

CHRISTINE MUSANHU
versus
GEORGE MUSANHU
and
BROBONDO PRIVATE LIMITED
and
THE REGISTRAR OF DEEDS NO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 7 February & 4 May 2023

Opposed Application

T K Bvekwa, for the applicant
M Ndhlovu, for the 1st respondent
TG Chigudugudze, for the 2nd r
espondent

TSANGA J: In a divorce action, which the applicant was granted in 2015 in default by the respondent, she was allocated property known as a certain piece of land situate in the District of Salisbury, called the remaining extent of Lot 361 Highlands Estate of Welmoed, measuring 5202 m², registration number 2476/1996. It is commonly known as 18 Knightsbridge Road, Highlands, Harare. That property was registered in her then husband's name, George Musanhu, the first respondent herein. The order was straightforward. Within forty-eight hours of the service of the order, he was supposed to have signed over to her the necessary papers for the awarded properties inclusive of this one, failing which the order authorised the Sheriff to do so on his behalf. That did not happen as the property was mortgaged. In 2016 a company called Treffor Investments Private Limited obtained a court order declaring the property executable for a debt owing of US\$250 000.00 plus US\$1000.00 monthly interest for a specified period.

The allegations by the applicant are that her former husband, George Musanhu, fraudulently cancelled two mortgage bonds registered against the property and obtained an upliftment of a caveat in Bulawayo without so much as the applicant having been served. He is said to have then sold the property to the second respondent, Brobondo Private limited. The latter averred in its opposing affidavit to having bought the property. Title was obtained in 2021.

What applicant therefore seeks, since according to her everything is said to have been done fraudulently, is the cancellation of that title deed to Brobondo (Pvt) Ltd, being deed of transfer 3983/21 and reinstatement of the original title deed being 3976/96.

Several points *in limine* were raised at the hearing on behalf of George Musanhu. The first was that Verna Sambureni, the person who swore to the affidavit on behalf the applicant, did not have power to institute legal proceedings under the general power of attorney. Reference was made to *Tendai S. Masamba v Zimbabwe Electricity Transmission And Distribution Company (Pvt) Ltd* HH 411/15, which case drew on the case of *Ashley v S.A. Prudential Ltd* 1929 (1) TPD 283at 285, to argue that a general power of attorney is inadequate for litigation. A special power of attorney to litigate was regarded as necessary because it was said that litigation might come with dire expenses, hence the need for specific authorization. In addition, the averments in the founding affidavit were argued by the first respondent to be hearsay evidence when the applicant could have sworn to the founding affidavit herself as evidenced by her ability to later file a supporting affidavit in this matter. Every paragraph, except the name of the deponent in the founding affidavit, were therefore said to be hearsay evidence.

A second point *in limine* raised was that the judgment became superannuated in 2017. The order granted by the court in the divorce was said to have superannuated and in need of revival, in so far as the property was concerned. The case of *Shorai Mavis Nzara & Ors v Cecilianh Kashumba N.O. & Ors* HH 151/16 was relied on with respect to the effects of a superannuated order.

A third point *in limine* was that the order seeking cancellation of the deed of transfer was an impossible request against the backdrop of an order of this court, which had declared the property specifically executable. Therefore, as long as that order remained extant, it was argued that this court cannot grant an order cancelling the transfer. Brobondo (Pvt) Ltd had bought the property pursuant to that order of the court. To cancel the transfer would be reviewing the order of the court authorizing the sale. The case of *Unitrack (Private) Limited v Telone (Private) Limited*

SC 10/2018 was cited for the principle that a court cannot sit in review of another judge of parallel jurisdiction.

Lastly, the application was said to have no cause of action as none had been pleaded. In particular, the allegations of fraud committed by the purchaser who bought the executable property had not been spelt out.

Mr. *Chigudugudze* counsel for Brobondo (Pvt) Ltd the second respondent, agreed with these preliminary points adding that in effect there were no proper affidavits before the court due to a computer generated date by applicant's lawyer. He also argued that Treffor, the company that was owed by the respondent, had personal rights just like the applicant and could not be stopped from executing the property to satisfy a judgment debt. In its case, it had bought that property pursuant to a sale after George Musanhu failed to pay monies owing on that property. He also highlighted that at the time of purchase of the property from George Musanhu, there were no caveats and that Brobondo (Pvt) Ltd bought the property legally.

In response to these points *in limine*, Mr. Bvekwa argued that the power of attorney gave broad powers to perform any function on behalf of the applicant. He distinguished this case from those cited on the basis that those had deliberated situations where the power of attorney had been very precise on what actions could be done under its authority. As for Brobondo (Pvt) Ltd's purported purchase of the property, he submitted that no proof had been put forward to support the averment of a valid purchase. As such, he argued that Brobondo (Pvt) Ltd participated in a fraudulent sale hence the reason why no proof was attached. The superannuation argument was said not to apply since the Sheriff had already acted by signing papers to transfer the said property to the applicant before George Musanhu acted to thwart those efforts by unlawfully disposing of the property.

Whilst numerous points *in limine* have been raised, in my view this matter can easily be disposed without going into the technical arguments raised in some of the grounds. This is by dealing with the third point *in limine* regarding the extant order, which granted permission for the property could be sold in execution. That order, under HC2343/15, would not have been granted if the property was not encumbered. Whilst the property was awarded to the applicant on divorce, as long as it remained encumbered, it always ran the risk of being sold to satisfy the debt which had not been settled. That is what happened in essence. That order, under HC2343 was never

challenged. The property is said to have been sold by private treaty. How Brobondo (Pvt) Ltd fraudulently acquired it is not explained given that there was in fact an order of court declaring the property executable.

In my view, as long as it is not in dispute that the property was mortgaged and that it was declared executable, there is no basis for this application. Much of what both parties have devoted copious amount of paper, time and circuitous arguments to, amounts to simply running around a mulberry bush, picking berries here and there . If the property was executable and if the property was sold pursuant to a court order as alleged, then that in my view is the end of the matter. The defects or otherwise in the application made need not entertain this court.

Costs have been sought on a higher scale. They are not justified. The first respondent could simply have cut to the chase in terms of what happened by explaining fully to his former wife. He could have been equally succinct with the court instead of presenting arguments, which suggest that indeed he has something to hide by fronting numerous technicalities. The second respondent too, could have been more detailed with the information of its purchase as opposed to appearing to be behaving as a simple echo chamber for the first respondent. However, as stated, this court is satisfied with the preliminary point that the property was indeed declared executable as evidenced by the order under HC 2343/15 which was part of the record. This court is also satisfied that the property was therefore bought under the circumstances of an extant order of the court.

In the result:

The application is dismissed with each party paying its own costs.

Bvekwa Legal Practice, applicant's legal practitioners
Lawman's Law Chambers, first respondent's legal practitioners
Madanhe & Chigudugudze, second respondent's legal practitioners