

LYDIA HWENGWERE
versus
POINTWAIVE PROPERTIES (PVT) LTD
and
BENNY MARK GARWE
and
PATIENCE STEMBILE GARWE
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 10, 11, & 18 May 2022.

Trial Cause

Plaintiff in person
Ms. P Mukumbiri, for the first defendant
No appearance for the 2-fifth defendants

CHIRAWU-MUGOMBA J: This matter commenced as an application before being converted into an action through an order in HC-1979-19 by MUSHORE J dated the 18th day of November 2019. The plaintiff's application and founding affidavit were to stand as the summons and declaration and the second and third defendants' opposition standing as their plea. The plaintiff's answering affidavit was to stand as the replication. The first defendant was to file its plea within a period of ten days from the date of the order and thereafter pleadings were to be deemed closed. The plaintiff seeks an order that the first to the 4th defendants be ordered to reverse the transfer of an immovable property known as Stand 469 Meadowlands Township 5 of Uplands of Subdivision A of Waterfalls Harare held under Deed of transfer No. 0672/15 (the property) into the names of the plaintiff. Further that upon failure to sign, the fifth defendant be authorised to sign the relevant documents and further that the first defendant and all those claiming title though them be ordered to vacate the said property upon service of a court order. Although the second and third defendants filed a notice of opposition and opposing affidavits, and the second defendant appeared at the pre-trial conference, they took no active part in the trial cause.

The plaintiff averred that she was the victim of fraud through misrepresentation by the second and third defendants. The latter wanted to obtain a loan and misrepresented facts to her. As a result she acted as guarantor to the loan which led to her property being sold to the first defendant after default. Further that the second and third defendant were convicted of fraud in a criminal trial. The first defendant raised a special plea of prescription and averred that the property was purchased at an auction sale conducted by the fifth respondent and transfer was effected on the 25th of February 2015. The plaintiff's claim was filed on the 7th of March 2019, a period of more than three years since the cause of action arose.

The joint pre-trial conference minute captures the issues for trial as follows:

1. Whether plaintiff's claim has prescribed?
2. Whether the agreement of sale of stand number 469 Meadowlands Township 5 of Uplands Waterfalls entered into by the fifth defendant and first defendant should be cancelled and reversed?
3. Whether if agreement is cancelled and transfer in favour of first defendant is reversed, the plaintiff is entitled to transfer into her name?
4. Whether first defendant and all those claiming occupation should be ejected from stand number 469 Meadowlands Township 5 of Uplands Waterfalls

At the trial, the plaintiff led evidence on her own behalf and did not call any witnesses. She testified as follows. In 2011, the second and third defendants approached her and persuaded her to stand in as guarantor for a loan. The two were given a loan of US\$25000 by Royal Crown Investments. The title deeds to plaintiff's property were used as collateral for the loan. Plaintiff later learnt that the second and third defendants had failed to pay back the loan and hence her property had been attached. She made a report to the Police leading to the arrest and conviction for fraud of the second and third defendants in 2015. She became aware in 2012 that her property had been attached. She became aware in 2015 that the property had been transferred to the first defendant after a letter had been addressed to her requesting her to vacate the property. The property was sold during the criminal proceedings, that is, before these were completed. Plaintiff stated that she filed a case in the High Court in 2017 but did not follow it up. She was not aware of the case number.

Susan Choga gave evidence on behalf of the first defendant to the following effect. The property in question was purchased through the Sheriff's sale. The agreement of sale was signed in December 2014. The full purchase price of US\$68 000 was paid and transfer was

effected on the 25th of February 2015 as confirmed by a copy of the title deeds. The plaintiff has since been evicted from the property. The plaintiff was aware as far back as 2014 that the property was to be sold through the Sheriff. A perusal of the file at the offices of the fifth defendant confirms that position. There was no challenge to the sale since the first defendant did not receive any court documents. The court order of eviction against the plaintiff is still extant. The first defendant was not aware of the alleged fraud and it is something that the plaintiff should take up with the fifth defendant. The first defendant has no relationship with the second and third defendant.

The first consideration in my view is whether or not the plaintiff's claim falls within the definition of a debt for purposes of the Prescription Act [*Chapter 8:11*]. It is clear that the plaintiff locates her remedy in common law, i.e, setting aside of a sale under common law. This is because she did not challenge the sale of her property in the manner provided in the rules. She alleges that the sale was based on a fraudulent transaction between herself and the second and third defendants and further that the two were arraigned before the Magistrate Court on charges of fraud and convicted. See *Chiwanza vs Matanda and ors*, 2004(1) ZLR 200. I fully associate with what was stated in *Mukahlera v Clerk of Parliament & Ors* 2005 (2) ZLR 365 (H) and at 368E – 369 by A-B. PATEL J on the definition of a debt.

“In terms of s 15 (d) of the Prescription Act [*Chapter 8:11*], the period of prescription applicable to debts general is three years. Section 16(1) provides that prescription commences to run “as soon as a debt is due”. The word “debt” in this context encompasses “anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise” (see s 2 of the Act). By virtue of s 16(3), a debt is not deemed to be due “until the creditor becomes aware of the identity of the debtor and of the facts from which The debt arises”. However, a creditor is “deemed to have become aware of such identity and of such facts if he could have acquired knowledge thereof by exercising reasonable care”.

In my view, the plaintiff's claim as stated, falls squarely within the definition of a debt.

