MOSES MAGAYA
versus
MARY MAGAYA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 12 June 2017

Opposed Matter

B K Mupawaenda, for the applicant
E Dondo, for the respondent

MUNANGATI-MANONGWA J: On 7 March 2013 the parties hereto were divorced by this court and their matrimonial assets duly distributed between them. It is about the disposal of one asset, an immovable property, Stand No. 9406 Budiriro Township of Stand 11265 Budiriro Township (hereinafter referred to as "the property)" that the parties find themselves back in court again. Whilst each of the parties was awarded 50% share of the property, the respondent has remained in occupation since 2013 and the applicant is still to get his share of the award. In pursuant of his share the applicant has had a valuer appointed by the registrar of this court, paid valuation fees and had an estate agent appointed by the registrar to sell the property.

The applicant has now approached this court seeking that:

1. The respondent be ordered to sign the Agreement of Sale within seven (7) days of the granting of the order.

Alternatively

2. Should the current purchaser opt out and the transaction fails, the respondent be and is hereby ordered to sign any subsequent Agreement of Sale within seven (7) days of being called upon to do so by the Agent.

3. The respondent should avail herself to the Zimbabwe Revenue Authority to attend to the Capital Gains interviews and to sign all the necessary paper work to enable transfer to take place to the Purchaser within seven (7) days of being called upon to do so by the Conveyancer of the property.

3.1 In the event of respondent's failure to attend to Zimbabwe Revenue Authority for the Capital Gains interviews, the applicant be and is hereby ordered to attend the interviews on his behalf as well as respondent's behalf.

4. Respondent to comply with paragraph two (2) and three (3) above, the Sheriff of Zimbabwe be and is hereby authorised to sign the Agreement of Sale and the relevant paperwork to enable transfer of the property.

5. Respondent to pay costs of suit.

The application is opposed on the basis that the applicant cannot seek the sale of the property where the relevant terms of the divorce order have not been complied with. In that regard the application is premature due to non-compliance with paragraphs 4.1 – 4.5 of that divorce order which state as follows:

4.1 The parties shall agree on and appoint a valuer within 14 days from the date of this order to value the property, failing which the Registrar of the High Court shall within 14 days of such failure appoint a Valuer, from the Master's list of Valuers.

4.2 The valuer shall evaluate the property within 14 days of his appointment.

4.3 The parties shall equally share the costs of evaluation.

4.4 The defendant shall pay the plaintiff the value of his share of the property within eighteen months from the date of the valuation report.

4.5 Should the defendant fail to pay off the plaintiff within eighteen months the parties, shall within 14 days of the defendant's failure appoint an Estate Agent, who shall sell the property to best advantage failing which the Registrar of the High Court shall within 14 days of such failure appoint the Estate Agent,

4.6 The parties shall equally contribute towards the Estate Agent's commission.

4.7 The parties shall equally share the net proceeds thereof as per their respective shares in the property.

Mr *Mupawaenda* for the applicant submitted that the application was properly before the court and that the applicant had complied with the terms of the order. The applicant had put a lot of effort into the finalization of the matter with no action from the respondent. Despite the application being filed in 2015 the respondent had not made effort to asset her rights. The respondent seeks to deny the existence of the valuation report as a ploy and way of seeking to extend her stay on the property for a further 18 months. He submitted that the valuation report is part of the papers as annexure G, so applicant was being mischievous in denying its existence. If

she were genuine and *bona fide* in her intention to buy out the applicant she should have taken steps to do so given that this application was made in 2015. To date no offer has been made to the applicant regarding buying him out and not even reimbursing the applicant for costs he incurred on her behalf.

The respondent averred in her opposing papers that a valuer was never agreed on so there was no compliance with the specific requirement of the order on that aspect. That after the appointment of a valuator at applicant's instance, no valuation report or certificate was produced, thus the property is still to be valuated. The respondent was then to exercise her right to buy out the applicant within 18 months calculated from the date of receipt of the valuation report. As no valuation report was done, the respondent therefore was not afforded a chance to exercise her right to purchase the property. It was further submitted in her papers that even if it were to be accepted that the property was valued, upon the respondent's failure to buy out the applicant, the parties were to agree on an estate agent to sell the property. In the absence of such an agreement the registrar was then supposed to appoint an estate agent to sell the property. According to the respondent's heads of argument, this option is still available for the parties to agree on an agent to sale the property, if they cannot agree, the registrar to then appoint an estate agent.

Mr *Dondo* for the respondent argued that there was no valuation report annexed to the answering affidavit despite reference to it. The court record and the Applicant's copies had the annexure. I gave Mr *Dondo* the opportunity to have sight of, peruse the report and take instructions during a brief court adjournment. On resuming proceedings, Mr *Dondo* advised the court that respondent was now accepting the existence of the document however service upon the respondent was being disputed. This was due to the fact that the valuation report was purportedly served by a police officer when it should have been served by the Deputy Sheriff. He urged the court to consider the 12 June 2017 (the date of hearing) as the date to be reckoned in calculating the time period of 18 months within which the respondent had to buy out the applicant. In that regard the application was therefore premature.

