

CROWHILL FARM
versus
GRACE TAMWA
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 22 January and 13 May 2025

Court Application for cancellation of a deed

T Tanyanyiwa, for the Applicant
K C Rusike, for the 1st Respondent
No Appearance for the 2nd Respondent

TAKUVA J: This is a court application for cancellation of a registered deed of transfer

BACKGROUND FACTS

The parties in this matter are worlds apart in their perspective of what transpired between them, the nature of their relationship or how it was borne. The applicant is a company duly incorporated in terms of the laws of Zimbabwe. On one hand, in its founding affidavit the applicant begins by bringing up a pending case before this court which is HC1878/23 wherein the first respondent, a female adult, seeks a *declaratur* as well as vindication of possession. This is in regards with a certain stand namely undivided 0.0298% share being Share N0. 2081 in a piece of land in District of Salisbury called Lot J of Borrowdale Estate measuring 724,04575 hectares. The first respondent possesses the Deed of Transfer for this certain land and it is this very deed that the applicant in this matter wishes to the court to have cancelled. Applicant motivates its motion by challenging the manner in which the first respondent acquired the deed. It is applicant's averment that the first respondent acquired this deed of transfer fraudulently through a third person, *Cephas Msipa*, who did not possess any authority to dispose of the immovable property. Applicant submits that by mere perusal of the deed of transfer, one can easily identify that the deed was acquired fraudulently.

On the other hand, the court is presented with the first respondent's submissions which tells a completely different story. In its opposing affidavit the first respondent claims that she acquired the aforementioned property through a housing scheme. The first respondent is a

former employee of the Reserve Bank of Zimbabwe. During her employment there, first respondent claims that employees were afforded a chance to join a housing scheme that would allow them to acquire stands under Crowhill Estate in Borrowdale. She claims it is through this scheme that she was allocated stand 2081 which was part of a long list of stands, with others being allocated to her other colleagues. It is the Reserve Bank that necessitated the payments of these stands and it was only after an employee had paid its loan in full that it would be handed over its title deeds for the property.

However, after first respondent had been handed over her deed, she could not proceed to commence construction on the land as she had to relocate to Masvingo. It is at this point then when dispute arose as first respondent was advised that in her absence, someone else had proceeded to construct on her land. Upon investigation, first respondent found out from one *Cephus Msipa* that her stand had been reallocated to someone else due to some sanctioned judicial review. This is what gave rise to the matter under HC 1878/23 wherein first respondent applied for a *declaratur* and *rei vindication*.

To add on, first respondent also challenges this application stating that cancellation will not be possible due to prescription. It is the first respondent's view that the applicant ought to have made this application in 2015. This is the year that applicant became aware that there were stands sold to third parties through Crowhill Farms (Pvt) Ltd and Cephas Msipa. A court order under HC7674/14 ordered everyone who claimed rights to any property within the Crowhill Estate through Crowhill Farms (Pvt) Ltd and Cephas Masimba Msipa to desist from doing so. The order was granted in 2015 and first respondent argues that it is at this point when need to act arose but applicant however, failed to do so.

It is very apparent that both parties are not in agreement in regards to the history of events that have led to this dispute.

ANALYSIS OF THE FACTS

Despite the parties' positions that might seem hard to follow, the court shall focus on what is required from it and what the applicant seeks. The applicant seeks cancellation of a registered deed namely Number 2536/2008 and the revival of Certificate of Registered Title number 1981/2008.

The issues for determination are as follows;

1. Whether or not the dispute in case HC 1878/23 constitutes *lis pendens* thus directly impacting this present mater?

2. Whether or not the deed of transfer was acquired fraudulently thus requiring cancellation?
3. Whether or not right to cancel has prescribed?

THE LAW AND ITS APPLICATION TO THE FACTS

The doctrine of *lis pendens* seeks to prevent multiple legal actions involving the same parties, cause of action, and subject matter from proceeding simultaneously in different courts. Courts try by all means to avoid giving conflicting judgments regarding the same matter. This principle ensures judicial efficiency and consistency in legal proceedings.

In Erasmus Superior Court Practice 2nd Edition at pp 280 – 281 the following is stated as the requirement of the defence of *lis pendens*;

“The two actions need not be identical in form. The requirement of the same cause of action is satisfied if the other case necessarily involves a determination of some point of law which will be *res judicata* in the action sought to be stayed [see *Marks and Kantor v Van Diggelen 1935 TPD 29 at 37*]”

In its founding affidavit, as mentioned before, the applicant began by bringing the existence of the pending proceedings between the parties to the court’s attention. It is the court’s view that the applicant was aware that omitting this information would have been detrimental to its case. Applicant is misdirected in asserting that the pending proceedings have no bearing on this application. Applicant seeks to cancel a deed of transfer that it claims to have been acquired fraudulently. This is the very deed of transfer that applicant is using to motivate her case under HC1878/23. It surely follows that if this court is to declare the said deed of transfer fraudulent, the pending matter is automatically extinguished while this present one can also suffer the same predicament if the court hearing the pending matter decides to grant the first respondent’s relief. These two matters are intertwined.

Although this might be the case and a point that the court cannot ignore, *lis pendens* does not constitute dismissal of a matter. In the case of *Mhungu v Mtindi 1986 (2) ZLR 171 (SC)* MC NALLY JA stated the following,

“if an action is already pending between parties and the plaintiff there brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendant to take the objection of *lis pendens*, that is, another action respecting the identical subject matter has already been instituted, **whereupon the court, in its discretion, may stay the second action pending the decision in the first action.**” {emphasis added}

This is the approach that the court will lean towards. Consequently, it means that this matter may only proceed when the court in the pending matter makes its decision. As noted, the court had listed 3 issues for determinations. It is the court's considered view the remaining two can only be decided after the first matter is settled. Applicant can proceed to challenge the legality of the deed of transfer while Respondents may persist with their opposition based on prescription. This approach will be indeed much cleaner and will allow the court to reach at a decision swiftly.

DISPOSITION

1. Following these considerations, it is ordered that the matter be stayed pending the finalisation of matter HC 1878/23.
2. There shall be no order as to costs.

TAKUVA J:.....

Tanyanyiwa and Associates Attorneys at law, applicant's legal practitioner
Zvobgo Attorneys, first respondent's legal practitioner