

DANIEL TATENDA MATENGAMBIRI
and
TSITSI ANNA MPOFU
versus
GODWIN MANZUNZU
and
RM AFRICA PROPERTY CONSULTANTS (PRIVATE)
LIMITED t/a RAWSON PROPERTIES
and
THE SHERIFF OF ZIMBABWE (N O)

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 16 November 2022 & 6 April 2023

Opposed Application

Mr *TC Masara*, for the applicants
Mr *A Mugiya*, for the 1st respondent
No appearance for the 2nd and 3rd respondent

MHURI J: This is an application for the confirmation of a provisional order granted on 21 July 2022 whose interim terms were that, pending determination of this matter, the applicant is granted the following relief:-

“1st respondent be and is hereby ordered, forthwith to cease any form of development of a certain piece of land situate in the district of Salisbury called Stand Number 17782 Tynwald Township of Lot 12 of Tynwald measuring 408 square metres.”

The terms of the final relief sought were:

- “1. 1st respondent be and is hereby interdicted from interfering with applicant’s possession or occupation of a certain piece of land called Stand Number 17782 Tynwald Township of Lot 12 Tynwald measuring 408 square metres and from otherwise causing disturbance thereto.
2. 1st respondent be and is hereby ordered to remove or cause to be removed from Stand 17782 Tynwald Township, all assets of any kind or description which he may have placed or caused to be placed at or within same.
3. 1st respondent, his assignees, sub tenants, invitees and all those claiming right of occupation through him, is hereby ordered to vacate Stand 17782 Tynwald Township.
4. applicant be and is hereby authorised to demolish or cause to be demolished and remove or cause to be removed, at the 1st respondent’s expense, any form of development of any structure on Stand 17782 Tynwald Township.

5. 1st respondent to pay costs on the legal practitioner client scale.”

First respondent is averse to the confirmation of the Provisional Order averring that the application does not meet the requisite requirements of such an application and it must be dismissed.

The requisite requirements in applications such as this where a final interdict is sought are well established. These are that:

1. a clear right which must be established on a balance of probabilities.
2. irreparable injury/harm actually committed or reasonably apprehended.
3. the absence of an alternative remedy.

See: *CHARUMA BLASTINGS & EARTHMOVING SERVICES (PVT) LIMITED v*

NJANJI & ORS 2000 (1) ZLR 85 (S)

and

SETLOGELO v SETLOGELO 1914 AD 221

In brief, applicants’ submissions in support of the confirmation of the provisional order were that they have a clear right in relation to the property, Stand 17782. They purchased the property from the second respondent which had the authority to sell same. The sale was sanctioned by this court in case number HC 5182/15, that is, they bought it pursuant to an execution order by this court.

They further averred as regards irreparable harm that they have been deprived of their right of occupation and use of the property by first respondent’s actions. There also is no other adequate remedy available to them to preserve their occupation, possession and use the property.

In opposition, first respondent’s submissions in brief were that applicants do not possess a clear right in respect of the property. They did not adduce any evidence to substantiate that they fulfilled the agreement of the 28 November 2019 nor that the property was transferred to them.

Further, that the applicants failed to adduce evidence to substantiate their claims, as such cannot claim that they suffer irreparable harm when first respondent is the registered owner of the property having purchased it from Pilo Kauma who had bought it from Martin Sibindi the registered owner.

Lastly, first respondent submitted that applicants failed to establish that there was no alternative remedy. They merely stated in their founding affidavit that there is no other remedy available to them. It submitted that he who alleges must prove.

I have stated above the requisite requirements in applications of this nature, where a final interdict is being sought.

In casu, have the applicants established a clear right to the property so as to be entitled to the final relief they are seeking. To get an answer to the question, regard is to be had to the historical background of this property.

Lot 12 of Tynwald, Salisbury measuring 30.5172 hectares under which the property in question falls was transferred from one Rose Florence Schaller to Martin Sibindi on 11 July 1986. (Title Deed 4209/86).

On 14 November 2016 in an application pitting Ian Musango, Rudo Musango and Martin Sibindi, City of Harare Council N.O. and the Registrar of Deeds N.O. HC 5182/15, this court issued an order to this effect.

