

CHARLTON MOYO

vs

MARTIN ZUZE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 4 JUNE & 11 JULY 2019

Civil Trial

T. Masiye-Moyo for the plaintiff
V. Majoko for the defendant

TAKUVA J: Plaintiff issued summons against the defendant claiming:

- (a) The eviction of the defendant and or those claiming occupation through him from certain piece of land situate in the District of Bulawayo being stand number 8621 Nkulumane Township.
- (b) Holdover damages of \$6,50 per day from the issue of summons up to the eviction of the defendant.
- (c) Costs on an attorney-client scale.

Defendant entered appearance to defend and subsequently the matter was referred to trial on two issues captured in the joint pre-trial conference minute as:

- “1. Whether the plaintiff should evict the defendant and all those claiming occupation through him from stand number 8621 Nkulumane, Bulawayo.
2. Whether the defendant is liable to pay holdover damages of \$6,50 per day from the issue of summons up to his eviction and all those claiming occupation through him.”

At the hearing of this matter both parties indicated that they wanted to proceed by way of stated agreed facts leaving the court to make a determination of a single question of law, namely, whether or not the defendant has a defence at law to the eviction suit on the admitted facts.

Defendant agreed that in the event the order of eviction is successful, the holdover damages claims should follow.

The parties then produced a statement of agreed facts whose contents are:

- “1. In case number MC 2507/14 in the Magistrates’ Court, judgment was granted in monetary terms against the defendant in this matter.
2. Consequently, the defendant’s property house number 8621 Nkulumane, Bulawayo was attached in execution.
3. The defendant’s property was put up for auction in about December 2015 but for the reason of a non-competitive bid, was not sold by auction resulting in the Messenger of Court putting it up for sale by private treaty. (See page 103 paragraph 4 of the record in HCA 55/17).
4. Plaintiff in this matter subsequently purchased the property by private treaty from the Messenger of Court, Bulawayo on the 5th of October 2016. The agreement of sale is marked exhibit 1 in the plaintiff’s bundle of documents filed of record at page 6.
5. In March 2017, the defendant in this matter filed a court application in the Magistrates’ Court, Bulawayo challenging the sale of the property in issue to the plaintiff herein alleging that the property was irregularly sold to the plaintiff – see page 89 of the record of appeal HCA 66/17.
6. On the 20th March 2017, plaintiff took transfer of the property by Deed of Transfer 310/2017. Copy of the Deed of Transfer is marked exhibit 2 in the plaintiff’s bundle of documents page 2).
7. By judgment of the Magistrates’ Court handed down on the 7th July in case number MC 2507/14 aforesaid, the Magistrate in that matter declined to set aside the sale in execution holding in the operative part of the judgment that:
 - “1. The point *in limine* that the court cannot review the confirmation of the sale in execution be and is hereby upheld with costs.”
8. The defendant herein appealed the decision in 7 above under cover of HCA 66/15.
9. Meanwhile, the plaintiff herein issued summons for eviction in this matter on the 28th March 2017. Upon entering appearance to defend, plaintiff applied for summary judgment under HC 1928/17 that application failed.
10. On the 24th day of January 2019, this matter was set down for trial. On the day of the trial, the parties agreed that the resolution of the appeal in HCA 66/15 would resolve the dispute of the parties.
11. As it turned, both parties discovered that the defendant’s appeal in HCA 66/15 was in fact dismissed on the 1st of February 2018 for failure to file heads of argument in time. The dismissal letter is marked exhibit 3 in the plaintiff’s bundle of documents (page 16).
12. That following, plaintiff set this matter down for hearing.
13. The parties further agree that:

- 13.1 Plaintiff purchased the property by private treaty and that the property was paid for. The admitted evidence is found in the plaintiff's bundle of documents as exhibit 4 (page 12), (exhibit 5 page 13), exhibit 6 (page 14) and exhibit 7 (page 15).
- 13.2 There is no pending challenge to the sale of the property to the plaintiff.
- 13.3 There is no counter claim by the defendant in this matter.
- 13.4 Should the court find in plaintiff's favour, the quantum of holdover damages claimed by the plaintiff is not contested.

