

LIZNET MPOFU
versus
ENOCK B. MPOFU

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 2 JUNE AND 25 JUNE 2015

Application for summary judgment

Mr *M. Ndlovu* for the applicant
Mr *S. S. Mlaudzi* for the respondent

MAKONESE J: The applicant purchased house number 24733 Gundwane Road, Pumula North, Bulawayo, at a public auction on 2 October 2013. The sale was conducted by the Deputy Sheriff Bulawayo pursuant to a judgment debt against respondent involving a third party. The applicant duly paid the purchase price in the sum of US\$12 000 and the Deputy Sheriff proceeded to effect cession of the property into applicant's names. The rights title and interest to and in the property have been transferred to the applicant. The respondent has refused to vacate the property and is not paying rentals to the applicant. Applicant issued summons against respondent on 22 September 2014 seeking respondent's eviction and all those claiming occupation through him from the property. The respondent entered appearance to defend on 8 October 2014. Applicant has filed this application for summary judgment contending that respondent has no *bona fide* defence to her claims and that appearance to defend has been entered for the sole purpose of delay. Applicant avers that she has a clear and unanswerable claim. The property was lawfully purchased and she has received transfer of all the rights, title and interest in and to the property. Further, the applicant contends that the respondent failed to challenge the validity of the sale, which was duly confirmed by the Deputy Sheriff.

In her papers in opposition, respondent alleges that he has a valid defence to the applicant's claims. Respondent confirms that the property in issue was sold at a public auction in a sale in execution. Respondent alleges that when the process of attaching the property was underway he was away at his rural home in Silobela. He was not aware that summons had been issued against him and that a writ of execution against his immovable property had been issued. He only became aware of the sale in execution in October 2013 when the applicant informed him that she had purchased the property. Respondent states that he has filed an application to rescind the default judgment obtained against him. The application for rescission of judgment was filed in December 2012. No further explanation is forthcoming from the respondent regarding the fate of that application for rescission of judgment. Respondent alleges that he has a defence against the action brought against him by one Moses Mazithulela which resulted in the default judgment and the sale in execution. Respondent further alleges that respondent filed an application for rescission of judgment before applicant purchased the property. A bold averment is made by the respondent that applicant must have been aware of the respondent's application for rescission of judgment and that she took a risk in purchasing the property at a public auction.

Analysis of the Law

It is my view that an innocent party who purchases a property at a public auction duly advertised by the Deputy Sheriff and who lawfully purchases a property and fulfills all the conditions of sale by paying the purchase price and subsequently receiving transfer is entitled to the protection of the law. The innocent purchaser should not concern himself with the dispute between the debtor and the creditor which results in the sale in execution. By its very nature, a sale in execution in pursuance of a debt is a mechanism designed to compel a debtor to fulfill his obligations. The sale is not conducted voluntarily but under the force of the law. The debtor will invariably seek to escape the inevitable consequences of the sale in execution by seeking a rescission of judgment or challenging the validity of the sale. The legal position regarding the rights of parties after a sale has been conducted, and confirmed by the Deputy Sheriff, and where

transfer has already been effected to the third party was canvassed in the case of: *Chiwadza v Matanda and Others* 2004 (2) ZLR 203 (H). In this matter MAKARAU (J), held that after the sale has been confirmed and transfer has been effected to the purchaser, an interested party may still approach the court at common law to have the sale set aside, but not on the grounds of alleged violations of the rules of court nor on the general grounds of review at common law. The sale cannot be impeached in the absence of an allegation of bad faith, or knowledge of prior irregularities in the sale, or fraud. This is so because of the protection our legal system affords the innocent third party in commercial transactions.

See also the case of *Mupedzamombe v Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S).

WHETHER APPLICANT HAS MADE A CASE FOR SUMMARY JUDGMENT

In making an application for summary judgment, the applicant is required to verify his cause of action and state that in his belief the respondent has no *bona fide* defence to the action. In terms of Order 10 rule 64 (2) and (3) of the High Court Rules, 1971, the applicant has attached an affidavit supported by documents which indicate that the applicant purchased the property at a public auction. The documents further confirm that the applicant paid the required purchase price. The documents further indicate that title in respect of the immovable property has been effected into the applicant's names. The applicant has indeed verified the cause of action. The applicant has made out a clear case that she has lawfully acquired the right to the use and enjoyment of the property in dispute. She is the lawful owner of the property.

WHETHER RESPONDENT HAS RAISED A *BONA FIDE* DEFENCE TO THE CLAIMS

In determining an application for summary judgment, the test is whether the respondent is *bona fide* in advancing his defence and whether it can possibly succeed. Further, the balance of prejudice has to be in respondent's favour. In the case of *Jena v Nechipote* 1986 (1) ZLR 29 (SC), the court stated that all that the defendant has to establish in order to succeed in having an application for summary judgment dismissed is that:

- (i) there is a mere possibility of success
- (ii) he has a plausible case
- (iii) there is a triable issue
- (iv) there is a reasonable possibility that an injustice may be done if summary judgment is granted.

The respondent does not satisfy any of the above requirements. The respondent has neither challenged the validity of the sale nor challenged the rights of the innocent purchaser. The respondent is required to allege facts which if proved at the trial would entitle him to succeed in his defence. Although the respondent does not have to set out the facts exhaustively he must set out material facts upon which his defence is premised with sufficient clarity to allow the court to decide whether these facts constitute a valid defence to the claim. It is not sufficient for respondent to advance vague generalisations and bald and sketchy details. See the case of *Hales v Doverick Investments (Pvt) Ltd* 1998 (2) ZLR 235 (H).

The respondent, in my view, does not have a *bona fide* defence to the applicant's claims. The facts which led to the house being sold in execution have nothing to do with the applicant who is an innocent purchaser. I have already set out the legal routes available to an individual whose property has been sold in execution and where transfer has already been effected into the names of the innocent purchaser. If the respondent was diligent enough he should have made an urgent application to stop the sale of the property. He failed to do so. Even so, after the sale was conducted, the respondent could have made an application for the sale not to be confirmed. The respondent did not do so. The story by respondent that he did not receive the summons is unbelievable, regard being had to the fact the sale was advertised in the newspapers as required by law. The application for rescission of judgment, which respondent seems not very keen to conclude has no effect on the application for summary judgment. The respondent has no legal basis to justify his continued occupation of the house, rent free.

I have no difficulty in concluding that respondent has no recognizable defence, neither are there any triable issues. The respondent's defence is a delaying tactic which is designed to

frustrate the applicant from taking over occupation of the property. The plaintiff's claim is unanswerable and she is entitled to summary judgment with costs on a punitive scale:

I accordingly order as follows:

1. Respondent be and is hereby ordered to vacate the premises at stand 24733 Gundwane Road, Pumula North, Bulawayo, and all those claiming occupation through him, forthwith.
2. Respondent pays the sum of US\$200.00 (two hundred dollars) being monthly rentals from 10 December 2013 to date of eviction.
3. Respondent pays costs of suit on an attorney and client scale.

Mweli Ndlovu and Associates, applicant's legal practitioners
Samp Mlaudzi and Partners, respondent's legal practitioners