 October 2010. His counter application was filed on the same date. He counterclaimed for a declaratory order that he is the sole and legal owner of the Bluffhill stand held under Deed of Transfer 0004804/98, and for an order that Deed of Transfer 0005304/09 be declared null and

void. The application by first respondent to rescind HUNGWE J's order was set down on the unopposed roll on 1 December 2010, and the following order was granted unopposed, by BHUNU J:

1. Default judgment entered against applicant (Mudimu) in the consolidated case number HC2775/10 be and is hereby rescinded.

2. Costs of suit shall be borne by the respondent (Mushosho).

Applicant denied ever having been served with papers in case number HC 3508/08, in which first respondent obtained an order from MAVHANGIRA J, in default of appearance by applicant, on 24 September 2008, to the effect that applicant sign all necessary documents to effect transfer of the Bluffhill stand into first respondent's name within seven days of the date of that order, or failing which the deputy Sheriff was authorized to sign the documents on his behalf. Applicant averred that he suspects that deed of transfer number 0005304/09 came into existence that way. Applicant contended that first respondent obtained the order in case number HC 3508/08 fraudulently and under unclear circumstances. Applicant averred that he was never served with any papers and that had he been served, he would have vigorously opposed the granting of the order. Applicant averred that first respondent never approached him and requested that he sign transfer documents within seven days of 24 September 2008, as directed by the order. Applicant averred that as at 24 September 2008, when first respondent obtained the order from MAVHANGIRA J, the consolidated matters under HC 538/08 were still pending determination on similar issues.

Applicant contended further, that the order under HC 6627/10, which rescinded judgment in the consolidated cases determined by HUNGWE J, was obtained irregularly and in unclear circumstances. He contended that his counterclaim was not determined or referred to. He reiterated that he was not in default, and that the matter was erroneously set down on the unopposed roll without his knowledge. Applicant's claim is that the orders obtained by the first respondent in HC 3508/08 before MAVHANGIRA J, and HC 6627/10 before BHUNU J were obtained fraudulently and irregularly and ought to be rescinded.

First respondent, in his opposing affidavit, raised a preliminary point that the application is without merit and should be dismissed as it seeks the rescission of a judgment entered against applicant on 25 September 2008 in HC3508/08, four years later, and on 1 December 2010, in HC6627/10, two years later. The preliminary point raised is that an applicant has a period of one month from the date when he becomes aware of a judgment, to apply for its rescission, and may not do so thereafter unless he applies for condonation of the late filing first. First respondent averred that applicant, in bringing this application is in breach of Order 9, r 63 of the rules of this court. First respondent averred that applicant ought to be ordered to pay costs *de bonis propriis*, because, his legal practitioners were advised of the apparent breach of the rules of this court on 3 December 2012, but have persisted with their application.

Regarding the merits of the application, first respondent averred that applicant sold the Bluffhill stand to him on 23 June 2006 through Messrs Dinha Bonongwe & Partners legal practitioners. First respondent averred that applicant received the full purchase price and tendered a letter dated 24 October 2012 in which *Mr. Bonongwe* of Messrs Dinha Bonongwe & Partners confirms that the parties entered into an agreement of sale in respect of stand 2819 Bluffhill Harare, and that the sale was perfected. The letter states that a Mr. Robert Nyawasha, a paralegal with that firm, was able to positively identify both parties as being the parties who entered into the agreement of sale. Both parties' identity card numbers were supplied.

First respondent contended that he was forcibly despoiled of the property by applicant, and that he was intimidated into handing over the keys to the property, a cottage that he had constructed and which he was in occupation of. First respondent averred that applicant attempted to serve a notice of set down of the pre-trial conference before HUNGWE J, a mere thirty minutes before the set down time, and confirmed that the receptionist at Messrs Manase and Manase, his legal practitioners of record, refused to accept service of the notice of set down. First respondent averred that applicant produced a fake notice to HUNGWE J, indicating that first respondent had withdrawn its claim and tendered wasted costs, at the pre-trial conference, in the absence of the first respondent, who had not been correctly served with notice of set down.

First respondent averred that he applied for rescission of the judgment handed down by HUNGWE J. He confirmed that the title deeds in his name were obtained as a result of the order

granted by MAVHANGIRA J, under HC 3508/08. First respondent contended that the court in HC 3508/08 would not have granted the order had it not been satisfied that the papers had been duly served on the applicant, and that he was indeed in default. He challenged applicant to state whether a perusal of that record failed to show that there was adequate proof of service of the process on him. First respondent reiterated that applicant failed to file opposition in time in both matters, and that he was justified in setting down HC6627/10 on the unopposed roll for determination. First respondent contended that no evidence of error on the part of those two courts had been alluded to or provided by the applicant.