The legal issue for the determination of this matter is whether the defendant has any defence, at law against an order for eviction and subsequent relief.”

The statement of agreed facts was signed by both parties' legal practitioners. Plaintiff's argument is simply that the defendant's challenge to a sale in execution does not constitute a defence against a claim for eviction by the plaintiff who is a registered owner of the property. Plaintiff relied on the Supreme Court decision in *Twin Wire Agencies (Pvt) Ltd v CABS SC-46-05*.

The brief facts were that, the appellant's property had been sold in execution but appellant refused to vacate the premises causing respondent to issue summons for eviction against the appellant. Appellant entered appearance to defend and respondent applied and obtained an order for eviction by summary judgment.

The Supreme Court held that,

“A challenge to a sale in execution does not constitute a defence against a claim for eviction by the registered owner of the property. Once the sale is properly confirmed by the Sheriff and transfer effected by him to the purchaser against payment of the price any application to set aside the transfer falls outside ...”

The court went further to state that even if the challenge to the sale is pending elsewhere, as long as there has been transfer of the property, that challenge to the sale does not constitute a defence to a claim of eviction.

In arguing his case further, plaintiff emphasized that the law jealously protects the right of ownership including the correlative right of the owner over his property. In so doing, reliance

was placed on *Oakland Nominees Ltd vs Gerlia Mining and Investment Co. Ltd* 1976 SA 441 (A) where the presiding judge had this to say;

“The legal principle enunciated above is solidly noble because since time immemorial, at every stage of human evolution, societies have suffered the inevitable unfortunate phenomenon of having in their midst, an array of thieves, fraudsters, robbers, cutthroats, the throwbacks in evolution etc with applying no qualms whatsoever in force or chicanery to disposes fellow humans of ownership of their property. If the law did not jealously guard and protect the right of ownership and the correlative right of the owner, it could be meaningless and the jungle law could prevail to the detriment of legality and good order.”

Finally, by way of authority, plaintiff cited a passage in Willie’s *Principles of South African Law* 8th ed page 255 where the author states:

“The real right of ownership or *ius in re propria* is the sum total of all possible rights in a thing.” It is trite that these rights include right to possess, mortgage and alienate. It is indeed a principle of our system of land registration that a registered owner remains owner until he formally loses his ownership by operation of law. Ownership embraces the power to alter, destroy or alienate the thing concerned to enjoy the fruits thereof, to prevent others from using it and to transfer rights to the thing.

The object of a real right is a thing. The thing itself is bound to the holder of the right. A real right consequently establishes a direct legal connection between a person and a thing, the holder of a real right being entitled to control that thing within the limits of his right – Silberberg Schoeman – *The Law of Property in South Africa* Second Edition 1983.

In casu, it is common cause that plaintiff is the registered owner of the property in dispute. Defendant accepts that plaintiff acquired the rights to the property, not fraudulently, not by way of forgery, duress, undue influence, mistake or any form of *animus furandi* but by irregular sale of the property by the Messenger of Court. That being so, plaintiff’s acquisition of the right to the property is not void *ab initio* but voidable at most.

On the other hand defendant argued that his defence is premised on the allegation that the purchase and subsequent acquisition of rights by the plaintiff is irregular in that the sale was never confirmed with the result that the resultant transfer was equally irregular. Therefore, so that argument went, plaintiff is not entitled to evict the defendant. In order to emphasise his case defendant relied on *McFoy v United Africa Co. Ltd* [1961] 3 ALLER 1169 at 1172 where it was stated per LORD DENNING that:

“If an act is void, then in law it is a nullity. It is not only bad, but invariably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is not bad but incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Defendant also relied on the authority of *Mapedzomombe vs Commercial Bank of Zimbabwe & Anor* 1996 AD ZLR 257 at 259-60 where it was stated that:

“When the sale of the property not only been properly confirmed by the Sheriff but transferred by him to the purchaser against payment of the purchase price, any application to set aside the transfer falls outside rule 359 ...”

