

MAXWELL MATSVIMBO SIBANDA  
versus  
ZAMBE NYIKA/GWASIRA  
and  
REGISTRAR OF DEEDS  
and  
EVERJOY MEDA

HIGH COURT OF ZIMBABWE  
MATANDA-MOYO J  
HARARE, 5 November and 28 November 2014

### **Opposed Matter**

*Advocate T Mpofu*, for the applicant  
First respondent in person  
*Mrs L Chinuwo*, for the 3<sup>rd</sup> respondent

MATANDA-MOYO J: The applicant obtained default judgment against the first respondent in case No. HC 12599/11 on 7 March 2012 in the sum of \$4 000-00, delivery of 1 120m<sup>3</sup> of sawn timber or alternatively \$392 000-00 together with interest at the prescribed rate plus costs of suit. The applicant has not executed on the judgment to date. Initially the applicant brought this application against the first and second respondent. Third respondent sought to be joined in the matter claiming she had interest therein. Such joinder was granted.

This is an application for an interdict barring first respondent from disposing of a certain piece of property namely Stand 13552 Salisbury Township of Salisbury Township Lands measuring 1569m<sup>2</sup> held by first respondent under deed of transfer number 5750/94 dated 21 September 1994. The applicant also seeks an order declaring the above property specially executable in order to satisfy the judgment debt owed to the applicant under case No HC 12599/11. Applicant also sought costs of suit from the first respondent.

First respondent opposed the application. In his opposition first respondent sought an order for rescission of judgment in HC case number 12599/11. First respondent has failed to meaningfully respond to the present application.

The first respondent seeks to rescind a default judgment *via* filing of opposition. Such procedure is irregular and not in compliance with the rules of this court. Rule 63 and r 449 of the High Court Rules 1971 deals with applications for rescissions of judgment. Such application will take the format prescribed in r 230, that is, must be in form No. 29.

Rule 229A provides for counter applications which are the equivalent of a counter claim in an action matter. It provides:-

“(1) where a respondent files a notice of opposition and opposing affidavit, he may file, together with those documents a counter – application against the applicant in the form, *mutatis mutandis*, of a court application or a chamber application whichever is appropriate.”

From the above it follows therefore that a counter relief can be sought against an applicant by a respondent under a separate heading than the notice of opposition and opposing affidavit. It is a standalone claim made against an applicant. Even if the applicant later withdraws his application the counter application could be proceeded with. In the matter *in casu* the purported counter claim by the first respondent is not in terms of the rules of this court and is therefore invalid. The purported counter application for rescission of judgment is therefore improperly before the court and cannot be entertained. Since the first respondent has not opposed the relief sought by the applicant the first paragraph of the order stands unopposed. This was also confirmed by the counsel for the third respondent.

The only issue which falls for determination is whether I should declare the property in question specially executable.

The third respondent has opposed the granting of the relief sought on the basis that she has an interest in the property. The third respondent was customarily married to the first respondent and the two have one minor child. It is common cause that the third respondent and the minor child reside at the property in question. The respondent opposed the attachment of the immovable property on the basis that she owns 50% share of the value therein. The third respondent relied on a provisional order granted in her favour on 20 March 2001 by ORMERJEE J (as he then was) in HC 2784/01. The order was granted against the first respondent. The order was in the following;

“PROVISIONAL ORDER

TERMS OF ORDER MADE

That you show cause to this Honourable Court why a final order should not be made in the following terms;

1. That the first respondent be and is hereby interdicted from selling the matrimonial home, namely, Stand No. 13552 Salisbury Township of Salisbury Township lands situated in the District of Salisbury also known as No. 48 Don Judson Road, Milton park, Harare, registered in the name of the first respondent under Deed of Transfer No. 5750/9 pending determination in the appropriate court by the applicant of a claim for her share in the matrimonial home and pending the finalisation of that suit.
2. That alternatively in the event that the transfer has been done the first respondent is hereby interdicted from receiving any proceeds from the sale of the property without paying the applicant the sum of \$1 000 000-00 being the applicant's half share of the value of the property or failing agreement thereon pending determination as the applicant's claim in the appropriate
3. That second respondent be and is hereby interdicted from transferring or registering the transfer of Stand No 13552 ----- to any third party pending the finalisation of applicant's claim for a share in the matrimonial property in a, and competent court as stipulated in para 1 above.

