ESTATE LATE ENESIA CHIREMBA
REPRESENTED BY JACOB HARDWICK
CHIREMBA
versus
PIRIMUKAI ZISHECHE
And
KAROI TOWN COUNCIL

HIGH COURT CHINHOYI
BACHI MZAWAZI & MUZOFA JJ
CHINHOYI, 21 October 2024 & 28 November 2024

Civil Appeal

S. Dizwani, for the appellant
S. Muyemeki, for the respondent

BACHI MZAWAZI J:

Introduction

On the return date of an exparte application for an interdict, the Magistrates Court dismissed the appellant's application on the basis that the first respondent had constructed a building on the disputed boundary to completion. The trial court's reasoning was that the interdict was meant to stop the construction of an incomplete structure, now that the building has been completed the application had been overtaken by events and was *brutum fulmen* (to quote the actual words). In its ruling, the trial court, nonetheless, had made a finding that the appellants had a clear right but for the fact that the harm or injury had already been occasioned the court concluded that the appellant should pursue other recourses or remedies. It is this finding of the first court of instance that is under impugn and subject to this appeal.

The court took judicial notice that the representative of the estate filed letters of administration indicating that he represented the estate. Further, that there was need to cite the executor in his official capacity as a representative of the estate of the late Enesia Chiremba. An estate is not a legal entity. It acts through an executor so the most appropriate procedure is to cite the executor as follows: Jacob Hardwick Chiremba (in his official capacity as the executor of the Estate Late Enesia Chiremba). See *CIR v Emory NO 1961 (2) SA 621 (A),*

Veritas v ZEC & 2 ORs SC 103/20. See *Vandira v Estate Late George William Noble & Anor HMA 10/23*.

However, the parties did not challenge or raise the issue. In addition, there is no prejudice on either part as the entity has been described with sufficient accuracy, though wrongly cited, an Estate is not a legal persona.

The appeal is premised on a single ground of a misdirection of fact couched as follows:

Issues

1. The court *aquo* grossly erred and misdirected itself on the facts when it made a finding that the first respondent had already completed building construction when this was not a fact in issue before it and where no evidence of this had been properly placed before it.

Brief Facts

The brief history is that the appellant occupied the second respondent's open space for the purposes of a wood stall at stand number 9 Chikangwe, Karoi. The occupation was regularized by the then Karoi rural council which had authority over the area. The appellant proceeded to comply with other requisites needed and was given the permits to operate a shop for a considerable period with the blessing of the council authorities then in place. The new Urban Council took over and ushered in new commercial land by- laws, demarcations and plans. The old plans were then revised affecting the occupation status of the original occupants. Evidence was placed before the trial court however, that the appellant's occupation was recognised even after the changes as she continued to pay rates and permits fees which were being accepted by the local council for stand number 9.

The problem arose when the 1st respondent was allocated an adjacent open space called number 10, which allegedly encroached the boundaries of the appellant's old existing boundaries by 21 square metres. The 2nd respondent is already seized with the boundary dispute. However, before the resolution of the dispute the 1st respondent constructed a building encroaching what the appellant deems as part of her stand. After failed negotiations the 1st respondent continued with constructions prompting the initial law suit.

Arguments by the parties

The 2nd respondent recognises the rights of occupation of both parties but argues that the size of land was changed alongside the occupational status of the appellants. They argue that the 1st respondent was lawfully allocated his own piece of property. The 2nd respondent also confirmed that they were seized with a pending boundary dispute between the parties.

Preliminary Points

The respondents raised two preliminary objections. Their first *point in limine* that the ground of appeal was not short and concise is dismissed as lacking merit. The appellant's ground of appeal, though a bit longish, is clear and sound. The second objection that there was no proper and timeous service of the notice of appeal is also devoid of merit and dismissed. The record of proceedings bails out the appellant. They served the respondents through his legal practitioners of record through the electronic mail. Proof of service to that effect has been attached to the record on pages 10 to 12 of the record of proceedings.

Analysis, facts, evidence and the law

Rule 15(21) of the High Court rules SI202/ 2021, stipulates that proof of service of electronic mail delivery constitutes prima facie evidence of service. This is clear proof that service was done on the respondents' legal practitioners. Legal practitioners in terms of rule 15 (13) (a) of the High Court rules, are deemed authorised agents as succinctly stated in the case of *Nyangani v Sibantubahle Housing Construction and Anor* HH64 /2017.

Rule 15(13) (a) of the High Court rules denotes that service of any other process other than summons may be effected by delivering a copy thereof to that person or his authorised agent.

This court in the case of *Nyangani v Sibantubahle Housing Construction and Anor, supra,* commenting on a rule similar to rule 15(13)(a) above posited that;

> " In terms of r39(2) of the High Court of Zimbabwe Rules, 1971 process may be served upon a person by personal delivery to that person or to his duly authorized agent. In the case of process which is not a summons or court order, it may be served by delivery to that person's legal practitioner of record. In this particular case the applicant's legal practitioners are Chibaya and Partners whose address for service is care of R. Ndlovu and Company. As I have said that address for service has never changed to this date. Therefore the sheriff was entitled to serve the notice of set down at that address for service and when they refused to accept service, affixing it on a table right inside their offices, was proper service."(My emphasis)

In that regard, the issue of the preliminary points has been laid to rest. Moving to the merits, an examination of the nature of the application which was before the trial court is called for. Before the Magistrates was the return day of an application for a prohibitory interdict to stop the continual erection of the structure pending a determination by the local authority. This was a final interdict as opposed to an interim one where only *prima facie* right had to be established.

