

STANLEY NANZOMBE
versus
SICINGILE MASUKU (NEE MOYO)
and
THE SHERIFF OF ZIMBABWE
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 23 JUNE AND 2 JULY 2015

Opposed Application

Mr *K. Ngwenya* for the applicant
Mr *G. Sengweni* for the respondent

MAKONESE J: The applicant purchased the immovable property known as stand 4022 Khumalo Township of stand 4125 Bulawayo (commonly referred to as 36 Ellington Avenue, Khumalo, Bulawayo) at a public auction conducted by second respondent on 19 July 2013. The property is registered in the name of Raphael Masuku (first respondent's husband). The sale was confirmed by the second respondent on 17 October 2013. The applicant complied with all the terms and conditions of the sale and duly paid the purchase price. The transfer of the property cannot, however, be effected into the names of applicant as first respondent obtained a Provisional order against her husband, Raphael Masuku, on 20 September 2000 under case number HC 3089/2000. The interim order provides in paragraph 4 that pending an order of this court, third respondent be and is hereby interdicted from transferring the property to a third party. A caveat was registered against the title deed of the property in terms of that interim order.

The applicant has filed this application seeking an order for the discharge of paragraph 4 of the provisional order under case number 3089/2000 and for the upliftment of caveat number

808/2000 registered in pursuance of the interim order. This is to enable third respondent to effect transfer of the property from Raphael Masuku into the applicant's names. In essence, the relief being sought by applicant is to give effect to the judicial sale which has been stalled by the terms of the interim order granted by this court on 20 September 2000.

First respondent has opposed the relief sought by applicant primarily on the grounds that the judgment/order under case number HC 1938/12 which led to the attachment and subsequent sale of the property in dispute is being challenged in court by her husband Raphael Masuku. In that matter Raphael Masuku has filed an application for condonation for leave to apply for rescission of judgment under case number HC1938/12 which led to the attachment and auctioning of the property by second respondent.

Point in Limine

The applicant raised a point *in limine* arguing that the first respondent was barred by reason of failure to file heads of argument in terms of Order 32 rule 238 (2a) of the High Court Rules, 1971. First respondent contended, correctly, in my view that, regard being had to rule 238 (2a) (ii), first respondent filed the heads of argument within the time limits as set out the rules. I accordingly find no merit in the point *in limine* and accordingly dismiss it. I shall proceed to deal with the merits of the application.

Background

First respondent is married to Raphael Masuku and there is a divorce action which is pending under case number 3089/2000. On 20 September 2000, first respondent obtained against her husband interim relief interdicting the sale of the property in dispute to a third party, pending an order of this court. First respondent duly registered a caveat against the title deed bearing number 808/2000. The divorce action instituted some 15 years ago has not been finalized. No proper explanation for the delay in finalization of this matter has not been proffered by first respondent. Sometime in May 2012, Raphael Masuku was served with summons under case number HC 1645/12. At that time Raphael Masuku was at Khami Prison on charges of theft of

motor vehicle. The plaintiff in that matter obtained judgment and subsequently this led to the sale of the property known as 36 Ellington Road. Khumalo, Bulawayo, in satisfaction of the judgment debt. Under case number 1398/12 Raphael Masuku has attempted to seek a rescission of judgment. Once again, as in the divorce matter, there seems to be no urgency in having that matter brought to finality. No sensible and plausible explanation has been advanced to explain the failure to have the application for condonation, and for rescission of judgment resolved. First Respondent and her husband seem content with maintaining the status *quo*. It suits the first respondent to cling to the caveat registered in the year 2000. This is so because the property cannot be transferred to the applicant for as long as the caveat is not uplifted. As things stand, the first respondent is not proceeding with the divorce action and Raphael Masuku is not pursuing the application to rescind the default judgment that led to the sale of the immovable property.

Established facts

It is not in dispute that the applicant purchased the property through a public auction conducted by second respondent. The applicant complied with all the terms and conditions of the sale and paid the full purchase price for the property. The applicant is essentially an innocent purchaser. It is further not in dispute that the property is registered in the names of Raphael Masuku, who is the registered owner of the real rights over the property. First respondent's opposition to the upliftment of the caveat is premised on the fact that the judgment which led to the property being auctioned is being challenged in court. That judgment which led to the sale in execution is still operative and has not been set aside by a competent court. It is beyond dispute that the immovable property was placed under attachment and sold to applicant in terms of a valid court order. I have already indicated that both first respondent and Raphael Masuku have shown no interest in bringing to finality, firstly the divorce matter and secondly, the application for rescission of judgment.