As stated in *Brooker vs Mudhanda and Anor and Pearce v Mudhanda and Anor*, 2018(1) ZLR 33(3), for a court to determine whether or not a claim has prescribed, a finding has to be made as to when the cause of action arose. In *Efrolu (Pvt) Ltd v Muringani*, 2013(1) ZLR 300(H), the court had occasion to discuss the issue of prescription in relation to transfer of a property to a third party as follows.

“In terms of s19 of the Prescription Act, the running of prescription is interrupted by the service on the debtor of any process by the creditor claiming the debt. Thus, if Mrs Muringani's summons for the reversal of the transfer had been served on Efrolou within three years of her becoming aware of the transfer then the running of prescription would have been

interrupted. Section 16(3) of the Prescription Act provides that a debt shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises. In my view, Mrs Muringani became aware of the transfer of the property from the deceased's name to Efolou in 1999 when transfer was registered. Apart from the fact that Efolou maintains that the property was sold by public auction following a court judgment, in terms of which, among other things, the sale in execution would have been advertised to the public, the transfer was registered by the registrar of deeds, a public official, through the deeds office, a public office. Section 14 of the Deeds Registries Act [Chapter 20:05] provides that the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar. Registration of title in the deeds office is a transfer of real rights in a property from one person to another. The transferee becomes the owner of those rights in the property. He or she can now enforce his or her rights against the whole world. The registration of transfer is constructive notice to the whole world of the change of ownership. *H Silberberg The Law of Property* (Butterworths, 1975) at p 67 says: "The registration of a real right protects its holder and the public alike. As far as the former is concerned, he is entitled to rely on the doctrine of constructive notice which means that every person is deemed to have knowledge of the existence of a duly registered real right. In other words, once a real right has been registered it becomes enforceable against the world at large, provided only D B C E F G H A that it has been obtained in good faith. Conversely, every member of the public is – subject to certain exceptions – entitled to rely on the deeds register being correct."

In the *Mukahlera* case, (*supra*) cause of action was defined as,

The "cause of action" in relation to a claim is "the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim" (*per* WATERMEYER J in *Abrahamse & Sons v SA Railways and Harbours* 1933 CPD 626 at 637). Similarly, in *Patel v Controller of Customs & Excise* 1982 (2) ZLR 82 (H) at 86, GUBBAY J (citing *Controller of Customs v Guiffre* 1971 (1) RLR 91 (G) 1971 (2) SA 81 (R) at 84A, and *Read v Brown* (1888) 22 QBD 131) defined the cause of action as being "every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court". Again, SMITH J, in *Dube v Banana* 1998 (2) ZLR 92 (H) at 95, observed that "the cause of action means the combination of facts that are material for the plaintiff to prove in order to succeed in his action". See also *Peeble v Dairiboard Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (H) at 45."

In *casu*, the plaintiff stated in her evidence in Chief that she became aware as far back as 2015 that her property had been sold by the fifth defendant. Even if I was to give her the benefit of the doubt, as at the 25th of February 2015, the property was transferred to the first defendant. At that date, the identity of the new owner of the property was known. She also claimed that she did not receive any process from the fifth respondent advising her of the sale of her property. Plaintiff did not place any evidence before the court to support her assertion. In any event, it is trite that a sale in execution is a process. Plaintiff did not state the steps if any she took to ascertain the status of her property having known as far back as 2012 that it had been attached. Plaintiff can only succeed by showing that the prescription period was

interrupted. She claimed that she had filed some process in 2017 but was unable to produce proof of such. The inescapable conclusion is that she did not file any process. She also seemed to rely on the criminal proceedings against the second defendant as interrupting the prescription period. DUBE J (as she then was) in, *Gwiriri v, Star Africa Corporation and another*, HH-674-15 discussed this issue as follows.

“Prescription begins to run when the debt or other cause of action arises. Prescription is interrupted by the service of process on the debtor thus commencement of a suit. In *Du Bruyn v Joubert 1982 (4) SA 69*, the court laid down the requirements of interruption as follows, (1) there must be process, (2) the process must be served on the debtor and (3) by that process the creditor must claim payment of the debt. For process to interrupt prescription, the claimant is required to prosecute the claim to final judgment and not abandon the matter. In the same case, the court held that if the judgment is set aside for whatever reason, interruption will not take place.”

The first issue that this court is being asked to resolve is whether this claim has prescribed.

Section 19 of the Prescription Act deals with interruption of prescription. It reads in part as follows,

“19 JUDICIAL INTERRUPTION OF PRESCRIPTION

(1)

(2) The running of prescription shall, subject to subsection 3, be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

(3) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor –

- (a) does not successfully prosecute his claim under the process in question to final judgment, or
- (b) successfully prosecutes his claim under the process in question to final judgment but abandons the judgment or the judgment is set aside.”

It is clear that the plaintiff’s assertion that she had to wait for the outcome of the criminal proceedings to enable her to take action is misguided. There was no interruption of prescription at all. In any event, the criminal proceedings were terminated on the 23rd of July 2015 when the second defendant was convicted and sentenced. There was no process served on the defendants within three years from the 25th of February 2015.

Resultingly, the plaintiff’s claim has prescribed. Given that finding, it is not necessary for me to go into the merits of the matter.

DISPOSITION

1. The plaintiff's claim having prescribed, it be and is hereby dismissed
2. The plaintiff shall pay the first defendant's costs

Rubaya-Chinuwo Law Chambers, first defendant's legal practitioners