SIMON DANGA
and
OBERT DANGA
and
NYARARAI DANGA
and
TINASHE DANGA
and
NHARINGO DANGA
and
MURINGI DANGA
versus
NYASHANU MUDYIRAPO
(In her official capacity as the Executor of Estate late ISHMAEL MUDYIRAPO)

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 11 July 2023 & 8 May2024

Opposed Application

H Mhara, for the applicants
T M Mutema, for the respondent

WAMAMBO J: This application came by way of a summary judgment application as per R 30 of the High Court Rules 2021. The applicants seek in the main the eviction of respondent and all those who claim occupation through him from Ranch 1090 Hampshire Estate Wilshire Chivhu (hereinafter called the farm).

The applicants are siblings and their father Absolom Mugova Danga who died on 24 June 1992, was the registered owner of the farm. The former vice-President of Zimbabwe the Late Simon Muzenda was appointed as the executor of the late Absolom Mugova Danga's estate. After due process the farm was transferred to the applicants.

From this point onwards the narration of events that followed differs markedly between the applicants' version and that of the respondent.

According to the applicants what thereafter transpired is as follows:-

Ishmael Mudyirapo (Ishmael) and his family members continued in occupation of the farm as relatives of the applicants. Ishmael Mudyirapo let out part of the farm to third parties without the knowledge of the applicants. Despite instructions to the contrary from the applicants Ishmael Mudyirapo persisted.

Applicants issued summons with this Court for the eviction of Ishmael Mudyirapo under HC 2991/04. The summons were served on respondent who filed an appearance to defend. Before the eviction proceedings were finalized Ishmael died. Ishmael has now been substituted with the respondent in his capacity as the executor of Ishamel's estate. According to applicants respondent has no *bona fide* defence to the matter on account of three factors namely that applicants are the registered owners of the farm, respondent did not file any objections with the Master of the High Court despite several advertisements in the newspaper for the past twenty years and lastly that respondent's occupation at the farm is no longer required by the applicants.

In para 6 of first applicants founding affidavit he states as follows:-

> "The applicant's summary judgment is on the basis that the respondent have no *bona fide* defence or mere possibility of success, plausible case or triable issues and have only entered an appearance to defend for the purpose of delay, thus abusing the court process."

The respondent is opposed to the application. In his opposing affidavit he raised three points *in limine* namely lapse of summons that there are material disputes of fact and lastly, they raise *lis pendens* in that case number 7045/22 is a current matter wherein the same parties and same subject matter are involved. At the hearing Mr Mutema for the respondent submitted that points *in limine* two and three are best addressed on the merits. Effectively this means he realized the two points *in limine* were raised in error, or he had no confidence the points would lead to the resolution of the matter, were I to find favour with same. Effectively, in terms of points *in limine* the first point *in limine* as raised in the opposing affidavit is that of lapse of summons.

It may be necessary for clarity to regurgitate this point *in limine* in the form it is couched in respondent's opposing affidavit. It reads as follows:-

> "1. LAPSE OF SUMMONS
> I am advised that the summons in this matter case number 2991/04 have since lapsed. In terms of Practice Direction No. 1 of 2022 in para 2.2 it is stated that,
> 'If the summons in an action is not served within two years of its issue……the plaintiff has not ….taken further steps to prosecute the actions, the summons shall lapse.'"

> "One can note that since 2004 and for a period in excess of eighteen years, the applicants have done nothing in order to prosecute their matter. In terms of the law the summons have since lapsed and on that basis the matter must be dismissed."

Mr Mutema in brief oral submissions opined that an application for summary judgment is for speedy, resolution of a matter. Applicants' position that the delay was occasioned by the fact that there was no executor appointed is neither here nor there. Further that applicants ought to have filed an application for extension of time. It was further submitted that no reasons have been proferred by the applicants why they did not make use of para 2.2 of the Practice Directive No. 1 of 2022.

For the applicants the counter argument was as follows:-

The wording of the Practice Directive relates to serving of summons within 2 years. In this case summons were issued in 2004 and served within two years. Appearance to defend was thereafter entered. Correspondence followed and the matter was not finalized solely because the defendant in the matter Ishmael Mudyirapo passed on. Respondent had a duty to have an executor appointed in terms of the Rules of Court which was only done on 7 October 2022. According to the applicants it is respondent who has delayed the finalization of this matter by not appointing an executor.