Applicant filed an answering affidavit in which he denied that this application is devoid of merit. He contended that his application is not premised on r 63, but on r 449 (1)(a) of the rules of this court. According to applicant an application in terms of r 449 is not time specific, and all that one has to show is that the order sought to be rescinded was erroneously sought or erroneously obtained, in the absence of the applicant. Applicant contended that first respondent's point *in limine* ought to be dismissed and urged the court not to accede to the request for an order of costs *de bonis propiis*. Applicant contended that Messrs Dinha Bonongwe & Partners participated in the fraud perpetrated against him by the first respondent, and caused the illegal transfer of the Bluffhill stand into first respondent's name.

The issue that falls for determination is this: is there sufficient evidence before the court, on the basis of which the court should grant rescission of the two judgments in case numbers HC 3508/08, and HC 6627/10, and if so, should the court be guided by the provisions of Order 9 r 63 or Order 49 r 449(1)(a).

Put simply, the first issue to be determined is that of which of the provisions of the High Court Rules 1971, out of those that provide for rescission of judgments granted in default of one of the parties, is best suited to determine the dispute between the parties in this case. The second issue for determination after that will be whether in the circumstances of this case, on the evidence before the court, applicant should be granted the relief that he seeks.

Order 9, r 63 provides as follows:

"***63. Court may set aside judgment given in default***

(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for the judgment to be set aside.

(2) If the court is satisfied on an application in terms of sub rule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just.

Order 49 r 449 provides as follows:

449. Correction, variation and rescission of judgments and orders

(1) The court or a judge may, in addition to any other power it or he may have *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order—

(*a*) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
(*b*)…
(*c*)…

Applicant, relied on the case of *Motor Cycle (Pvt) Ltd* v *Old Mutual Property Investments Corporation Ltd HH 4/07 @ pp 5-6,* where CHATUKUTA J said:

> "… Mr. Mushonga submitted that the applicant was seeking rescission in terms of r 449 as read together with Order 9 r 63. Firstly, applicant does not refer to r 63 in its pleadings. Rule 63 was first mentioned in the oral submissions and therefore was not pleaded. Secondly, I am not sure whether the two rules can be read together. It is my view that there are three separate ways in which a judgment in default of one party may be set aside. This can be done in terms of r 63, or r 449 (1) (a) or in terms of the common law".

There are two noteworthy issues that distinguish Motor *Cycle* v *Old Mutual supra* and the issue under consideration. The first is that in *Motor Cycle* v *Old Mutual Supra*, it was not in dispute that a defective notice of entry of appearance to defend had been filed of record. In the matter under consideration, it is not clear what the errors was, and whether it was an error relating to the pleadings filed, or on the part of the court in accepting such pleadings. The second

distinguishing factor is that in *Motor Cycle* v *Old Mutual*, the alleged error was defined as an error of law and was clearly spelt out as such in the pleadings.

It is my view that, in order to qualify for relief under r 449(1) (a) a litigant must show that:

1. the judgment was erroneously sought or erroneously granted.

2. the judgment was granted in the absence of the applicant or one of the parties;

3. the applicant's rights or interests were affected by the judgment. See *Mutebwa v Mutebwa and Anor 2001 (2) SA 193* .

4. there has been no inordinate delay in applying for rescission of the judgment.

It is my view that, in order to qualify for relief under r 63, a litigant must show that:

1. Judgment was given in the absence of the applicant under these rules or any other law.

2. The application was filed of record and set down for hearing within one calendar month of the date when applicant acquired knowledge of the judgment.

3. Condonation of late filing has been sought and obtained where applicant fails to apply for rescission within one month of the date of knowledge of the judgment.

4. There is "good and sufficient cause" for the granting of the order. See *Viking Woodwork v Blue Bella Enterprises 1988(2) ZlR 249 (S) @ 251 B-D, Highline Motor Spares 1933 (Pvt) Ltd & Ors v Zimbank Corp Ltd 2002 (1) ZLR 514 (S) @ 516 C-E, 518A-B, Sibanda* v *Ntini 2002 (1) ZLR 264 (S) Pastor Jameson Moyo & 3 Ors* v *Reverend Richard John Sibanda & The Apostolic Faith Mission SC 6/10*

5. The phrase 'good and sufficient cause' has been construed to mean that the applicant must:

   (a) give a reasonable and acceptable explanation for his/her default;

