

MEMORY MADZIMBAMUTO
and
JUDITH MUSAMADIYA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 19 October 2023 & 6 June 2024

Opposed Application

P Charamba, for the applicant
Respondent in person

TAKUVA J:

“the object of proceedings of contempt is to punish disobedience so as to enforce an order of court and in particular an order *adfactum praestandum*, that is to say, orders to do or abstain from doing a particular act. Failure to comply with such order may render the other party without a suitable or any remedy and at the same time to constitute disrespect for the court which granted the order” per ZIYAMBI JA in *Moyov Machera* SC 55/2005 at p 7 of the cyclostyled judgment, quoting with approval GOLDIN J in *Haddow v Haddow* 1974(1) RLR 5 at 8- A-C.

BACKGROUND FACTS

This is a chamber application for Contempt of Court Proceedings in terms of r 79(1) of the High Court Rules 2021. Sometime in January 2022, the applicant and the respondent entered into an agreement of sale in terms of which the respondent sold to the applicant rights, title and interest in stand 13993 Kuwadzana Extension Harare for USD 17000.00. Having paid USD 15400.00, the respondent became evasive and refused to take the balance of USD 1600.00.

Aggrieved, applicant approached the court to enforce the agreement and an order directing the respondent to sign transfer papers and to collect the balance of the purchase price from Charamba & Partners was granted per CHIGUMBA J under HC 10657/14. See Annexure A. This order was served upon the respondent on the 15th of August 2014. Applicant formally changed ownership into her name and the property is now registered under her name -see Annexure B being a copy of the title deed.

On 24 March 2022, applicant issued summons for eviction against the respondent. The summons together with the declaration was served on the respondent on 31 March 2022 by the Deputy Sheriff. Applicant applied for default judgment after the *dies induciae* expired. An order was duly granted by MUTEVEDZI J on 20 January 2023 under HC 1996/22 ordering the eviction of the respondent and all those claiming occupation from stand 13993 Kuwadzana Extension, Harare. Specifically, the court ordered that”

- “1. Respondents and all its subtenants, assignees and all those claiming occupation through her be ejected forthwith from stand Number 13993 Kuwadzana Extension, Harare.
2. Respondent be ordered to pay applicant costs on an Attorney and Client Scale.”

The Sheriff of the High Court served a copy of the writ of execution together with the court order and notice of eviction upon the respondent. In spite of this notice to vacate the premises the respondent and her tenants, assignees, invitees and other persons claiming right title and occupation through her remained in occupation. On 10 March 2023 the Sheriff successfully evicted the respondents and all those who were claiming occupation through her from the premises. The applicant was given vacant possession.

The Sheriff of the High Court, Zimbabwe had secured the premises from the gate, and the house with a chain and locks and advised applicant to collect keys from his office. On the same date, the respondent restored herself back into the premises after having broken the chain and locks. In an effort to stop the illegality applicant reported the respondent to the Police. Respondent was arrested and advised by the Police to comply with the order. However, respondent defied the advice and remains in occupation of the premises to date, hence this application.

Respondent opposed the application arguing that she was not aware of the proceedings before CHIGUMBA J and MUTEVEDZI J. It was submitted that the applicant obtained these orders fraudulently. In the notice of opposition respondent strongly denied being in contempt of court proposing to pay the applicant what she paid since the contract was cancelled. Respondent further accused applicant of forum shopping by abandoning criminal proceedings at Magistrates Court and filing the same proceedings in this Court. It is respondent’s argument that there exists an order by a Magistrate under case No. 11912/12 forbidding applicant from evicting respondent from the house.

Respondent submitted that applicant was approaching the court with dirty hands presenting falsehoods in that it is applicant who breached the contract by failing to pay the balance of

US\$1600.00 on 20 April 2012. Further, respondent submitted that the Sheriff connived with the applicant to “indicate and confirm” service which was never done. Equally so, respondent denied receiving the summons repeating the same allegation that the Deputy Sheriff acted fraudulently by pretending to have served process to the respondent. On the respondent’s eviction of 10 March 2023, the respondent insisted that she was not served with process although she conceded that the Sheriff came to the premises and “carried out the eviction in a thuggish manner and drove as if he was being chased. It was denied that the Sheriff locked the premises. According to the respondent, the Sheriff left the gate and house not secured after he and his crew had “fatally” assaulted and tied up respondent’s son.

