

CASE NO. HC6525/22

1. THE SHERIFF FOR ZIMBABWE  
and  
CHANDAKAFIRA KONDE  
and  
HILARIOUS TERERAI  
and  
JETINA TERERAI

CASE NO. HC6526/22

2. THE SHERIFF FOR ZIMBABWE  
and  
MARY MAKWARIMBA  
and  
HILARIOUS TERERAI  
and  
JETINA TERERAI

CASE NO. HC 6527/22

3. THE SHERIFF FOR ZIMBABWE  
and  
ABENA LETISIA CHASOWA  
and  
HILARIOUS TERERAI  
and  
JETINA TERERAI

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE; 24 January and 8 February 2023

### **Opposed Application**

*N Chihota*, for the applicants  
*K Mlambo*, for the claimants  
*L Rufu*, for the judgment debtors

**TAGU J:**

### **INTRODUCTION**

By consent of the parties the three matters HC 6525/22, HC 6526/22 and HC 2527 were consolidated and were heard at the same time mainly because the applications in the three files

concerned an application for an interpleader. The Applicant in the three matters is the same. The judgment creditors are the same. The judgment debtors are the same. Only the Claimants are different but the legal practitioners representing the parties in each of the matters are the same. The reliefs being sought is essentially the same.

### **BACKGROUND FACTS**

The proceedings before this Honourable Court relate to Interpleader reliefs sought by the Claimants pursuant to the provisions of r 63 of the High Court Rules S.I. 202 of 2021 where the court is requested to determine the competing rights of the parties.

In HC 6525/22 the Judgment Creditor obtained judgment for costs in Case No. HC 2856/19 against Charles Linzi & Ors. Pursuant to the judgment, the Judgment Creditor instructed the Applicant to attach certain property. The Applicant then attached Stand number 14816, Tynwald South, Harare measuring 400 square meters belonging to the Judgment Debtor. The Claimant Chandafira Konde claimed that he is the lawful owner of the immovable property and the Judgment Debtor does not own the property hence the interpleader notice.

In HC 6526/22 the Judgement Creditor obtained judgment for costs in HC 2856/19 against Charles Linzi & Others. Pursuant to the judgment, the Judgment Creditor instructed the Applicant to attach certain property which is Stand 14780, Tynwald South, Harare. The Claimant Mary Makwarimba informed the Applicant that they lay claim to the Stand 14780, Tynwald South, Harare, hence the interpleader notice.

Lastly, in HC 6527/22 the Judgment Creditor again obtained judgment for costs in Case No. HC 2856/19 against Charles Linzi & Others. Pursuant to the judgment, the Judgment Creditor instructed the Applicant to attach certain property. The Applicant attached Stand 14815, Tynwald South, Harare. The Claimant Abena Letisia Chasowa advised Applicant that she lay claim to the property hence the interpleader Notice.

### **ISSUES FOR DETERMINATION**

1. Whether or not claimants are the lawful owners of stands Nos. 14816, 14870 and 14815 Tynwald South Harare held under Deed of Transfer No. 8149/2005 respectively.
2. Whether there are special circumstances on the Claimants' part which warrant setting aside the sale of stands Nos. 14816, 14870 and 14815 in execution of the court order under case No. HC 2856/19.

3. Whether the or not Select Housing Trust (The Trust), which is the Judgment Debtor under HC 2856/19 and the Applicant is colluding with the Claimant.

## **THE LAW**

The law relating to interpleader proceedings is settled. A claimant must set out facts and allegations which constitute proof of ownership. To that is added the hallowed principle of our law that the conveyance of ownership in immovable property from person to person is achieved through the registration and transfer at the deeds registry. Real rights in immovable property are held only by registration at the Deeds Registry. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (S). The first Claimant of Stand No. 14816 Tynwald South Harare, Chandakafira Konde, submitted that sometime in 2005, he was among a group of employees of the Public Service Medical Aid Society (PSMAS) who came together and formed an association or cooperative to pull together financial resources for the purpose of buying a piece of land for a housing project. Pursuant to that, they bought a certain piece of land called Lot 14 of Subdivision A of Tynwald South of Fontainebleau. After the land was subdivided in terms of Section 39 and Section 40 of the Regional, Town and Country Planning Act [*Chapter 29.12*], Stand 14816 was allocated to him. Therefore, at the time of attachment of the property, all the requirements for subdivision had been satisfied and the property had been lawfully allocated to himself and for all practical and legal purposes the property became his. What remained outstanding was the formal transfer of the property to him. He had given instructions to his legal practitioners seized with the project to attend to the process but he was now trying to raise funds for them to effect transfer.

The Second Claimant gave an explanation similar to the first Claimant. Mary Makwarimba said Stand 14780 was allocated to her and transfer of title to her is pending.

Similarly, the third Claimant Abena Letisia Chasowa gave the same explanation as to how she acquired her stand. She said Stand 14815 was allocated to her and transfer of title to her is pending.

## **DO THE PROPERTIES IN QUESTION BELONG TO THE CLAIMANTS?**

The claimants submitted that the properties belong to them. The undisputed facts are that the properties in question belong to the Judgment Debtor, SELECT HOUSING TRUST. The fact that the property which the claimant lays claim is registered in the name of the judgment debtor

raises a presumption that the attached property belong to Select Housing Trust. The position was put this way by DE VILLIERS CJ in *Zandberg v Van Zyl* 1910 AD 256 @ 272:

“Possession of a movable raises a presumption of ownership, and that therefore a claimant in her interpleader suit claiming the ownership on the ground that he has bought such movable from a person whom he has allowed to retain possession of it must rebut that presumption by clear and satisfactory evidence.”

