STANLEY MUNGOFA
versus
CITY OF HARARE
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 3, 6 and 19 July 2018, 14 September 2018 & 3 October 2018

Civil Trial

Advocate E Mubaiwa, for the plaintiff
C Kwaramba, for the 1st defendant
No appearance for the 2nd defendant

CHIKOWERO J: It cannot be a proper exercise of the court's discretion to allow a plaintiff to reopen his case, and to amend his summons and declaration where such efforts are designed to ward off an application for absolution at the close of the plaintiff's case.

What happened is this.

On 16 November 2016 the plaintiff issued summons seeking the following relief:

"(a) Delivery and transfer of ownership by the first defendant to the plaintiff of the residential property being a house number 93 Rotten Row Road/Cnr Robert Mugabe Road, Harare.

(b) should the first defendant fail to comply with the para (a) above, the Sheriff for Zimbabwe or his lawful deputy be and is hereby authorised to sign all necessary documents to pass transfer of house number 93 Rotten Row/Cnr Robert Mugabe Road, Harare in favour of plaintiff, second defendant is hereby ordered to accept any documents signed by the Sheriff or his lawful deputy and to register the transfer into plaintiff's name.

(c) in the event of defendant's failure to comply with para (a) above, the Sheriff or his lawful deputy be and is hereby further authorised to evict the defendant and all those claiming through it from house number 93 Rotten Road/Cnr Robert Mugabe Road, Harare within seven (7) days of issuance of this order.

(d) payment of damages for unlawful occupation of the property at the rate of US$3000 (three thousand United States dollars) *per* month with effect from 1 May 2015.

(e) Costs of suit on a legal practitioner and client scale."

This relief was based upon a written retrenchment package entered into between plaintiff and first defendant.

The same, couched in the form of a Deed of Settlement and Addendum thereto, was duly signed at Harare on 20 April 2015.

Nothing turns on the other terms of that package. It was not disputed that they were fulfilled.

The Deed of Settlement, in relevant part, records:

"3.15 House Allocation

Parties agree that Dr SM Shall be allocated a house number situated at the corner of Rotten Row Road and Robert Mugabe Road, Harare, by COH."

"Dr SM" and "COH" are abbreviations for the plaintiff and first defendant *in casu*, respectively.

Also in relevant part, the Addendum to the Deed of Settlement reads:

CITY OF HARARE EXECUTIVE RETRENCHMENT

AGREED ISSUES	AGREED ISSUES
	MONETARY VALUE
Dr S Mungofa will receive a house situated at Cnr Robert Mugabe and Rotten Row	Dr S Mungofa will receive a house situated at Cnr Robert Mugabe and Rotten Row

It is necessary that I quote para 2.1 of the first defendant's plea. This averment is made therein:

"2.1 The agreement is invalid for failure to identify the proper property. To that end there is no valid agreement in respect of House No 93 Rotten Row Road/Cnr Robert Mugabe Road, Harare."

This plea was filed on 11 January 2017.

To this, the plaintiff replicated on 13 January 2017. Each and every allegation of fact was denied. Each and every conclusion of law was also denied. Issue was joined.

A Joint Pre-Trial Conference Minute was issued on 15 September 2017. The first two issues referred to trial were these:

"1.1 Whether there is a valid agreement of sale in respect of number 93 Rotten Row/Cnr Robert Mugabe Road, Harare.

1.2 Whether or not the first defendant should be ordered to effect delivery and transfer of the house situate at 93 Rotten Road/Cnr Robert Mugabe Road, Harare to the plaintiff."

Trial commenced on 3 July 2108 before me. The plaintiff led evidence in chief. The matter was then postponed to 6 July 2018 for cross-examination. Plaintiff was cross-examined. The trial was again postponed to 19 July 2018 for continuation.

On 19 July 2018 the plaintiff, without any further ado, promptly closed his case.

I asked plaintiff's counsel at the time, Mr *B Magogo,* whether the plaintiff considered that he had established a *prima facie* case. The response was that the threshold had been reached.

With the consent of both counsel the following timelines were agreed to. First efendant's counsel would file his closing submissions in support of an application for absolution from the instance at the close of the plaintiff's case before the end of the day on 24 July 2018. Plaintiff's counsel would file his response by close of business on 27 July 2018.

I therefore postponed the matter indefinitely.

What was received, and that on 9 August 2018, was something completely different.

