

COLLINS KABAIRA
versus
MR MADEGA N.O.
and
NELHURST TRADING (PRIVATE) LIMITED
and
MR AND MRS S MAHLANGU

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 1 April and 3 November 2021

Court application for review

T G Kuchenga, for the applicant
O D Mawadze, for the 2nd and 3rd respondents
No appearance for the 1st respondent

CHINAMORA J:

Introduction:

On 23 March 2020 the applicant filed an application in terms of Rules 26 and 27 of the old High Court Rules, 1971. Three grounds for review were listed by the applicant in his application as follows:

1. The 1st respondent did not properly serve all the beneficiaries of the said immovable property namely, No. 421 Lockerby Close, Borrowdale, Harare.
2. The 1st respondent improperly described the said property named No. 421 Lockerby Close, Borrowdale, Harare, by omitting material information.
3. The 1st respondent unlawfully and irregularly confirmed the sale of the immovable property, namely, No. 421 Lockerby Close, Borrowdale, Harare.

The applicant prayed for the following relief:

1. The confirmation of the sale of the immovable property, namely, No. 421 Lockerby Close, Borrowdale, Harare, to the 3rd respondent be and is hereby reviewed and set aside.
2. The sale of the immovable property, being Stand No. 421 Lockerby Close, Borrowdale, Harare, be and is hereby reviewed and set aside.

The 2nd and 3rd respondents opposed the application, while the 1st respondent filed a Report (titled “Sheriff’s Report”) on 29 March 2021.

Factual background

The applicant asserted that sometime in 2012, the 2nd respondent obtained a default judgment against the applicant amounting to \$80,000-00. A writ of execution of both movable and immovable property was then issued, pursuant to which the applicant’s property, No. 421 Lockerby Close, Borrowdale, Harare, was sold to the 3rd respondent for a sum of \$270,500-00 on 20 November 2012. The property is registered in the name of Cokasa Leads (Private) Limited according to the Deed of Transfer on pages 38-41 of the record. Since then, the applicant has challenged the sale in the High Court on no less than one occasion. The applications were dismissed in HC 3680/13, HC 2927/14 and HC 6039/17 for want of prosecution. Following an order granted by this court on 3 March 2020 condoning the late noting of filing an application for review, this application was filed. The application had to be filed within 14 days of the order.

The applicant alleges that the 1st respondent did not properly serve the notice of attachment on all the beneficiaries of the property. He adds that they only knew of the intended sale through a newspaper advertisement. The applicant states further that the property was improperly described as being some 17 km from the Central Business District yet it is 12 km away. In addition, the applicant submitted that it was not stated that it is located in a “most sought after” area.

Further, the applicant avers that, by letter dated 12 April 2013, the 1st respondent declared and confirmed the 3rd respondent as purchasers at a sum of \$270,500-00. The applicant says that, when this was done, the applicant was not given an opportunity to challenge the sale of the property, as provided in the High Court Rules, 1971. He concludes that the inaccurate description resulted in the property fetching a lower price that would have been obtained.

The 2nd and 3rd respondents first raised points *in limine*, namely; (a) the registered owner of the property, Cokasa Leads (Private) Limited, has not been cited in the proceedings; (b) the 3rd respondent has been incorrectly cited, because two different persons have not been cited separately; (c) the application is fatally defective since in the absence of an objection to the Sheriff, he could not file a review application relying on Rule 359 (1) grounds of objection after confirmation and transfer of the property to a third party; (d) the application for review was filed outside the time (of 14 days) that it should have been filed in terms of this court's order, *viz*, by 17 March 2020; (e) the applicant lacks *locus standi* as he was never the registered owner of the property; and (e) the application, in any event, was filed outside the 8 week period for filing a review application and no condonation was sought.

At the hearing, I heard argument in respect of both the preliminary points and the merits and reserved judgment. I indicated that I would give my judgment in respect of the points *in limine* and/or the merits in due course. I now give my judgment with reasons for the conclusion and decision I have reached.

Points in limine

I will deal with the preliminary points not in the order I have listed them above. My proposed beginning point is to examine whether or not the applicant has *locus standi* to bring the present application.

The applicant's locus standi

The place to start looking at is Rule 359 (1) of the High Court Rules, which reads:

“Subject to this rule, any person who has an interest in a sale in terms of this Order may request the sheriff to set it aside on the ground that –

- (a) the sale was improperly conducted; or
- (b) the property was sold for an unreasonably low price, or on any other good ground”. **[My own emphasis]**

The way the Rule is worded affords anyone who has an interest in a sale conducted by the Sheriff to make a request to have the sale set aside for the reasons stipulated. It is also important, in this regard, to look at Rule 359 (8) which provides as follows:

“Any person who is aggrieved by the sheriff’s decision in terms of subrule (7) may, within one month after he was notified of it, apply to the court by way of a court application to have the decision set aside”. [My own emphasis]

Crucially, the both Rules 359 (1) and 359 (8) do not confine the right to object to a sale to an owner of the sold property. As the Rules currently stand, an interested or aggrieved person can object. Thus, subject to the applicant meeting all the other requirements of either Rule 359 (1) or Rule 359 (8) he can make an objection without necessarily being the owner of No. 241 Lockerby Close, Borrowdale, Harare. The way Rules 359 (1) and 359 (8) are drafted permit him to approach the Sheriff or the High Court, as the case may be. Consequently, I find no merit in this preliminary point and dismiss it. The next point *in limine* I turn to is whether or not the application is fatally defective as there is no Sheriff’s decision to review since no objection was made by the applicant.

Is the application fatally defective?

