

BIGGIE CHINOPEREKWEI
versus
ANNA TRADING (PVT) LTD

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 15 & 30 June 2021

Opposed Matter

T.L. Mapuranga, for applicant
G. Nyengedza, for respondent

TAGU J: This is an application brought in terms of Order 11 Rule 75(1) of the High Court of Zimbabwe Rules 1971, which provides that:

“Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious.”

The following is the order being sought-

‘IT IS ORDERED THAT

1. The Respondent’s claim as against the Applicant as 5th Defendant in case number HC 2721/19 be and is hereby declared frivolous and vexatious.
2. The action filed by the Respondent under case number HC 2721/19 be and is hereby dismissed.
3. The Respondent to pay costs of suit on a legal practitioner and client scale.”

The application is strongly opposed by the Respondent.

BACKGROUND FACTS

The undisputed facts of this matter are that on the 31st January 2014, the Sheriff of Zimbabwe conducted a public auction for the sale of Stand 105 Emerald Hill Township 2 of Stand 26B Emerald Hill Township measuring 2050 square metres held under Deed of Transfer 4370/96 commonly known as Stand 105 Goodall Close, Emerald Hill, Harare. The sale was conducted in terms of the rules of this Honourable Court and was pursuant to a court order obtained by *Ordecco (Pvt) Ltd* against one *David Govere* under case number HC 9257/12 and judgment number HH-

179/13. At the public auction Applicant offered the highest bid of US\$82 000.00. The offer was rejected by the Sheriff who then directed that the property be sold by private treaty. The sheriff proceeded in terms of Rule 358 (2) of the High Court of Zimbabwe Rules.

On the 3rd of April 2014 the Sheriff declared and confirmed the property sold to Applicant for the purchase price of US\$105 000.00. At that stage no objections were raised at the sale in execution despite the sale having been advertised. The sale was also confirmed by this court in a matter under the cover of case number HC 10883/15 after *David Govere* had challenged the judicial sale. On the 23rd of February 2015 title, rights and interests in Stand 105 Goodall Close, Emerald Hill, Harare were transferred into Applicant's name. The Applicant is currently the holder of title to the property. Applicant proceeded to institute *rei vindicatio* proceedings against *David Govere* in a matter under the cover of case number HC 2131/15 and was evicted in from the property in 2016. Since then Applicant has been enjoying vacant possession of the property.

In April 2019 Applicant received Summons commencing action from the Respondent under the cover of case number HC 2721/19. The Respondent was seeking an order setting aside the sale in execution and subsequent transfer of Stand 106 Goodall Close, Emerald Hill, Harare into Applicant's name and the cancellation of the mortgage bond Applicant had registered in favour of ZB Bank secured by the property. In addition the Respondent sought an order to the effect that the property is executable in its favour. Seven defendants were cited in that summons and the Applicant was cited as the 5th defendant. Respondent's cause of action is captured in paragraph 15 of the Declaration in the main matter under cover of case number HC 2721/19 as follows-

“The 2nd Defendant (David Govere) allowed the property to be sold by public auction with the full knowledge that there was a bond registered in favour of the Plaintiff (Respondent herein) in respect of the same property. The sale of the property was improper and irregular and it should be declared invalid, null and void. The facts of the matter also clearly show that the sale was fraudulently conducted. The bond in favour of Plaintiff was never cancelled. This means, at the time of sale of the immovable property, the bond was still valid and very much in favour of the Plaintiff. The Plaintiff seeks the sale of the immovable property to be declared invalid and the transfer thereof reversed. This is for the reason that sale could and subsequent transfer of property could not possibly have gone through since Plaintiff was in possession of the original title deed, and a surety mortgage bond duly registered in its favour.”

On the 17th of April 2019 Applicant, as did other defendants entered an appearance to defend and filed a plea on the 7th of October 2019. It is against the aforementioned background that the Applicant has filed the present application.

