GEMA JUMA MUGANHIRI
Represented by ETHEL TSOMONDO by
virtue of a Special Power of Attorney

Versus

MARK NDUKU
Being represented by Siduduzile Bhebhe by
Virtue of a Special Power of Attorney

And

EZEKIEL NDUKU

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO10 OCTOBER AND 27 NOVEMBER 2014

Mr J. Nyarota for the applicant
Mr A. Madzima for the respondent

Opposed Matter

MOYO J: This is an application for rescission of a judgment obtained in this court in HC 2874/13. The 1st Respondent obtained a default judgment against Applicant and 2nd Respondent in this court.

The facts of the matter are that 1st Respondent is a brother to 2nd Respondent. 1st Respondent who is based outside Zimbabwe apparently sent his brother (2nd Respondent) money to purchase an immovable property on his behalf sometime in 2007. 2nd Respondent did purchase flat B11, Msasa Park in Kwekwe. This is the immovable property at the centre of this dispute.

2nd Respondent purchased the immovable property in question from one Joyce Ngarize who owned the flat through a leasehold with the Kwekwe Municipality. 2nd Respondent apparently purchased the flat through Messrs *Makonese and Partners*. *Messrs Makonese and Partners* drew the agreement of sale between Joyce Ngarise (the registered owner with Kwekwe Municipality), and the 1st Respondent who was being represented by the 2nd Respondent. There is an affidavit by one Maureen Davison who is employed by *Messrs Makonese and Partners* as a conveyancing Secretary. This affidavit is annexed to the Notice of opposition. In this affidavit Maureen Davison confirms that their law firm did draw the agreement of sale between 1st

Respondent (as represented by 2nd Respondent) and Joyce Ngarize in 2007. She also avers that she has been employed by *Messrs Makonese and Partners* since 2005. Apparently because 1st Respondent lives outside Zimbabwe, unbeknown to him sometime in 2011, 2nd Respondent sold flat B11 to the Applicant. The property remains registered in the names of Joyce Ngarize at the Kwekwe Municipal offices. The 2nd Respondent apparently presented to the Applicant an agreement of sale purportedly drawn by *Messrs Makonese and Partners*. Such agreement is between the 2nd Respondent and the original owner (Joyce Ngarize). The 2nd Respondent apparently misrepresented to the Applicant that flat B11 Msasa Park, Kwekwe, was in fact his. He substantiated his claim by showing the Applicant a copy of an agreement between himself and Joyce Ngarize. Both parties also confirmed with the Kwekwe Municipal offices that Flat B11 Msasa Park, Kwekwe, in fact belonged to Joyce Ngarize according to their (Council's) records. The court order in HC2874/14 which is the order that Applicant seeks to rescind, is in fact to the effect that the agreement between 1st Respondent and Joyce Ngarize is the valid agreement and that the subsequent agreement between 2nd Respondent and Applicant is fraudulent and therefore invalid.

It is that judgment that Applicant now seeks to rescind on the basis that firstly, she was not properly served as the summons were served on her tenant who has subsequently become 1st Respondent's tenant since he is still in occupation of the flat in question. Secondly, that she has a good case on the merits in that 2nd Respondent showed her an agreement between himself and the original owner and he never said that he had purchased the flat on behalf of a brother who is 1st Respondent.

The Applicant seeks to rescind the judgment premised on two points mainly:
that the summons was not properly served and that therefore she was not in wilful default. Secondly that she has a good defence on the merits as the two brothers are likely to be conniving to short change her.

What the Applicant must successfully show in such an application is that:

1) firstly, she was not in wilful default,
2) secondly, that she has a good defence on the merits of the case.

Refer to *Songore vs Olivine Industries Pvt Ltd* 1988 (2) ZLR 210. In other words the court has the power to rescind a judgment obtained in default provided that sufficient cause for

rescission has been shown, otherwise the court would be inclined to uphold the principle of finality in judgments. On the question of whether or not Applicant was in wilful default, it is clear from the papers that the summons as against the Applicant were served on one Mrs. Mushedhe Applicant's tenant on the 8th of November 2013. Default judgment was subsequently obtained on the 20th of March 2014. The 1st Respondent's opposing papers have amongst them an affidavit by a Cuthbert Mushedhe who in paragraph 2 thereof states as follows:-

> "When I was served with the summons in the matter, I proceeded to advise by telephone Ethel Tsomondo who was responsible for the flat. I advised her two days after my wife received the papers. She advised me to take the papers to the Applicant's legal practitioners of record which I did."

The Applicant's Counsel filed an answering affidavit wherein he states that Mr Cuthbert Mushedhe had actually stated to him that he had called Mrs Tsomondo about the summons who advised him to take it to *Wilmot and Benett* but that he could however not recall whether he did take the summons there or not.

In my view whether the tenants subsequently took the summons to *Wilmont and Bennett* or did not, this is not of any significance at all. What is important here is that the tenant states that they advised Applicant's representative of the presence of the summons (although Applicant's representative denies this fact). There is a factual dispute here but the tenant has stated that upon receiving the summons they advised Applicant's representative accordingly. Of course there is the problem of a possible interest on the part of the tenant who is now 1st Respondent's tenant and is no longer Applicant's tenant as he remains in occupation of the property despite the fact that 1st Respondent is now in charge as per the court order. It would thus be difficult to make a factual finding on this issue and the Applicant can only be given the benefit of the doubt on that aspect. I can not therefore make a factual finding to the effect that the Applicant was indeed in wilful default on the basis of the information before me.

I now turn to assess whether Applicant has a good defence on the merits of the case. The difficulty with Applicant's case is that from the facts alluded to herein, it would seem as though she was defrauded by the 2nd Respondent. It is clear that *Makonese and Partners* confirm that the agreement of sale they did was between 1st Respondent and Joyce Ngarize and not between 2nd Respondent and Joyce Ngarize. Clearly from those facts, the 2nd Respondent could not have legitimately sold to the Applicant Flat B11, Msasa Park, Kwekwe, since he did not own

it and could therefore not pass title when in fact he had none.

It is for this reason that I find that Applicant does not have a good defence to the case on the merits. Her claim only lies in damages against the 2nd Respondent since he sold to her through misrepresentation a property that was in fact not his but his brother's. It is for this reason that the application has to fail. I accordingly dismiss the application with costs.

Wilmot & Bennet Incorporating Mtetwa & Nyambirai, C/o Danziger and partners, applicant's legal practitioners
Mutatu and partners, C/o Dube-Tachiona and Tsvangirai, respondent's legal practitioners