

SUPERVISION HOUSING COOPERATIVE SOCIETY LIMITED
versus
CITY OF HARARE

HIGH COURT OF ZIMBABAWE
TAGU J
HARARE, 15 January & 20 January 2021

Urgent chamber application

B Ndhlovu, for the applicant
R Nemaramba Dodzo, for the respondent

TAGU J: The applicant approached this court on an urgent basis seeking a provisional order to interdict the respondent from demolishing and evicting residents at stand number 3973 Budiriro 2 Harare. The facts of the matter are that the applicant which is a cooperative invaded the respondent's piece of land at number 3979 Budiriro 2 Harare and parceled out residential stands to residents without the respondent's authority. The respondent issued summons for the eviction against the applicant and those claiming occupation through it on the 18th of December 2018 which summons was served on the applicant on the 28th December 2018. A judgement was granted in default in favor of the respondent by this Honorable Court under case number HC 11374/18. The applicant subsequently filed an application for the rescission of the said judgment under case number HC 52918/19 which is yet to be heard. The respondent having knowledge of the pending court application for the rescission of the default judgment made a press statement on the 17th of December 2020 with an intention to evict applicant and its members at stand number 3973 Budiriro 2 Harare and to demolish dwellings. The applicant says the press statement targeting the applicant and its members is said to be in violation of the applicant's constitutional right to dwelling. The press statement jolted the applicant into filing the current application seeking the following provisional order.

“TERMS OF FINAL ORDER SOUGHT

IT IS ORDERED

That you show cause to this Honorable Court why a final order should not be made in the following terms.

FINAL ORDER

1. The application of an interdict be and is hereby granted.
2. That the Respondent be interdicted from executing the default judgment under case number HC 11374/18 pending the hearing and determination of the court application for the rescission of the default judgment under case number HC 5298/19.
3. The Respondent to pay cost of suit.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of this provisional order the Applicant is granted the following relief:

1. The Respondent be and is hereby interdicted from demolishing and evicting residents at stand number 3973 Budiriro 2 Harare.

SERVICE OF THE PROVISIONAL ORDER

1. To be effected by the deputy sheriff upon the Respondent.”

The respondent filed a notice of opposition to the applicant’s application. In that notice of opposition the respondent raised two preliminary objections. The first objection is that this matter is not urgent. The second point is that of dirty hands. I will look at each objection first before dealing with the merits of the application.

MATTER NOT URGENT

The respondent’s contention is that the urgency alleged by the applicant is not the urgency anticipated by the Rules of this Honourable Court as stated in the case of *Kuvarega v Registrar General and Anor* 1998 ZLR (1) 188. It said the urgency is self -created more so on the following reasons.

The applicant became aware of the Court Order in June 2019. At this time applicant knew or ought to have known that the respondent could execute the judgment at any time. It should have filed an application for stay of execution of the default judgment at that time. It did not. In fact it

filed an application for rescission of judgment. It submitted further that unfortunately the applicant has not been honest with this Honourable Court and has not put this Honourable Court into confidence despite the fact that it is the same court from which it is seeking relief. The respondent said the applicant has deliberately left out information to the effect that when it filed its application for rescission of judgment under HC 5298/19 on the 20th June 2019, the respondent filed its opposing affidavit on the 12th July 2019. The applicant did not take any action thereafter. It did not bother to file answering affidavit or heads of argument in the matter. As a result the respondent filed an application for dismissal of the application for rescission of default judgment on the 12th November 2019 under case number HC 9210/19 for want of prosecution, after giving notice to the applicant. The applicant only took action in HC 5298/19 on the 17th December 2019 after receiving the application for dismissal for want of prosecution and after that the applicant has not bothered to have the record for HC 5298/19 paginated and apply for set down of the matter.

The respondent further submitted that the fact that the applicant has not disclosed the existence of HC 9210/19 and also its reluctance to pursue its application for rescission clearly shows that the applicant has never treated this matter as urgent. Further, the applicant has also not explained what it was doing since the 17th December 2020, which it alleges urgency arose (which is denied). The applicant only approached this court a month later and has not bothered to explain what it was doing since the 17th December 2020. It is the respondent's contention that the need to act did not arise from the respondent or government's announcement to demolish the illegal structures and evict residents. It insisted that the need to act arose when the applicant had knowledge of the court order and chose not to seek stay of execution.

The applicant submitted that it is aware of the Kuvarega case, supra. It however, averred that it is distinct in that there was no intention on the part of the respondent to execute the default judgment following the an order made by MUNANGATI-MANONGWA J in case HC 114/18 in which development was to be stayed. It said currently no development is taking place at the stand in question. It insisted that agency arose when respondent published its intention to demolish and evict residents.

DIRTY HANDS

The respondent submitted that the applicant is approaching this court with dirty hands. The applicant invaded the respondent's land and went on to parcel out stands to its members without the approval and/or consent of the respondent. The applicant's members went on to build structures on respondent's land without approval plans. The land does not have amenities such as water reticulation, sewer and roads. This was done despite that the Regional, Town and Country Act [*Chapter 29.12*] and City By-laws require that any structure which is constructed in the City of Harare should be approved by the respondent and that the land should have amenities such as sewer, water reticulation and roads before occupation. According to the respondent the applicant is an illegal land invader and as such it is approaching this Honorable Court with dirty hands. The applicant need to be barred from being heard until it has purged its contempt.

The applicant submitted, however, that since the order by MUNANGATI-MANONGWA J no development has taken place. It further submitted that the parties have been exchanging documents with the view of regularizing what the applicant did. It said since the applicant regularized what others did in some areas this must be extended to the applicant. It therefore hoped and expected the respondent to regularize the applicant's stay at this stand since it has made an application for regularization. Because applicant took steps to have the issue regularized it is not approaching the court with dirty hands.

Having heard the submissions the court was convinced that this matter is not urgent. The applicant was aware of the court order in June 2019 at least. It opted to apply for rescission and did not apply to have a stay of execution then. When an order by MUNANGATI-MANAONGWA J was issued to stay developments, the applicant did not treat the matter as urgent to the extent that the respondent had to apply for the dismissal of the applicant's application for rescission of default judgment for failure to prosecute. The applicant then acted after being served with the application for dismissal meaning it never treated this matter as urgent. Agency in this matter is self-created. Even if the need to act is found to have arisen after the announcement by the respondent of its

intention to demolish and evict applicant's members, no explanation has been given as to why the applicant took over a month to file the present application. The first point *in limine* has merit and I will uphold it.

Coming to the dirty hands issue the applicant does not deny that it invaded the respondent's land without the respondent's consent. It is therefore an illegal settler. It however, pins its hopes on the fact that since the respondent regularized the stay of other land invaders it would be granted the same right. It now wants this court to protect it from its illegal occupation. With the greatest of respect this court cannot sanction an illegality. If the respondent decides to regularize the applicant's occupation of its land, well it will be in its discretion. I find merit in the second preliminary point as well.

The respondent prayed that this application be dismissed. However, having found that the application does not meet the requirements of urgency I think the best relief for the respondent is to have the application struck off the roll of urgent matters.

IT IS ORDERED THAT

1. The preliminary objections are upheld.
2. The application is struck off the roll of urgent matters.
3. There is no order as costs.

Bothwell Ndlovu Attorneys at Law, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, respondent's legal practitioners