

DEPUTY SHERIFF – HARARE
versus
DAVID MOYO
and
CBZ BANK LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, June 2015 and 22 July 2015

Opposed Application

K Musimwa, for applicant
S Evans, for claimant
C Malaba, for judgment creditor

MUREMBA J: These are interpleader proceedings whereby the applicant is the deputy sheriff of Harare. The claimant is David Moyo. The judgment creditor is CBZ Bank Limited.

In the heads of argument the judgment creditor raised a preliminary point to the effect that the claimant was not properly before the court as he did not file a notice of opposition as is required in terms of rule.....of the rules of this court. Instead the claimant filed what is called “claimant’s answering affidavit.” However, when the hearing commenced the parties indicated that they had agreed to disregard the preliminary point and make submissions on the merits. Another thing is that the claimant’s heads of argument were filed out of time. Again the parties agreed to have the bar uplifted in respect of the claimant for filing the heads of argument out of time. With this, I uplifted the bar and we proceeded into the merits of the case.

On 28 November 2011, the applicant attached an immovable property known as stand number 1301 Tynwald South Township of Stand 1042 Tynwald South measuring 383m² registered under Deed of Transfer No. 9072/2008. The attachment was pursuant to a writ of execution issued in favour of the judgment creditor. The judgment creditor obtained judgment against the judgment debtor, one Nompiliso Maphosa in case number HC 6553/11.

The claimant is claiming the attached property to be his. The property is a house. In interpleader proceedings the claimant has the onus to set out facts and allegations which constitute proof of ownership. See *Phillips N.O v National Foods Ltd and Another* 1996 (2) ZLR 532 HC at 534; *Deputy Sheriff, Marondera v Traverse Investments (Pvt) Ltd and Another* HH 11-03 and *Bruce N.O v Josiah Parkes and Sons (Rhodesia) (Pvt) Ltd and Another* 1971 (1) RLR 154. The onus of proof should be on a balance of probabilities.

Ownership in immovable property is passed or delivered by registration in the Deeds Office of a deed of transfer to the buyer. See R H Christie *Business Law in Zimbabwe* second edition at p 147.

In the case of *York and Company v Jones* 1961 R & N 490, 493-4; 1962 (1) SA 65 Murray CJ said,

“A seller of immovable property is under at least three duties to the purchaser in regard to the delivery of the property. He is firstly bound to effect transfer in the Deeds Office into the purchaser’s name. Secondly he is obliged to give physical possession of the property to the purchaser on or before the stipulated date. Thirdly he is under the duty, even after transfer and giving of possession to guarantee the purchaser against eviction, i.e. subsequent dispossession, total or partial, by third parties claiming a title superior to that which the purchaser has obtained from the seller.”

The purchaser of an immovable property therefore only obtains real rights in the property upon registration of the property into his name. Without transfer of registration from the seller’s names the purchaser only has personal rights to the property.

The claimant said his claim is based on the following history. On 5 August 2010 he purchased the house from Nompiliso Maphosa and Tarisai Matsveru who are husband and wife. He attached the agreement of sale that the parties signed. He also attached the title deed of the house which shows that the house is still registered in the names of Nompiliso Maphosa and Tarisai Matsveru.

The claimant also attached a receipt which shows that he paid the purchase price and transfer fees totaling \$29 670-00. Payment was made on 17 August 2010 to Machekeche and partners legal practitioners. According to the agreement of sale the purchase price of the house was US\$28 000-00. The seller was also supposed to pay transfer fees. The claimant attached proof to show that he made an inter account transfer of the money from a Barclays bank account number 6305419 to the account of Machekeche and Partners in the same bank. Machekeche and

partners being the legal firm mandated to transfer the property to the claimant went on to obtain the Capital Gains Tax and Rates Clearance Certificates and lodged transfer papers with the Registrar of Deeds on 20 December 2010. Proof of the clearance certificates were attached to the claimant's affidavit.

However, transfer of the house could not be effected because Lizhibowa Real Estate (Pvt) Ltd had obtained judgment in the magistrates court at Harare under case number 12290/10 against Nompiliso Maphosa and Tarisai Matsveru, on 24 August 2010. On 15 December 2010 Lizhibowa Real Estate (Private) Ltd had obtained a provisional order from this court which enabled it to register a caveat against the property in dispute. At the time of the hearing of these interpleader proceedings the provisional order in question was still in force. It had neither been confirmed nor discharged. The provisional order orders the Registrar of Deeds to register a caveat over the title deed of the house. The caveat prohibits transfer of the property from Nompiliso Maphosa and Tarisai Matsveru to the claimant or to any third party pending confirmation of discharge of the provisional order.

