

MARGARET NDLOVU

Versus

CHIQUITA MORRIS N.O

And

DEPUTY SHERIFF, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 20 JULY 2012 AND 11 OCTOBER 2012

Miss H Ndlovu for the applicant
Mr J. J. Moyo for the respondent

Urgent Chamber application

CHEDA J: This is an urgent chamber application for stay of Execution of a writ of Execution under case number HC 1978/2010 for her ejection which was due on the 25th June 2012. The application was filed on the 25th June 2012 and I ordered that it be served on respondents and the matter set down for hearing on the 20th July 2012.

Applicant in her affidavit which forms the basis of this application is that a summons of her ejection was issued against her on the 28th October 2010. She instructed her erstwhile legal practitioner namely, a Mr *Chivaura of Mashayamombe and partners* who held discussions with respondent's legal practitioners and advised her that an agreement to spare her the ejection had been reached. She was however shocked to receive a notice of ejection on the 25th June 2012.

Applicant submitted that:-

- (1) she entered into valid agreement of sale with first respondent's brother one Nigel Damain Morris regarding the sale of the property in dispute;
- (2) she paid the full purchase price of the property;

- (3) she was in peaceful occupation of this property since 2008 and as such she regards this property as her permanent home, and
- (4) she has made an application for rescission of judgment granted in case number 1978/10.

In her opinion it was granted as a result of first respondent's fraudulent conduct.

Mr *J. J. Moyo* for first respondent gave a vivid background of this matter which I hereinunder summarise.

First respondent issued out summons against applicant for ejectment and a default judgment was granted under case number 1978/10. Sometime in April 2011, Mr *Chivaura*, applicant's erstwhile legal practitioner applied for a rescission of judgment and stay of execution under case Nos. HC 1103/12 and HC 1104/11 respectively. The urgent application for stay of execution was dismissed after which the application for rescission was abandoned. Upon realisation that she had lost her attempt to stay execution, she requested permission to remain on the property for a further 6 months on the terms and conditions agreed upon by herself and first respondent. This position was further confirmed in writing as evidenced by an agreement signed by the parties which now form part of these proceedings.

The above facts are common cause and have not been disputed. What comes out clear in these proceedings is that applicant purportedly purchased the said property from Nigel Damain Morris who at the relevant period purported to be acting in his capacity as Executor of the Estate of the late Nellie Helen Morris. Nigel Damain's executorship was set aside by Mawadze J in case No. HH 71/2011.

It is essential that right from the start I dispel applicant's notion that she had a valid agreement of sale, for the disputed property. The so-called last Will and Testament of the late Nellie Helen Morris which purportedly appointed Nigel Damain Morris as Executor was nullified by Chitakunye J in case No. HC 1057/09. Therefore Nigel Damain Morris had no legal authority whatsoever to transact this property. This fact was impliedly accepted by applicant hence her abandonment of her application for the rescission of judgment. The effect of the above, therefore, meant that applicant had no legal basis to remain in occupation of the property.

The fact that she remained was purely on the benevolence of first respondent. The fact that first respondent discretionally allowed her to remain on the property for 6 months on condition of her paying rent can not and should not be construed as a waiver or forfeiture of her rights.

As stated above, I conclude that there is no legal basis for holding that applicant has a right to the property as first respondent, has in my view, the right to the property as both Heiress and Executrix of this property.

I find that applicant has not been truthful, she was aware that the legal basis of her right to the property was set aside by this court in the two cases, *supra*. She was also aware that she remained on the property not on the basis of any legal ground, but purely on humatarian grounds and her erstwhile legal practitioner was aware of this, that is the reason why he did not file an affidavit in support of her assertion. Despite all this knowledge and documentary proof filed of record she nonetheless persisted with her wrongful claim.

These courts have stated for time without number that litigants should not seek to mislead the courts. In *casu* applicant's deceitful conduct, has not only unnecessarily caused the delay of the conclusion of this matter, but, her obdurateness has also resulted in serious prejudice to first respondent. This, the court can not allow. For that stance, she can not escape being saddled with appropriate costs for such conduct.

The punitive costs are designed to ensure fair and honest dealings by litigants. The courts should not hesitate to order them where the facts of the case clearly call for them. This is one such case where the court should firmly stamp its authority.

Order

- (1) The application is dismissed, and
- (2) applicant is ordered to pay costs on an attorney and client scale.

Nyamo Ruzive Attorneys applicant's legal practitioners
Calderwood, Bryce Hendrie & partners, respondent's legal practitioners