PATIENCE KABANDA
versus
GABRIEL KABANDA
and
CLOETE MUNJOMA
and
SARAH MUNJOMA
and
SEEFF PROPERTIES
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 24 June 2021 & 15 September, 2021

Opposed application

E. Mubaiwa, for the applicant
T.L. Mapuranga,for 1st the respondent
Z.W. Makwanya, for the 2nd-3rd respondents

MANGOTA J: HC 9129/19 and HC 6/20 were filed as separate cases. They deal with substantially the same dominant parties and the issue of an immovable property. It was because of the stated matter that the two cases were consolidated with a view to having them heard together. The consolidation was at the instance of the applicant with the consent of the respondents.

Because of the need on the part of the parties to comply with the rule of court which relates to the filing and serving of Heads by one party upon the other, or others, the hearing of the application was postponed to 24 June, 2021. The parties were allowed the leeway to use the intervening period to file and serve Heads upon each other.

HC9129/19 is an application for rescission of default judgment which the court entered against the applicant on 31 October, 2018 under HC 8650/18. It is filed in terms of r 449 (1) (a) of the rules of court. HC 6/20 is an application for cancellation of a deed of transfer. It is filed in terms of s 8 of the Deeds Registries Act [*Chapter 20:05*].

Both applications succeed. The first one succeeds on the basis of non-compliance with due process and the second succeeds on the strength of the principle of *rei-vindicatio*.

Before the above matters are considered in detail, the context of the cases becomes pertinent. The context is that the applicant ("Patience") and the first respondent ("Gabriel") were married in terms of the Marriages Act [*Chapter 5:11*]. They divorced on 2 February 2016. They did so in terms of the consent paper which they signed on 1 February, 2016. They incorporated the same into an order of court which granted them the decree of divorce. They incorporated it under clause 4 of the court order. This reads:

> "4. The distribution of the parties matrimonial assets and all other ancillary issues to be dealt with in terms of the consent paper filed of record herein as part of this order." (emphasis added)

An application which is filed under r 449 (1) (a) of the High Court Rules, 1971 is premised on the allegation that default judgment which the respondent erroneously sought and obtained in the absence of the applicant may be rescinded. The rule offers a discretion to the court to interfere with the substance of the court order. The interference should not be taken as given. The court will only interfere where, from the circumstances of the case, it is satisfied that the respondent erroneously sought and obtained judgment in the absence of the applicant: *Tiriboyi* v *Jani & Anor*, 2004 (1) ZLR 470; 472 D-E.

It follows, from the foregoing, that the moment the court satisfies itself of the fact that a judgment or order was erroneously sought or granted in the absence of the applicant who is affected by the same, the court may correct, rescind or vary such without any further ado. The applicant who seeks relief under r 449 of the rules of court does not suffer the burden of having to show what is commonly referred to as good cause which is a requirement in a rescission application which is filed under r 63 of the High Court Rules, 1971. (see *Munyini* v *Tauro* SC 41/13).

That HC8650/18 was granted in the absence of the applicant requires little, if any, debate. HC 8650/18 is an application which Gabriel filed on 21 September, 2018. He cited Patience and the Sheriff of Zimbabwe as the respondents. He moved the court to compel Patience to sign:

(i) the agreement of sale which the second and third respondents concluded with him- and

(ii) all documents which would enable transfer of title of Stand number 159 Philadelphia Township of Philitia of Guomewood of Philadelphia ("the property")

from Patience and him into the names of the second and third respondents to whom he sold the property.

His alternative motion was that, where Patience fails or refuses to comply with the one or the other or both of the above-mention matters, the Sheriff be conferred with the authority to perform all the acts which she should comply with in terms of the agreement of purchase and sale of the property.

Because the property which forms the subject- matter of the dispute of Gabriel and Patience was/is co-owned by both of them, there is no doubt that both parties had/have a direct and substantial interest in the same. It is for the mentioned reason, if for no other, that they incorporated into the consent paper which they made an order of court the fact that they would share the value of the property in the proportion of 40% and 60% to Gabriel and Patience respectively.

Gabriel, the record shows, sold the property to the second and third respondents. He did so on 5 September, 2019. Reference is made in the mentioned regard to p 134 of the record. His assertion is that he sold the property in line with clause 9.4 of the consent paper which Patience and him signed on 1 February 2018 and made an order of the court on the following day. Reference is made to Annexures A and B which the applicant attached to her application. These respectively appear at pp 13 and 14 of the record.