I find it very difficult to comprehend how such arguments could be presented on behalf of the respondent in the light of the history and evidence available. On 11 April 2013, more than 30 days from the date of judgment, the applicant's legal practitioners wrote to the respondent's legal practitioners indicating that a valuer had to be agreed on and pointing out that 14 days had

since elapsed within which a valuer had to be appointed. The letter was delivered on 12 April 2013 as the stamp of receipt shows. No response was ever received from respondent's legal practitioners. It is only a month later, on 13 May 2013 that applicants approached the registrar's office requesting the appointment of a valuer, the request was in writing and is on record.

On 18 June 2013, after the lapse of another month, the registrar appointed a valuer. Respondent's then legal practitioners then were informed in writing that a valuer had been appointed and had done a valuation by letter of 3 July 2013 which was duly received by them on 3 July 2013 as the record shows. In the letter, applicant advised of his desire to receive US$250.00 his share of the rentals calculated from the date of the order. Again no response was received by applicant's legal practitioners and the respondent has not commented on this letter nor presented evidence to the contrary.

It was only after two full years from the date of appointment of a valuer that on 12 August 2015 the registrar appointed Realty World to sell the property. The estate agent then started looking for prospective buyers who in accordance with the evidence of Mr. Makoni the Estate agent, were frustrated by the respondent's conduct.

In his application, the applicant indicates that the respondent's then lawyers indicated to his lawyers that the respondent was not being co-operative and was refusing to accept the fact that the property had to be shared. She insisted the house was hers despite the order. I am bound to accept this as the prevailing scenario. Why would her legal practitioners not respond to all the letters that were being addressed to them if at all she was co-operative? They advised applicant's lawyers to deal directly with the respondent. The valuer himself who later got appointed as the agent to sell the property swore to evidence that getting to do a valuation was so difficult due to resistance from the respondent. Respondent denied knowledge of the existence of the order, after being furnished with same she pleaded illiteracy. For him to access the property he had to seek police assistance. Even after being appointed the selling agent, Mr. Makoni has had difficulty in marketing the property. When he takes prospective buyers to the house, the respondent has been so hostile even indicating that the property is not for sale. In my view, the respondent will not agree to anything which makes the "alternative options" argument presented by her legal practitioners to be untenable. In any case that stage is long past as the registrar has already appointed an estate agent and rightly so.

That a valuation was done is apparent as one is attached to the answering affidavit as annexure "G" which is before the court. If the said annexure had been missing on the papers served on the respondent her legal practitioners should have requested for it given that the answering affidavit was served upon them in December 2015, one and half-years ago. The pictures in the valuation report show the interior of the house and the exterior thereof with description of the rooms and the interior. This can only mean that the valuer accessed the property and came up with the report which respondent pretends not to be aware of.
I will take it that the respondent was duly served with the valuation report on 26 July 2013 as attested to by Anderson Chabata a member of the Zimbabwe Republic Police. That service was sufficient as the report is not court process which had to be served by the Deputy Sheriff. He even indicates in his affidavit that she refused to sign. This would not be surprising given the respondent's history of refusing to co-operate. I agree with Mr *Mupawaenda* that respondent is in the habit of not acknowledging any document that she receives and her bare denial shall not come in the way. The valuation report having been served on 26 July 2013 the respondent had more than the 18 months granted to her by the court to buy out applicant. Thus the appointment of the agent to sell the property in August 2015 was above board and in compliance with the order as no co-operation was coming from the respondent.

This is not the case of a sluggard litigant but that of a party who is bent on frustrating the rights of her former spouse in getting what is rightfully his. Respondent has enjoyed this property for a straight 4 (four) years to the prejudice of the applicant. She has no defence to this application and has sought to come up with frivolous excuses. In Rogers v Rogers[1] a frivolous and vexatious defence was described as one which "…is obviously unsustainable, manifestly groundless or utterly hopeless and without foundation." Such is the respondent's defence or opposition. Had applicant applied for costs on a client-attorney scale, same would have been granted without hesitation. I further highlight that legal practitioners should not be driven by clients to push for baseless, groundless and empty defences in the face of evidence to the contrary. That amounts to incompetence bordering on unethical conduct for which costs may be visited on the legal practitioner personally. This is because it is the legal practitioner who is trained in the intricacies of the law and the duty falls upon him to assess the evidence at hand and

[1] S7/08

ultimately properly advise client. The respondent's legal practitioner seems not to have properly exercised that duty *in casu*.

In the result, the application succeeds and the following order is granted:

1. The application be and is hereby granted.
2. The respondent to sign the Agreement of Sale within seven (7) days of the granting of this order.

   Alternatively

   Should the current purchaser opt out and the transaction fails, the respondent be and is hereby ordered to sign any subsequent Agreement of Sale within seven (7) days of being called upon to do so by the Agent.

3. The respondent should avail herself to the Zimbabwe Revenue Authority to attend to the Capital Gains interviews and to sign all the necessary paper work to enable transfer to take place to the Purchaser within seven (7) days of being called upon to do so by the Conveyancer of the property.

3.1 In the event of respondent's failure to attend to Zimbabwe Revenue Authority for the Capital Gains interviews, the applicant be and is hereby ordered to attend the interviews on his behalf as well as respondent's behalf.

4. Upon failure by the respondent to comply with paragraphs (2) and (3) above, the Sheriff of Zimbabwe be and is hereby authorised to sign the Agreement of Sale and the relevant paperwork to enable transfer of the property.

5. Respondent to pay costs of suit.

Mupawaenda & Mawere, applicant's legal practitioners
Pundu & Company, respondent's legal practitioners