

RABCO WHOLESALERS (PVT) LTD

Versus

BULAWAYO CITY COUNCIL

And

THE SHERIFF OF THE HIGH COURT (N.O)

And

MAUD MOYO

And

C K HOLLANDS T/A HOLLANDS AUCTIONEERS ESTATE AGENTS

And

REGISTRAR OF DEEDS COMPANIES & INTELLECTUAL PROPERTY

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 30 JUNE & 15 JULY 2021

Opposed Application

B. Masamvu, for the applicant
T. Dube, for the respondent

MAKONESE J: This is an application for a declaratory order. The applicant seeks an order in the following terms;

“IT IS ORDERED THAT:

1. The purported sale in execution of the applicant’s immovable property commonly known as a certain piece of land being stand 1116 Bulawayo Township situate in the district of Bulawayo measuring 1110 square metres, and the subsequent confirmation of such sale under case number HC 3088/13 be declared null and void and of no force and effect.

CONSEQUENTLY,

2. The sale agreement of certain piece of land being stand 1116 Bulawayo Township situate in the district of Bulawayo measuring 1110 square metres between the 2nd Respondent and 3rd Respondent be and is hereby cancelled.

3. 2nd and 4th Respondents be and are hereby directed to refund to the 3rd Respondent the sum of USD\$50 000 which 3rd Respondent had tendered as the purchase price for the applicant's property.
4. In the event that 3rd Respondent had already taken transfer of title in respect of certain piece of land being stand 1116 Bulawayo Township situate in the district of Bulawayo measuring 1110 square metres, the 5th Respondent be and is hereby ordered to cancel any such Deed of Transfer and to reinstate the applicant's title in respect of Deed of Transfer Number 1623/84.
5. Costs of suit only if the application is opposed.”

The application is opposed by 1st and 3rd Respondents.

FACTUAL BACKGROUND

Under case number HC 3008/13, 1st Respondent obtained a default judgement against applicant in the sum of US \$25 145.11. The judgment remains extant and has not been set aside. Pursuant to that judgment 2nd Respondent placed applicant's property known as Stand Number 1116 Bulawayo Township situate in the district of Bulawayo under judicial attachment. The said property was subsequently sold by Hollands Auctioneers (4th Respondent) on the 6th November 2015. On 18th November 2015, the Sheriff of the High Court wrote to all parties concerned advising that if no objections were made in writing within 15 days from the date the highest bidder was declared to be the purchaser in terms of Rule 358 of the High Court Rules, 1971, the Sheriff would confirm the sale. Applicant did not file an objection to the sale within the stipulated 15 days. There has been a flurry of litigation between the parties. Applicant filed an application for rescission of the default judgment under case number HC 2192/15. That application was abandoned by the applicant by reason of material defects in the application. Applicant also attempted to set aside the sale in terms of Rule 358(1) (a) of the High Court Rules on the grounds that no proper notice was given for the sale. That application was removed from the roll by applicant's erstwhile legal practitioners. Applicant mounted another legal challenge in this court under case number HC2551/16 seeking to stop the attachment and sale of the immovable property. That application was dismissed by MOYO J. In her written ruling the learned judge observed that she had absolutely no reason to interfere with a process of the lawful execution of the order. (HB 163/18) Applicant contends that this application is different from all the previous processes in that 2nd and 3rd Respondents have been joined to the proceedings and that the only available remedy is an application for a declaratory order. Applicant argues that it meets the requirements of such relief in that it is the owner of the immovable property that was sold in unclear circumstances. Applicant avers that it will suffer financial prejudice if the order is not granted. Respondent argues that this application is simply an abuse of court process in that applicant is trying to re-litigate this matter *via* the back door. Further, and in any event, applicant has already approached this court seeking to nullify execution of the immovable

property. This court has ruled that the said execution was lawful and made a pronouncement which still binds the parties.

POINTS IN LIMINE

Before dealing with the merits it is prudent to deal with the preliminary issues raised by both parties.

