ALAN JOHN WILLIAM DIXSON
versus
REGISTRAR OF DEEDS N.O
and
RUMBIDZAI ELIZABETH MUZEMBI
and
FIDELIS NGORORA

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 7 July & 21 September 2022

Opposed Application

Mr *S Muzondiwa*, for the applicant.
Mr *T Tanyanyiwa*, for the 2nd respondent.
No appearance for the 1st and 3rd respondents.

DEME J: The applicant approached this court seeking the relief for the cancellation of title deed number 551/2013 which was passed in favour of the second respondent and title deed number 552/2013 which was passed in favour of the third respondent. The applicant is also praying for the revival of his title deed number 4027/81. The relief sought by the applicant is expressed in the following way:

> "1. The Application be and is hereby granted.
>
> 2. The Title Deed Number 551/2013 and 552/2013 be and are hereby cancelled and the 1st Respondent be and is hereby ordered and directed to endorse such cancellation in his records.
>
> 3. The Applicant's Deed of Transfer Number 4027/81 be and is hereby revived.
>
> 4. There shall be no order as to costs unless the application is opposed and in that case, costs shall be at the scale of attorney and client."

The second respondent alleged that she purchased the property known as number 723, Gainsville Drive, Glenlorne, Harare, measuring 5964 square metres, (hereinafter called "the property") on 7 April 2004 from the applicant. The second respondent approached this court on an urgent basis under case number 3617/12 in 2012 in terms of the Titles Registration and Derelict Lands Act [*Chapter 20:20*]. Under this case, the second respondent affirmed that the applicant

was no longer available to effect transfer for the property that she allegedly bought. The provisional order, in favour of the second respondent was granted in default on 10 October 2012. In terms of the Provisional Order, the first respondent was directed to pass transfer of the property to the second respondent. The Provisional Order was confirmed, in default, on 14 November 2012. The order for the confirmation of the Provisional Order is as follows:

> "IT IS ORDERED THAT:
>
> 1.A provisional order granted by this honourable court on 10 October 2012 be and is hereby confirmed.
>
> 2.The registrar of deeds be and hereby directed to transfer to Rumbidzai Elizabeth Muzembi (born 30 December 1969) certain piece of land situate in the district of Salisbury called stand 723 Glen Lorne township 15 of lot 41 of Glen Lorne measuring 5964 square metres held under deed of transfer no. 4027/81 in the name of Alan John William Dixson (born 18 February 1955).
>
> 3.The applicant be and is hereby authorized to attend to all formalities required by the Zimbabwe Revenue Authority for the issue of a capital gains tax clearance certificate on behalf of Alan John William Dixson."

Consequently, the property title was passed in favour of the second respondent before being passed to the third respondent who had allegedly purchased the property from the second respondent. Both transfers were simultaneously done in 2013.

It is the applicant's case that the sale of the property never took place. The applicant approached this court seeking an order that the order of 14 November 2012 be set aside. On 23 July 2015, the order of 14 November 2012 was set aside by consent. The third respondent did not oppose the present application despite being served.

The second respondent raised some points *in limine* to the present application. On 14 April 2022, this court dismissed the preliminary points concerned. Thus, the court's duty is to deal with the merits of the present application as the points *in limine* were disposed of. After a careful examination of the facts and submissions placed before the court, the following issues require to be determined:

(a) Whether or not there are grounds for the cancellation of title deed number 551/2013 and title deed number 552/2013.

(b) Whether or not there are grounds for the revival of title deed number 4027/81.

In defining the matter before this court, MANZUNZU J., in the determination of the preliminary points for the present application remarked as follows:

> "This application is squarely to do with the interpretation of the order of 23 July 2015 which sets aside the confirmation order of 14 November 2012. The question which must be answered is whether the order has the effect to set aside the second respondent's title to the property."

It is apparent that title deed number 551/2013 and title deed number 552/2013 are founded upon the order of 14 November 2012. This order was set aside on 23 July 2015. The ordinary meaning and effect of the order of 23 July 2015 is that the second and third respondents were left with no legs to stand on. The order of 23 July 2015 is as follows:

> "It is ordered by consent that:
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> 1.The order granted by the Honourable Court on the 14th of November 2012, be and is hereby set aside.
>
> 2.Applicant be and is hereby joined as a Respondent in HC 3617/12 and shall file opposing papers to the same within fourteen days of this order.
>
> 3.Fidelis Ngorora be and is hereby joined as a Respondent in case No. HC 3617/12.
>
> 4.Costs to be in the cause."

The second respondent has failed to establish compelling reasons why title deeds numbers 551/2013 and 552/2013 should not be cancelled. Instead, the second respondent, through her counsel, insisted that the matter should wait for the finalisation of the matter under HC 3617/12. Mr Tanyanyiwa submitted that granting the present application would leave the parties at the position they were prior to the order of 14 November 2012 which would prolong the dispute among the parties. He further argued that allowing HC3617/12 to be finalised would bring the dispute between the parties to its logical conclusion. Mr. Tanyanyiwa also contended that the order of 23 July 2015 was by consent meant to ensure that parties would revisit the dispute. He further highlighted that the delay in setting the matter down was as a result of the fact that both parties have not been resident in the country for some time. The second respondent's counsel motivated the court to dismiss the present application.

