

MACARTHUR MVUDUDU
versus
PRIMROSE SHONHIWA
And
MAXWELL SHONHIWA
and
MARONDERA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 14 May 2013

Opposed Application

O. Kadare, for the applicant
Advocate F. Mahere, for the respondent

TAKUVA J: This is an opposed application for confirmation of a provisional order issued by my sister Judge, Justice GUVAVA on 25 March 2011 calling upon the respondents to show cause why a final order should not be made upon the following terms:

- “1. Pending the determination of proceedings to be instituted in para 3 of the interim relief granted, the first and second respondents be and are hereby interdicted from disposing through cession and from leasing certain property called Stand Number 259 Mahusekwa Growth Point Marondera.
2. The third respondent be and is hereby interdicted from registering the cession of rights, title and interest in the property known as STAND NUMBER 289 MAHUSEKWA GROWTH POINT MARONDERA.
3. The first and second respondents shall pay the costs of this application on the scale of Legal Practitioner and Client”.

The applicant and first respondent were married by customary rites sometime in 2001. The second respondent is the first respondent's brother. The applicant and the first respondent's marriage is in serious trouble to the extent that it has in all likelihood broken down irretrievably. The current dispute revolves around an immovable property namely stand 289 Mahusekwa Growth Point, Marondera. According to the first respondent stand no 289 was bought by their father in 1999. The first respondent was allowed to use the property to run a food outlet and to register the property in her name. By the time the first respondent got

married to the applicant, she had been running the food business on her own for approximately two years.

In 2009, the family, comprising the father, mother, the first and the second respondents decided that the property should be registered in the name of the second respondent. They approached the third respondent and the cession was effected resulting in the second respondent being the registered owner of the property.

On the other hand, the applicant contended that he and the first respondent jointly acquired in equal shares several properties at Mahusekwa Growth Point among them stand 289. While the applicant admits that stand no 289 was registered in the first respondent's name, he averred that this was with his consent. According to him notwithstanding the registration, the property remained "commonly owned property". In 2009, the first respondent without the consent of the applicant proceeded to cede rights, title and interest in stand 289 to the second respondent. The cession was registered with the approval of the third respondent.

The long and short of the applicant's case is basically that while the property was registered in the name of the first respondent, it was in fact jointly owned and the first respondent had no right to cede it to the second respondent. The issue therefore becomes whether the applicant has met the requirements for an interlocutory interdict. These are;

- (a) A *prima facie* right
- (b) Actual injury or a reasonable apprehension of injury.
- (c) Absence of other ordinary remedy by which the applicant can be protected in the same way as by an interdict
- (d) The injury must be irreparable
- (e) The balance of inconvenience must favour the applicant – see *Airfield Investments (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511(5)

As regards (a) above, if it is accepted (as is the case here) that the property was registered in the name of the first respondent before the parties married, can it be argued that the applicant has a *prima facie* right in it?

In *Agro Chem Dealers (Pvt) Ltd v Gomo & Ors* 2009 (1) ZLR 255 (H) it was held *inter alia* that:-

“the registration of title in one's name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to

vindicate his right, i.e. to enforce his right in the thing for his own benefit as against the world; that is against all persons whatsoever”.

In *Dhlembeu v Dhlembeu* 1996(1) ZLR 105 (S) it was held that the husband in whose name the property (a house) was registered had unfettered rights of ownership and since the wife “had no legal interest in the property, there was no valid basis on which she might continue in occupation. What she had was a claim in relation to the property that claim might or might not be successful”. Silberberg and Schoeman The law of Property 3rd ed at p 63 states:

“... Consequently, and because real rights belong to the category of rights known as “absolute” rights, the holder of a real right may as a general rule claim control, over the thing which is the object of his right, in so far as it is necessary for the effective exercise of his right. This is so irrespective of whether the person against whom he wishes to enforce his right happens to be a third party who acted in good faith, for example a purchaser in good faith and for value”.

In *casu*, the first respondent had a real right in Stand 289. She also had vacant possession of the land and her cession of the property to the second respondent was perfectly legal even if the applicant was not privy to it. As the possessor of a real right she had the right to deal with that property as she saw fit. Put differently, when property is registered in the name of one spouse, the other spouse has no legal interest in it, but merely a personal interest – see *Muswere v Makanza* HH 16/05 where MAKARAU JP (as she then was) made the following comments:-

“.. it presents itself clearly to me that as the position at law that a wife in the position of Mrs Makanza has no real right in immovable property that is registered in her husband’s sole name even if she directly and indirectly contributed towards the acquisition of that property. Her right in relation to that property are limited to what she can compel him to do under family law to provide her with alternative accommodation or the means to acquire alternative accommodation. Her rights classified as personal against her husband only are clearly subservient to the real rights of her husband as owner of the property” (my emphasis).

In the present case, the situation is worse in that not only was the applicant never in a registered marriage with the first respondent but the property was acquired before the customary marriage was entered. Consequently the applicant has no *prima facie* right to the property in issue and the matter should end here.

However, assuming I am wrong, it becomes necessary to consider the rest of the requirements for an interdict. The next requirement is that the applicant must suffer actual

injury or that there should be a reasonable apprehension of injury. In *casu*, there is no actual injury that the applicant has suffered. As for the reasonable fear of injury, the applicant submitted that there are four potential buyers who appeared at the property making enquiries about the prospect of purchasing the property. He further submitted that at least two other separate persons considered the prospect of leasing the business premises at stand number 289. When challenged to provide further particulars for these potential buyers, the applicant could not do so arguing that since these inquiries were “discreet”, he could not obtain their names.

The law requires that the fear must be well founded – see *Boadi v Boadi and Anor* 1992 (2) ZLR 22 (HC). In the present case I agree with Advocate *Mahere*’s submission that the applicant’s fear of injury arises from “the fanciful existence of some faceless and nameless characters he claims have been making inquiries about purchasing the property, whom he fears have entered into negotiations with the second respondent”. Also, the other facts of this matter do not disclose grounds for such a fear. For example when the application was brought, the property had been transferred to the second respondent some 17 months back. Further all the evidence is consistent with the averment that the property is viewed by the first and second respondent as family property, and it is unlikely that the second respondent will sell it to a third party outside the immediate family circle. In fact, if the first respondent had intended to put stand no 289 beyond the applicant’s reach, she could have done so by ceding it to a stranger a long time ago upon realising that her relationship with the applicant was bad. The conclusion I reach is that objectively assessed, the facts do not reveal grounds for such a fear.

The next requirement is the balance of convenience which requires the court to consider the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent if it is granted. From the reasons outlined in the preceding paragraphs, it is difficult to imagine any prejudice that the applicant might suffer if the interdict is withheld. The applicant by his own admission owns four other stands at the Growth Point. Although he has not stated what business activities he conducts, it is quite apparent that he can derive a livelihood from these stands. On the other hand, the first respondent and her family have control of only one of the five stands. For these reasons, I find that the balance of convenience does not favour the applicant.

Finally, for the applicant to succeed, he must prove absence of other remedies by which he can be protected in the same way as by an interdict. In *casu*, the applicant has a cause of action against the first respondent for the equitable distribution of matrimonial property once it is shown that it was acquired by the parties. The applicant can recover by way of damages from the first respondent, once it is proved that he is entitled to a share in the property. This is a personal right as against the first respondent not against the world at large.

For these reasons, it is ordered that the provisional order be and is hereby dismissed with costs.

G. Machingambi Legal Practitioners, applicant's legal practitioners
Coglan Welsh & Guest, 1st & 2nd respondent's legal practitioners