DEPUTY SHERIFF, HARARE
versus
KURAI JESINA KINGSLEY (Nee Nehonde)
and
THE COLD CHAIN ZAMBIA LIMITED

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 14 July 2011 and 24 September 2014

APPLICATION FOR REFERRAL IN TERMS OF SECTION 24(2) OF THE CONSTITUTION

Adv. *T. Mpofu*, for the claimant
Adv. *L Uriri*, for the judgment creditor

BERE J: This application for referral to the Constitutional Court follows hotly on the heels of an interpleader notice filed by the Deputy Sheriff, Harare following his attachment of several movables and one immovable property, *viz*, house no. 36 Devon Road, Avondale, Harare (registered in the name of the judgment debtor) in execution of a judgment granted in favour of the judgment creditor.

Apparently, the judgment debtor was at the time of this application an estranged husband to the claimant in the interpleader proceedings. For easy of reference I shall refer to the claimant as the applicant and the judgment creditor as the respondent.

The applicant and the judgment debtor solemnized their marriage on 11 February 2000 and they have one minor child born on 26 November 2000.

The applicant alleged that she stays at the attached immovable property and regards it as her matrimonial home where she is currently residing together with her minor child. It is the attachment of this matrimonial house which has caused much anxiety and apparent uncertainty on the part of the applicant which has prompted her to launch this application for referral of her concerns to the Constitutional Court of Zimbabwe.

The applicant alleged that prior to the institution of the proceedings against the judgment debtor by the respondent she had already commenced divorce proceedings against her estranged

husband and that in those proceedings she was in terms of s7 of the Matrimonial Causes Act [*Cap 7:13*] claiming *inter alia* the now attached matrimonial house as well as other movable properties.

From what the applicant alleges, it is clear that the immovable property is registered in the deeds office of Zimbabwe in the name of her estranged husband the judgment debtor.

On the morning of the hearing of the inter pleader application, the applicant decided to temporarily shelve that hearing in preference for this application in terms of s24(2) of the then Constitution of this country which has been, imported into the current constitution as s175(4). In terms of this section I am enjoined to refer the matter to the Constitutional Court unless I consider the request to be merely frivolous or vexatious.

I was urged to consider referring the following questions to the Constitutional Court. To avoid distortion of the issues I propose to quote in *extenso* the issues as captured by Adv. *Mpofu* for the applicant:

> "The question for referral
> 1.6. The following are the questions whose referral is sought;
> (a) Whether the common law position which fails to recognize the proprietary rights of a woman (or any spouse as the case may be) in the property for the time being registered in the name of the husband (or the other spouse) is inconsistent with provision of section 18 of the constitution and therefore void.
> (b) A fortiori, whether the common law rule in question and in view of the patently unjust position that it creates amounts under the circumstances to law as contemplated by the Constitution and is a basis upon which applicant can be disenfranchised.
> (c) Whether the pale in execution of the property in question by the second respondent interferes with applicant's right to a livelihood which right is taken in the sweep of section 12 of the Constitution
> (d) Whether the surrounding circumstances of the matter establish a contravention of section 15 of the constitution and therefore invalid"[1]

A number of cases were sampled for me in the heads of argument where focus on the relation of a wife to property registered in the sole name of her husband has assumed center stage. One such case which has evidently influenced the initiation of this application is the

[1] Page 3 of the Applicant's Heads of Argument

decision by MAKARAU J (now JA) in *Muswere* v *Makanza*[2] where the learned Judge lamented the apparent discord between the legal position at present as regards the right of a wife to the matrimonial estate, as determined by the principles of family law and the rights of her husband in the same property as determined by the principles of the law of property.

The head note to this case will suffice to bring to light, the concerns which exercised the mind of the learned judge. The head note is as follows:

> "The parties to this case, a married couple, had lived in their matrimonial home for many years. The property was registered in the sole name of the husband. Without seeking his wife's approval, he sold the property to another person and moved back to his rural area. The wife refused to join him and remained in the house. The buyer sought an order for her eviction, while she sought an order setting aside the sale and declaring her to be co-owner of the property.
>
> *Held*, that the law regarding the legal relation of a wife to property registered in the sole name of her husband is unsatisfactory and palpably unjust. Whoever has his name endorsed on the deed conveying title is at law *prima facie* recognised as the owner of the land with the most complete and comprehensive control over of that land. This individualistic approach is not realistic in a marriage which is the union of two people and, in most cases, the merging of their wealth generation capacities for mutual benefit. It is not uncommon for married couples to jointly acquire property during the subsistence of the marriage and to jointly acquire land in unclear ratios of contribution towards that acquisition. It is not uncommon, as occurred here, that the land will be registered in the name of one of the spouses, usually that of the husband. In a marriage, it is usual to refer to property acquired during the marriage as "joint" property while the marriage subsists. On the termination of the marriage through divorce or death, the principles of both family law and the law of inheritance recognise the joint matrimonial estate, which is then distributed as between the spouses, regardless of whose name appeared on the deed conferring title to the land or property. However, the law of property does not recognize the existence of the matrimonial estate. A wife cannot stop her husband from selling the matrimonial home or any other immovable property forming the joint matrimonial estate if it is registered in his sole name, even if she contributed directly and indirectly towards the acquisition of that property. Anachronistic as it is, the legal position at present is the right of a wife to the matrimonial estate, as determined by the principles of family law, are inferior to the rights of her husband in the same property as determined by the principles of the law of property[3]."