Respondent conceded that she received the eviction order dated 10 March 2023 and immediately noted an application for condonation for the late filing an application for rescission of the judgment obtained in default under case No. HC 4998/23 which is still pending. It is contented that by remaining in occupation the respondent is simply exercising her constitutional right against the fraudulent practice by the applicant who is not the owner of the property. Respondent believes that only if the “rescission of the judgment is thrown away by the court should she be labelled illegitimate and contemptuous.”

Finally, respondent prayed for the dismissal of the application.

THE LAW

Contempt of court is committed where one wilfully and *mala fide* refuses to comply with an order of court. The essentials are the following:

1. That there is a court order which is extant
2. That the order has been either served on the individuals concerned, or has come to their personal notice,
3. That the individual(s) in question know what it requires them to do or not to do, and
4. Knowing what that order dictates, the individuals concerned deliberately and consciously disobeyed the order.

See

Borges v Shumba HH 403/21 *Simba Mukambirwa & 7 Ors v The Gospel of God Church International* SC 8/2014 *Batezat v Permassan (Pvt) Ltd* SC 49/09.

APPLICATION OF LAW TO THE FACTS.

As regards the requirements, it is clear that the order under HC 1996/22 is extant and has not been stayed, rescinded or suspended. It is surprising that the respondent claimed ignorance of the various orders and processes until 10 March 2023, yet there is proof that she was served with CHIGUMBA J's order on 15 August 2014 according to Annexures A and B. Proof that respondent was served with the summons exists- See Annexure D that shows that the summons and declaration were served on respondent's son one Samukange (who resides at the house) on 31 March 2022. I find it highly improbable that the Sheriff who is an officer of this court can misrepresent facts on his return of service to please applicant.

Secondly, I am not convinced that two Judges of this court can make the same mistakes of granting default judgments without satisfying themselves that process had been properly conducted and that proof of service had been furnished. The respondent has been aware of this case since 2012 and process was served at the premises in dispute. This is the respondent's *domicilium citandi*. It is where his son resides and according to the Sheriff's returns on at least two occasions the son was found at the premises. Surely, it would be hard to argue that respondent did not get knowledge of the existence of the orders.

Clearly, respondent knew what was required of her. Proof of this is that she applied for rescission of judgment granted by CHIGUMBA J. The respondent knew that she was required to vacate the house and she took steps to reverse this order. She knew she had lost the battle over ownership and that she was required to collect the US\$1600.00 from applicant's legal practitioners. There was non compliance with any of the above. From the totality of the evidence, I find that respondent consciously disobeyed the order.

It is apparent that not only did respondent disobey the order but she defiantly reinstated herself back into the house despite the fact that she had been lawfully evicted by the Sheriff. Her disobedience was wilful and *mala-fide*. I find her contention that she remains in occupation because she had filed an application for condonation to be without merit, in that after her lawful eviction by the Sheriff she violently broke the chain and locks on the same day and unlawfully regained occupation. Can this conduct be said to be that of a law-abiding citizen who respects the rule of law in general and court orders in particular. I think not. An extant court order is not set aside by simply defying it.

An order of contempt of court against respondent is the only remedy available to the applicant in order to realize the court order of MUTEVEDZI J. I find it necessary that such order be granted in order to restore the name, repute, integrity and authority of the court, which respondent is intolerably holding in defiance and ridicule. The respondent has demonstrated a clear intent to defy the court and its processes.

COSTS

The applicant has asked for costs on a higher scale against the respondent. I agree because the extent of the contempt justifies such an order. In my view it is at any rate dishonest, *mala fide* and an abuse of process to condemn an order of court. In such cases a punitive admonitory costs order is warranted.

In the result, it is ordered that;

1. The application be and is hereby granted.
2. Respondent be and is hereby found to be in contempt of court order of the High Court granted under case number HC 1996/2022.
3. The court accordingly orders that:-
 - 3.1 Respondent is hereby committed to Chikurubi Maximum Prison for a period of 6 months all of which is suspended on the grounds that respondent shall immediately upon the grant of this order comply fully with the court order in Case No HC 1996/22.
4. The Respondent shall pay costs of this application on Attorney and Client scale.

Charamba & Partners, applicant's legal practitioners