IRREGULAR PLEADING BY 1ST AND 3RD RESPONDENTS

The preliminary objection raised by the Applicant relates to the form used by respondents in opposing the application. Applicant avers that the notice of opposition is strange and does not comply with the rules. In particular, it is argued that the notice of opposition does not comply with the provisions of Rule 233 of the High Court Civil Rules. It is contended that the notice of opposition must be expunged from the record of proceedings and the matter treated as unopposed. Applicant states that the Notice of Opposition is drawn in terms of form Number CC14 as read with section 32 of the High Court (Commercial Division) Rules, 2020. It is further argued that respondent's legal practitioner deposed to an opposing affidavit on behalf of 1st and 3rd respondents, and that in the absence of supporting affidavits from the parties themselves the pleadings are irregular and the matter must be treated as unopposed. I need not be detained much on this point *in limine*. The principle has repeatedly been laid down in our courts that the Court is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side. See; *Municipality v Uys* 1974 (3) SA 800 at p 805D-F. Applicant's interpretation of Rule 233 is so narrow that it has become unreasonable. Applicant would have this court only accept notices of opposition that are exact replicas of Form 29 A of the rules. This would be a classic case of a litigant relying on form over substance. A closer inspection of respondent's notice of opposition clearly shows that there is no material departure from Form 29A. The opposing papers are sufficient for the purposes of this matter. There is no ambiguity in the purpose and intent of the respondents. In any event, and more importantly there is no prejudice to the Applicant. It has not escaped this court's notice that Applicant has also not strictly complied with the rules. Applicant inserted its e-mail address and phone numbers on its pleadings, particularly the Notice of filing to the answering affidavit. It would be a travesty of justice and inequitable to punish litigants on the basis of minor defects in pleadings. Both parties are entitled to be heard in order to bring this matter to finality. In the circumstances Applicant's point *in limine* is entirely devoid of merit and must be dismissed.

MATTERS RAISED BY APPLICANT ARE RES JUDICATA

Respondents contend that Applicant has already approached this court seeking to nullify the sale in execution. It is argued that the court has already ruled that the sale was in accordance with the law. Respondents argue further that the applicant is essentially attempting to reverse the sale of the immovable property. The requisites for a successful plea of *res judicata* based on a judgement in *personam* are threefold, namely, that the prior action:

- (a) must have been between the same parties or their privies,
- (b) must have concerned the same subject matter; and must have been founded on the same cause of action.

See Beck's *Theory and Principles of Pleading* 5Ed at p 165; and *Towers v Chitapa* 1996 (2) ZLR 261 H at p 271.

It is clear that Applicant seeks a declaratory order. Applicant concedes that various court processes have been filed in respect of this matter. Applicant avers that it sought the nullification of the sale on entirely different grounds. The basis of the present application is clearly grounded on the premise that there is no other available remedy. The only option is therefore, to couch this application, as an application for a declaratory order. A declaratory order constitutes a declaration of existing or future contingent rights between parties to a dispute. The granting of such relief is a discretionary decision exercised by the court in relation to the particular circumstances of the case. Applicant avers that the preliminary objection on *res judicata* is of no moment and ought to be dismissed. Applicant takes the narrow argument that all previous cases filed concerning the sale of the immovable property did not adjudicate the declaratory relief being sought. I would have to agree with the Applicant. All the matters considered before dealt with the same subject matter and the same parties. It is clear however, that the cause of action is different. In respect of case number HC 2551/16 the matter cannot be adjudged as *res judicata* considering that the cause of action was not the same. The relief sought is not the same. In the event, I am persuaded to dismiss the respondent's preliminary objection and proceed to deal with the merits.

THE MERITS

Before dealing with the requirements of the relief sought it is necessary to set out the sequence of events that led to this application. Applicant seeks an order setting aside the sale of the property known as stand 1116 Bulawayo Township situate in the district of Bulawayo. At first Applicant put forward an argument that there was no proper service or no service at all of the notice to attach the property in execution as required by Rule 347 (a) of the Rules. That argument was rejected. Applicant then sought to advance another argument that 2ND Applicant served a notice of sale that was not accompanied with an inventory. That argument was also baseless and was rejected. Applicant then filed a request to set aside the sale in terms of Rule 359 of the High Court Rules on the grounds that the sale was improperly conducted and additionally that the property was sold for an unreasonably low price. Such a request should be made in writing and lodged with the sheriff within 15 days from the date on which the highest bidder was declared to be the purchaser in terms of Rule 256 or the date of the sale in terms of Rule 358, as the case maybe. The sheriff may accept a request made after that 15 day period but before the sale is confirmed, provided that there is good cause for the request being made late. This application was removed from the roll by applicant's legal practitioner and eventually abandoned. It is abundantly clear that the Applicant was fully

aware of the sale in execution. Applicant attempted to stop the sale under case number 2551/16. The learned judge had this to say in dismissing that application;