[2] 2004 (2) ZLR 262 at page 262 - 263
[3] 2004 (2) ZLR page 262 - 263

Whilst accepting the practical challenges highlighted by Adv. *Mpofu* in this case, Adv. *Uriri* who appeared for the respondent was strongly opposed to the referral of the matter to the Constitutional Court.

Counsel for the respondent argued that to accommodate the contingent rights of the applicant in the manner suggested by Adv. *Mpofu* would be to set a very dangerous precedent in the property regime in this country. Such an approach would trigger numerous claims by those in the mould of the applicant against financial institutions who would have advanced financial assistance on the basis of title deeds in their possession and held as security, so the argument went.

It was also further argued that the Deeds Registry Act would be severely undermined and in fact rendered nugatory by what counsel reasoned was an attempt by the applicant to complicate property rights in this country.

The tragedy in this application in my view is the impression created by the applicant's counsel that our courts have blindly or religiously accepted that registration of title in the Deeds Office signifies conclusive ownership or entitlement to that property.

With respect, there is a *plethora* of cases which show that the mere registration of a property in the name of a spouse is no bar to the court making an appropriate order contrary to such registration. This has been the position where it has been demonstrated that the information in the Deeds Office is not reflective of the correct situation as regards the actual ownership of the particular property. The Supreme Court in this country has clearly not stood aloof in this regard.

Even though, as said in *Takafuma* v *Takafuma*[4] that the registration of an immovable property in the Deeds Office is not a mere matter of form, a party is entitled to claim back his or her share if it can be shown that the registered party was a mere nominee in respect of the share being claimed back.

Thus for example, in *Lafontant* v *Kennedy*[5], even though the Supreme Court criticized the ground of her claim and the state of her pleadings, the court nevertheless authorized the transfer to the ex-wife of the ex-husband's share in a jointly owned immovable property after the ex-wife

[4] 1994 (2) ZLR 103 (S)
[5] 2000 (2) 280 (S)

had shown that the registration into their joint names had been done for convenience only and that the ex-husband had not contributed to its purchase.

In *Nyamweda* v *Georgias*[6] even though the property had been registered in the name of the ex-mistress to circumvent difficulties posed by the requirements of the building society that had funded the purchase, the full bench of the Supreme Court accepted that the ex-mistress was a mere nominee or agent when the property had been registered in her name and it allowed the transfer to the rightful owner. See further the case of *Young* v *Van Rensburg*[7] The list is endless.

In *Menezer* v *McGaili*[8] the court reasoned that where transfer is tainted by *mala fide* or fraud it can be reversed reaffirming that registration does not necessarily lead to conclusive ownership of the registered property. Even in the *Muswere* case (*supra*) the court was fully alive to the fact that "whoever has his or her name endorsed on the deed conveying title is at law *prima facie* recognised as the owner of the land with the most complete and comprehensive control over that land"

Coming back to the application before me, it occurs to me that the civil processes currently in force in this country can be invoked to protect the applicant's situation if she can demonstrate entitlement to the attached property. This can be achieved even through the filed interpleader proceedings which have nothing to do with the Constitutional Court.

Our current constitution speaks to no discrimination against women in their quest to acquire any property and those who find themselves in the situation of the applicant or potentially in her situation must be encouraged to be proactive in pushing for their joint registration on properties with their spouses or husbands in deserving circumstances and not to wait to deal with a crisis like what is happening in this case.

In my view the thrust must not be to spend time lamenting or bemoaning the perceived disharmony between the current common law position and the proprietory rights of women who find themselves in the position of the applicant or in the *Muswere* case. The thrust must instead be to sensitise or conscientise these women and even men to be warry of their proprietory rights

[6] 1988 (2) ZLR 422 (S)
[7] 1991 (2) ZLR 149 (SC)
[8] 1971 (2) SA.P.12 @ 14

particularly in a matrimonial set up. They must be taught to fully appreciate the importance of ensuring joint registration of property in order to adequately protect themselves.

In the *Muswere* case and the instant case if joint registration had been effected, the concerned women would have adequately protected themselves because the title deeds would have shown that the property was jointly owned thereby making both disposal and attachment respectively without the wife's involvement difficult if not impossible.

I have had to reflect on this application for several months. Even as I write this judgment I am unable to locate any traces of logic in the nature of the order which the Constitutional Court would be asked to make. I cannot imagine the Constitutional Court being asked to make a pronouncement that effectively interferes with the smooth conclusion of a judicial process initiated by the respondent, or to make a pronouncement that seeks to regulate the proprietory rights of individual in a matrimonial set up. People cannot be forced to assert their right by an order of court. I am reminded of the old adage,

> "vigilantbus *non dormientibus jura subvenient* – the law will help the vigilant and not the sluggard"[9]

Those who worry about proprietory rights in a matrimonial set up must be proactive. They must do the right things in time in order to enjoy maximum protection of our legal processes as they currently stand.

Having reflected on the application for referral, I am unable to acceed to it for I regard it as both frivolous and vexatious. The current legal framework in this country is sufficient to deal with the applicant's concerns.

The application is accordingly dismissed with costs.

Manase and Manase, applicant's legal practitioners
Atherstone and Cook, respondent's legal practitioners

[9] Ndebele v Ncube 1992 (1) ZLR 288 (S)