FRANCIS NYAMADZAWO

And

SIPIWE NYAMADZAWO

Versus

AGRIPPA HLABANGANA

And

BARBRA HLABANGANA

And

JOYCE SEVERINO

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 2 AND 5 OCTOBER 2023

Opposed Application

Applicants in person
T. Marume, for the 1st and 2nd respondents
No appearance for the 3rd respondent

KABASA J: Any litigation must come to an end. The principle of finality to litigation is in the interests of the public policy. Rule 59 (15) (b) of the High Court Rules SI 202/2021 espouses this policy.

Rule 59 (15) (b) provides that:-

> "Where the respondent has filed a notice of opposition and an opposing affidavit and within one month thereafter, the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent, on notice to the applicant, may either –
>
> (a) … or
> (b) make a chamber application to dismiss the matter for want of prosecution, and the Judge may order the matter to be dismissed with costs or make such order on such terms as he or she thinks fit."

The applicants seek the dismissal of an application which granted a provisional order on 21 October 2008 under HC 2079/08 because the respondents have not set the matter down for its confirmation or discharge.

The background to the matter is this: The 3rd respondent sold her house, Number 6460 Mkoba North Township to the applicants. The same property was also sold to the respondents in what appears to be a double sale. The applicants subsequently approached the magistrates court under case number 1965/02 seeking the ejectment of the occupants of 6460 Mkoba, the contentious house. The applicants cited the 3rd respondent only. The second respondent was the one in occupation and upon obtaining judgment, the writ of ejectment and notice of ejectment was duly served on the occupants. Ejectment was set for 25 August 2008. That ejectment proceeded and the 1st and 2nd respondents were duly evicted. The 1st respondent was however not at the premises due to work commitments.

On 17 October 2008 the 1st and 2nd respondent filed an urgent chamber application in which they stated that they had been evicted from 6460 Mkoba and needed protection from the court. This application was filed as an *ex-parte* application and was duly granted. The interim relief was that:-

> "Execution of the writ issued by the Magistrates Court Gweru in Case No. 1965/02 dated 5th August 2008 is hereby suspended pending the confirmation or discharge of this Provisional Order."

The final relief which was being sought was that:-

> "Pending finalisation of the applicants' claim in Case No. HC 2078/2008 applicants are hereby allowed to remain in occupation of Stand No. 6460 Mkoba North Township of Mkoba otherwise known as House No. 6460 Mkoba 18 Gweru."

The applicants were served with the provisional order and duly filed their notice of opposition, opposing the confirmation of the provisional order. The matter then stalled. The present application was then filed seeking to dismiss the application filed under HC 2079/08, for want of prosecution.

When the matter was initially set down for hearing the 1st and 2nd respondents appeared in person and exhibited a lack of comprehension of what the matter was about. The court advised them to seek legal representation. They had however filed their opposing papers. *Mr. Chizhande* was then engaged to represent the respondents and the court duly allowed counsel to file heads of argument. The parties proceeded to file a set of new opposing papers and the applicant also filed heads of argument. Such papers were not filed with the leave of the court and so are expunged from the record. The record the court considered is therefore the one which was before it at the time the matter was postponed to allow the 1st and 2nd respondents to get legal representation.

The matter was subsequently set down for 2 October 2023 and argued. The applicants' contention was that the delay in setting down HC 2079/08 is unreasonable and inordinate. The provisional order's confirmation has no prospects of success as it was obtained fraudulently. The application was *ex parte* seeking to stop an eviction which had already occurred. The confirmation is also anchored on HC 2078/08 a matter where the 1st and 2nd respondents were claiming ownership of the house in question. That matter HC 2078/08 was however removed from the roll by MAKONESE J on 12 January 2012. It was subsequently deemed abandoned and dismissed by operation of law. The confirmation of HC 2079/08 therefore stands on nothing.

In opposing the application counsel for the 1st and 2nd respondents had taken points *in limine* which he abandoned on the day of the hearing. I will therefore not consider these points. Suffice to say the decision by counsel to abandon the points *in limine* was wise. This being so because the attack on the citation of r 236 and not r 59(15) of the new High Court Rules, 2021 sought to put emphasis on form rather than substance. The second point *in limine* on *res judicata* was untenable as there never was a determination of the application *in casu*. The matter was never finally and definitely dealt with in prior proceedings (See *Chimpondah & Anor* v *Muvami* 2007 (2) ZLR 326 (H)).

On the merits counsel's argument was that the delay in prosecuting HC 2079/08 was due to financial constraints. The applicants acquiesced for the past 10 years and in HB 7/11 the parties were advised to focus on resolving the real dispute. That advice by the court interfered with the process in that the parties were both obligated to see the matter to finality.

As regards prospects of success counsel's argument was that the matter involves an immovable property worth thousands of dollars. It is therefore important for the matter to be resolved so each party knows where they stand as regards their competing claims to the property. The respondents purchased the property unaware that the applicants had already entered into an agreement of sale with the 3rd respondent. The 1st and 2nd respondents have paid the full purchase price for the property and are residing thereat. The balance of convenience favours them as a dismissal of their application on technical grounds would prejudice them.

It is important to set out that the application sought to be dismissed is HC 2079/08 which granted a provisional order whose confirmation is anchored on the finalisation of HC 2078/08. The matter under HC 2078/08 in which the issue of the parties' competing claims to this property was to be determined is not what is sought to be dismissed, as counsel appears to suggest.

With that said in *Guardforce Investments (Pvt) Ltd* v *Ndlovu & Ors* SC 24-16 CHIDYAUSIKU CJ set out what the court should look at in applications of this nature.

> "The discretion to dismiss a matter for want of prosecution is a judicial discretion to be exercised taking the following factors into consideration –
> (a) the length of the delay and the explanation thereof.
> (b) the prospects of success on the merits.
> (c) the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time."