The plaintiff filed, through Advocate *E Mubaiwa* duly instructed by Messrs Makuwaza and Magogo Attorneys, a two-in-one application.

It was a chamber application to reopen plaintiff's case coupled with an application to amend the plaintiff's summons and declaration.

The application to reopen sought, if granted, to enable the plaintiff to return to the witness stand for the purpose of producing a certain Deed of Transfer and copy of the record of proceedings in an eviction matter held before the magistrates court.

The application for amendment sought leave to file an amended summons and an amended declaration by supplying, in essence, the Deeds Office description of the property in respect of which title transfer was ought.

The amendment was also sought to enable the plaintiff to introduce a new cause of action. That cause of action was rectification of para 3.15 of the Deed of Settlement by reflecting therein the Deeds Office description of the property I have already alluded to.

Opposing papers, an Answering Affidavit and Heads of Argument were duly filed.

I caused the double-barrelled application to be set down for 14 September 2018 for argument.

I heard oral argument and reserved judgment.

I agree with both counsel that these applications are intertwined. They stand or fall together.

Now, the principles applicable in determining an application for re-opening of a plaintiff's case are settled. They include: the reason why the evidence sought to be adduced was not led timeously, the degree of materiality, the possibility that it may have been shaped to relieve the pinch of the shoe, the balance of prejudice, the healing balm of an appropriate costs order and the general need for finality in judicial proceedings. See Fortis Street 69 *Eiendomme (Pty) Ltd* v *PA Venter Worcester (Pty) Ltd* 2000 (4) SA 59 (C).

In my judgment, the plaintiff has deliberately sought to mislead the court on the reason why it did not produce copies of the Deed of Transfer and copy of the record of the eviction proceedings held in the Magistrates Court.

In respect of the Deed of Transfer, the plaintiff states this. Before the trial started it conducted a Deeds search but same failed to yield the expected results because plaintiff did not have the Deeds Office description of the property alluded to in the summons and declaration.

As for the magistrates Court record of proceedings, plaintiff did not have the case number. Therefore, it was not even feasible for the plaintiff to approach the Clerk of Court magistrates Court to obtain a copy of the record. Above all, the record was of proceedings conducted in 2008 and were kept at the National Archives.

Simply put, the explanation given is false.

The following is clear from the trial proceedings held before me. The plaintiff considered the Deeds Office description of the property irrelevant because he was suing on a retrenchment package and not an agreement of sale. If the first defendant considered the Deeds Office description to be material then the onus was on the first defendant to produce the Deed of Transfer. Delivery and transfer of the property could be ordered by the court, and registered by the second defendant on the property as described in the summons.

The cross-examination of plaintiff is replete with questions challenging the propriety of seeking transfer of the property as described in the summons and declaration. The plaintiff was adamant. He stuck to his guns. I will refer to only a few of those questions and answers:

> Q. Look at description of the property. You want transfer thereof?
> A. Yes
> Q. Do you have a proper description of the property from the Deeds Office?
> A. Council in its wisdom offered the building and in its wisdom offered to do the transfer. I asked them to do the transfer. I asked them to give us description and they did not. However, this is not an agreement of sale so there is no need to have description like they appear title deeds.
> Q. You accept you do not have proper description of the property?
> A. For me a lay person City of Harare does not have any other property at the corner of Rotten Row and Robert Mugabe. What 1 was offered is there physically.
> Q. You may very well be asking the court to give you nonexistent property.
> A. The property exists. I know as council employee. City of Harare came to Court seeking eviction. The property exists. The tenant there has been there for years.
> Q. There are no papers to show what you are saying.
> A. They can be availed during course of the day.
> Q. This court must issue an enforceable order.
> A. Yes, I believe the property in question is Council property and they should bring out the title deeds and when that is done it becomes enforceable."

The explanation that efforts were made before the trial to obtain both the title deeds and the copy of the court record for the eviction proceedings is therefore false. Also untrue is the explanation that it was only after the close of the plaintiff's case that the efforts bore fruits. Untrue as well is the explanation that at the time he testified the plaintiff did not know of the eviction proceedings in the magistrates court.

It necessarily follows that both the application to re-open and to amend the summons and declaration are mala fide: *Ryan Anthony Cheney* v *Katie Pearce Cheney (nee Turner)* HH 78/18. These applications are nothing but a reaction to the pinch of the shoe. Having realised the gaping inadequacies in his case, and that it could not successfully resist an application for absolution, the plaintiff came up with the present applications to endeavour to resurrect his case through the back

door. He wants another bite of the cherry. He wants to cure the deficiencies in his case by producing documents recanting his evidence which is on record. This is clear testimony that he has chosen the wrong procedure to cure his ills.