I also note that there is nothing in the papers to suggest that there was an attempt to challenge the confirmation of the sale. First respondent has taken no action at all to obtain an

order setting aside the sale in execution. There is therefore no basis to oppose the upliftment of the caveat registered in the year 2000, simply on the grounds that Raphael Masuku has not finalized his application for rescission of judgment. As matters stand, first respondent has remained in the property in dispute from 17 October 2013. The first respondent and her husband enjoy the use of the property, rent free.

Analysis of the Law

The onus is on the applicant to satisfy the court that there are special circumstances why an order uplifting the caveat should be granted. See the case of *Maphosa and another v Cook and Others* 1997 (2) ZLR 314 (H). In this matter the learned judge goes further to state at page 317 as follows:

“It is clear from the authorities that in the exercise of its discretion the court will consider the fact that the attached property had been sold to the applicant but that the applicant must show, in addition to that factor, the existence of facts or circumstances which satisfy it that it would be just or equitable to grant the relief sought.”

In the case of *Bulle v Merchant Bank of Central African and Others* HH 2/96 it was held that a caveat recorded against a title deed does not confer on the judgment creditor real rights. In the same vein in this instance the caveat placed against the title deed does not confer any real right on first respondent.

In her heads of argument, first respondent makes the following averments in paragraph 2.2:

“The first respondent stands to be prejudiced if the caveat is lifted since the said property forms part of the matrimonial property upon which a divorce matter is still pending under case number 3889/2000. This property cannot then be disposed of at the detriment of the first respondent who also happens to be an interested party. Lifting the caveat will be contrary to public policy since first respondent’s husband’s indebtedness cannot prejudice her interest in the property.”

I hold the view that first respondent only holds personal rights against the registered owner of the real rights, Raphael Masuku. First respondent’s opposition to the upliftment of the caveat on the grounds that it would be against public policy lacks merit as she may claim

damages against the registered owner of the property, Raphael Masuku. In the instant case what first respondent is in effect protecting is her 50% claim of the proceeds of the sale of the property upon the granting of a divorce. That divorce, sadly has not been resolved for 15 years and there seems to be no interest on the part of first respondent or her husband to bring the matter to a final conclusion because the issue of the caveat will then simply fall away. The issue of the caveat is being used in my view, as a shield against the enforcement of applicant's rights arising from the sale of the property. The position was aptly stated by HERBSTEIN AND VAN WINSEN in Civil Practice and Procedure of the Superior Courts in South Africa, 3rd Ed at page 596 where it is stated as follows:

“--- a judgment creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such a debtor to the ownership or possession of such property which right arose prior to the attachment or even the judgment creditor had notice when the attachment was made. An attachment in execution acts as a judicial mortgage or *pignus judiciali*.”

I make the further observation that the caveat which has been in place for close to 15 years now has been overtaken by events. Since the caveat was placed or or about the time of institution of divorce proceedings, its real purpose was to prevent a sale which her husband could conclude with a third party without her knowledge, thus prejudicing her personal rights in and to the property. The property has since been sold in terms of a sale in execution and first respondent can enforce her personal rights for her fair share of the proceeds of the sale against her husband. First respondent's opposition to the removal of the caveat lacks substantive and well-grounded basis at law.

In the result, I am satisfied that the applicant has made out a good case justifying the upliftment of the caveat. In the exercise of my discretion, in applications of this nature the applicant is entitled to the relief sought:

I, accordingly make the following order:

1. Paragraph 4 of the Provisional order granted under case number HC 3089/2000 be and is hereby discharged and caveat number 808/2000 registered over stand 4022 Khumalo Township of stand 4125 Bulawayo under Deed of Transfer number 3137/2000, more

commonly known as number 36 Ellington Road, Khumalo, Bulawayo be and is hereby set aside.

2. Third respondent be and is hereby authorized and directed to uplift the aforesaid caveat and allow transfer of the said property from Raphael Masuku into the names of the applicant.
3. Second respondent be and is hereby authorized to sign any relevant documents to enable transfer on behalf of the said Raphael Masuku.
4. First respondent shall bear the costs of this application.

Messrs T. J. Mabhikwa and Partners, applicant's legal practitioners
T. Hara and Partners, 1st respondent's legal practitioners