It is of importance of examine the exact wording of Practice Directive No. 1 of 2022. I note here that respondent in his notice of opposition does not quote the relevant provisions in full Practice Directive No. 1 of 2022 provides as follows on lapsing of summons.

> "Lapsing of summons
> 2.1 If the summons in an action is not served within two years of the date of its issue, or having been served, the plaintiff has not, within the time stipulated in the High Court Rules, 1971 taken further steps to prosecute the action the summons shall lapse.
> 2.2 The plaintiff may secure an extension of the period set out in para 2.1 by filing with the Registrar of the High Court before the expiration of the period stated therein, an affidavit seeking such extension and giving reasons acceptable to the Registrar for such an extension and the Registrar may, at his or her discretion, grant the extension."

I note from the first respondent's opposing affidavit in para 1 as adverted to earlier that respondent's basis in raising this point *in limine* is that applicants have done nothing to prosecute their matter. A reading of para 2.1 of the Practice Directive starts off with the serving of the summons. Respondent effectively concedes that summons was served within two years of its issue. The attack is on applicants doing nothing to prosecute the matter.

It is common cause proceedings were stalled because of the death of Ishmael Mudyirapo. Ishmael Mudyirapo whose full names are reflected as Takadyebaya Ishmael Mudyirapo died on 27 May 2004 as per his certificate of death, attached to the record at p 20.

Acknowledging that now applicants' legal practitioners raised issue with the representation of defendant and the appointment of an executor, respondent's legal practitioners responded in a letter dated 4 October 2006. Said letter is at p 21 of the record and reads as follows on the pertinent portion.

> "RE: SIMON DANGA and OTHERS v E MUDYIRAPO -CASE NO HC 2991/04. The above matter refers.
> We acknowledge receipt of your letter dated 21 September 2006 and apologise for a delayed response.
> We confirm that we still represent the defendant and that an Executor was duly appointed at the edict meeting held in Chivhu sometime in August 2006. The deceased's first wife Miriam Mudyirapo is now the executor for the Estate Late Ishmael Mudyirapo."

The letters of administration at p 22 of the record however record the executor as Nyashanu Mudyirapo and is dated 7 October 2022.

In the circumstances as given above the applicants persisted with their application. They made efforts to identify the executor. The respondent was only appointed on 7 October 2022. Clearly, it is the respondent who stalled the movement of this matter. It is certainly not the applicants who were firmly bent on the matter proceeding. I find that the sole point *in limine* has no merit and is dismissed.

I turn to the merits.

Applicants' stance is to the following effect as adverted to earlier. Applicants are the registered owners of the farm. They have real rights to the farm. A deed of transfer has already been registered in their favour. Although respondent avers that the farm was bought by Ishmael there is no agreement of sale. The title deed in favour of applicants has not been challenged. As far back as 2004 respondent was aware that applicants had title to the farm and never challenged same.

Respondent sturdily opposed the matter by raising the following:-

There was an agreement of sale between applicants' deceased father and respondent's deceased father (Ishmael). In this regard reference was made to what is referred to as the "B" series- some not very legible documents handwritten in the Chishona language. When counsel for

the respondent was quizzed on why the documents were not translated into English by a prescribed and legally recognized interpreter counsel conceded that the "B" series documents should be disregarded. To that end I disregard the "B" series.

Respondent placed reliance on the "C" series documents contained at pp 44 to 50. These documents are Agricultural Finance Corporation (AFC) receipts reflecting that one T.I Mudyirapo deposited various amounts "for account of Mugova Danga. The sums deposited are in the order they were filed as follows;

1940 dollars on 29 October 1990

2000 dollars on 8 January 1989

1000 dollars on 25 September 1990

1500 dollars on 25 January 1989

2000 dollars on 1 February 1989

1000 dollars on 27 April 1989 and

1000 dollars on 31 August 1989

The respondent submitted that the aforementioned deposits amount to proof that respondent's father made these deposits on behalf of applicants' father in furtherance of the agreement to sell the farm to Ishmael. Effectively that the deposits were towards the purchase of the farm. Further that applicants do not impugn these deposits nor do they proffer any explanation on why deceased Ishmael effected payment into the late Mugova Danga (also referred to as Absolom Mugova Danga) AFC account,

Respondent had further submissions to make in the form of the "D" series of documents at pp 51-54 of the record. On 14 March 2022 Sawyer and Mkushi legal practitioners representing respondent's interests wrote to Gill, Godlonton and Gerrans law firm alerting the latter to a possible agreement of sale between Ishmael Mudyirapo and Mugova Danga on the sale of the farm.