In a bid to prove ownership Chandakafira Konde attached a certificate from the surveyor General dated 8 April 2014 which certificate incorporates the attached Stand 14758. He also attached a letter from Zimbabwe Revenue Authority dated 26 March 2018. Mary Makwarimba also in a bid to prove ownership also attached a certificate from the surveyor General dated 8 April 2014 which incorporates Stand 14815 and a letter from Zimbabwe Revenue Authority dated 26 March 2018. Lastly, Abena Letisia Chasowa proved her ownership by attaching a Certificate from the Surveyor General dated 8 April which incorporates Stand 14815 as well as a letter from ZIMRA dated 12 December 2017.

The properties which the claimants lay claim is registered in the name of the judgment debtor. This raises a presumption that the attached properties belong to Select Housing Trust. See *Zandberg v Van Zyl supra*. Title therefore infers real rights in immovable property. It cannot be gainsaid that a title deed is prima facie proof that a person enjoys real rights over the immovable property defined in the deed. In *Fryes (Pvt) Ltd* 1957 (3) SA 575 at 582 the court held that-

“Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the person in whose name real rights are registered. Generally speaking, no person can successfully challenge the right of ownership against a particular person whose right is duly and properly registered in the Deeds Office.”

On the reasoning above the claimants are not the owners of the properties in question until and unless they rebutted the presumption and show that special circumstances exist.

#### **ARE THERE SPECIAL CIRCUMSTANCES ON THE PART OF CLAIMANTS?**

The claimants argued that there are special circumstances which exist to establish their ownership to the properties. Special circumstances were defined in the case of *CBZ Bank v (1) David Moyo* (2) Deputy Sheriff Harare SC 17/18 as follows:

“Special Circumstances exist where a purchaser has failed to have the property registered in his name, when he and the seller have demonstrated a clear intention to effect transfer and when there

was no legal impediment to such transfer or the impediment does not justify the refusal to grant protection to the purchaser.”

The claimants based their claim on the case of *CBZ Bank v David Moyo and Anor suprar*, where court said:

“I must state that a deed of transfer or registration of cession is not conclusive proof of ownership or the rights of a cessionary. See the case of *Young v Van Rensburg* 1991 (2) ZLR 149 (S) at 156 D-G and *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 237 B-D. It simply raises a presumption in favour of the holder of the title deed or the rights of a cessionary until the claimant proves on a balance of probabilities that he innocently bought the property or cessionary rights from the owner of the property or cedent. See the case of *Cunning v Cunning* 1984 (4) SA 585 (T). In any event, the registration of transfer in the Deeds Registry or registration of cession at the offices of a local authority or Deeds Registry does not always reflect the true state of affairs. A title deed or registered cession is therefore prima facie proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable. The fact that it can be challenged is vital for the disposal of this appeal.”

The first claimant conceded that at the time of attachment of property by the Applicant, the transfer of title in the property had not yet been effected into the claimant’s name. However, he had paid the purchase price, monthly subscriptions, service costs and attended to obtaining a Capital Gains Tax and Rates Clearance Certificate. Finally he had retain counsel to attend to transfer, but this had not happened due to financial constraints on his part. This is the same excuse advanced by the second and third claimants.

The Judgment Creditor submitted that the certificates and letters attached by the claimants do not prove ownership of the attached properties. Hence Claimants have no real rights over the stands in question. On special circumstances the Judgment Creditor submitted that the claimants did not place any special circumstances before this court because they are non- existent. The claimants argued that they had given instructions to their legal practitioners to work on the transfer processes as they were raising funds. To date nothing has been done.

I agree with the submissions made by the Judgment Creditor. From 2017 and 2018 when claimants received letters from ZIMRA they did not take any steps to effect transfers. They did not act promptly and only paid legal fees for interpleader after the judgment debtor’s property was attached. They did nothing for the past five six years. This distinguishes them from the facts on special circumstances which were found to be existing in the case of *CBZ Bank v David Moyo &*

*Another (supra)* where claimant acted promptly to secure registration of title by paying transfer fees and obtaining tax clearance certificate within three months. Claimants in this matter did nothing from 2014 up to date.

In the *CBZ Bank v Moyo and another (supra)*, it was found as special circumstances the fact that the transfer could not be registered because Lizhibowa Real Estate (Pvt) Ltd, a creditor of one of the sellers, had registered a caveat on the title deeds of the property. The caveat was registered after the first respondent was already in possession of the property and a day before the first respondent's transfer papers were filed in the Deeds Registry. The first respondent had done all that a purchaser is required to do to get transfer. In *casu*, the claimants did nothing for almost six years towards getting transfer other than fulfilling the preliminary requirements towards the purchase of the Stands. In *CBZ Bank v Moyo and Anor (supra)* processing of the transfer of the title to themselves. The claimants' claims to the properties is hereby dismissed and an order in the Alternative is granted.

**IT IS ORDERED THAT**

1. The claimant's claim to the property 14816, Tynwald South, Harare which was placed under attachment in execution of the order in Case No. HC 2856/19 be and is hereby dismissed.
2. The claimant's claim to the property 14780, Tynwald South, Harare which was placed under attachment in execution of the order in case No. HC 2856/19 be and is hereby dismissed.
3. The claimant's claim to the property 14815, Tynwald South, Harare which was placed under attachment in execution of the order in case No. HC 2856/19 be and is hereby dismissed.
4. The above mentioned properties attached by the Applicant are hereby declared executable.
5. The Claimants are to pay the Judgment Creditor's and Applicant's costs.

*V Nyemba & Associates*, applicant's legal practitioners  
*Hongwe/Nyengedza*, claimants' legal practitioners  
Rufu-Makoni legal practitioners, first and second judgment creditors.