   (b) prove that the application for rescission is bona fide and not made with the intention of merely delaying plaintiff's claim; and

(c) show that he/she has a *bona fide* defense to plaintiff's claim. See *Songore* v *Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210)*

It is also my view that, in order to qualify for relief in terms of this court's common law power to rescind its own judgments a litigant must show that:

1. The court' discretion that it is being asked to exercise is broader than the requirements of both rules 449 and 63.

2. Whether, having regard to all the circumstances of the case, including applicant's explanation for the default, this is a proper case for the grant of the indulgence. See *Gondo & Anor* v *Stfrets Merchant Bank Ltd 1997 (1) ZLR 201, and de Wet & Ors* v *Western Bank Ltd 1979 (2) SA 1031 @ 1043*

The question is, what sort of error will suffice to bring an applicant squarely within the ambit of r 449(1)(a). Is it an error of fact, an error of law, or both? An "error" in common and ordinary parlay, is defined as: a mistake, fault, blunder, boo-boo, slip, slip-up, inaccuracy and miscalculation. The law is settled, on the issue of if or when and whether this court ought to grant rescission of its own judgments in terms of rule 449. In South Africa,

In *Bakoven Ltd* v *G J Howes (Pty) Ltd 1992 (2) SA 466 (E), at 471 F,* ERASMUS J said of the almost identically worded r 42(1)(a) of the South African Uniform Rules:

> "It is an abuse of the process of the court to bring such an application some five years and eight months later. Matters must have some finality and r 449 was not designed to let defendants have a second bite at the cherry by raising a defense which should have been raised when the summons was issued."

The Zimbabwean courts have followed some aspects of the South African position and rejected others.

In Grantuilly (Pvt) Ltd & Anor v *UDC Ltd 2000 (1) ZLR 361 (SC)* the court held that,

> "the judgment had been granted because at the time of its issue the judge was unaware of a relevant fact, the provisions of the clause in the acknowledgment of debt. Had he known of the clause, he would not have granted the judgment he did. There was ample precedent for the proposition that a court to which application is

made for rescission is not confined to the record of proceedings in deciding whether a judgment was erroneously granted. The wording of r 449(1)(a) of the High Court Rules made it clear that a party against whom default judgment had been granted was entitled to place before the correcting, varying or rescinding court facts which had not been before the court granting the default judgment. It was held, further, that it is not necessary for a party seeking relief under r 449 to show "good cause". If a court holds that the default judgment was erroneously granted, it may be corrected, rescinded or varied without further enquiry. The court also found that rule 449 is one of the exceptions to the general principle that once a court has pronounced a final judgment or order it is functus officio and has itself no authority to correct, alter or supplement it… *See Firestone South Africa (Pty) Ltd* v *Genticuro AG 1977 (4) SA 298 (A) at 306 F-G; Stumbles & Rowe v Mattinson; Mattinson* v *Stephens & Ors 1989 (1) ZLR 172 (H) at 174 D-F; Tshivhase Royal Council & C Anor* v *Tshivhase & Anor; Tshivhase & Anor* v *Tshivhase & Anor 1992 (4) SA 852 (A) at 862 I-J."*

It is clear that, to qualify for relief under r 449(1)(a), mistakes of fact are not precluded, although it is apparent that the mistakes referred to are not trivial or petty clerical ones. The mistake must have been made on the part of the party seeking the judgment in default, or of the judge who grants it, and the applicant ought to show that he was prejudiced as a result, or that there was a miscarriage of justice. In other words, despite having a good defense on the merits, judgment was given against him in error, as a result of such mistake. The law is also clear, that any fact which was not brought to the attention of the court at the time judgment in default was given, may be placed before the court dealing with an application to rescind judgment in terms of r449. The allegations of fraud made by the applicant were not placed before the courts that determined the judgments that applicant seeks to have set aside. Applicant is now entitled, to place evidence of such fraud before this court.

Disposition

It is my view that, the differences in the requirements of the two High Court rules are clear. Rule 63 has strict time limits which must be adhered to and a litigant who falls foul of

the time limits will not be heard unless condonation is first sought and obtained. The phrase "good and sufficient cause", is seemingly wide ranging and all encompassing. The explanation for the default must be reasonable and or acceptable. Applicant must show that he has a bona fide defense to the claim. On the other hand, the court's common law discretion to rescind its own judgments is wide and requires that regard be had to all the circumstances of the case, including the explanation for, and the length of the delay in bringing the application, and the prospects of success of the applicant in the main matter. In my view, Rule 63 is more in tandem with this court's common law discretion to rescind its own judgments. I say so because, when regard is had to the wording of r 63, that "A party against whom judgment has been given in default, whether under these rules or under any other law, (my underlining for emphasis) it becomes clear that r 63 recognizes the possibility that judgments may be rescinded under other laws which may not necessarily fall under the rules of this court, such as the common law discretion that this court has, to rescind its own judgments. Rule 449(1)(a) is narrower than rule 63. It does not require evidence of "good and sufficient cause", although it appears to require some consideration of an applicant's prospects of success in the main matter. It appears deceptively simple in its requirement of evidence of an error that caused or induced a court to grant judgment in default in circumstances where it would not have ordinarily granted such judgment.

