

FADZAI USAYI
versus
LEONARD USAYI

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE 16 December 2024

Urgent Chamber Application

R Mabve with J Sande, for the applicant
T Gurira & C Makorokotera, for respondent

WAMAMBO J: This matter came by way of an urgent chamber application. The applicant seeks a stay of execution of an order rendered by the High Court in HCH F 11/24. The order sought is couched as follows: -

IT IS ORDERED

TERMS OF FINAL ORDER SOUGHT

That you show cause, if any, to this Honourable Court why a final order should not be made on the following terms:-

1. That the execution of the court order granted under **Case number F11/24** be stayed until the application for rescission under Case Number **HCH5477/24** has been adjudicated upon.
2. Respondent bears costs.

INTERIM RELIEF GRANTED

Pending the determination of this Application for Rescission of Judgement **Case number HCH5477/24**, the Applicant is granted the following relief:-

1. That the respondent be and is hereby interdicted from evicting the Applicant until the final determination of the Application for Rescission under Case number HCH5477/24.
2. There is no order as to costs.

The parties were married in terms of the Marriage Act [*Chapter 5:11*]. The marital relationship hit turbulent waters resulting in applicant issuing summons for divorce. A trial ensued under HC5260/21 and an order for divorce was granted along with an order relating to the distribution of the parties property. The cyclostyled judgment is HH 495/23.

Dissatisfied with the order of the High Court applicant appealed to the Supreme Court. The Supreme Court under SC 504/23 rendered an order wherein the appeal succeeded in part. Each party was awarded 50 % of shares of the values of the Remaining Extent of Lot 4 of Chimwemwe of Subdivision A of Kingsmead Extension of Borrowdale Estate and Stand No 16 Borrowdale Township of Lot 4 of Chimwemwe of Subdivision A of Kingsmead Extension.

The Supreme Court also ordered for the valuation of the said properties and an option for the parties to buy each other out after valuation. This is but a summary of the order rendered by the Supreme Court. The actual judgment is attached to the record and contains the full order of the Supreme Court.

Respondent thereafter filed an urgent chamber application which was struck off the roll. Applicant later filed heads of arguments on the merits of the application Respondent insisted that the notice of opposition was defective as it was commissioned in French and that it must be struck off and the relief granted as prayed for. The High Court agreed with respondent and granted relief as sought. The Court order was granted under HCH F 11/24 and evicts applicant herein pending the exercise of parties options to buy each other out as per Supreme Court Order under SC 504/23.

The Applicant was dissatisfied with the order under HCHF 11/24 and filed a rescission application. The instant application seeks to stay the order rendered under HCH F 11/24 pending the application for rescission, which was filed under HC 5477/24.

The Respondent is opposed to the application. He however raised three points *in limine*. At the hearing the other two points *in limine* were abandoned leaving only one point in limine. The remaining point *in limine* raised is the lack of urgency.

Respondent submitted that the need to act arose in February 2024 when the respondent herein raised the point *in limine* that the notice of opposition was defective. Applicant on the other hand contends that the order sought to be stayed was granted a few days before this application. I am of the view that what is sought is a stay of the order under HCH F 11/24. The applicant filed this application within a short space of time.

The consequence factor flows from being evicted from a home along with dependants, in the circumstances. I find that urgency has been established and I dismiss the point *in limine* of lack of urgency.

I move to the merits.

Ms Mabwe argued that parties are better served to argue the merits rather than clinging to preliminary points and a judgment rendered in default. The rescission application will ensure that the parties are heard on the merits while at the same time the court will be controlling its own processes.

Mr Makorokotera for the respondent argued that real and substantial justice favours the Respondent. It was argued that no co – owner can exclude the other from enjoying benefits from the co-owned property. It was strongly argued that respondent is “rotting in the gutter” while applicant enjoys benefits accruing from occupation of the parties properties.

After I had indicated to the parties that I was reflecting on the judgment and had reserved it, some developments took place. The developments resulted in me directing that the parties should appear before me which they did. The issues raised were allegations of respondent giving effect to the order sought to be stayed. There were also counter allegations. Noting that there would be no end to the processes and noting that there was acrimony between the parties I expressed to the parties that they should act according to the law in the circumstances.

It appeared to me that the parties could settle the challenges posed by the application. The Supreme Court judgment appears clear and deals with specified issues of the distribution of the property and the buying each other out options. The acrimony clouded the parties minds to the extent of refusing to accept the reality and implications of the Supreme Court order, the High Court order under HCH F 11/24 and this application.

Be that as it may I now consider the law in so far as it relates to applications for stay of execution and its application to the circumstances of this case.

In *Transfrontier Investments (Private) Limited and Phibeon Busangabanye v Bondcrown Investments Private Limited at & 4 others* HH 671/21 p 11 MUCHAWA J said:

“Regarding the law to be applied in an application for stay of execution, Mr Mpofo referred the court to the case of *Mupini v Makoni* 1993 (3) ZLR 80 (SC). The position was aptly stated below:

As observed by GOLDIN J as he then was in *Cohen v Cohen* (1) 1979 RLR 184(GD) 1979 (3) SA 420 @ AT 423 B-C the court enjoys an inherent power, subject to such rules as there

are, to control its own processes. It may therefore in the exercise of a wide discretion, stay the use of its process of execution where real and substantial justice so demands. See also *Graham v Graham* 1950 (1) SA 655 (T) AT 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused to him or to express the proposition in a different form of the potentiality of his suffering irreparable harm or prejudice.”

I have also considered the requirements which must be met when an application is mounted for interim relief. Applicant seeks to protect a right to shelter and continuity. If she is evicted there are issues of a fresh and jerky start in the search for new accommodation which may well be irreparable considering that there would be movement of people and property.

I am alive to the fact that the parties have a Supreme Court judgment granting 50 % shares to their two properties. Their focus at this stage should be on fulfilling the Supreme Court order so that each party can move on after the divorce proceedings.

I am also alive to the fact that applicant herein was sturdily opposing the application in HCHF 11/ 24 and seeks that the matter be resolved on the merits.

The default order rendered in HCH F 11/24 was mounted on a technicality. That is an issue which will be decided in the rescission application which I need not comment on. In other words the order was not mounted after both parties were heard on the merits. When they are both given the platform the court dealing with the rescission application, will come to a decision that balances both parties positions.

Considering that the parties are practically co-owners of the properties and that they should benefit therefrom in the meanwhile I find in the circumstances that the application is meritorious.

To that end I grant the order as per draft, excluding the costs clause.

Tarugarira, Sande, applicant’s legal practitioners
Sinyoro & Partners, respondent’s practitioners