What is clear from defendant’s submissions is that he wants this court to enquire on whether the sale was confirmed and if it was, properly confirmed. The *Mapedzomombe* case *supra* was an appeal against the dismissal with costs of an application brought before the High Court to set aside the sale in execution of an immovable property. Transfer of the property was registered in the name of the purchaser. The sale to the purchaser was therefore *perfecta*. The applicant wanted the sale set aside on the grounds that the purchase price was unreasonably low and therefore unfair. He also contended that he had a prospect of being able to settle the judgment debt by the grant of a loan without there being the need of having recourse to the dire expedient of taking the roof over his head.

GUBBAY CJ (as he then was) in dismissing the appeal held that:

“A sale in execution effected in terms of the High Court Rules is, until it has been confirmed by the Sheriff in terms of r360 of the High Court Rules, a conditional sale only and any interested party may apply to the court for it to be set aside. At that stage even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. Once the sale is confirmed, however, it is no longer conditional and a court would be even more reluctant to set it aside pursuant to an application under r359. Where the sale not only has been properly confirmed but transfer effected by the Sheriff to the purchaser against payment of the price any application to set aside the transfer falls outside r359 and must conform strictly with the principles of the common law.”

Features such as an unreasonably low price being obtained at the auction and the prospects of the debtor being able to settle his debt without having his property sold are no longer relevant because under common law immovable property sold by judicial decree cannot after transfer has been passed be impeached on the absence of an allegation of bad faith or knowledge of prior irregularities in the sale, or fraud.” (my emphasis)

I do not see how this case advances defendant’s argument since I am not *in casu*, determining the validity of the sale and the subsequent transfer of the property to the plaintiff. Defendant feels that the manner in which plaintiff acquired title is at the heart of the defendant’s defence to a claim for eviction. I disagree for a number of reasons. Firstly, an analogy between defendant’s situation and that of an ex-employee resisting eviction from his employer’s house will show the glaring fallacy of defendant’s argument. Dismissed or suspended employees cannot validly oppose a claim for their eviction on the grounds that they intend to challenge or are challenging the lawfulness of the dismissal or that they had a lien of some sort due to non-payment of wages.

In *Chisipite School Trust (Pvt) Ltd vs Clark* 1992 (2) ZLR 324 it was held that “Pending the removal of the suspension, respondent was not entitled to the continued enjoyment of benefits comprising the free occupation of the headmistress’ house and continued use of the motor vehicle. No residual rights that entitled one to the continued enjoyment of such benefits remain once a contract of employment has been suspended or terminated.”

In *Hamtex Investments (Pvt) Ltd vs King* 2012 (2) ZLR 334 (H). MATHONSI J (as he then was) held that,

“... so exclusive is the right of an owner to possess his property that at law he is entitled to recover it from wherever found and from whomsoever is holding it without alleging anything further than that he is the owner and that the defendant is in possession of the property. It is an action *in rem* enforceable against the world at large.”

In *Alspite Investments (Pvt) Ltd v Westernhof* 2009 (2) ZLR 226 MAKARAU JP (as she then was) held that;

“There are no equities in the application of the *rei vindicatio*. Thus in applying the principle, the court may not accept and grant pleas of mercy or for exclusion of possession of the property by the defendant against an owner for the convenience or comfort of the possessor once it is accepted that the plaintiff is the owner of the property and does not consent to the defendant holding it. It is a rule or principle of law that admits no discretion on the part of the court. It is a legal principle heavily weighted in favour of property owners against the world at large and is used to ruthlessly protect ownership.” See also *Zimbabwe Broadcasting Holdings vs Goso* 2010 (1) ZLR 8 (H); *Paul Mundaandi vs The Administrator SMM Holdings (Pvt) Ltd* HH-173-15.