It is my view that the law is clear on the question of which vehicle a party seeking rescission of judgment given in default may use. There are three vehicles, r 63, r 449 and common law discretionary power. Depending on the circumstances of the case, an applicant is at liberty to elect to utilize whichever one of those three vehicles best suits the circumstances of the case. See *Gondo & Anor* v *Syfrets Merchant Bank Supra.* In my view, whichever vehicle a litigant chooses, the court will have to consider the question of length of time that will have elapsed since the judgment sought to be rescinded was granted. It follows

that first respondent's preliminary point cannot be upheld. Applicant is not duty bound to proceed in terms of r 63. However, the court's scrutiny of the circumstances of this case will show whether applicant was wise in electing to proceed in terms of r 449(1)(a).

Having disposed of the point *in limine,* I now turn to the merits of the matter. Applicant contended that its non appearance in both instances was caused by the first respondent's fraudulent and or irregular set down of the matters without notice, despite clear opposition, and despite the absence of proof of service on him. Rule 449(1)(a) requires that an applicant demonstrates a simple error, either in the seeking of the default judgment, or on the part of the court in granting it. My reading of applicant's papers is that applicant does not expressly state that the error lay in the erroneous seeking of the judgments. It is implied, in applicant's papers, that the allegation is that the error lay with the court in being influenced by papers fraudulently or irregularly filed, being almost "duped" as it were, into granting the two judgments when it normally or ordinarily would not have done so. The court must decide, having regard to the papers filed of record by the applicant, whether there was any mistake, or blunder, or miscalculation , on the part of the court in granting the two judgments that are sought to be impugned.

Applicant, correctly in my view sought to rely on the case of *Gondo & Anor* v *Syfrets Merchant Bank supra,* as authority for the proposition that any type of error will suffice, for purposes of entitling an applicant to relief under r 449(1)(a). It would appear, that this case is distinguishable from the one under consideration because, in that case, judgment had been granted by consent and its rescission was sought on the basis of an error common to both parties in terms of r 449(1)(c). The error related to a question of law, the debtors had not opposed the granting of the judgment because they were not aware of the *in duplum* rule. It was held that, even assuming that the parties were laboring under a common mistake, the applicants would have had to go further and prove that the amount of the judgment debt had

breached the *in duplum rule*. In other words the defence in the main matter must have merit. I accept that the sort of error that entitles a litigant to proceed in terms of r 449(1)(a), can be one of fact, or of law, as long as there is evidence that the court was influenced by such error in granting the default judgment. I also accept that before rescinding the judgment a court must consider whether the applicant his prospect of success on the merits of the matter.

In seeking the rescission of two judgments granted in default of appearance by himself or his legal practitioner of record, in terms of r 449(1) (a) applicant contended that, in case number HC 3508/08 first respondent obtained judgment in default of applicant's appearance. Applicant averred that the error that occurred was that judgment was granted despite the fact that

> "…court papers leading to the grant of such default judgment were never served on the applicant…neither did the first respondent serve papers on the applicant's legal practitioners of record".

It is my view, based on the papers filed of record, that Applicant did not provide any explanation, let alone an acceptable or reasonable explanation, as to why or how the court which granted the judgment in default did so in the alleged clear absence of proof of service, on him or his legal practitioner, or a certificate of service as required in terms of order 5 r 42 B (1)(b) of the rules of this court. It is my view that the presumption that judgment granted in default was done so on the basis of adequate proof of service to the court, was not adequately rebutted in the papers filed of record by the applicant.