Both the plaintiff and his legal practitioner at the trial, Mr *B Magogo*, were clearly not diligent. Mr *Magogo* has not deposed to an affidavit stating the reasons why the plaintiff's case was closed without producing the title deeds in respect of the property relating to the remedies of transfer and eviction. Neither has he deposed to an affidavit explaining why he drafted summons and declarations where transfer and eviction was sought without first carrying out a Deeds Search. The explanation however, is self-evident. Both he and the plaintiff considered the title deeds irrelevant.

The plaintiff was not diligent. What is sought to be adduced now is not new evidence. The Magistrates Court record has always existed since 2009. Likewise, the Deed of Transfer has always existed at all material times.

The plaintiff freely chose to close his case without producing documentary evidence because he regarded it as irrelevant. His change of mind, prompted by the certainty of otherwise having to deal with an application for absolution does not transform that documentary evidence into new evidence discovered after the close of the plaintiff's case.

In this regard, UCHENA J (as he then was) said, in *Zenus Banda* v *Eunice Taylor* HH 261/10 at p 4:

> "The plaintiff's application to re-open his case must therefore fail on both the materiality of the evidence to be led, and lack of diligence in that he mentioned selling of lorries during his evidence, and thus traversed that part of his evidence without leading evidence to substantiate it. It seems to me clear that Mr *Mapondera* who represented the plaintiff when he led his evidence appreciated the issues before the court and consciously closed his case without calling the evidence the plaintiff now wants to lead"

These considerations dovetail with the need for finality in litigation. In *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) at 290 C – E MCNALLY J A put it thus:

> "It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years applications for rescission , for condonation for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetency is becoming a growth industry. The time has come to remind the legal profession of the old adage, *vigilantibus non dormientibus jura subveniunt* roughly translated, the law will help the vigilant but not the sluggard"

These words, uttered twenty six years ago, are truer now than when they fell out of the lips of his Lordship.

On materiality, evidence on record from the plaintiff himself is that the documents sought to be produced now are immaterial. The property as described in the summons and declaration is adequate. The title deed description is irrelevant because the suit is founded on a retrenchment package and not an agreement of sale. Because the Plaintiff himself has said so, if he has had a change of view, he must start afresh and express the new views in different proceedings. In the exercise of my discretion, I cannot give him a platform, in the current proceedings, to continue to twist and turn. I agree with Mr *Kwaramba* that he cannot make his case as he goes.

That, if it were to be allowed, would be prejudicial. Allowing both applications and ordering plaintiff to bear the costs would not wipe out the prejudice to the first defendant of having to contend with a new case midstream. What the plaintiff is seeking to do, if sanctioned by this court, is to effectively dump his case as standing on the record and embark upon a new case without facing the consequences of a withdrawal and starting afresh.

In fact, the plaintiff wants to start his case all over again without appearing to be doing so.

I observe that he has already indicated that he seeks to introduce a new cause of action being rectification of the Deed of Settlement. It is a marked departure from the position already testified to by himself. He was adamant that there is nothing wrong with clause 3.15 of the Deed of Settlement. Here too, he has changed his mind. He must face the consequences.

Litigants must always remember that when they institute proceedings the court becomes involved. They can no longer do as they please. They cannot obtain amendments and leave to reopen cases just because they have asked for the same. There must be justification. An indulgence is being sought. Discretion is involved.

This twin application represents a dishonest attempt by plaintiff to try to wriggle out of the predicament that he drove himself into. I was unable to allow him to pull wool over my eyes. I looked at the substance of what was intended to be achieved rather than being deceived by the form of the applications put before me.

I must mark the court's displeasure at the conduct of the plaintiff.

As alluded to in this judgment the correct course of action for a plaintiff in a situation such as the present is clear. It certainly cannot be to abuse the procedure of leave to re-open the plaintiff's case and to amend the summons and declaration.

In the result I order as follows:

(1) The application for leave to re-open the plaintiff's case is dismissed.

(2) The application to amend the plaintiff's summons and declaration is dismissed.

(3) The plaintiff shall pay the first defendant's costs in respect of both applications, on the legal practitioner and client scale.

Makuwaza and Magogo, plaintiff's legal practitioners
Mbidzo Muchadehama and Makoni, 1st defendant's legal practitioners