The Respondent is opposing the application. Its basis for the opposition being that the sale was unprocedural in that the Respondent is the holder of a surety mortgage bond over the property and that it never had sight of any advertisement or distribution plan from the Sheriff. It averred that it only became aware that the property had already been transferred to the Applicant when it attempted to execute the judgment it obtained against one *David Govere* under Case number HC 12137/11, otherwise it could have raised objections to the sale.

ISSUES FOR DETERMINATION

1. Whether or not the claim under HC 2721/19 is frivolous and vexatious.
2. Whether or not the sale of the immovable property in question ought to be set aside.
3. Whether or not the Applicant is entitled to costs on attorney client scale.

This is an application for the dismissal of the action proceedings under the cover of case number HC 2721/19 filed by the Respondent on the basis that they are frivolous and vexatious. Rule 75 of the rules of this Honourable Court allows a defendant who has pleaded to apply for summary dismissal of action on the ground that it is frivolous or vexatious. The term frivolous and vexatious was defined in *Fisheries Development Corporation of SA Ltd v Jargensen & Anor*, *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1979 (3) SA 1331 (W) at 1339E-F as follows:

“In its legal sense ‘vexatious’ means ‘frivolous’, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant.....Vexatious proceedings would also no doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant; ‘abuse’ connotes a misuse, an improper use, a use mala fide, a use for an ulterior motive.”

In essence, frivolous connotes an action or legal proceedings characterized by lacking seriousness, unsustainable, manifestly groundless, utterly hopeless and without foundation in the facts on which it is purportedly based. See *S v Cooper & Ors* 1977 (3) SA 475. On the other hand, vexatious means causing annoyance to the opposing party in the full appreciation that it cannot

succeed. It is not raised bona fide and the action is obviously unsustainable. Allowing the claim would be to permit the other to be vexed under a form of a legal process that is baseless. See *Martin v Attorney General and Another* 1993 (1) ZLR 153 (S), *Ushangwa and Anor v Makandiwa & Ors* HH 40/19. Recently the meaning of the phrase ‘frivolous or vexatious’ was explained in the *Williams and Anor v Msipha* N.O. and Ors 2010 (2) ZLR 552 (S) at 568C-F as follows-

“In *S v Cooper and Ors* 1977 (3) SA 475 at 476D, BOSHOFF J said that the word ‘frivolous’ in its ordinary and natural meaning connotes an action or legal proceeding characterized by lack of seriousness as in the case of one which is manifestly insufficient.”

In this case the Applicant submitted that the claim under the cover of case number HC 2721/19 is unsustainable. It is a nuisance and an abuse of court process in that the Respondent is basically challenging a judicial sale by the Sheriff of Zimbabwe which has not only been confirmed, but transfer of the property has already been effected to the Applicant.

On the other hand the Respondent said the raising of the claim for setting aside the sale of an immovable property that had a surety mortgage bond can in no way be defined as lacking seriousness. Property rights of an individual were disposed of without their consent or knowledge. The claim under case number HC 2721/19 is sustainable and enjoys prospects of success. It said the sale was not legitimate. It was further submitted that in the event of any bad faith or irregularity, a sale can be set aside. In the present case it was submitted that the Applicant obtained title pursuant to a Sheriff’s sale the proceeds of which should have benefitted the Respondent. The Respondent should not suffer because of another man’s dishonesty. *David Govere* was fully aware of the mortgage bond on the immovable property but opted to remain silent thereby acting in bad faith. Likewise, the Sheriff remained even stirred the mixture by transferring all proceeds of sale to Ordeco whilst the Registrar of Deeds remained at peace. The sale was therefore vitiated by the mistake, hence the same be set aside. To it the sale was void ab initio. Reliance was made to the case of *Macfoy v United Africa Company Limited* 1961 3 ALL ER 1169 PC at page 11721 where LORD DENNING commended as follows-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Hence the Sheriff could have at least informed the Respondent of the sale before hiving off the entire proceeds of sale to Ordeco without setting off the debt owned to the latter.

A reading of the Respondent's cause of action in the main matter is premised on allegations of fraud against the original owner of the property one *David Govere* (judgment debtor) and procedural irregularities in the manner in which the Sheriff conducted the judicial sale.

