

MRS RONNAH MAFURIRANO  
t/a Skyorks Filing Station  
**versus**  
THE SHERIFF OF THE HIGH COURT  
and  
CBZ BANK  
and  
BULAWAYO REAL ESTATE  
and  
THE REGISTRAR OF DEEDS  
and  
FELIX VAZHURE

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 21 JUNE 2018 AND 26 JULY 2018

**Opposed Matter**

Applicant in person  
*Miss B Dube* for the 2<sup>nd</sup> respondent  
No appearance for the 3<sup>rd</sup> respondent  
No appearance for the 4<sup>th</sup> respondent  
*S Siziba* for the 5<sup>th</sup> respondent

**MOYO J:** In this matter the applicant seeks an order setting aside a sale in execution pursuant to the provisions of rule 359 (8) of the High court rules.

The facts of this matter are that applicant's house namely number 10 Kerr road Kumalo Bulawayo was sold in execution pursuant to a judgment debt in favour of CBZ Bank Limited.

The immovable property was sold by the first respondent to the fifth respondent for \$80000-00. The first respondent relied on an evaluation report by Bulawayo Real Estate which pegged the market value of the property at \$130000-00 and the forced sale value of \$75000-00.

Applicant objected to the sale on the basis that the price was unreasonably low. She tendered her own evaluation report by Dawn properties which put the market value at \$150000-00 the forced sale value at \$98000-00.

The sheriff confirmed the sale after setting aside the objection which is what brings this matter before this court. The applicant challenges the sale in execution on the basis that it was irregular for the sheriff to accept an unsworn evaluation report from Bulawayo Real Estate (whom she says was an interested party) as opposed to her evaluation which was sworn to by the evaluator. The objection by the applicant to the sale as well as her bid to set the sale aside before this court, are based on rule 359 which provides that an objection can be lodged with the sheriff if the judgment debtor is of the view that the property has been sold for an unreasonably low price.

The sheriff had an evaluation report by Bulawayo Real Estate, which gave the forced sale value at \$75000-00. The sheriff managed to sell the property for \$80000-00.

I do not think that the evaluation report by Bulawayo Real Estate is irregular as challenged by the applicant in that it flouts the provisions of rule 351. Rule 351 is not couched in peremptory terms, it actually provides that the “sheriff may.” The rule in fact goes on to provide that any other interested party may also bring an independent evaluation report. The rule does not say such independent report must be on oath. Whilst an evaluation report on oath would be more desirable as it is a sworn statement, in the absence of any pertinent fault with an evaluation report, whether it is on oath or otherwise, cannot in my view be the sole basis for setting aside a sale in execution. An evaluation report in my view has features that attest to its relevance and if at all such features are present, I hold the view that it is not proper for a court to throw it out and the resultant sale solely on that basis. It serves as a guideline for the purpose for which it is required and it suffices in my view. I also hold the view that the assertion that Bulawayo Real Estate is an interested party has not been substantiated. That they would be the agents of the sale in execution and therefore derive a commission from the sale would certainly not make them have an interest that would lead to an improper evaluation of the property because, they prepared the evaluation report on 12 September 2014 prior to the date of sale which was 19 September 2014. The property had not yet been sold. It was just advertised. They could not have envisaged at the time that they prepared the report, that the highest bid at the auction would be \$80000-00.

On the other hand, the Dawn Properties report, was done on 22 September 2014, two days after the sale in execution. In other words at the time Dawn Properties prepared the report,

it was after the sale and they could have had the incentive to put a price higher than the bid price as they had been engaged by the applicant who engaged them for the sole purpose of challenging the sale.

It is on this basis that I hold the view that in the customary the evaluation report by Bulawayo Real Estate, which was prepared prior to the sale, could be the one that reflects a better picture of the forced sale value.

I am reluctant as a result to find that the sheriff should have thrown out the Bulawayo Real Estate evaluation report and accepted the Dawn Properties one. I do not believe that the applicant has made a case for the interference by this court with the sheriff's finding on that point.

Having said that this court finds no basis to interfere with the sale in execution neither does this court find that the applicant has laid a proper foundation for such an interference. Applicant has cited the case of *Rodo Mpofo v Mr M Kunene and 3 others* HB 148/16. The case of *Rodo Mpofo (supra)* is distinguishable from the current case in that case there were a series of factors that the court considered whose cumulative effect was to tilt the scales in favour of setting aside the sale. The factors considered in that case were the following:

- a) that the properties were sold for an unreasonably low price
- b) that the advertisement of the properties preceding the sale was inadequate and improper.
- c) that stand 9 of subdivision A of Willsgrove had already been sold to third parties prior to the date of the public auction.
- d) that the judicial manager of the company being the principal debtor was offering stand number 145 Gwanda Township for sale for the proceeds to be used to pay the debt owed to CABS
- e) that stand number 729 Gwanda Township was the sole dwelling house of the applicant and his family.

Therefore, the facts of this case and the issues before me are miles away from the factors that the court dealt with and considering in the *Mpofo* case (*supra*). In the matter before me, it is pertinent to note that fifth respondent has obtained title of the property in dispute. This even renders interference by this court more complicated. See the case of *Makuyana and another v Stanchart and 3 others* HB 52/07.

Sales in execution, should in my view be set aside only in those situations where there has been a flagrant breach or disregard for peremptory rules and procedures by the sheriff. In such cases the court, though reluctant to cause a lack of confidence in such sales, it ought to emphasis the need for efficacy in such sales and where appropriate set the sale aside. However, sales in execution cannot and should not be set aside as a matter of course, it cannot be every judgment debtor's complaint that leads to setting them aside unless if the complaint raised goes to the root of the sale and infact leads to an injustice. This court has to balance the judgment debtor's interests with those of the judgment creditor as well as the purchasers of these properties. This court would not want to create a lack of confidence in the would be purchasers by interfering with less than perfect sales and setting them aside on any complaint. A complaint should be about the process which renders the sale unsustainable in the circumstances. Refer to the cases of *Kanoyangwa v Messenger of court and Others* SC 68/06, *Lalla v Bhura* 1973 (2) RLR 280 (A), *Twine Wire Agencies Pvt Ltd v CABS* SC 46/05. These cases are precedent to the effect that applicant can only succeed in setting aside this sale where transfer has already been effected on allegations of bad faith or fraud on fifth respondent's part. With no fraud or bad faith on fifth respondent's part this court cannot interfere with fifth respondent's title.

I do not hold the view that the applicant has made a case for the relief sought.

I accordingly dismiss the application with costs.

*Mvingi and Mugadza*, 2<sup>nd</sup> respondent's legal practitioners  
*Ndove, Museta and Partners*, 5<sup>th</sup> respondent's legal practitioners