

THE SHERIFF FOR ZIMBABWE
and
THE NDANGARIRO DANGAREMBIZI FAMILY TRUST
versus
INTERFIN BANKING CORPORATION LTD
t/a INTERFIN
(Represented by Peter. L. Bailey in his capacity as Curator)

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 13 September 2016 & 7 December 2016

Opposed Application-Interpleader

M. Mugandiwa, for applicant
H. Marara, claimant
D. Halimani, judgment creditor

CHIGUMBA J: The applicant is the Sheriff for Zimbabwe, who filed an interpleader notice in terms of Order 30 rr205 and 207 of the High Court Rules 1971. The Judgment Creditor, Interfin Banking Corporation Ltd trading as Interfin, as represented by *Mr. Peter L. Bailey* in his capacity as Curator, obtained judgment in case number HC9108-12 against Absolute Paints Private Limited and 3 others. The applicant duly attached certain property in accordance with the judgment creditor's instructions. The claimant laid a claim to this property, a certain piece of and situate in the District of Salisbury called Stand 836 Greystone Township of Stand 130A Greystone Township 2, measuring 3000 square meters (the property). The claims of the Judgment Creditor and of the Claimant being mutually exclusive, notice was issued by the applicant in terms of Order 30 rule 207 of the rules of this court. It is trite that in an application of this nature the onus is on the claimant to set out sufficient facts and averments which constitute proof of ownership, on a balance of probabilities.

In its founding affidavit dated 10 December 2015, the sheriff averred that he had attached the property pursuant to a writ issued in favor of the Judgment Creditor. He expresses his willingness to abide by the court's decision because he has no interest in the property, save for

his charges and costs. The claimant's affidavit, which appears at rp13, was deposed to by Tonderai Sarari, who made the following averments; - he is a trustee of the Ndangariro Dangarembizi Family Trust. The property which was attached belongs to the trust, and it was due to be sold by public auction on 20 November 2015 as advertised. The property was acquired by the trustees and paid for using bank transfers. It was subsequently bequeathed to the trust through a deed of donation. The trust had expended money in renovating the property. The residents of the property are beneficiaries of the trust. The property should not be sold to settle a debt incurred by a third party.

Ngoni Kudenga deposed to the opposing affidavit on behalf of the Judgment Creditor. He averred that he is the Liquidation Agent duly appointed by the Deposit Protection Corporation (DPC) on 12 March 2015. The DPC was itself appointed by the court on 4 March 2015. The claimant has no *locus standi in judicio* because a trust has no legal standing, it is not a recognized legal *persona* in this jurisdiction. Secondly this matter was already dealt with and disposed of by the court on 12 November 2014, and the claimant's claim was dismissed. The claimant is now coming back to have the same claim adjudicated upon, this time under the guise of a trust, its previous interpleader having already been determined and dismissed. The claimant should not be allowed a second bite of the cherry. The long delays in getting payment are prejudicial, payment is long overdue. The property was mortgaged to the Judgment Creditor at the time that the parties purported to enter into an agreement of sale and could not have been sold without its knowledge or consent.

The purchase price ought to have been utilized to settle the indebtedness of the Judgment Debtors to the Judgment Creditor if the agreement of sale was above board. The Registrar of Deeds cannot pass transfer unless and until the mortgage bond is uplifted, which is only done on full satisfaction of the debt. The claimant may have acquired personal rights over the property, which are not binding on the Judgment Creditor. The Deed of Donation is a ruse calculated to defeat the sale of the property in execution. The property remains in the name of the Judgment Debtors and it is executable for their debt which has not been discharged. This interpleader is an abuse of court process. At the hearing of the matter, all three parties indicated that they had nothing meaningful to add to their heads of argument which they filed of record.

The applicant filed heads of argument on 12 January 2016 and submitted that this court should determine the parties' competing rights in terms of Order 30 r 210. It was submitted that the provisions of Order 30 r 208 of the rules of this court had been met, in that the applicant had established that it was independent, not colluding with any of the parties, had no interest other than its charges and costs, and was willing to abide by any decision made by the court. The claimant filed its heads of argument on 26 January 2016, and submitted that it had discharged the onus on it to set out facts and allegations which constitute proof of ownership as set out in the following line of cases;- *Phillips N.O v National Foods & Anor*¹, *Deputy Sheriff Marondera v Traverse Investments Private Limited & Anor HH 11-03*, *Bruce N.O. v Josiah Parkes & Sons (Rhodesia Private Limited) & Anor* 1091 (1) RLR 154. The claimant correctly submitted that it was required to discharge the onus on a balance of probabilities. The court accepts as correct the submission made on behalf of the claimant, that a Trustee is empowered in terms of Order 2A r 8 of the rules of this court, to institute legal proceedings in the name of a Trust. See *Mafirambudzi Family Trust v Madzingira*².