Turning to the facts *in casu*, the provisional order was granted in 2008. When the present application was filed 14 years had lapsed without the respondents seeking its confirmation.

It would appear the applicants filed several applications which all appear to have suffered a still birth. In *Nyamadzawo and Anor* v *Gweru Magistrate (Mhlanga) & Ors* HB 07/11 MATHONSI J (as he then was) adjudicated in a matter where the applicants were seeking the consolidation of HC 2335/08, HC 2078/08 and HC 2079/08 and the dismissal and discharge of a provisional order issued by the Gweru Magistrates Court on 29 October 2008 under Case No. 1965/02. After bemoaning the proliferation of litigation between the parties the learned Judge dismissed the application and concluded:-

> "The only remaining matters are HC 2078/08 which is a summons action still pending and HC 2079/08 where a provisional order protecting 2nd and 3rd respondents' occupation of the disputed house was granted and its confirmation has been opposed by the applicants. Nothing will be served by consolidating those 2 matters and if the parties genuinely want to bring the matter to finality they should agree to either the confirmation or discharge of the provisional order in HC 2079/08 and strive to set down the main action for trial.
>
> That way the respective rights of the parties will be determined once and for all instead of perpetuating the proliferation of litigation which does not even attempt to bring the matter to finality."

This sound advice was not heeded, with the 1st and 2nd respondents presumably preferring to enjoy the protection afforded by HC 2079/08.

MATHONSI J's judgment was handed down on 27 January 2011. The pleadings in HC 2078/08 must have subsequently been closed as the matter appeared before MAKONESE J on 12 January 2012. It was removed from the roll. The 1st applicant who was the 2nd defendant therein was the only one who appeared. HC 2078/08 is the matter which sought to pronounce the rights of the parties to this house. The removal of the matter came about a year after MATHONSI J's judgment in HB 7-11. I was not favoured with an explanation of what became of that matter which was then obviously deemed abandoned and dismissed at the lapse of 3 months, reckoned from 27 January 2012.

The delay has therefore been inordinate and the explanation unreasonable. I say so because the 1st and 2nd respondents cannot hide behind financial constraints when in 2012 they had HC 2078/08 set down but did not appear on the day of hearing.

We are talking of a period in excess of 10 years since the grant of HC 2079/08. The applicants have been self-actors and the 1st and 2nd respondents could have sought to have HC 2079/08 confirmed as self-actors. Would they have not acted had they not been enjoying the protection afforded by the provisional order? They surely would have.

Litigation cannot be held in limbo for over 10 years with no definitive end to it.

In *Guardforce (supra)* the point was made that a respondent faced with an application for dismissal can proceed to attend to the complaint, in other words do that which had caused the other party to seek dismissal of the matter.

In casu the respondents have done absolutely nothing except oppose the present application. There has been no attempt to set HC 2079/08 down for its confirmation/discharge and no attempt at all to attend to HC 2078/08 upon which the confirmation of HC 2079/08 rests.

This brings me to the prospects of success. If HC 2079/08 is anchored on HC 2078/08 and HC 2078/08 is no longer before the court as it was deemed abandoned and dismissed, how can one talk of prospects of success for HC 2079/08. What is there to confirm when such confirmation speaks to the finalisation of HC 2078/08, which matter is not before the courts for such finalisation?

Had the 1st and 2nd respondents shown that they were reacting to the application by seeking the confirmation of HC 2079/08 or even attending to HC 2078/08 I would have had reason to make an order other than dismissal (*Scotfin Ltd* v *Mtetwa* 2001 (1) ZLR 249).

In *Masulani* v *Masulani & Ors* 2008 (1) ZLR 491(H) MAKARAU J (as she then was) underscored the interests of public policy in seeing finality to litigation. Granted, the dismissal of HC 2079/08, is not the ideal finality as the parties' wrangle over ownership of the house is in limbo. It will however not be a proper exercise of my discretion to refuse to dismiss HC 2079/08 given the circumstances already highlighted herein.

If the removal of the HC 2079/08 protection results in galvanizing the 1st and 2nd respondents into action then that is what would be ideal. Whatever action they deem fit to pursue given the fate of HC 2078/08 is for them to decide.

The balance of convenience and resultant possible prejudice applies equally to both parties. The applicants who have been up and down seeking to assert a right to this house on one hand and the 1st and 2nd respondents who have been staying in the contentious house for a long time. The respondents' inertia has largely contributed to the merry-go-round the parties have been on and the dismissal of HC 2079/08 must, hopefully, result in some effort to resolve the impasse. I have deliberately refrained from commenting on the applicants' amended draft order wherein they sought eviction of the respondents , the lifting of the suspension of the order of the Magistrates Court under 1965/02 and the right to be placed in occupation of the property. This is because the issue regarding the rightful owner of this property is yet to be decided. The double sale saga has to be adjudicated on and resolved. Only then can either party claim ownership and the right to occupy the property. This application is not about the resolution of this issue.

As regards costs, costs usually follow the cause unless there is some justification to depart from that norm. I am of the view that the applicants could have set HC 2079/08 down for its confirmation or discharge, in line with the sentiments expressed by MATHONSI J in HB 7/11 but chose not to. Both parties appeared content to unnecessarily drag this matter with no resolution for over a decade.

This is a good case for ordering each party to bear its own costs.

With that said, I make the following order:-

1. The 1st and 2nd respondents' application under HC 2079/08 be and is hereby dismissed for want of prosecution.

2. Each party shall bear its own costs.

Marume & Furidzo c/o Masamvu & Da Silva-Gustavo Law Chambers, 1st and 2nd respondents' legal practitioners