As is often the case with contracts of purchase and sale, the issue of transfer of title in the property from Patience and Gabriel to the second and third respondents became topical. Her apparent intransigence made it difficult, if not impossible, for title to change hands.

It is in the context of the above-stated matter that Gabriel filed HC 78650/18. He served it upon Patience who filed her notice of opposition one day outside the *dies induciae*. She filed it when she was barred.

Patience advances three reasons for seeking to set aside the order which the court issued under HC8650/18. She states, for a start, that the court could not enter default judgment against her in the face of the notice of opposition which she filed. She alleges that the notice evinces her intention to oppose. The court could not, she insists, decide against her before Gabriel had successfully applied for striking out of her notice of opposition. She places reliance on *Founders Building Society* v *Dalib (Pvt) Ltd & Ors*, 1996 (1) ZLR 526 which states that:

> "In any action where the plaintiff's legal practitioner contemplates applying for default judgment, but is aware of some proceedings being taken by the defendant which is an attempt at opposition

> but does not constitute due and regular entry of appearance to defence, he ought to address to the defendant or his legal practitioner due warning of the irregularity of the procedural step.
> Having done so, he may then choose between-
>
> (a) An application for default judgment; or
> (b) An application, on notice to the defendant, to strike out the irregular proceeding.
>
> The latter application may be joined with an application for default judgment. If he opts to apply for default judgment, he must inform the court of the relevant irregularity and give reasons why the court should exercise its discretion in the plaintiff's favour. The further, and preferable, course is an application to strike out, coupled with a prayer for default judgment"

What the *Founders* case is, in effect, suggesting is that Gabriel erroneously sought and obtained judgment when he sought the same before he had successfully moved the court to strike out the applicant's defective notice of opposition. The court, Patience submits, would not have entered default judgment against her if it had been made aware of the notice of opposition which she filed.

The question which begs the answer is whether or not the view which Patience is taking of the law is correct. The statement of Gabriel with which I agree is *in sync* with the law of practice and procedure. He states that there is no need on the part of the plaintiff or applicant who notices that the defendant or respondent has filed a defective process to write warning the latter of the irregular process which has been filed. He insists that the warning which the court referred to in the *Founders* case was/is contained in Form 29 which he employed when he filed and served HC 8650/18 upon Patience. The form, he asserts, specifies the period within which opposing papers should be filed. It, he states, gives warning of the consequences of failure to oppose timeously. The form, he insists, serves as an indication to the court as to when the matter may be treated as unopposed.

The submissions of Gabriel resonate well with r 233(3) of the Rules of Court. Patience was barred when she filed her notice of opposition. The registrar should not, therefore, have accepted her notice of opposition for filing. The notice was as good as not having been filed. It was a nullity. It remained so pending Patience's application for upliftment of the bar.

Because she did not uplift the bar, it cannot be asserted, as she is doing, that the default judgment which Gabriel obtained was erroneously sought or granted. It was, to the extent of the application of r 449(1)(a), properly sought as well as granted.

Patience is not suggesting that the judge was unaware of her defective notice of opposition. He was but he did not pay any regard to it because of the defects which were inherent in it. He saw no need on his part to give it any consideration. The view which he took of the matter of Patience's defective notice of opposition accords with the law of practice and procedure. It cannot therefore be impugned.

The case of *Founder Building Society* upon which Patience places reliance, with the greatest of respects, appears to make an effort towards a revision of the rules of court. It brings into the law of practice and procedure matters which completely fall outside the parameters of that law. The principles which are enunciated in the case place an onerous task on the defendant or the respondent, for the unreasonable failures of the plaintiff or the applicant who applies for rescission of default judgment. The principles do not require a party, *in casu*, Gabriel, who has complied with the rules of court to write warning the failing party (i.e. Patience) to do anything about his failure to comply before the complying party obtains his order from the court.

The rules of court are designed in such a way that they are self-regulating. They enable parties who are before the court to progress their respective cases. They thrive on the principle which the court was pleased to enunciate in *Ndebele* v *Ncube* 1992 (10 ZLR 288 (S) which stresses that the law helps the vigilant and not the sluggard.

The court, it is trite, was aware of the existence of Patience's defective notice of opposition. It was also alive to the fact that she was barred and did not apply for upliftment of the bar making the notice of opposition which she filed a nullity. Patience's submission which she premised on the case of *Founders Building Society* is, therefore, without merit.

Patience premises her second line of attack on para (c) of subrule (1) of r 449 of the High Court Rules 1971. She alleges that there was a common error between Gabriel and her in regard to her filing of the notice of opposition. Reference is made in the mentioned regard to para 9.1 as read with para 9.2 of her answering affidavit. The paragraphs appear at p 232 of the record.