It was again correctly submitted on behalf of the claimant that ownership of immovable property is passed or delivered by registration of a Deed of Transfer in the name of the buyer. See R. H. Christie *Business Law in Zimbabwe*, 2nd ed, p 147, *York & Company v Jones*³. Where the court stated that;-

“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”.

It follows therefore that since it is common cause that the claimant has physical possession of the property, and that the title deeds are not in its name, the issue that falls for determination is whether the Judgment Creditor's title is superior to that which the claimant obtained from the seller (the mortgage bond). On 28 January 2016, heads of argument were filed on behalf of the Judgment Creditor, in which it was submitted that it has real rights over the

¹ 1996 (2) ZLR 532 HC @ 534

² HH338-14

³ 1961 R & N 490, 493-4, 1962 (1) Sa 65

mortgaged property whereas the claimant only has personal rights against the seller. The court notes that the case which the Judgment Creditor seeks to rely on as authority for the proposition that a trust is not a legal person in this jurisdiction and cannot institute legal proceedings, is a 2003 case, *WLSA & Ors v Mandaza & Ors*⁴. Order 2A, which provides for proceedings by or against associations, was inserted by SI 192-1997. It was part of our rules in 2003 when this case was decided. It defines as ‘associate’ in relation to a trust to mean a trustee (Order 2 rr7 (a)).

It stipulates that an association includes a trust Order 2A rr7 (b) (a). It provides that associates (trustees) may sue and be sued in the name of their association (Trust) (Order 2A r 8). The claimant’s affidavit clearly identifies its deponent as a trustee. In my considered view that establishes *locus standi in judicio*, not only in terms of r 2A of the rules of this court, but in terms of the Trust Deed, which is attached to the papers before the court. It is a correct statement of law that a trust is not a corporate body and cannot appear as a party to litigation. A trust’s juristic personality vests in any of its trustees. It is trite that the assets and liabilities of a trust vests in its trustees. As such these proceedings, brought at the instance of a trustee in whom the claimant’s juristic personality reposes, are properly before the court in terms of r 2A which allows a trustee to institute proceedings in the name of the trust.

The question of whether this court has already dealt with this matter in case number HC3774-14 on 12 November 2014 must be determined in favor of the Judgment Creditor, partly because of the reasons already stated above. That case had Ndangariro Ryan Dangarembizi and Mellisa Nothanda Hunda as claimants. This mother and her son are beneficiaries of the claimant. When regard is had to the date on which the property was allegedly donated to the claimant, it will become clear that this was a ruse to defeat the Judgment Creditor’s claim. The proper issue that arises for determination is whether, a mortgaged property can be donated to a Trust, by third parties who purported to buy it from the judgment debtor, before the debt is discharged in full, and to the satisfaction of the Judgment Creditor? In the case of *Meda v Homelink Private Limited & Anor*⁵ the court aptly summed up the applicable law, as follows;-

“The mortgagor’s first and foremost duty is to pay the debt secured and the mortgagee’s corresponding right is to ‘call up’, or ‘foreclose’ the bond. The significance of mortgage bonds and all other forms of hypothecation lies in the fact that they provide the creditor with a ‘real security’ for the payment of his

⁴ 2003 (1) ZLR 500 (H) @ p505-6

⁵ HB 195-11 @p3-4

claim for if the debtor is unable to raise the necessary funds to pay the debt which is secured, the creditor is entitled to demand that the property, that being the thing which is the subject matter of his security, be sold and that the proceeds of such sale are used for the satisfaction of his claim-. *The Law of Property* (3rd ed) Silberberg & Schoeman @ 419 & 429. The rights of the judgement creditor will enjoy relative primacy". (My underlining for emphasis).