Applicant contended further, that, in case number HC 6627/10, an "absurdity" occurred, in that, applicant had filed his opposing papers to the application with the Registrar of this court and served the same on the first respondent's legal practitioners, who then erroneously set the matter down for hearing on the unopposed roll as if no opposition had been filed, and a default judgment was erroneously granted by the court. The notice of opposition filed of record as part of applicant's papers appears to have been filed of record with the registrar of this court on 6 October 2010. Judgment in this matter was granted in 2012, a good two years after the opposing papers were allegedly filed of record. Yet nowhere on those papers is there a date stamp to show that the opposing papers were served on first respondent's legal practitioners of record. The

presumption that arises is that the notice of opposition may have been filed of record with the registrar, but there is no proof that it was served on the first respondent. Not even a certificate of service by the applicant was filed of record in terms of Order 5 rr 42 B(1)(b). In the absence of service on first respondent, and assuming that some administrative error was made, and that there was no copy of the opposing papers in the record, I fail to see the mistake made by the court in granting judgment in default. The judgment of the court was based on the papers before it at the time. The court could not have guessed that opposing papers had been filed of record and somehow fallen out of the record. No explanation at all has been given as to why those opposing papers were not served on first respondent. The matter would not have been set down on the unopposed roll had first respondent been aware that it was opposed. Applicant has not rebutted the presumption that opposing papers were not served on first respondent.

It is my view that no mistake was alluded to or proved from the papers filed of record. There is evidence that applicant is the one who sold the Bluff-hill stand to first respondent. There is a witness who can identify him at Messrs Bonongwe & Partners legal practitioners as being the seller of the Bluff Hill stand. He has not proved fraud on the part of first respondent or Messrs Dinha Bonongwe & Partners. In the absence of proof of fraud, the agreement of sale is valid and binding on him. There is evidence that the sale was perfected. In my view, applicant has no prospects of success in the main matter.

I find that the applicant has failed, in the circumstances of this case, on the papers before me, to furnish adequate proof of fraud, irregularities, or any fault in respect of both judgments sought to be impugned, on the part of the court in granting each judgment. None of the elements of fraud were expressly averred or pleaded. Fraud is a criminal offence. It is not clear whether there was a misrepresentation and if so who made it to the court. There is no evidence that the court relied on any misrepresentation when it granted the two judgments. There is a bald assertion that there was fraud in the filing of the papers, there is a vague reference to “irregularities”, and to an “absurdity”. But there is nothing in the way of proof of these allegations, not even *prima facie* evidence. All the applicant tells us is that the papers were not in order. We are not treated to the courtesy of being told what exactly it is

that was allegedly done, and by whom. We are not provided with evidence that indeed the court proceeded to grant judgment on the unopposed roll when the papers before it clearly showed that it ought not to have done so. We are not told that despite proof that there was a notice of opposition duly filed of record and served on all interested parties, the court erred in overlooking it and proceeded to grant judgment in default. There is simply no evidence of any error on the part of the court in both instances, whether an error of fact or an error of law. It is my view that r 449(1)(a) does not apply to the circumstances of this case, and, to borrow the phrase in *Gondo* v *Syfrets supra* "…the judgments in fact reflected the true decision of the court on the basis of the evidence presented". It is my considered view that applicant is not entitled to the relief that he seeks.

In the never-ending quest for justice, litigants are becoming increasingly indefatigable in approaching the well of justice to quench their thirst for justice. Uppermost in my mind in considering the merits of the application before me, was a question the answer to which I knew would only be resolved by resorting to that vague and elastic notion, discretion. The parties before me have made numerous applications and counter applications, in regards to the same piece of property, stand 2819 Bluffhill Township, Harare, over a considerable period of time, from 2006 to date. Surely there comes a time when justice and fairness demands that both the victor and the vanquished act sensibly and accept that the matter has been conclusively resolved? I can do no better than other esteemed courts have done before me, in expressing my disquiet at the manner in which proceedings were conducted between these parties in such a protracted way and over such a lengthy period, with no light at the end of the tunnel. In *Grantuilly v UDC supra,* the court expressed the view that a judge would be :

> "…justified, in the exercise of his discretion, in dismissing the application by reason of the inordinate lapse of time. Rule 449 was a procedural step, designed <u>to correct expeditiously an obviously wrong judgment or order</u> (my underlining for emphasis).
>
> It is in the interests of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of court orders. It would be a proper exercise of the court's discretion to rule that, even if the applicant proved that the

rule applied, it could not be heard after the lapse of a reasonable time. The length of time the appellants waited in this case, whatever the explanation, was unreasonable and the application was an abuse of the court's process".

The court has already found that r 449(1)(a) is not applicable to the circumstances of this case. Even if r 449(a)(a) had been applicable to this case, no reasonable or acceptable explanation was given as to why applicant waited so long to apply to rescind these judgments.

For these reasons, the application is dismissed with costs.

Mudambanuki & Associates, applicants' legal practitioners
Manase & Manase, 1st respondent's legal practitioners