At p 52 of the record is a letter from Danziger and Partners law firm to Gill, Godlonton and Gerrans law firm dated 11 December 1985. Notably Danziger and Partners represented applicants' now late father. The said letter reflects that applicant's father owned two farms 1042 and 1090 Wiltshire. Further that Mudyirapo (apparently Ishmael) on 27 July 1983 bought Farm No 1042 Wiltshire from applicant's father for $21000 which was paid. The other letters do not seem to add anything of substance to the resolution of this matter.

I note here that there were some issues raised like the issue of prescription raised by the applicant which were raised improperly and which I will disregard paying regard to the nature of the application before me.

In an application for summary judgment the requirements have been traversed in a number of cases. TAGU J in *National Employment Council* v *Antelope Park (Pvt) Ltd* HH 799/22 at p 3 enunciated the requirements as follows:

> "Coming to the merit it is trite than in an application of this nature the applicant has to establish and prove that it has a clear and an unanswerable claim against the respondent and that respondent has no defence to the claim and has entered an appearance to defend for the sole purpose of delaying the applicant's claim."

MAKARAU JP (as she then was) in *Stationery Box (Private) Ltd* v *Natcon (Private) Ltd & Farai Ndemera* 2010 (1) ZLR 227(H) stated the following at p 230D – E

> "The test to be applied in summary judgment applications is clear and settled on the authorities. The defendant must allege facts which if he can succeed in establishing them at the trial would entitle him to succeed in his defence.
> Obviously implied in this test but often overlooked by legal practitioners is that the defendant must raise a defence. His facts must lead to and establish a defence that meets the claim squarely. If the facts that he alleges, fascinating as they may be and which he may very well be able to prove at the trial of the matter do not amount to a defence at law, the defendant would not have discharged the onus on him and summary judgment must be granted."

The applicants have proven that they have a clear and unanswered claim against respondent. They have proferred a title deed in their names. They hold real rights to the farm. The title deed has been in existence for long. It was issued as long ago as 27 November 2002.

The respondent raises claim that the farm in question was bought by Ishmael Mudyirapo. There is no agreement of sale that establishes this point.

The deposits made into an AFC account for the applicants' father's account do not go any further than that Ishmael Mudyirapo made the deposits. The deposits do not amount to a defence for eviction. Further the said Ishmael Mudyirapo had since passed away. He is the very person who would be able to explain why he made the deposits. Referring the matter for trial on this point will in the circumstances not assist respondent's case.

The "D" series documents apparently speak to farm 1042 being bought by Ishmael Mudyirapo. The farm at hand is farm 1090. The deposits made are apparently for farm 1090.

There is no witness nor document that amounts to a plausible defence to the claim for eviction. It has been raised that there is a pending matter under HC 7045/2022. The matter is

clearly not on the same subject matter. According to the respondent HC 7045/22 concerns the setting aside of the transfer of the farm and the passing of transfer of the farm into the respondent's name. This matter concerns eviction of the respondent and all those claiming occupation through him. The causes of action are clearly not the same.

In any case just because a matter is *lis pendens* it is not a complete bar to an application such as in this case. HC 7045/22 was instituted by the respondent as the plaintiff. He is effectively at the driving seat for the processes leading to the resolution of the main matter relating to the title deeds of the farm.

I find in the circumstances of this matter that the application has merit and stands to be granted.

I am not convinced that the opposition mounted is *mala fide*, specially considering that respondents have filed HC 7045/22 in pursuance of what amounts to a final resolution of the main dispute between the parties. I will thus order that costs be on the ordinary scale.

I thus order as follows:

1. The application for summary judgment be and is hereby granted.
2. The respondent and all those who claim occupation through respondent be and are hereby ordered to vacate Ranch 1090 Hampshire Estate Wilshire, Chivhu within seven (7) days of service of this order.
3. Respondent shall pay costs of suit.

Tizirai Chapwanya & Mabukwa, applicant's legal practitioners
Sawyer and Mkushi, respondent's legal practitioners