Patience's second line of attack shows nothing but confusion on her part. She filed her application under r 449(1)(a). That rule is not synonymous with r 449(1)(c). Whilst the two bring about the same result – rescission of default judgment – where the applicant successfully pleads them, the reasons which are advanced for an application under para (a) are not the same as those

which are advanced for an application which is filed under para (c) of subrule (1) of r 449 of the rules of court.

Patience, it would appear, decided to shoot from all directions, so to speak. She, it seems, adopted that approach in the vein hope that she would, in the process, strike at the correct code. She, unfortunately for her, displayed her lack of tactic. She showed confusion as to the correct avenue which she had to employ to succeed in whatever relief she was/is praying for. Her second line of attack is, once again, devoid of merit. She cannot base her application for rescission on an alleged error which she says was/is common to Gabriel and her when she, in the same breath, sought rescission on the ground that Gabriel erroneously sought and obtained default judgment against her. The two paragraphs, it has already been stated, are not synonymous. They are separate and distinct from each other. The cause of action for the one is separate and different from that of the other.

Patience's third line of attack has merit. She states, and her assertion remains largely unchallenged, that Gabriel did not comply with the consent paper which she and him signed on 1 February 2016. That the two of them incorporated their consent paper into an order of court is taken as a given.

A court order is the last pronouncement of the court. It takes place after everything has been said and done. It is the hallmark of the justice delivery system. It punishes the guilty and sets the innocent free. It is sacrosanct. It is immutable. It cannot, therefore, be varied by anyone except the court which authors it. It places a stiff sanction on anyone who violates its terms.

Clause 4 of the consent paper which Patience and Gabriel signed turned their paper into an order of court. The moment that their consent paper assumed the status of a court order, the power which Patience and Gabriel enjoyed to interfere with its contents vanished into thin air. Neither patience nor Gabriel nor both of them retained in him/her/them the authority to interfere with/correct/vary what the court had baptised into the name of its own order. Either of them who intended to interfere with, or vary, the terms of the order had no option but to invite the court which owns or authored it to vary it.

That Gabriel and Patience violated the terms of the consent paper which they turned into the order of court requires little, if any, debate. Neither of them could explain why they failed to live up to the terms of the court order. None of them complied with the stipulated time-lines and/or

the substantive roles of the court officials upon whom the court placed the responsibility of implementation of its order.

The fact that the court imposed its authority on paras 9.1, 9.2, 9.3 and 9.4 of its order meant that anything which related to the paras had to be complied with to the letter and spirit. Anything which the one or the other or both of them did outside the four corners of the court order is, to the extent of the violation of the same, regarded as not having been performed. It remains a nullity. This is the case irrespective of the fact that the act which the party performed was in an attempt to implement the order of the court.

Gabriel was in the driving seat when he filed HC 7633/18 which sired the consent paper which birthed the court order. He had every right and the requisite opportunity to comply with the order of court. He offers no explanation for his failure to act within the four corners of above-mentioned four paras. Whatever he did or caused the court officials upon whom the court placed the responsibilities of implementing its order to do outside the time-lines which the court stipulated for them, remains a violation of the court order and, therefore, a nothing. It is a nullity from which nothing is derived.

Gabriel accuses Patience of having been intransigent. He was, however, *dominus litis.* He could easily have returned to the court which is the author of its own order to request from it a user friendly way of resolving his dispute with Patience. Nothing prevented him from adopting the stated course of action. His right to seek from the court an alternative resolution of his dispute with Patience over the property was, in my view, unlimited. He, once again, offers no explanation for his failure in the abovementioned regard.

The route which Gabriel took to resolve the dispute of the property with Patience cannot assist him. I took the liberty to read the founding papers which he made when he lodged HC 8650/18. I observed that he did not disclose, in the same, that Patience and him materially departed from the terms of the order which the court issued to them on 2 February, 2016. He withheld that vital information from the court which entered default endowment for him under HC 8650/18.

In acting as he did, Gabriel fell into the trap which Patience laid down for him. She exploited on the avenue that HC 8650/18 was entered in violation of r 449(1)(a) of the rules of court. She insisted on the point that, if Gabriel had informed the court that she and him had violated

HC 7833/13, the court would not have granted him his prayer. She submits that the court entered judgment for him in circumstances where it should not have done so.