#### INTERIM RELIEF GRANTED

That pending the determination of this matter the applicant is granted the following relief:

1. The first respondent be and is hereby interdicted from selling the matrimonial home namely Stand 13552 ---- known as No. 48 Don Judson Road, Milton Park, Belvedere, Harare ----- pending the filing in the appropriate court by the applicant of a claim for her share in the matrimonial home within 7 days of the granting of this order. (my own underlining).
2. That the second respondent be and is hereby interdicted from transferring or registering the transfer of Stand 13552----- registered under Deed of transfer No. 5750/94 to any third party pending the finalisation of the applicant's claim for a share in the matrimonial property in a, and by competent court stipulated in para 1 above.
3. That alternatively in the event that the transfer has been effected, the first respondent is hereby interdicted from receiving any proceeds from the sale of the property without paying the applicant the sum of \$1 000 000-00 or failing agreement on the value of applicant's share, pending the determination of the applicant's claim in the appropriate court as set out in para 1 above."

The above provisional order was never confirmed. I also did not hear the third respondent to be saying she brought a claim for the share of the matrimonial home in compliance with para 1 of the interim order granted. Such action was to be brought within 7 day of the order. Such

period has since lapsed. In any case a provisional order simply grants *prima facie* rights. A provisional order should be real rights. What the above order did was to bar the first respondent herein from selling the matrimonial property. Such order did not extend to banning sale by execution. Counsel for the applicant referred to Herbstein and Van Winsen in *Civil Practice of the Superior Courts in South Africa* where the author says:-

“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 might arise prior to the attachment or even the judgment creditor’s cause of action, and of which the judgment creditor had notice when the attachment was made. An attachment in execution creates a judicial mortgage or *pignus judiciale*.”

Counsel for the applicant argued that the third respondent’s rights in the immovable property are of a personal nature. She does not have real rights in the property as her name does not appear in the deed registry as co-owner of the property.

He argued that the third respondent’s rights even if accepted, are not such as to result in a situation where property is excluded from execution.

What are the third respondent’s rights in the property? It is common cause that no competent court of law has declared the rights of third respondent in the immovable property. The third respondent attempted to rely on the interim order granted above in her favour, in a matter between her and the first respondent. As I reiterated above, the third respondent has failed to pursue the interim relief to finality. It remains a *prima facie* right.

The third respondent submitted that she has been staying in the house together with a son she had with the first respondent. The third respondent wants the applicant to respect her 50% share in the property. I am of the view that the third respondent has personal rights in the property but such rights are as against the first respondent. Such rights cannot stop a judgment creditor from selling the property in execution. BUNNS – WORD J in *ABSA Bank Ltd v Peterson* (934/2011) (2012) ZA WCHC 18 at para 33 said:-

“It is only when the exercise of the mortgage’s right (to realise the security) is in bad faith that effect should not be given to the right. An indication of bad faith would be provided if the mortgage seeks to proceed with execution against the defendant’s home when it is evident that the judgment debt can probably be satisfied in a reasonable manner, without involving the drastic consequences of the loss of the mortgaged home.”

The above can be applied with equal force in this scenario where a judgment creditor intends to execute on a home. The respondents did not argue that they are capable of settling

the debt using other means. The first respondent has not been making payment towards the debt. There is therefore, no evidence of malice on the part of the judgment creditor that has been placed before me.

I am satisfied that this is a case where execution against the first respondent's property should be ordered. The first respondent has not shown any intention nor capacity to pay the judgment debt in reasonable instalments. There has been no evidence placed before me that the first respondent has movables which could be executed upon to satisfy the debt.

The third respondent has not acted with diligence in protecting her rights in the above property. As was reiterated in *Mavhunduse v UDC Ltd & Ors* 2001 (2) ZLR 337 that:-

“Until such time as title deeds are issued in respect of plot 216, and ownership thereof is registered in the Deeds Registry in the name of a particular planter, all that the applicant and the purchaser can acquire are rights and interests in the plot. Such rights are personal to the holder thereof. They are not real rights.”

I am in the result satisfied that the applicant has met the rest for the granting of the interdict sought. Accordingly, it is ordered as follows:-

- 1) That the application for a mandament, restraining the first respondent from disposing or otherwise alienating the immovable property be and is hereby granted.
- 2) That the immovable property known as stand 13552 Salisbury Township of Salisbury Township lands held by the first respondent under deed of transfer number 5750/94 dated 21 September 1994 be and is hereby declared specially executable.
- 3) That the first respondent shall pay costs of suit.

*Scanlen & Holderness*, Applicant's Legal Practitioners  
*Mandizha & Company*, 3<sup>rd</sup> Respondent's Legal Practitioners