VINOD RAMA
and
SEESHNA (PVT)
versus
ROSELYN MURAMBIWA
and
THE REGISTRAR OF DEEDS
and
THE MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 19 & 27 September , 2017

Chamber application- rule 449 of High Court Rules

G Gapu, for the applicant
1st respondent in person

CHITAPI J: The first and second applicants in this application are first and third respondents in case No. HC4168/14 wherein Roselyn Murambiwa as executrix dative (Estate Late Phillip Murambiwa) is the applicant. Case NO. HC 4168 is the main case brought as a court application. In case No. HC 4168/14, the applicant sought the reversal of transfer of an immovable property in Karoi which she wants to be included in the estate of her late husband. The property was alledgedly purchased by the respondents who took transfer.

The applicant Roselyn Murambiwa is a self-actor whilst the respondents are legally represented save for the Registrar of Deeds and the Master of the High Court who are cited in their official capacities.

On 25 October, 2016 I dismissed the main application HC 4168/14 for want of prosecution consequent upon the provisions of Order 32 r 236 (4) (b) of the High Court Rules (1971). My order of dismissal followed an application made by the respondents'' legal practitioners wherein it was averred that Roselyn Murambiwa as the applicant had not taken any steps to prosecute her application HC 4168/14 since 28 June 2014 when she filed an answering affidavit. The record shows that the applicant attempted to set down the application

for hearing but the set down could not be processed on account of the applicant's failure to comply with r 227(2) (d) as advised of the applicant by written notification by the Registrar dated 18 August, 2014.

The application for dismissal was accompanied by a certificate of service showing that the said Roselyn Murambiwa had been served with the application which was handed over to one Mrs Muchenje who had accepted service of the application on behalf of Roselyn Murambiwa (as 1st respondent). I shall come back to certificate of service.

It appears that the applicant in the main case, Roselyn Murambiwa was aggrieved by the order which I granted dismissing her claim HC 4168/14 for want of prosecution. She approached the Supreme Court and made an application whose contents I am not privy to. What was placed before me was copy of a letter dated 7 July, 2017 addressed to the applicant by the Supreme Court Registrar under case No. SC 205/17 in which it is stated;

> "ROSELYN MURAMBIWA v VINOD RAMA
>
> The above matter refers.
>
> The matter was placed before the Judge of Appeal the Honourable Mrs Justice Gowora who commented this;
>
> 'The applicant must obtain written reasons for the order by Chitapi J. In the absence of the reasons, the court is severely hampered in considering the application'"

The letter from the Supreme Court was accompanied by a written request from the applicant that I provide my reasons for dismissing her application.

When an application for dismissal for want of prosecution is placed before the judge in chambers, the judge calls for the record on the main application whose dismissal is sought to ascertain whether or not he basis pleaded by the respondent who seeks a dismissal of the application is supported by what is on record. If indeed the record shows that the main application has not been prosecuted as pleaded by the respondent and further as required by the rules of court, the judge grants the order of dismissal as prayed for or makes such order as the judge thinks fit. The process is more of routine and written reasons for judgment are normally not provided.

Having been requested for reasons for my order, I had to go through the whole process of perusing the records. I was satisfied that the application had a sound basis in that the applicant had failed to comply with the provisions of order 32 r 236 (4) (b) as she had not set

down her application for hearing or taken steps to prosecute it further almost two years after the filing of the answering affidavit.

In considering the actual application for dismissal made by the respondent's legal practitioners, I noted what appeared to be an anomaly in the certificate of service of the dismissal application. It is a requirement in terms of the provisions of r 236 (4) that the respondent should serve the application for dismissal on the applicant. The certificate of service reads as follows:

> "I. Mahendra Rama in my capacity as the brother to the 1st applicant hereby certify that at the 1st respondent address 1646 Chikwangwe, I served copy of the following document:
>
> CHAMBER APPLICATION IN TRMS (*sic*) ORDER 32 RULE 236 (4) (b) upon
>
> Mrs Muchenje who accepted service on behalf of the 1st respondent on the 09th September 2016 at 15:30 pm
>
> Dated at Harare this 14th day of September, 2016
>
> Signed
>
> …….
> Mahendra Rama
>
> I MEMORY MAFO a legal practitioner of record for the applicants hereby certify that I have satisfied myself by personal enquiry of Mahendra Rama who is a responsible person in the employ of the 2nd respondent that service was effected as above.
>
> Dated at Harare this 14th day of September, 2016
>
> Signed
>
> …….
> Scanlen & Holderness
> Applicant's Legal Practitioners"

As clearly appears from the certificate of service, Mahendra Rama is a brother to the first applicant and served the application in that capacity. Quite clearly therefore, proof of service had to be in the form of an affidavit as provided for in r 42 B (1) (c) of the High Court Rules. Since the certificate of service was not in the proper form, it followed that I inadvertently relied on an invalid proof of service. Where service has not been proven in terms of the rules it cannot be assumed. Proof of service is pivotal to the determination of the application because it impacts on the concept of a fair hearing which is defeated if the *audi alteram* rule is not observed. Service of process must be strictly proved and not inferred.

The order of dismissal which I granted was therefore granted in error because the respondent did not file a valid certificate of service to prove that the applicant had been served with the application.

Having noted my error, I directed the registrar to call the parties to my chambers to make any representations they considered fit before I invoked *mero motu* my powers under r 449 to set aside my order of dismissal. On 19 September, 2017 the applicant in the main case appeared before me and Mr *Gapu* from Scanlen & Holderness was also in attendance. Mr *Gapu* indicated that Scanlen & Holderness had renounced agency in the matter. By notice filed on 26 June, 2017. The notice gave the new address for service for the respondents as Zimudzi & Associates who have neither assumed agency nor filed any pleading in the matter to date. Since, the error was committed on account of an invalid certificate of service filed by Scanlen & Holderness before the firm renounced agency, I asked Mr *Gapu* whether he supported its validity. Mr *Gapu* agreed that the certificate of service prepared by Scanlen & Holderness which I relied upon was invalid. It being therefore agreed that the certificate of service was invalid, it followed that the judgment granted consequent to it was not valid.

In the circumstances, I therefore make the following order:

1. The order made on 25 October, 2016 in case No HC 8667/16 wherein I dismissed case No. HC 4168/14 for want of prosecution is in terms of r 449 of the High Court Rules (1971) hereby rescinded on account of it having been granted in error.
2. The application for dismissal for want of prosecution filed in case No. HC 8667/16 on 26 August, 2016 is struck off the roll with no order of costs.
3. The Registrar is directed to forward a copy of this judgment to the Supreme Court Registrar for inclusion in case No. SC 205/17 for the attention of GOWORA JA as directed.

Scanlen & Holderness – erstwhile, applicant's legal practitioners
Zimudzi & Associates, respondent's legal practitioners