The submissions of Patience are, in my considered view, with merit. I remain satisfied that, if the court which entered judgment under HC 8650/18 had been made aware of the correct circumstances of the case especially that the judgment which Gabriel was moving it to grant to him was meant to rubber-stamp the violation of the court order made under HC 7833/13, the court would have refused to grant to Gabriel his motion. I, in the stated regard, associate myself with the *dictum* which the court made in *Mtembwa* v *Mtemwa & Anor* 2001(2) SA 193 wherein it was stated that:

> "Decided cases show that relief may be granted under this rule if (i)……, (ii) at the time the order was made, the court was unaware of the facts which, if then known to it, would have precluded the granting of the order." (emphasis added).

That the court which granted default judgment under HC 8650/18 was not made aware of the violation of HC 7855/18 requires little, if any, debate. Gabriel offers no explanation at all for withholding that information from the court. His conduct in the mentioned regard was/is counter-productive. It allowed him to shoot himself in the foot, so to speak. His opposition to the application for rescission cannot stand. The application is, accordingly, granted as prayed.

In HC 6/20, Patience is moving me to order Gabriel and her to return to the status *quo ante* the issuance of HC 8650/18 which purportedly transferred title in the property to the second and third respondents ("the respondents"). She insists that she did not sell her own share of the property to them. She is, accordingly, vindicating the same. She moves that title deed number 7364/19 be cancelled and replaced with title deed number 34/1998. She applies under s 8 of the Deeds Registries Act.

That Patience and Gabriel were/are co-owners of the property which lies at the centre of these proceedings requires no debate. The record shows that as the unvanished fact. The statement of the two of them is to an equal effect. HC 8650/18 which Gabriel filed on 21 September, 2018 confirms the position of the matter.

The record shows that Patience did not take part in the sale of the property to the respondents. Gabriel single-handendly conducted the sale. It is for the mentioned reason, if for no other, that he realised the inadequacy of the sale which he sought to sanitise by applying under HC 8650/18. His aim and object, it would appear, were to give the impression that he was

implementing HC 7833/13 when he conducted the sale as he did. He, unfortunately for him, materially departed from the terms of the order which the court issued under HC 7833/13 when he sold the property to the respondents. The sale is, therefore, of no legal force or effect. It is not in terms of due process and is a nullity at law.

The question which begs the answer is could/can Gabriel alienate Patience's share in the property without her consent. The answer to the same is simple and straight-forward. He could not or cannot do so. For the sale to be valid and binding he needed not only the co-operation, but also the consent, of Patience. He did not get her consent and that invalidates the sale of the property to the respondents.

It is trite that a property which is jointly owned, as the one *in casu*, requires the undiluted agreement of the joint owners for its sale to be considered as valid. Sale of the property by one co-owner to the exclusion of the other makes the sale materially flawed. It cannot stand.

Where, as *in casu*, the sale is pursuant to an order of court and the co-owner shows no co-operation in the sale as Patience did, the party who wants to sell, *in casu*, Gabriel, cannot be allowed to flout the terms of the court order in the name of wanting to comply with it. His best avenue is to return to the court and present before it evidence which is associated with his difficulty in implementing the court order. He should move the court for an alternative relief which achieves his desired end-in-view.

That Gabriel cannot alienate Patience's share of the property without the consent of the latter is taken as given. He can only sell his share and nothing more. What belongs to Patience does not belong to Gabriel and vice-versa. He will have given what he does not have if he sells, as he purports to have done, the entire property to the respondents. That form of sale is not a sale at all. It presents challenges which are of a formidable character to the purchasers, or the respondents, *in casu*. They, in their view, purchased a whole property and not a part of it. Yet the cicumstances of the case will not allow them to have the whole property to themselves.

Case authorities and textbook writers are in agreement on the point that property which is co-owned cannot be alienated by one co-owner to the exclusion of the other. *Silberberg & Schoeman* state in *the Law of Property*, 2nd edition, p 332 -7 that:

> "All co-owners are entitled to a share in the whole of the property. No co-owner has a *jus abutendi* in respect of it…A co-owner cannot introduce an innovation or change in the nature of the occupation of the land <u>without the consent of his co-owner.</u> Similarly, he cannot permit strangers to share in the use of the property <u>without the consent of all the other co-owners</u>." [emphasis added]

The issue of co-ownership of property dominated the mind of man from as far back as the time of *Voet*. *Voet 10.3.7 (Gane's translations)* reads on the subject-matter as follows:

> "….no new step can be taken in regard to common property by one partner against the wish of the other. The position of him who forbids it is stronger, so much so that if some new step has been taken by one partner or a mandate given for it against the wish of the other, the one can be forced to put the matter back into its original position" [emphasis added].

