

**MARIA MAGIGWANA**

**and**

**AMOS MAGIGWANA**

**and**

**DAVID MAGIGWANA**

**and**

**MAFARO MAGIGWANA**

**versus**

**MICHAH CHOGA**

HIGH COURT OF ZIMBABWE  
BERE J  
BULAWAYO, 27 July 2006 and 17 May 2012

**Opposed Application**

Mr *Ndlovu*, applicants' legal practitioners  
*L Mcijo*, defendant's legal practitioners

**BERE J:** This is an application for rescission of judgment premised on the alleged non-compliance with the provisions of r 236 (3) of the High Court Rules, 1971. The applicant alleges that when the respondent made an application for the dismissal of the applicants' case the provisions of the cited rule had not been complied with.

The respondent argued that he had complied with the rule as his application for dismissal of the applicant's case was made on notice to the applicants via his erstwhile legal practitioners Messrs Maputsenyika & Associates.

Annexure 'B' to the respondent's notice of opposition clearly shows that on 22 July 2005 the respondent's legal practitioners notified the defendant's then legal practitioners of the intended chamber application to have the applicants' case dismissed. It was only after this warning or notice had been given that the respondent successfully filed for the dismissal of the applicants' application for want of prosecution.

It is in my view quite mischievous for the applicants to allege that they were not notified of the application by the respondent. The respondent's means of communication with the applicants was limited to the applicants' chosen legal practitioners. Those legal

practitioners were advised of the impending application by the respondent's legal practitioners and in my view that notification was sufficient.

I hear the respondent's legal practitioner very well when he alleges in his opposing affidavit that:

“Ad paras 7 and 8

The applicants had been given notice through their lawyers and that was sufficient notice which is the reason why the application was granted since there was compliance with the rules”<sup>1</sup>

In the case of Anchor Ranging (Pvt) Ltd<sup>2</sup>, I had occasion to deal with the operation and application of r 236 (3) *supra* and I entirely agree with the interpretation of the “notice” alluded to by the respondent's counsel. That the applicants' erstwhile counsel proceeded to renounce agency after being notified of the intended action does not aid the applicants in their effort to have the judgment granted rescinded.

Even if I have erred in my interpretation of r 236 (2/3) *supra* (which point I must emphasize I am not conceding to) the applicants would still be faced by an even more serious challenge to deal with the merits of their case.

As correctly observed by the respondent's counsel in para 9 of the notice of opposition, the applicants have not been candid with the court in their stout effort to convince the court that they were not aware of the appointment of one Solomon Stuart Magigwana's appointment as heir to the original owner of the farm.

The respondent, being an innocent purchaser cannot be obstructed in his occupation and use of the purchased farm as the seller had every right to dispose of the farm in a question in a manner he desired.

In coming to this conclusion I am largely guided by the position taken by their Lordships in the case of *Seva & Ors*<sup>3</sup> where part of the head note reads:

“Held, further, that as the eldest son had inherited this house in his personal capacity, he had the right to dispose of it as he wished. He was entitled to sell it to the buyer as he had done. The wife and the remaining children had no enforceable rights against the buyer. The only rights they had, if any, were against the eldest son. They therefore had no defence to the action for eviction brought by the buyer.”

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<sup>1</sup> Para 7 of p 10 of the opposing affidavit

<sup>2</sup> Anchor Ranging (Pvt) Ltd v Beneficial Enterprises (Pvt) Ltd & Anor 2008 (2) ZLR 246

<sup>3</sup> *Seva & Ors v Dzuda* 1992 (2) ZLR p 34 at p 35

By the same reasoning I do not see how the applicants could succeed in the instant case.

Accordingly the applicants' application has no merits.

I order as follows:

1. That the applicants' application be and is hereby dismissed.
2. That the applicants and all those claiming occupation through them be and are hereby directed to vacate farm number 49 Vungu, Gweru on or before 30 June 2012.
3. That the applicants pay the costs of suit.

*Cheda & Partners*, applicants' legal practitioners  
*Lazarus & Sarif*, respondent's legal practitioners