

THE SHERIFF OF THE HIGH COURT
versus
NOMVUYO HILARY MADZIRO
and
ANESUISHE MADZIRO
and
RUVARASHE MADZIRO
and
AFRICAN BANKING CORPORATION OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12 & 1 April 2015

Opposed Application

C Malaba, for the applicant
F Machekeche, for claimants
A Mobbs, for judgment creditor

TSANGA J: In an interpleader claim on the 12th of March I granted an order in favour of the claimants that the property under dispute was not executable. The order I granted was in the following terms:

1. The claimants' claim to the stand 13594 Salisbury Township of Salisbury Township Lands measuring 1543 square metres held under deed of transfer 503/2002 dated February 2002 under attachment in execution of judgment HC 306/12 is hereby granted.
2. The property is declared not executable.
3. The judgement creditor to pay the costs of the claimants and the applicant.

I indicated after granting the order that my fuller reasons would follow for clarity on interpleaders that involve property that has effectively been granted to a spouse in terms of a divorce order but which has not been transferred.

The facts presented were as follows: The judgment creditor, African Banking

Corporation of Zimbabwe issued a writ of execution of immovable property registered in the judgment debtor's name, one Walter Madziro whereupon the applicant attached the said property. The judgment debtor had been married to the first claimant Nomvuyo Hilary Madziro and they had two children namely Anesuishe and Ruvarashe Madziro who are the second claimants in this matter. The claimants, issued an interpleader summons on the basis that the property belongs to them having been awarded to them as part of a divorce order granted by the High Court on the 8th of December 2011.

The Consent paper incorporated into the divorce order captured how the property was to be distributed in the following terms:

“The immovable property known as No. 28 McGowan Road Belvedere, Harare shall be transferred to and registered in the names of the Defendant and the two minor children of the marriage namely Anesuishe and Ruvarashe Madziro. Transfer shall be conducted within six (6) months of the divorce order and the plaintiff shall meet the cost of transfer”.

The Consent paper was incorporated into the divorce order in these words in clause 3 of the court order:

“The matters of access, maintenance and division of the matrimonial assets are to be determined in terms of the consent paper signed by the parties”.

However, transfer was not effected within six months and remains outstanding. The judgment creditor relied on this to argue that the property therefore effectively belongs to the judgment debtor particularly as the date upon which the transfer had been ordered to be effected had long since passed. The judgment creditor also emphasised that that proof of ownership of immovable property is by virtue of deed of transfer registered in the name of the owner. It was on this basis that it insisted that the claimant's position is without legal merit and that the immovable property in question still belongs to the judgment debtor, Walter Madziro.

The claimants counter-posed that the fact that it has not been transferred does not mean it is not theirs as transfer title would only be a final point to the process of effecting full ownership as sanctioned by court order on divorce.

To bolster this argument first claimant in particular drew on s 7(1) (a) of the Matrimonial Causes Act which allows the transference of property from one spouse to another in granting a divorce. It is worded as follows:

“Division of assets and maintenance orders

7(1) Subject to this section in granting decree of divorce, a judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to
a) The division, apportionment or distribution of assets of spouses, including an order that any asset be transferred from one spouse to the other”

The court therefore utilised its powers in light of the above provision to order that the house be transferred to the wife and the children. However, the fact that the title to the house has not been changed does not invalidate the order as the court remains with the power to coerce the transfer and to punish by contempt of court should it be so approached by the party who was awarded the property.

To that extent a party who has been ordered to transfer title to certain property and continues to hold onto such title following a divorce order, he only continues to hold that title on behalf of its true owners. Ownership of the property will have passed by the granting of the divorce order where the consent paper divesting the party with ownership will have been made an order of the court. Whilst the Deeds Registry Act [*Chapter 20:05*] does indeed dictate in s14 that ownership is conveyed from one person to another by means of a deed of transfer, and certain procedures have to be observed in practice to realise transfer, delay in so doing does not erode an order of the court that has effectively ordered transfer of an asset from one person to another. As argued on behalf of the claimants the change of title in such circumstances is in reality the final stage in giving effect to the order granted.

On costs I agree with the claimants that there was no need for the claim to have been resisted once they had produced their valid court order thereby putting forward a tangible foundation for their claim. The claimants were put through an unnecessary expense and were accorded the order with costs.

These were therefore my reasons in total for granting the claim.

Kantor & Immerman, applicant’s legal practitioners
Machekeche & partners, claimants legal practitioners
C Nhemwa & Associates, judgment creditors legal practitioners