- “1. the application be and is hereby granted.
2. 1st respondent (Martin Sibindi) be and is hereby ordered to complete the developments for the subdivision permit within three months of this order and effect transfer of a certain piece of land situate in the district of Salisbury called Stand known as share 74 on the remainder of Lot 12 of Tynwald measuring 488 square metres to the applicants.
3. Failing which the Estate Agent council be and is hereby authorised to appoint a developer to complete and supervise the project development to completion at the expense of 1st respondent.
4. In the event of the 1st respondent failing to sign all transfer papers the Sheriff be and is hereby authorised to sign all necessary papers for the said transfer to be effected and to dispose of 1st respondent’s properties to finance the project.
5. The 2nd and 3rd respondent be and are hereby ordered to give effect to paragraph 2 and 4 above.
6. The 1st respondent shall pay costs of suits.
(underlining my own)

It is noted however that this Order was in relation to the transfer of property known as share 74 of Lot 12 from Martin Sibindi to Ian Musango and Rudo Musango, it however authorised the Sheriff to dispose of Martin Sibindi’s properties to finance the completion of the developments as per the subdivision permit (the project).(emphasis added)

It is on the basis of this Order that the Sheriff deposed an affidavit on 28 February 2020 confirming that the second respondent (Rawson Properties) and Hayes Construction are the owners of the various properties which included the property *in casu* Number 17782. This was also after the City of Harare had addressed a letter dated 15 April 2019 to Martin Sibindi as represented by the Sheriff in which it granted a permit authorising land rationalisation and regularisation of Subdivision of the remainder Lot 12 of Tynwald.

On 28 November 2019 the second respondent entered into an agreement of sale with the applicants in respect of the property in question. Paragraph A of the said agreement states,

“A. Hayes Zimbabwe (Pvt) Ltd and R M Africa Property Consultants (Pvt) Ltd by virtue of a Contract Agreement dated 7 November 2018 with the Sheriff of Zimbabwe duly representing Martin Sibindi by virtue of the order of the High Court No 0122049 dated 14 November 2016 under case number HC 5182/15, have entered into an agreement to service stands 17722- 18080 Tynwald Township of Lot 12.

B: The said sellers have been, in terms of the above mentioned contract agreement awarded and paid in the form of stands for their services.

C. The said sellers are the holders of the rights and interest in the respective subdivision of the land situate in the district of Salisbury called the stand 17782 Tynwald held under Deed of Transfer No 4209/86 by the said Martin Sibindi duly represented by The Sheriff of Zimbabwe.

D.....

E.....

F.....”

On 14 October 2019, first respondent entered into an agreement of sale of the same property with Martin Sibindi. This was despite the fact that by then the third respondent was already representing Martin Sibindi in all transactions as per the High Court Order 5182/15 in respect of the stands under Lot 12.

In response to the application for a provisional order, on 21 July 2022 second respondent filed a consent to judgment consenting to judgment as prayed for by the applicants.

Considering all the above, I am persuaded that the applicants established a clear right to the property. With that finding I am also persuaded that first respondent by being in occupation of the property, applicants are being prejudiced as they cannot occupy or use the same property there by suffering irreparable harm.

Equally so, having established that they have a clear right to the property, applicants have no other remedy except to obtain a mandatory interdict.

I am in the circumstances persuaded that applicants’ application satisfies the requirements of applications of this nature and will therefore confirm the Provisional Order of the 21 July 2022.

Applicants prayed for costs on the higher scale. I am not convinced that these are warranted in this case. There was no abuse of court processes as first respondent armed with the agreement

of sale entered into with Martin Sibindi he had the right to oppose the confirmation of the Provisional Order.

In the result, it is ordered that:

1. The Provisional order issued on 21 July 2022 be and is hereby confirmed.
2. The terms of the final order of the Provisional Order be and are hereby granted.
3. First respondent to bear costs of the application on the ordinary scale.

Masara, Savanhu Attorneys, applicant's legal practitioners

Mugiya, Muvhami Law Chambers, first respondent's legal practitioners

Mabuye, Zvarevashe Legal Practitioners, second respondent's legal practitioners