The unmistakable position of the law is that once a sale has been confirmed, courts will in the most exceptional circumstances set aside the sale. The situation is even onerous where transfer has been effected against payment of the purchase price. A judicial sale cannot, after transfer has been passed, be challenged unless there is proof of fraud on the part of the purchaser, an allegation of bad faith on the part of the purchaser or knowledge of prior irregularities in the judicial sale. In the celebrated case of *Mupedzamombe v Commercial Bank of Zimbabwe & Anor* 1996(1) ZLR (S) at 260D-261A it was held that:

“Before a sale is confirmed in terms of R360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla v Bhura (supra)* at 283A-B. Once confirmed by the Sheriff in compliance with R360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of R359 for it to do so. See *Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-91(not reported) at pp6-7. When the sale of the property not only has been properly confirmed by the sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside 359 and must conform strictly with the principle of the common law.

This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale by execution, or fraud. See *Sookdeyi & Ors v Sahadeo & Ors* 1952 (4) 568 (A) at 571H-572A; *Gibson*

NO. v Inscor Housing Utility Co. Ltd & Ors 1963 (3) SA 783 (T) at 787A-B; *Maponga v Jabangwe* 1983 (2) ZLR 395 (S) at 396D-E; *van den Berg v Transkei Development Corporation* 1991 (4) SA 78 (TkG) at 80G-J; *Erasmus v Michael James (Pty) Ltd* 1994 (2) SA 528 (C) at 552F.

This principle of the common law has been codified in S70 of the South African Magistrates Court Act of 1944, but not in the comparable Zimbabwean Act or Rules.

No allegation was made, let alone proof offered by the appellant, of bad faith or knowledge of any defect in title on the part of the second respondent. It follows therefore that the registration of the property in the name of the second respondent must be allowed to stand. If one has regard to the importance which attaches to the system of land registration in our law and the faith that the public places therein, the sense behind the rule that once perfected by transfer the transaction is virtually unassailable, is easily understood. Were one to hold otherwise, mortgage bonds and subsequent transfer might fall to set aside.”

A perusal of Respondent’s summons indicates that allegations of fraud are being raised against the original owner of the property one David Govere and not the Applicant. No allegations of bad faith on the Applicant’s part have been raised or any knowledge of prior irregularities. On this basis alone there is no recognizable cause of action which has been pleaded by the Respondent against the 5th Defendant. As that is not enough, the sale was confirmed by this Honourable Court under the cover of case number HC 10883/15. An attempt by David Govere to also have the judicial sale set aside by the court under the cover of case number HC 5845/16 was also dismissed. Given this background, it is clear that the Respondent’s claim is without foundation and is designed to vex the Applicant. It is frivolous and vexatious to say the list. Worst still, the property was sold following the Rules of this Honourable Court. The Sheriff advertised the sale and no objections were recorded. A distribution plan was prepared and advertised and the Respondent did not raise any objections. The claim is hopeless.

The counsel for the Respondent submitted that the claim should not be dismissed since there are a number of Defendants in HC 2721/19 who have also pleaded but are not part of this application. Counsel for the Applicant responded by saying the second paragraph of the draft order may be amended to say-

“2. The action filed by the Respondent under case number HC 2721/19 be and is hereby dismissed as against the 5th defendant”, but hastened to say even if that is done, what would remain of the case in HC 2721/19, it can as well be dismissed. I totally agree with the counsel for the Applicant. I will therefore grant the application and order the Respondent to pay costs on a legal practitioner and client scale.

IT IS ORDERED THAT

1. The Respondent’s claim as against the Applicant as 5th Defendant in case number HC 2721/19 be and is hereby declared frivolous and vexatious.
2. The action filed by the Respondent under case number HC 2721/19 be and is hereby dismissed as against the 5th Defendant.
3. The Respondent to pay costs of suit on a legal practitioner and client scale.

Rubaya and Chatambudza, applicant’s legal practitioners.

Hogwe Nyengedza, respondent’s legal practitioners.