Secondly, the alleged irregularity in the acquisition of rights by the plaintiff arises from the provisions of the Magistrates’ Court (Civil) Rules 1980, SI 290/1980. It is common cause that the sale in dispute was conducted by the Messenger of Court in terms of the above rules. Specifically, the sale was conducted in terms of o26 r7 of SI 290/1980. These rules provide in (15c) that;

“Any person having an interest in a sale may apply to court to have it set aside on the ground that the sale was improperly conducted or that the property was sold for an unreasonably low sum or on any other reasonable ground.

Provided that any person making such application shall give due notice of the application to the messenger stating the grounds of his objection to the confirmation of the sale.” (my emphasis).

Where the property is sold by a Messenger of Court in terms of the Magistrates’ Court Civil Rules, any challenge to the propriety of such a sale should be made by way of a court application to the Magistrates’ Court. When, however the sale is by the Sheriff in terms of the High Court Rules 1971, such a challenge would be directed to the High Court in terms of rule 359. See *Smith & Anor v Acting Sheriff of Zimbabwe & Anor* 1995 (1) ZLR 158 (S) and *Zviranda v Makoni & Anor* 1988 (2) ZLR 15 (SC).

I take the view that it would be improper for this court to sit as a Magistrates' Court in determining the compliance or otherwise of a sale in execution in that court. This court can only do that in an appeal against a magistrate's decision to confirm or not to confirm the sale in terms of the rules. I am fortified in this view by the fact that defendant in fact correctly utilized the provisions of o26 r7 (15c) of the Magistrates' Court (Civil) Rules under cover of case number MC 2509/14. That challenge was unsuccessful leaving the sale *perfecta*. Dissatisfied, defendant appealed against the decision of the magistrate aforesaid under cover of HCA 66/17. That appeal also failed and the sale and transfer remained standing.

To entertain any argument that relates to compliance by the Messenger of Court outside the provisions of that court's rules would be tantamount to trying the Messenger of Court in his absence. This arises because the Messenger of Court is not a party to these proceedings. He has not been cited as a party. Therefore it would be in my view improper to make an adverse finding on an officer of court in respect of matters arising from his execution of his official duties without hearing that officer.

As regards *res judicata*, there is some considerable uncertainty about the invocation of the principle of *res judicata* by a plaintiff against a defence by a defendant. See *Tsvangirai & Ors v Registrar General* 2002 (2) ZLR 653 at 665 -667 (S).

I therefore leave the question open, suffice to say that currently, the Registrar dismissed the defendant's appeal and the sale and transfer remain good in law. Further, it is common cause that the defendant is not presently challenging the sale in execution in any court or forum whatsoever. Accordingly, there is no impediment or defence to the claim for eviction. In any event, should the defendant wish at his own time to mount a challenge of the sale in execution, he may still do so without the property, not within. Put differently his eviction does not extinguish his right to challenge the sale and transfer of the property.

What should also be noted is that defendant (judgment debtor) *in casu* unlike the judgment debtor in *Smith's* case *supra* has refrained from taking any steps to save his property. He has not said of any arrangements to satisfy the judgment creditor. He is obviously content

with the *status quo* where the purchase price paid by the plaintiff has already been utilized by him in paying his monetary obligations to the judgment creditor due by a judgment of a court. It cannot be denied that defendant, literally has the money and the house, while plaintiff has nothing. This distorts plaintiff's ownership rights in that if his claim for eviction is dismissed as prayed by the defendant, it will result in an absurd and anomalous situation where plaintiff remains the owner of property without rights provided for at law and a defendant who has possession without title. This is what has prevailed for years now and it must come to an end.

In the circumstances, I come to the conclusion that a challenge or purported challenge to the sale in execution does not constitute a defence against a claim for defendant's eviction by plaintiff who is the registered owner of the property.

Accordingly, it is ordered that:

1. The defendant and/or those claiming occupation through him be evicted from certain piece of land situate in the District of Bulawayo being stand number 8621 Nkulumane Township.
2. The defendant pays holdover damages of \$6,50 per day from the issue of summons up to the eviction of the defendant.
3. The defendant pays costs of suit.

Messrs Masiye-Moyo & Associates, plaintiff's legal practitioners
Messrs Majoko & Majoko, defendant's legal practitioners