

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 405/09

In the matter between:

RHODA ZIKALALA

APPLICANT

and

THOMAS MOORE CARL KIRK

1ST DEFENDANT

THE DEPUTY SHERIFF - MANZINI DISTRICT 2ND RESPONDENT

In re:

THOMAS MOORE CARL KIRK

PLAINTIFF

and

RHODA ZIKALALA

1ST DEFENDANT

SIFISO SGODO

2ND DEFENDANT

JELE SEBENELE MASUKU

3RD DEFENDANT

MGCIBELO MASUKU

4ST DEFENDANT

SABELO SIBANDZE

5TH DEFENDANT

JOHN DLAMINI

6TH DEFENDANT

DUMSANX MAGAGULA

7TH DEFENDANT

CORAM

Q.M. MABUZA

FOR THE APPLICANT

MR, W. MKHATSHWA OF S.V.
MDLADLA & ASS.

FOR THE RESPONDENT

MR. J. FAKUDZK OF FAKUDZE
ATTORNEYS

RULING

15TH SEPTEMBER 2009

[1] The first. Respondent. Mr. Kirk obtained default judgment against the applicant on the 27/2/09 for the Applicant's eviction from certain immovable property described as Portion 62 (a portion of portion 49) ox Farm no. 1270 situate in the District of Manzini.

[2] The Applicant upon hearing about her imminent eviction launched the present application in terms of rule 31 (3) (b) on the basis of urgency. She seeks an order in the following terms:

1. Dispensing with the rules of this Honourable Court with regards time, manner and form of service and to hear this application as one of urgency.

2. Staying execution of the Order granted by this honourable court granted on this 27th February, 2009 against the Defendants' in the main action.

3. Rescinding and/or setting aside the Judgment granted by this Honourable Court on the 27th February, 2009 against the Defendants' in the main action.

4. Ordering and directing that a Rule Nisi do hereby issue returnable on a date to be determined by this Honourable Court, calling upon the Respondents to show cause why;

4.1 an Order **in terms of prayers 2, and 3** should not be **made final.**

4.2 the 1st **Respondent should** not pay the cost **of** this application.

5. Granting Applicant such further and/or alternative relief as to this Honourable Court may seem meet.

[3] On the 7th March 2009 the Applicant was granted a stay of execution pending the finalisation of this application.

[4] In her founding affidavit the Applicant states that on the 2nd March 2009 she received a copy of an eviction order from one of her daughters. She was unaware that there were proceedings against her as she was not served with any summons.

[5] She further states that it was only after she had instructed her attorneys that she was advised that indeed a summons had been issued against her and others. She has stated that had she been aware of the issuance of summons against her, she would have defended the matter.

[6] She farther contends that she has a good defence to the main action which *prima facie* carries good prospects of success. She has set out her defence at paragraph 10 of her founding affidavit as follows;

“10.1 It is my submission that the landed property **from which the said Order seeks to have myself evicted, has served as my home since time predating my birth.**

10.2 **The said piece of land previously had concessionary title which in the late 1980's was returned to Swazi Nation Land. To further illustrate this, the area is a Chieftaincy and presently headed by the Chief of Ekufinyeni.**

10.3 **I also wish to state that there is still the underlying issue for trial, on not only how Plaintiffs predecessor in title managed to procure ... transfer to Plaintiff itself. I am advised and believe that the Trustee to the Seller just so happens to be the Plaintiffs own biological son.**

10.4 **I also submit that yet another question for ventilation at trial would have been the issue of how ... purportedly obtained in 2007 by the Plaintiff would not have been brought to the**

attention of the second generation occupants of the said land,"

[7] The 1st Respondent in his answering affidavit H, denies that the Applicant was unaware of legal procedures against her. He contends that the Applicant was aware of the summons which had been served on her daughter, Sithembile Msimango. He further states that the day after the service of summons she approached certain of his employees namely Kenneth Masilela and Siyabonga Ndlangamandla. She requested these employees to arrange an appointment with the 1st Respondent with whom she wished to discuss the issue of compensation if indeed she did vacate the premises.

[8] In support of the 1st Respondent's averments, the deputy sheriff of Manzini, Melusi Qwabe filed a confirmatory affidavit. In it he states that he served summons on the Applicant's daughter, Sithembile Msimango on the 5th February, 2009. When he effected service of the summons he was accompanied by an employee of the 1st Respondent, Simon Maziya. Mr. Maziya has also filed a confirmatory affidavit confirming true service of the summons on the Applicant's daughter. Mr. Kenneth Masilela and Siyabonga Ndlangamandla filed confirmatory affidavits confirming averments by the 1st-Respondent and that the Applicant admitted that; she had been served with the summons.

[9] Sithembile, the Applicant's daughter did not file an affidavit explaining what she did with the summons. But that is water under *in-:-* budge now.

[10] Of critical importance in my opinion is whether or not good or sufficient cause has been shown for rescission to avail. It is an accepted legal principle that a reasonable and acceptable explanation for the default must be shown as well as a **bona fide** defence on the merits which **prima facie** carries prospects of success.

[11] The Applicant has stated that she did not receive the summons and has raised a good defence to the action which prima facie carries the prospects of success. I accept her explanation **tie--one** dh *not* receive the summons. I further accept the defence that ehe hac raised. The issue of **Concession Land** being converted to **Freehold Land** needs to be addressed by all stakeholders including the Government; so that the matter is put to rest once and. for all.

[12] In response to the Applicants defence the 1st Respondent has stated that the land in question is **Title Deed Land**. Thai; he served a copy of the Tieh Deed, with the summons. The Title Deed has not been attached to these proceedings. I requested a copy from Mr. Fakudze and to date it has; not been forthcoming, Inste^{0^} tyf" * deeds of lease were attached to the 1st Respondent- iffidavit. These leases with respect do not assist the Court. It *is* not clear on the papers before me whether the 1st Respondent has title or not to the land in question. The Applicant may very well be correct that the land was initially concession land. She may well be correct in questioning how concession land was converted to freehold land and if this was done legally.

[13] In the event, the application is granted. Costs to be in the cause.

Q.M. MABUZA J