The court accepts, as correct, the submission made on behalf of the Judgment Creditor, that the object of a mortgage bond is to give the mortgagee a "charge" upon the mortgaged property as security for a debt. Upon registration of a mortgage bond, the mortgaged property is encumbered. It remains in the name of the mortgagor, but a preferred encumbrance is conferred upon the mortgagor, that title in the property may not be passed to a third party, unless and until the mortgage bond is uplifted, which can only be done by the mortgagor's consent, usually after the debt is discharged in full. The court accepts that the purchaser of mortgaged property only acquires rights *in personam* as against the owner of the property. Those rights rank second, in comparison to the rights of a mortgagee, especially where the mortgage bond was registered before the purported sale of the property.

According to s 14 of the *Deeds Registry Act [Chapter 20:05]* "the ownership of land may be conveyed by one person to another only by means of a Deed of Transfer executed or attested by a registrar". See *Machiva v Commercial Bank of Zimbabwe & Anor*⁶, *Maphosa & Anor v Cook & Anor*⁷, where the court said the following;-

"It is clear to me that at the time the second respondent recorded the caveat against the undivided share in the land, the first respondent was the lawful owner of the real rights therein. The applicants had personal rights against her to claim transfer of the real rights. Maarsdorp Institute of South African law vol 2 6 ed @ p82 states; In South Africa no person may be said to be the owner of land or immovable property until he has obtained transfer of the same. It is the transfer that gives the dominium. Without transfer a purchaser has only to claim the transfer. He is not the proprietor of the ground, although he may have paid the purchase price. At p55 of the 9th edition, the learned author states; "Where the basis for the transfer of ownership of immovable is a contract, formal transfer in terms of the Deeds Registry Act is necessary to pass the ownership, and payment of the purchase price, coupled with giving the purchaser possession of the land sold, does not avail to make him the owner of the land". The second respondent did not only attach the real rights at a time they were owned by its judgment debtor but recorded the caveat against the title as notice to the world at large of its interest in the property attached. The applicants, on the other hand, did not have the agreement of sale endorsed on the title deeds in terms of s 64(1) of the Deeds Registries Act [cap 20:05]. They remained in possession of personal rights claimable against first respondent. They are creditors without security".

⁶ 2000 (1) ZLR 302 (H) 2 305 C-D

⁷ 1997 (2) ZLR 314

The learned authors Herbstein & Van Winsen *Civil Practise of the Superior Courts in South Africa* 3rd ed p597 have said that;-

“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 right arose 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...”

It being common cause that the claimant has not taken transfer, and that the title deeds remain in the name of the Judgment Debtor, it follows that the claimant’s claim to the mortgaged property, ranks second to that of the Judgment Creditor, and may not defeat the Judgment’s Creditor’s claim, its right to sell the property and extinguish the debt. See *Roodeport United Main Reef GM Co Ltd v Du Toit*⁸, *Barclays Nasionale Bank BPK v Registrateur Van Atkes, Transvaal*, 1975 (4) SA 936. The mortgage bond was notice to the whole world that the property was encumbered, that title to it could not be transferred while it remained in place. The claimant has not taken the court into their confidence as to what steps it took if any, to investigate title prior to entering into the agreement of sale, and before parting with the purchase price. It follows therefore that the claimant is not an innocent third party purchaser for value. No equitable consideration arises in its favor, or deserves to detain the court from dismissing its personal right to transfer of the property. The court takes a dim view of the attempt to deprive the Judgment Creditor of its right to sell this mortgaged property. A punitive order as to costs should discourage such conduct in future.

In the result, it be and is hereby ordered that;-

1. The claimant’s claim to the property known as a certain piece of land situate in the District of Salisbury called stand 836 Greystone Township of Stand 130A Greystone township 2, measuring 3000 square meters, placed under judicial attachment in HC 9108-12, be and is hereby dismissed.
2. The Notice of Intention to sell immovable property in Execution dated 1 April 2015 issued by the applicant be and is hereby confirmed and the abovementioned immovable property be and is hereby declared to be especially executable.

⁸ 1928 AD 77 @ 71

3. The claimant be and is hereby ordered to pay the applicant, and the Judgment Creditor's Costs, on a Legal Practitioner-Client Scale.

Kantor & Immerman, applicant's legal practitioners
Takawira Law Chambers, claimant's legal practitioners
Wintertons, judgment creditor's legal practitioners