The applicant, on the other hand, through his counsel, argued that the cancellation should be effected as the title deeds in question are no longer valid given that the order which founded them is no longer in place. Mr *Muzondiwa* submitted that the second respondent is the *dominus litis* under case number HC 3617/12 who had the responsibility of driving the litigation therein

through expeditiously setting down that matter. He further submitted that the matter under case number HC 3617/12 is no longer pending before this court as this matter was removed from the roll. According to the counsel for the applicant, the second respondent failed to set the matter down within three months thereafter.

It is common cause that the matter under case number HC 3617/12 was removed from the roll on 17 May 2017 through an order by consent. The order for the removal of the matter from the roll is as follows:

"IT IS ORDERED BY CONSENT THAT:

The matter be and is hereby removed from the roll."

At the material time, the law governing the matters removed from the roll was para 10 of Practice Direction 3 of 2013 which provides as follows:

> "10. Where directives have not been given in terms of paragraph 8 above, and a matter postponed sine die or removed from the roll is not set down within three (3) months from the date on which it was postponed sine die or removed from the roll, such matter shall be regarded as abandoned and shall be deemed to have lapsed."

This paragraph is now Rule 66(3) of the High Court Rules, 2021. Thus, after 17 August 2017, the matter under case number 3617/12 had been abandoned. The present application was filed on 10 June 2021, some four years after the matter under case number HC 3617/12 was removed from the roll. After the present application had been duly filed, any reasonable person in the position of the second respondent would have been forced to take necessary steps to correct the lapsing of the matter under case number HC3617/12. Once the matter is abandoned or is deemed to have lapsed, it is the responsibility of the party concerned, the second respondent in this case, to ensure that the same matter is reinstated by making an appropriate application. There is no such application for reinstatement of the abandoned matter, being case number HC3617/12.

In my view, the second respondent's lethargic conduct by failing to promptly take a remedial action, has demonstrated lack of interest in the matter. The applicant cannot eternally wait for the conclusion of the matter which has been abandoned or which has lapsed. An order allowing the conclusion or prioritization of the matter under case number HC 3617/12 which has been abandoned is not in the interest of justice as the contemplated matter is not pending before the roll of this court. Put differently, this court cannot be expected, *mero motu* to finalise the matter that has been abandoned. Those who bring the matters before the courts of law have a direct duty

to ensure that such matters are expeditiously brought to finality. Any unnecessary delay in finalising matters before the courts will result in incurable prejudice to the rights of the litigants who have been dragged to the courts.

The appropriate law for the cancellation of title deeds is s 8 of the Deeds Registries Act [*Chapter 20:05*] which provides as follows:

> "8. Registered deeds not to be cancelled except upon order of court
>
> (1) Save as is otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of court.
>
> Upon the cancellation of any deed pursuant to an order of court—
>
> (a) The deed under which the land or any real right in land was held immediately prior to the registration of the deed which was cancelled shall be revived to the extent of such cancellation unless a court orders otherwise; and
>
> (b) The registrar shall make the appropriate endorsement on the relevant deeds and entries in the registers."

Thus, the present application is founded in terms of the existing law. In the circumstances, the applicant has demonstrated a strong case for the cancellation of the title deeds numbers 551/2013 and 552/2013. Further, the relief for the revival of the applicant's title to the property in dispute is established in terms of s 8(2) of the Deeds Registries Act. Once the two title deeds have been cancelled, title deed number 4027/81 is, by operation of law, automatically revived as the Applicant's deed was The deed under which the land was held immediately prior to the registration of the two title deeds for the second and third respondents. Consequently, the present application is with merits.

Turning to the issue of costs, the applicant had prayed for costs on an attorney and client scale. It is apparent that costs are within the discretion of the court which should be judiciously exercised. Costs on a legal practitioner and client scale can have the effect of scaring away persons who may wish to access justice. An order for costs on a higher scale can only be granted in exceptional circumstances where the applicant has justified such costs. I am not convinced by the justification advanced by the applicant for the claim of such costs. In my view, costs on an ordinary scale would be appropriate in the circumstances. In the case of *Nel* v *Waterberg Landbouwerkers Kooperative Vereeniging*, the court held that:

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that , by reason of special consideration arising either from the circumstances which give rise to the action from the conduct of the losing party , the court, in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation . Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but it is not chargeable in the party and party bill. See Hearle and McEwan v Mithcell's Executor (1922 TPD 192), Therefore in a particular case the Court will try to ensure , as far as it can, hat the successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party…"

In casu, the costs on an ordinary scale are reasonably sufficient. Paragraph 4 of the applicant's draft order must be accordingly amended to reflect this position. In the result it is ordered as follows:

(a) The application be and is hereby granted.

(b) Title Deed Number 551/2013 and Title Deed Number 552/2013 be and are hereby cancelled and the first respondent be and is hereby ordered and directed to endorse such cancellation in his or her records.

(c) The applicant's Deed of Transfer Number 4027/81 be and is hereby revived.

(d) The second respondent shall bear the costs of the application on an ordinary scale.

Samukange Hungwe and Attorneys, applicant's legal practitioners.
Tanyanyiwa and Associates, second respondent's legal practitioners.