It is not in dispute that the judgment creditor issued summons against Nompiliso Maphosa on 17 August 2011 under case number HC 6553/11. The summons was served at the property in question. The summons was served on the claimant who had already taken occupation of the property. The claimant even brought it to the attention of the judgment creditor that he had purchased the property from Nompiliso Maphosa. On 28 November 2011, the applicant served the claimant with a writ of execution against immovable property and a notice of attachment of the property in question. The claimant argued that he is a *bona fide* purchaser who was not aware of the dealings of the judgment debtor. The claimant averred that he had sold his house in Mabelreign to one Norbert Zinaka under Deed of Transfer No. 6579/80 and effected transfer thereof on 11 August 2010. He attached a copy of the Deed of Transfer as proof. He said that he disposed of his Mabelreign house because being advanced in age and having suffered a stroke some years before, he needed to raise money for his medical bills and his day to day welfare since he is unemployed.

The claimant said that when the applicant in the present matter served him with a notice of attachment of the property he rushed to this court and obtained an order by consent on 9 December 2011 under case number HC 12148/11 for stay of execution pending the institution

and finalization of interpleader proceedings.

The claimant said that on 12 December 2011 he was again served with a writ of execution and Notice of attachment by the Messenger of Court seeking to enforce judgment against Nompiliso Maphosa and Tarisai Matsveru in case no. 12290/10. The judgment is in favour of Lizhibowa Real Estate (Pvt) Ltd. Again the claimant obtained a provisional order in the Magistrates Court staying execution pending confirmation or discharge of the provisional order.

The claimant made averments that the property that he purchased cannot be sold to satisfy debts that he is not a party to.

In opposing the claimants claim the judgment creditor submitted that Nompiliso Maphosa used to work for it as a supervisor of the Foreign Currency Department at its Kwame Nkrumah Brach, Harare. It is said that she defrauded it of US\$460 289-00. After carrying out extensive investigations the judgment creditor instituted civil proceedings against Nompiliso Maphosa in case no. HC 6553/11. This resulted in a judgment which led to the attachment of the property which is at the centre of the dispute in this matter. The judgment creditor said that as soon as the fraud was discovered the judgment debtor absconded to South Africa and a warrant of arrest was issued against her. Apparently criminal proceedings were also instituted against her.

The judgment creditor submitted that the provisional order which stayed execution made it clear that interpleader proceedings were to be instituted on or before 16 December 2011. Ms *Malaba* argued that because the interpleader proceedings were not instituted within the time stipulated in the order the proceedings are therefore incompetent and should be dismissed.

I will not dismiss these proceedings simply because they were not made on or before 16 December 2011 as per the order by consent which stayed execution pending institution of interpleader proceedings. My reasons are that, that order by consent does not say that failure to institute interpleader proceedings within the stipulated time will render interpleader proceedings instituted subsequently null and void. The court order in question does not say what the consequences are for failure to institute interpleader proceedings within the stipulated time.

The judgment creditor further argued that the attachment of the house is lawful because the house is registered in the name of the judgment debtor and not in the name of the claimant. It argued that the agreement of sale produced by the claimant is not proof of ownership of the house. It was further argued that the agreement of sale only gives the claimant personal rights as

against the seller and not real rights which remain vested in the seller who still has the property registered in her name. Ms *Malaba* argued that the claimant must look for the seller (judgment debtor) for the appropriate remedy. She further argued that it does not matter that the process of change of ownership may have started, what is important is whether or not the claimant is the registered owner of the property. She argued that the claimant was unfortunate in that he bought property from an indebted seller and that it is a risk he took when he entered into the agreement of sale.

In *Moyo v Muwandi* SC 47/03 the judgment debtor had ceded his rights, title or interest to Muwandi after entering into an agreement of sale. Since the property still belonged to council, the judgment debtor and Muwandi took the agreement of sale to council for transfer of ownership. The council officials who were too busy to attend to the transfer of ownership at that time advised the parties to leave the agreement of sale promising to effect transfer later. However, for more than 8 months no transfer was effected. The judgment creditor happened to owe the judgment debtor some money. Pursuant to that debt the judgment creditor had the judgment debtor's right, title or interest in the property attached and sold to Moyo at a public auction. When Moyo sought transfer, Muwandi filed an urgent chamber application in this court seeking an order restraining the transfer of the right, title or interest to Moyo, setting aside the sale in execution and declaring Muwandi the sole owner of the right, title or interest in the property. This court granted the provisional order and thereafter confirmed it. Aggrieved by the decision Moyo appealed to the Supreme Court. The Supreme Court held that at the time right, title or interest was attached and sold by the Deputy Sheriff it had not yet been transferred to Muwandi. It further held that *prima facie* the judgment creditor was entitled to have it attached and sold since it was still registered in the name of the judgment creditor. However, it went on to say that the other issue which needs to be considered is whether or not there is any basis to set aside the sale in execution. It said,

