

Judgment No. SC. 7/07
Civil Application Nos. 290/05 & 171/06

KILLIAN CHIPENDO v (1) GUTSIKANAYI NYAMUPANDA (2)
THE DEPUTY SHERIFF

SUPREME COURT OF ZIMBABWE
HARARE, MARCH 28, 2007

The applicant in person

No appearance for the respondents

Before: MALABA JA, In Chambers in terms of r 34 (5) of the Supreme
Court Rules

The two applications which have been considered together are for reinstatement of a lapsed appeal in case SC 290/05 and noting of an appeal in case SC 171/06.

The first respondent bought a house which formed part of the applicant's late father's estate. The purchase of the immovable property, stand No 2 Umguza Close, Willmington Park, Cranborne by the first respondent in November 2002 was in terms of an agreement of sale entered into with the executor dative of the deceased estate. He had been authorized by the Master by letter dated 29 October 2001 to sell the property otherwise than by public auction. Transfer of the property into the first respondent's name was effected on 6 March 2003.

It appears from the papers that the immovable property was sold at the instigation of some of the applicant's siblings who were beneficiaries of the deceased estate. They wanted the proceeds from the sale of the property distributed amongst the beneficiaries including the applicant. The applicant opposed the proposed sale. The executor dative gave the applicant an option to buy out the other beneficiaries in order to acquire ownership of the house. The applicant admits that he was given the option. He said that the time within which he was expected to exercise the option was too short. He failed to raise the money to buy out the other beneficiaries until the property was sold to the first respondent who then took transfer.

When the first respondent sought to take occupation of the house the applicant refused to vacate the same, forcing the first respondent to apply to the High Court in Case HC 3967/03 for an eviction order. Meanwhile the applicant had instituted action in the High Court in Case HC 7963/03 challenging the validity of the sale of the property to the first respondent.

On 14 September 2005 the High Court granted the first respondent an order of eviction against the applicant and all those claiming right of occupation through him. In granting the eviction order the learned Judge said:

"The applicant by virtue of the transfer of the property to him is the holder of real rights in the property. He is therefore entitled to enforce those rights against anyone. The respondent merely occupied the premises as a child of the deceased. He had no real rights in the property. He has not proffered a defence to the claim for eviction in the application."

On 16 September 2005 the applicant noted an appeal to the Supreme Court against the order of eviction in case SC 290/05. On 17 November he successfully applied to the High Court for an interim interdict restraining the first

respondent from executing the eviction order pending the determinations of the appeal by the Supreme court.

On 12 April 2006 the applicant was given notice by the Registrar of the High Court of the fact that the appeal noted by him in case SC 290/05 had lapsed for failure to comply with the requirements of Rule 34(1) of the Supreme Court Rules. The applicant had not deposited with the said Registrar the estimated cost of the preparation of the record in the case concerned at the time of noting of the appeal.

The effect of the lapse of the appeal was that there was no appeal pending before the Supreme Court. The basis of the interim interdict was removed by operation of the law and the way for the enforcement of the eviction order opened.

Sensing that the execution of the eviction order was imminent, the applicant made an urgent chamber application to the High Court on 27 April 2006 for a stay of his eviction from the house. He was nonetheless evicted on the day the application was lodged with the High Court. At that time no application for reinstatement of the appeal had been made to the Supreme Court.

On 9 May 2006 the applicant filed an application for reinstatement of the appeal in case SC 290/05. On 6 June 2006 the High Court dismissed with costs the application made on 27 April 2006 in case HC 2346/06. The applicant was in contempt of court in that, after having been evicted from the house in terms of the court order, he had forced his way back into occupation at the time the application was heard and determined.

In dismissing the application the learned Judge said:

"The appeal that was filed by the applicant has lapsed. He has filed an application to have it reinstated but until that is done there is no appeal pending. ... As the appeal is no longer pending, the applicant is not entitled, in my view, to have the ejection stayed".

On 29 June 2006 the applicant noted an appeal in case SC 171/06 against the judgment of the High Court in case HC 234/06. There was in effect no appeal because the fifteen days from the date the judgment was delivered within which the Rules require a valid appeal to be noted had expired. On 18 July 2006 the applicant made an application for condonation of the late noting of the appeal. There was no application for the extension of time within which to note the appeal. The founding affidavit made no mention of prospects of success on appeal.

The position of the applicant at the time the two applications were heard and determined is set out in the first respondent's heads of argument:

"(1) The appellant is appealing against the order of the High Court which authorized his eviction from house No. 2 Umguza Close, Wilmington Park, Cranborne, Harare. The appeal has been overtaken by events in the sense that the order of the High Court has already been executed. The Applicant was evicted by the second respondent on 15 March 2007 and vacant possession of the property was handed over to the first respondent. An order in an application for reinstatement of the lapsed appeal or even the appeal itself which is meant to prevent the applicant's eviction will be a *brutum fulmen* because the harm which applicant seeks to prevent has already occurred.

(2) The Applicant was lawfully evicted after he unsuccessfully tried to block his eviction through various urgent chamber applications he had made in which he was seeking an order to be restored into the property after realizing that it had no merit. The withdrawal was made before the Honourable Justice Guvava on 19 March 2007 and surely in light of these developments the essence of the application or pursuing the appeal against eviction cannot be understood. To appeal against the order of the High Court authorizing eviction is just an academic exercise meant to achieve nothing at the end of the day."

At the time the eviction of the applicant was carried out, there was no appeal against the order of eviction pending before the Supreme Court. The eviction was lawfully carried out and the writ of execution satisfied. There is no legal ground on which the applicant can claim a right to be placed in occupation of the house which no longer belongs to the deceased estate. The house now belongs to the first respondent, who alone has the right to decide who should occupy it.

The appeals had been noted for the purpose of retaining occupation of the house pending their determination. The lawful eviction of the applicant from the house removed any prospects of success on the appeals. The eviction confirmed the fact that the learned Judge was correct in holding that the first respondent was entitled to vacant possession of the house. That conclusion is, on the facts of the case, unassailable. After all the first respondent is the registered owner of the house. He was entitled to evict the applicant from its occupation.

The applications are dismissed with costs.