

ASSEMBLIES OF GOD
versus
ASSEMBLIES OF GOD SPIRITUAL MOVEMENT
and
LUCKMORE ZINYAMA
and
PHILIP ZINYAMA
and
DAVID MAKWINDI

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 27 September, 4 October, 11 October & 3 November 2023

Opposed Application

Ms C Manhlangu, for the applicant
Mr A Masawi, for the respondents

TAKUVA J:

The plaintiff issued summons from this court seeking eviction of the four defendants from a church property known as No 2666T corner Bimha and Mbira Street, Rujeko Township, Marondera. The Sheriff duly served the summons on the four defendants on 24 August 2023 and 25 August 2023.

In terms of r 20(2) of the High Court Rules 2021 the first, second and third defendants had up to 7 September 2023 to enter their appearance to defend while the fourth defendant up to 8 September 2023. In accordance with r 20(6) they were required to serve a Notice of the appearance to defend upon the plaintiff within seven (7) days. On 29 August 2023, a Notice of Appearance to defend was issued and was also served upon the plaintiff's legal practitioners on 8 September 2023.

Since it is this notice that is the subject matter of this application, it is instructive to summarize its contents. They are as follows;

- a) The heading shows two plaintiffs whereas in the summons there is only one, that is. Assemblies of God.
- b) There are three defendants while the summons contains four defendants,
- c) Chikomba Rural District Council is indicated as third defendant when they are not a party to this action.
- d) The third and fourth defendants' names are not appearing on the heading.
- e) It is indicated on the notice that the first to fourth defendants entered appearance to defend the action. However, only first and second defendants are named as defendants on the heading.
- f) It is also apparent that the legal practitioners who signed the notice signed only on behalf of first and second defendants.

Plaintiff's counsel notified defendant's counsel of the seeming defect. Although defendants' counsel indicated his intention to amend the notice, he did not do so at all. On 20 September 2023, the plaintiff requested for default judgment as against the third and fourth defendants. The matter was set on the unopposed roll. On the date of the hearing, the defendants appeared and opposed the request for default judgment against the third and fourth defendants.

Their argument is that all the four defendants entered appearance to defend in the appearance book at the Registry hence the referral of the matter to the unopposed roll is incompetent. They also contend that the Notice of Appearance served on plaintiff is in respect of all four defendants hence the third and fourth defendants are not barred.

ISSUE

Whether or not the Notice of Appearance to defend complies with the rules?

THE LAW

Rule 20(2) of the High Court Rules 2021 provides as follows;

“APPEARANCE TO DEFEND

20(1)

20(2) subject to the provisions of the Act or any other law, the defendant in every civil action shall be allowed ten days after service of summons on him or her within which to deliver a notice of intention to defend, either personally or through his or her legal practitioner.

20(3)

20(4).....

20(5).....

20(6) Within seven days of the entry of appearance to defend written notice there of shall be served on the plaintiff or on his or her legal practitioner where the plaintiff sues by a legal practitioner at the plaintiff's address for service failing which the defendant shall be barred and such notice shall be in Form No. 7.

(7) A defendant who has failed to enter appearance shall be barred.....”

The third and fourth defendants' argument is that their legal practitioner complied with r 20(3) by recording in the appearance book at the registry. They also relied on the following cases to bolster their argument;

(1) *Stircrazy Investments (Pvt) Ltd v A Lucky Brand (Pvt) Ltd and Anor* HH 194/12, where the issue was the rescission of a default judgment obtained on the ground that a notice of appearance to defend had been delivered to the wrong address. Rescission was granted on the basis that on the then applicable rule (Order 7 r 49) no sanction was provided for in relation to a defendant who would have served a notice of appearance to defend outside the 24 hour period. That apparent lacuna was cured by r 20(6) of the High Court Rules 2021 which provides that such a defendant would be barred for failure to serve a notice of the appearance to defend to the plaintiff within 7 days from the date of entry of same.

Defendants also relied on *Pinelong Investments (Pvt) Ltd v Thomas Vallance & Ano* HH 132/09 where the issue before the court was the effect of failure to have a notice of appearance to defend served on the plaintiff within the stipulated time frame. Again, the court was interpreting the old rules (HIGH COURT RULES 1971). The new rules provide the current position of the law. On this basis, the case is inapplicable. See also *Gertrude Pachizvaina Stembile Mutasa & Ano v Nyakutombwa & Mugabe Legal Counsel and Anor* HH 145/17.

It is neither here nor there that third and fourth defendants' names appear in the Appearance Book. The underlying principle in r 20(6) is that where service of the notice has not been properly effected there is no appearance to defend. The consequence is a bar. *In casu*, the third and fourth defendants failed to serve plaintiff with the notice of appearance to defend. The matter was referred to the unopposed roll in terms of r 23(1) of the High Court Rules 2021 which states;

“23(1) In cases where the plaintiff's claim is not for a debt or liquidated demand only and the defendant has failed to enter appearance after the period prescribed in the summons for entering appearance, the plaintiff shall set down the case for judgment on an appropriate day specified in these rules relating to set down of unopposed matters, without notice to the defendant.....”

In the circumstances, I find that the third and fourth defendants appearance to defend is irregular. I find also that the matter was properly enrolled on the unopposed roll.

In the result, it is ordered that:

1. The third and fourth defendants and all those claiming occupation through them, be and are hereby ordered to vacate church properly located at stand 2666T Corner Bimha and Mbira Street, Rujeko Township Marondera within forty-eight (48) hours of granting of the order.
2. In the event of failure to comply with,
(1) above, the Sheriff for Zimbabwe, with the assistance of the ZRP as the exigencies of the situation demands, be and is hereby ordered to evict the third and fourth defendants and all those who claim occupation through them.
3. The third and fourth defendants, jointly and severally, the one paying the other to be absolved, pay plaintiff's costs of suit on the ordinary scale.

C Mahlangu-Ruzvidzo & Mahlangu Attorneys, applicant's legal practitioner
A Masaini Mufuka & Associates, respondent's legal practitioners