Whilst it is correct that a judgment creditor has the right to have attached and sold in execution property registered in the name of the judgment debtor, that right is merely a *prima facie* one. As Kotzé J said in *Van Niekerk v Fortuin* 1913 CPD 457 at 458-459:

“It seems to me that the plaintiff being a judgment creditor, and the property being still

registered in the name of the defendant, *prima facie* the plaintiff has the right to ask that the property shall be seized in execution, unless the party interested can show that there are special circumstances why such an order should not be granted.”

The Supreme Court then considered whether Muwandi had managed to show that there were special circumstances why the judgment debtor’s right, title or interest should not have been attached. It made a finding that he had because cession had not been effected in favour of Muwandi because council officials had been too busy to attend to the transfer. The Supreme Court considered that Muwandi had already taken occupation of the property long before the attachment and sale in execution. SANDURA JA said,

“I am therefore satisfied that Muwandi proved that special circumstances existed which justified the setting aside of the attachment and sale in execution of Peters’ right, title or interest in the property, notwithstanding the fact that it was still registered in Peters’ name. On that basis alone, Muwandi was entitled to succeed.”

In *casu* looking at the explanation given by the claimant, it is not in dispute that the property is still registered in the name of the judgment debtor. *Prima facie* the property can be sold in execution of the judgment which was obtained by the judgment creditor against the judgment debtor.

However, considering the circumstances of the present case, it is my considered view that this is one case where it can be said that there are special circumstances justifying the court to find in favour of the claimant. Equity (fairness and justice) demands that judgment be entered in favour of the claimant. The claimant has set out facts and allegations which show that save for the registration of the property into his name from the judgment debtor and her husband, the claimant did everything else which a purchaser of an immovable property is expected to do. He has the agreement of sale. He paid the purchase price. He was given vacant possession of the property. He paid transfer fees. The judgment debtor was willing to effect transfer of the property to him. This is evidenced by two special powers of attorney that she signed on 16 August 2010. In one she was nominating and appointing her husband Tarisai Matsveru to cause to be sold, sign cession forms and transfer documents to enable the Registrar of Deeds to effect transfer of the property in dispute. In another she was appointing Fiona Machekeche to appear before the Registrar of deeds and make transfer of the property to the claimant. The claimant had the

transfer papers prepared and lodged with the Deeds Office. Registration could not be done in his favour because of the caveat that was registered on the title deed of the property 5 days before the claimant's papers were submitted to the Deeds Office for transfer of ownership. So had it not been for the caveat registration would have been effected.

When the judgment creditor issued summons in November 2011 the claimant had long bought the property from the judgment debtor in August 2010. The claimant's papers for transfer or registration of the property had already been submitted to the Deeds Office in December 2010 and registration had failed because of the caveat. When the judgment creditor served the summons at the property in question the claimant was already in occupation thereof. The claimant's legal practitioners even advised the judgment creditor not to serve process to do with the judgment debtor on this property but the judgment creditor's lawyers did not take heed arguing that the property was registered in the judgment debtor's names. So the judgment creditor was well aware that the claimant was saying he had bought the property from the time it served the summons. When it went on to instruct the applicant to attach this property it knew fully well that it is a property that the claimant was saying he had purchased from the judgment debtor. I am sure that if the judgment creditor had asked for proof the claimant would have shown it all the documents that he produced in these interpleader proceedings.

The sequence of events clearly shows that the claimant bought the house well before the judgment creditor issued summons against the judgment debtor. The judgment creditor issued summons 1 year 4 months after the claimant had bought the property. Under the circumstances surely to allow execution to proceed simply because the property is still in the judgment debtor's name will be a gross injustice. It is not like the judgment creditor obtained judgment before the claimant had purchased the property from the judgment debtor.

The claimant also produced proof in the form of title deeds to show that he sold his property in Mabelreign in the same month that he bought the property in dispute. This confirms his story that he sold his house in order to buy a smaller house so that he could get money to pay his medical bills since he suffered a stroke. This shows that he was a genuine or *bona fide* purchaser who did not act in collusion with the judgment debtor in order for the judgment debtor to avoid her obligations in relation to the judgment creditor.

In the result, the claimant's claim be and is hereby granted. The judgment creditor is ordered

to pay costs to the claimant and the applicant.

Musimwa & Associates, applicant's legal practitioners

Mabuye, Zvarevashe, claimant's legal practitioners

Kantor & Immerman, judgment creditor's legal practitioners