It was contended by the 2nd and 3rd respondents that the application, being one that seeks a review of the Sheriff’s decision, is fatally defective since in the absence of an objection to the Sheriff, he could not file an application based on Rule 359 grounds of objection after confirmation and transfer of the property to a third party. The applicant himself makes the critical, if not damning, admission that he did not object to the sale. He also confirms the sale and transfer of he property to the 3rd respondent. In this context, Rule 359 provides an elaborate procedure of what happens when a property attached by the Sheriff in terms of a writ of execution is sold by public auction. It is worth quoting Rule 359 in *extenso* below:

“359. Confirmation or setting aside sale

(1) Subject to this rule, any person who has an interest in a sale in terms of this Order may request the sheriff to set it aside on the ground that –

- (a) the sale was improperly conducted; or
 - (b) the property was sold for an unreasonably low price,
- or on any other good ground.

(2) A request in terms of subrule (1) shall be 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 356 or the date of the sale in terms of rule 358, as the case may be:

Provided that the sheriff may accept a request made after that 15 day period but before the sale is confirmed, if he is satisfied that there is good cause for the request being made late.

(3) A request in terms of subrule (1) shall –

- (a) set out the grounds on which, according to the person making the request, the sale concerned should be set aside; and
 - (b) be supported by one or more affidavits setting out any facts relied on by the person making the request, and copies of the request shall be served without delay on all other interested parties.
- (4)
- (5)
- (6)
- (7) On receipt of a request in terms of subrule (1) and any opposing or replying papers filed in terms of this rule, the sheriff shall advise the parties when he will hear them and, after giving them or their legal representatives, if any, an opportunity to make their submissions, he shall either –
- (a) confirm the sale; or
 - (b) cancel the sale and make such order as he considers appropriate in the circumstances ...”

The application before me purports to be an application to review the Sheriff’s decision confirming the sale of No. 241 Lockerby Close, Borrowdale, Harare, to the 3rd respondents relying on Rule 359 grounds of objection. Clearly, it has the hallmarks of an application in terms of Rule 359 (8) of the High Court Rules. It is therefore bedeviled by difficulties. The applicant, by his own admission, never objected to the Sheriff in terms of Rule 359 (1), which would have led the Sheriff to decide on the objection and make a decision confirming or setting aside the sale in terms of Rule 359 (7). As he squandered the chance, he can no longer make a Rule 359 (8) application to set aside the sale.

It has also not eluded my attention that the proviso to Rule 359 (2) allows the Sheriff to hear an objection filed outside the 15 day *dies induciae* provided by Rule 359 (1) if good cause is demonstrated for the late filing. The applicant did not choose to follow the route of filing the objection late despite Rule 359 (2) which permits him to do so. The effect of his inaction to utilize this right is that he cannot rely on the procedure under Rule 359 (8). The position of our law was stated by MAKARAU J (as she then was) in *Chiwanza v Matanda and Ors* HH 170-04, as follows:

“After a sale has not only been confirmed but transfer of the property has been effected to a third party, interested parties may still approach this court at common law for the sale and transfer to be set aside. It further appears to me that an approach at this stage, after the property has been transferred to a third party, cannot be sustained on alleged violations of the rules of this court nor on the general grounds of review at common law but only on the equitable considerations aptly summarized by Gubbay C.J. (as he then was) in *Mapedzamombe v Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S) when at 260D he said:

“... 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 in execution, or fraud.”

The grounds for review relied on by the applicant appear on the face of the application. That this is so is not optional, but is a mandatory requirement of the Rules. In this respect, in *Dandazi v Wankie Colliery Co. Ltd* 2001 (2) ZLR 298 (H), it was expressly stated:

“I wish to make an observation which is relevant to many review applications that are brought to the High Court. In terms of Order 33 r. 257, it is a requirement that: The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. This is not an idle requirement. It was inserted in the rules of the court so that an applicant for review may apply his mind to the grounds upon which he seeks a review and be able to state them clearly and in brief form”. [My own emphasis]

I have carefully examined the grounds on the applicant’s application, it is apparent that they are grounds which found an application under Rule 359 (1). For the avoidance of doubt, the applicant asserts that the property was incorrectly described and that beneficiaries of the property were not served with the decision. No grounds under common law or sections 26 and 27 of the High Court Act [Chapter 7:06] appear *ex facie* the court application or are relied on by the applicant. The grounds under section 27 of the High Court Act are: (a) absence of jurisdiction on the part of the decision maker; interest in the cause or bias, malice or corruption on the decision maker’s part; gross irregularity in the proceedings or the decision. Nor have the common law grounds referred to in *Mapedzamombe v Commercial Bank of Zimbabwe and Anor supra* been pleaded by the applicant. In the result, I come to the conclusion that the point *in limine* raised in this respect is merited, and uphold it. Let me go on to address the final aspect of the preliminary points.

The application for review was filed late (outside the Rules)

The 2nd and 3rd respondents further argue that the applicant was inordinately out of time to seek a review of the 1st respondent’s decision made in April 2013. It was submitted that an application for review ought to have been filed 8 weeks from the date of the 1st respondent’s confirmation of the sale. The argument proceeded that the applicant should have sought condonation for late noting of the application for review, but did not do so. Having come to the conclusion that the point *in limine* on the application being defective. I will decide the application on the basis of the point that I have upheld. For the same reason I find it unnecessary to deal with

the remaining preliminary points or merits of the application. As I have resolved the matter on the basis of the aforesaid preliminary point, there is no application before the court.

Disposition

1. The application is struck off the roll with costs.

Applicant in person

Musimwa & Associates, second and third respondents' legal practitioners