

KARREN SEKAI CHAYITARA
versus
DAVISON KANOKANGA
and
TECHSTONE INVESTMENTS (PRIVATE) LIMITED
and
LIVINGSTONE CHAYITARA
and
LEARNMORE TIGERE
and
MESSENGER OF COURT N.O.
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 15 October & 28 October, 2020

Opposed application

R Zimuti, for applicant
T.S. Nyawo, for 4th respondent

TAGU J: This is an application to confirm or discharge a Provisional order granted by this court on the 9th of August 2019. The brief facts are that the applicant filed an urgent chamber application for an Interdict stopping transfer of an immovable property known as a Certain 2 012 square metres of land called Stand 317 Waterfalls Induna Township of Subdivision A of Lot 24 of Waterfalls Induna of Waterfalls situate in the District of Salisbury held under Deed of Transfer Number 6175/07 pursuant to an Order granted by the Harare Magistrates Court under case number MC 418/18 which order was not granted against the Applicant who is a 50% co-owner with third respondent of the property but was rather granted against the Second and Third Respondents. The property was sold at a Public Auction by the Fifth Respondent to the Fourth Respondent outside the provisions of the Writ of Execution and without consent of the Applicant. The Writ of execution specifically authorized the Messenger of court to sell 50% share of the immovable property, but instead proceeded to sell 100% share of the property to the Fourth respondent. The applicant only became aware of the sale after the property had been sold and when an attempt was being made to remit 50% of the proceeds to the applicant.

For avoidance of doubt the Provisional Order granted in favour of the Applicant reads as follows-

“INTERIM RELIEF GRANTED

Pending the confirmation of the Provisional Order, the following interim relief is granted:

It is hereby ordered that:-

1. First, Fifth and Sixth Respondents be and are hereby interdicted from proceeding with the intended transfer of Certain 2 012 square metres of land called Stand 317 Waterfalls Induna Township of Subdivision A of Lot 24 of Waterfall Induna of Waterfall situate in the District of Salisbury held under Deed of Transfer 6175/07 to the Fourth Respondent .
2. That First and Fifth Respondents be and are hereby directed to instruct their chosen conveyancers to stay any transfer efforts in respect of the said Stand.
3. Costs of suit on an Attorney and Client Scale against the Respondents who oppose the application.”

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. That the sale in execution by the Fifth Respondent to the Fourth Respondent on the 15th February 2019 and subsequent purchase by the Fourth Respondent in respect of Case No. MC 418/18 of the Magistrates Court Harare of certain 2 012 square metres of land called Stand 317 Waterfall Induna Township of Subdivision A of Lot 24 of Waterfall Induna of Waterfall situate in the District of Salisbury held under Deed of Transfer 6175/07 be and is hereby set aside.
2. The First and Fifth Respondents be and are hereby ordered to instruct their Conveyancers to stop any transfer process of the Certain 2 012 square metres of land called Stand 317 Waterfall Induna Township of Subdivision A of Lot 24 of Waterfall Induna of Waterfall situate in the District of Salisbury held under Deed of Transfer 6175/07.
3. The Sixth Respondent be and is hereby directed to uplift the caveat number 362/18 dated 16th July 2018 placed on Certain 2 012 square metres of land called Stand 317 Waterfall Induna Township of Waterfall of Subdivision A of Lot 24 of Waterfall situate in the District of Salisbury held under Deed of Transfer 6175/07.
4. That Respondents who oppose this application pay the costs of suit on an Attorney and Client Scale.

SERVICE OF ORDER

The Applicant’s Legal Practitioners are granted leave to serve this Provisional Order on the Respondents.”

The fourth respondent opposes the application and averred that the property in question is owned by the applicant and the judgment debtor. He said what was sold was at public auction was third respondent’s 50% share in the property and not the entire property. He said there was a typographical error that emanated from the offices of the fifth respondent and the error has since been rectified.

In her answering affidavit the applicant maintained that it is clear from Annexure A to the Application that what was sold is the whole property and not 50% shares hence the sale was void *ab initio*.

Two issues arise for determination in this case. The first is what was sold? If the answer is 50% was sold then that is the end of the matter. The second issue is if 100% shares were sold, what does the law say in respect of co-owners of property where one co-owner wants or is forced to sell his or her 50% share without the consent of the other co-owner?

WHAT WAS SOLD AS PER ANNEXURE A?

To answer the above question the starting point is to look at the Writ of Execution. Annexure D, the Writ of execution clearly states what was to be sold. It says in the relevant portion that-

“**THIS THEREFORE** is to authorize and require you to attach and take into execution the 2nd Defendant(50%) share of in a Certain Piece of Land called stand 317 Waterfall Induna Township of Subdivision A of 24 Waterfall Induna of Waterfall situate in the District of Salisbury measuring 2012 square metres held under Deed Transfer 6175/07.

And return as required by the law what you have done by virtue of hereof for which this shall be your Warrant.”

A reading of the Warrant dated 15th June 2018 clearly says that 50% of the property was to be sold. However, Annexure A, a Statement of Sale in execution against immovable property generated by the Messenger of Court Harare shows that the whole immovable property was sold and after deduction of other costs a figure of \$88 000.00 was to be shared by the co-owners of the immovable property and the applicant was to get \$44 000.00 being her half share and the other \$44 000.00 was to go to the judgment creditors less costs. So I agree with the applicant that what was sold was the 100% shares in the immovable property.