Wille's *Principles of South African Law*, 8th edition p 311 makes a stament to an equal effect. The learned authors state that an alienation of joint property can be effected only by the joint action of all the co-owners.

The above-mentioned propositions of the law of joint ownership are replicated in *Erasmus* v *Afrikander Proprietary Mines Ltd* 1976(1) SA 950(W) at 958; *Pretorins* v *Netfdt & Glas*, 1908 TS 854 as well as in *Shawn* v *Shawn & Ors*, 1990(2) ZLR 129 which states that:

> "An owner of real rights cannot, in law, transfer greater rights than he has in the *res vendita*"

It follows from a reading of the above excerpts that, without Patience's consent, all that Gabriel could dispose of is his share in the property. Patience's consent therefore remains a *sine qua* non aspect of the purported sale of the property by Gabriel to the respondents.

Letters which Gabriel wrote advising Patience of whatever steps he was taking in respect to his attempt at selling the property do not themselves translate into Patience's consent to the sale. She should have expressed her consent and should have done so without any conditions attaching to it for the sale to be considered as valid. Gabriel's conduct of purporting to sell the property cannot, at law, be interpreted any less than his intention to defeat Patience in her right to buy him out. Patience states, in my view correctly, that the stated conduct prejudiced her in a material way.

Evidence filed of record shows that Patience was not co-operating with the estates agents whom Gabriel, through officers of the court, appointed to sell the property. Given the allegation that she did not allow estate agents and potential purchasers to inspect the property, the logical conclusion which one reaches is that the respondents purchased the property which they did not inspect. They, on their part, do not state that they inspected it before they purchased it.

The above-observed matter places the mind of the respondents into question. They do not explain, as Patience insists, why they appear to have avoided her as the co-owner of the property. She was, after all, staying at the property. As honest and reasonable purchasers, they most certainly must have visited the property and talked to Patience as regards their intention to purchase it. Their

statement which is to the effect that they are innocent purchasers cannot hold. It cannot do so given the fact that they clearly avoided talking to Patience and ascertaining her views as regards the status of the property. Nothing prevented them from getting as much information as they could from both Gabriel and Patience.

The respondents are not innocent purchasers at all as they would want me to believe. They went into the sale with full knowledge of its circumstances. They, like Gabriel did, believed that HC 8650/18 which he filed to sanitise the sale would serve as their shield of protection against any challenge which might occasion their title in the property.

Nothing turns on the statement which is to the effect that Patience, through her erstwhile legal practitioners, requested and got her 60% share of the proceeds of the sale of the property. She states that these wrote without any mandate from her to do so. She insists that it is for the mentioned reason, if for no other, that she terminated her relationship with them. That she did that is a fact. She would not have done so if they did not act outside their mandate.

The probabilities of the matter are that *Mushoriwa Pasi Corporate Attorneys* who represented Patience did not have the mandate of the latter when they wrote as they did. It is a fact that Patience refused to consent to the sale of the property. Annexure L which Eagle Estate Agents (Pvt) Ltd wrote to Patience's legal practitioners on 28 June, 2018 shows, in clear terms, her attitude to the attempt at selling the property. It appears at p 111 of the record.

It is inconceivable that Patience who refused to co-operate in the sale of the property would have written requesting that her 60% share in the property be deposited into her account. Common sense and logic would not support that line of reasoning.

Patience, it is evident, is vindicating her own share in the property. She has real rights in the same. She holds those against the whole world. No one, therefore, can hold her rights as contained in the property against her will. Her rights in the property are not conditional upon the fulfilment of anything by her. They are absolute and she enforces them against the whole world without any exception.

The respondents cannot legally resist her cause when she is asserting her right to her share in the property. What they can only retain is Gabriel's share in the property. The stated matter presents formidable challenges to their case. They cannot occupy a portion of the property. They

require the whole of it. Their case, therefore, crumbles on the ground that they cannot successfully resist Patience's superior rights to a portion of the property.

I have considered all the circumstances of this case. I am satisfied that the respondents are not innocent purchasers. I am satisfied further that even if they were, their case would not stand in an application for vindication which has nothing to do with the law of equities.

The applicant, in my view, proved her case on a balance of probabilities. In the result, both her applications succeed as prayed.

Jarvis.Palframan, applicant's legal practitioners
Messrs Chihambakwe, Mutizwa & Partners, 1st respondent's legal practitioners
Makwanya Legal Practice, 2nd & 3rd respondents' legal practitioners