“I also cannot stop the attachment, by the sheriff of stand 1116 Bulawayo as that attachment is in pursuit of a lawful execution of a judgment of this court. I absolutely have no reason to interfere with that process.”

Applicant was aware of the sale as far back as the 6th November 2015. When applicant filed its objection to the sale of the property under Rule 359 in case number HC7956/16 it was already aware of the auction sale and that the 3rd Respondent had been declared the highest bidder. The objection did not comply with the provisions of the law in that it was filed outside the 15 day period stipulated by Rule 359 (2) and the objection was not served on all the interested parties, contrary to the provisions of Rule 359 (3). In any event the application under HC 795/16 was subsequently withdrawn. The Applicant may not, therefore, institute fresh proceedings in this matter relying on the fact that the sale was not conducted properly. Applicant concedes that there are a number of cases that have been litigated between the parties. An attempt to overturn the judgment in case number HC 3088/13 failed. Applicant’s bid to appeal to set aside the judgment of MOYO J in the Supreme Court also failed.

The sole issue for determination in this matter is whether Applicant has established a case for a declaratory order. In dealing with applications of this nature certain basic requirements must be established. The position is well articulated in *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65 (SC) at p 72 as follows;

“The condition precedent to the grant of a declaratory order under section 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an “interested person”, in the sense of having a substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of the discretion.”

The Applicant does not pass the first hurdle. Applicant is no longer the holder of any rights in the immovable property. The property was sold to 3rd Respondent way back on 6th November 2015. The sale was duly confirmed by the Sheriff on the 15th December 2015. The

purported objections by the Applicant were fatally defective and abandoned by reason of failure to comply with the provisions of Rule 359. This much is common cause and beyond dispute. Applicant avers that the sale in execution was conducted in an opaque judicial sale. This assertion if true is, quickly disposed of by pointing out that Applicant failed to utilise the provisions in the Rules of challenging the sale by raising an objection to the confirmation of the sale. Further, the Applicant brought proceedings in this court seeking to stop the sale in execution. This court dismissed the application. The matter was taken to the Supreme Court on appeal. Applicant lost the appeal. The Applicant may not invent a new cause of action and bring it for adjudication. This court has no power to review and overturn previous decisions of this court. Having come to that conclusion I must emphasise that Applicant has failed to discharge the onus of establishing that this is a proper case for the exercise of my discretion in terms of section 14 of the High Court Act.

In *R K Footwear Manufactures (Pvt) Ltd v Boka Book Sales (Pvt) Ltd* 1986 (2) ZLR 209, the court was required to issue a declaratory order involving the rights of a lessor to evict a tenant at a future date. The learned judge came to the conclusion that the matter before him was not a proper one for him to exercise his discretion as at the time of the hearing of the matter there was no good and sufficient cause for requiring the order.

It is my view that the application before the court is in bad faith. It is bad at law and factually misleading. Applicant through its malicious prosecution has continued to drag the Respondents to court for a lawful sale in execution. Applicant used all the available tools at its disposal to stop the sale. Having failed to do so, Applicant still had a 15 day window period to file objections to the sale. Applicant made an abortive attempt to object to the sale. That failed. This is but a last ditch effort to somehow manufacture and create a basis for the intervention of this court by way of seeking a declaratory order. Applicant has not established good and sufficient cause for the relief sought.

In the circumstances, and accordingly, the application is hereby dismissed with costs.

Mutatu, Masmvu & Da Silva Gustavo, applicant's legal practitioners
James, Moyo-Majwabu & Nyoni, 1st & 3rd respondent's legal practitioners