THE UNDISPUTED FACTS

It is not disputed that the applicant is a co-owner with a 50% share in the property known as Stand 317 Waterfalls Induna Township of Subdivision A of Lot 24 of Waterfall Induna of Waterfalls situate in the District of Salisbury held under Deed of Transfer 6175/07 measuring 2 012 square metres. It is further not in dispute that the applicant is not a co-debtor and is not a party to the proceedings that resulted in the Writ being issued. It is further not in dispute that the applicant was not advised of the sale of the property before it was sold. It is not in dispute that the immovable property that is subject of the matter is indivisible property. Even if 50% shares in the house were to be sold the applicant should have been advised and her consent sought.

THE LAW

It is trite that each co-owner has the right to a share in the entire thing and one co-owner may not prevent another co-owner from using the joint property in proportion to his or her undivided share- see Silberberg & Schoeman’s *The law of property 5th edition p 133 & 134*. Every co-owner has the right to freely and without reference to co-owners alienate his or her share- EX PARTE MENZIES ET UXOR 1993 (3) SA 799 (C) at 812C-D. Every co-owner may insist on partition of the property of the property at any time and if the co-owners cannot agree on the manner in which the property is to be divided amongst them the court will make an order which is fair and equitable in the circumstances. The court will either order one of the co-owners to take it and pay out the others, or that the property be sold and that the proceeds be divided among the co-owners according to their shares. See *Silberberg & Schoeman supra* and *Rademeyer v Rademeyer* 1968 (3) SA 1.

MUREMBA J in the case of *Chisvo v The Sheriff of Zimbabwe N.O & 4 Ors* HH-239/16 said the applicant being the owner of the other half share, and not being a judgment debtor, her share cannot

be attached and sold in execution without her consent. This is irregular and unlawful. She had this to say-

“As I have already stated above, in enforcing the judgments he is directed on what to do by the writs of execution. If the writ of execution directs him to attach and sell 50% share on what basis then does he attach and sell 100% share? I do not believe that he has a right to make such a decision *mero motu*. All he can do is attach 50% share and sell it. I verily believe that if the whole property is to be attached and sold there has to be such an order first from the court. For the Sheriff to attach and sell the whole property in the manner he did in the absence of a court order amounts to a complete disregard of the applicant’s rights to property which are protected in the Constitution. The applicant being the registered co-owner of the property in question means that she has real rights over the property. Her estranged husband’s rights over the property do not prevail over her rights as a co-owner. What the judgment creditor has as a person who is owed money by the judgment debtor are personal rights over that property. Surely personal rights cannot prevail over real rights. I hold the view that for the Sheriff to attach and sell the whole property there is need for the applicant to have consented to it. In the absence of consent by the applicant there has to be recourse to the courts first for a determination before the Sheriff can proceed with the attachment and sell the whole property.”

The fourth respondent’s position therefore, that the applicant is only entitled to 50% share of the sale proceeds and not 50% of the property itself is factually and legally wrong. The applicant as an owner has the right to deal with her property as she wishes and her consent to the sale is necessary. *In casu* there was no such consent and neither was same sought. In fact, no courtesy was ever done by the fourth respondent to try to engage the applicant to map the way forward. Therefore the said property cannot be attached and sold in execution because it is legally impossible and as such the writ authorizing the attachment of the property is void. The impending registration of the property in fourth respondent’s name is also null and void.

In the famous case of *McFoy v United Africa Co. Ltd* [1961] 3 ALL ER 1169 (PC) at 11721-

“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 this court to set it aside. It is automatically null and void without more ado...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.”

For the above reasons I will confirm the provisional order.

IT IS ORDERED THAT

1. That the sale in execution by the Fifth Respondent to the Fourth Respondent on the 15th February 2019 and subsequent purchase by the Fourth Respondent in respect of Case No. MC 418/18 of the Magistrates Court Harare of Certain 2 012 square metres of land called Stand 317 Waterfall Induna Township of Subdivision A of Lot 24 of Waterfall Induna of Waterfall situate in the District of Salisbury held under Deed of Transfer 6175/07 be is hereby set aside.
2. The First and Fifth Respondents be and are hereby ordered to instruct their Conveyancers to stop any transfer process of the Certain 2 012 square metres of land called Stand 317 Waterfall Induna Township of Subdivision A of Lot 24 of Waterfall Induna of Waterfall situate in the District of Salisbury held under Deed of Transfer 6175/07.
3. The Sixth Respondent be and is hereby directed to uplift the caveat number 362/18 dated 16th July 2018 placed on Certain 2 012 square metres of land called Stand 317 Waterfall Induna Township

of Subdivision A of Lot 24 of Waterfall Induna of Waterfall situate in the District of Salisbury held under Deed of Transfer 6175/07.

4. The 4th Respondent to pay the costs of suit on an Attorney and Client Scale.

SERVICE OF ORDER

The applicant's Legal Practitioners are granted leave to serve this order on the 4th Respondent.

Zimudzi and associates, applicant's legal practitioners

Nyawo Ruzive legal practice, 4th respondent's legal practitioners.