The requirements for the granting of a final interdict are well known, they are;

1. The existence of a clear right
2. irreparable harm/injury actually committed or reasonably apprehended
3. absence of any other remedy why which applicant can be protected with the same result.

See *Setlogelo* v *Setlogelo* 1914 AD 221, *Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt Ltd and Another* 1980 ZLR 378.

On the face of it, if the building that the appellants, the applicants in the court *aquo* sought barring from further construction had been indeed completed then it can be easily concluded that the court's finding was rational. True to fact past invasions are beyond redress through the avenue of a prohibitory interdict as highlighted by the honourable MALABA DCJ as he then was, in, *Airfield Investments (Private Limited v Minister of Lands, Agriculture and Rural Resettlement and Others* SC 36/04 and *Stauffer Chemicals v Monsato Company* 1988 (1) SA 805).

The honourable MALABA DCJ (as he then was) in the Airfield case above commented as follows:

> "The threshold the appellant had to cross was the production of evidence which established the existence in it of *prima facie* rights of ownership in the land at the time the application for interim relief was made. An interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken from him by operation of law at the time he or she makes an application for interim relief."

Nonetheless, in this case it is not as simple as that or as it appears. For the primary court to come to such a conclusion that the building has been completed, it must obtain evidence from the record. Such evidence only comes from the parties' pleadings, submissions and from evidence led or in documentary form. In *Smith v Smith* SC50/20, it was highlighted that parties are bound by their pleadings.

In *casu,* neither the first respondent nor the second respondents pleaded that the structures in contention had been completed. No evidence was placed before the trial court on the stages of development of the allegedly encroaching building. This forms the basis of the

appellant's attack. The court on its own arrived at the conclusion that the construction had been completed hence rested its decision on that unsubstantiated fact. It was an extraneous fact.

Thus, we agree with counsel for the appellant, that there is no evidence that was placed before the trial court indicating that the building in question had been completed. A thorough analysis of the record has revealed that the 1st respondent's opposing affidavit which was brief and cursory did not challenge the averments by the appellant of an incomplete structure in the process of construction. The same applies to the opposing papers of the 2nd respondent.

It is correct that the court relied on extraneous evidence not part of the record. It then lost sight of the issues that were before it. It is a truistic, that a court of law is not allowed to go on a frolic of its own. It is restricted to the claim, and the arguments of the parties before it. In reiteration, no evidence supported the finding of a completed building, a fact upon which the court dismissed the appellant's application. See, In *Ruturi v Heritage (Pvt) Ltd 1994 (20 ZLR 374 (S).*

UCHENA JA in *Nzara & Ors v Kashumba & Ors SC 18/18* opined that;

> "The function of a court is to determine disputes placed before it by the parties. It cannot go on a frolic of its own…There is no doubt that the *court aquo* exceeded its mandate which was to determine the issue placed before it by the parties through pleadings and proved by the evidence led."

See *Barros and Anor v Chimphonda and Anor 1999*(1) ZLR 58(S) at p 625-63A where the Supreme court noted:

> "It is not enough that the appellant court would have taken a different course from the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of fact or not taking into account relevant considerations."(My emphasis).

Therefore, the court erred by deciding the case on a fact which was not before it.

On the merits, the court pronounced itself that there was a clear right. The buildings, themselves until such time a determination has been made by the second respondent, constitute an injury. The injury is continuous in nature as the first respondent did not take heed of the appellant's protests but continued building on the demarcations in dispute. It is thus clear that the continued construction of the subject that needed to be stopped pending council dispute resolution, was a continuous injury.

Having found that the two requirements for an interdict were satisfied, we explore the third. The trial court stated that the appellants had another open recourse. Obviously, this

conclusion emanated from its finding that the building had been completed which we have rejected. We do not agree. Only a competent court of law has the jurisdiction to issue a prohibitory interdict. An interdict being a bar had the power to temporarily stop the shunned action pending resolution of the main matter. In such a scenario there was no other remedy other than the legal remedy taken by the appellant. See *Rodgers v Chiutsi and 5 others* SC25/2022 and *City of Gweru v NRZ* HMA52/21.

Disposition

The appeal succeeds. As regards costs, punitive costs are predominantly for errant litigants and, or, their counsel. They are extraordinary and rarely awarded. They are not meant to defeat the right to access to justice and to defend oneself. In this case, there is an on-going boundary dispute in the domestic remedies pipeline. It is still to be established whether there is an encroachment or not. The first respondent genuinely believes with supporting land plans that the area is his. Therefore, until such time clear demarcations have been made by the 2nd respondents, it within the 1st respondent's right to defend himself. As such, the punitive costs are unjustified under those circumstances. A case in point is *Nelch Investment (Pvt) Ltd v Toyorama Investment (Pvt) Ltd & Anor HH 82/21.*

Accordingly, it is ordered that:

1. The appeal succeeds.
2. The trial court's decision dismissing the appellant's application for an interdict is hereby set aside.
3. The prohibitory interdict barring the first respondent from any further developments, construction and or resumption of constructions until the second respondent has resolved in writing the boundaries between stands 9 and 10, Chikangwe, Karoi is hereby granted.
4. Costs follow suit.

Absolom & Shepherd Attorneys, the applicant's legal practitioners

Mapaya & Partners, the respondent's legal practitioners

Muzofa J Agrees