

THE SHERIFF FOR ZIMBABWE
and
BRIGHTON BAKO
versus
WILLDALE LIMITED t/a
WILLDALE BRICKS

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 01 June 2017 and 14 June 2017

Opposed Application

Mr T Kativhu, for the applicant
Mr M.A Chigudu, for the claimant
Mr Z.T Zvobgo, for the Judgment Creditor

MAKONI J: This is an application for an interpleader. The judgment creditor Willdale Limited t/a Willdale, obtained judgment in case no HC 11096/14 on 25th of February 2015 against Freewin Investments (Pvt) Ltd, the judgement debtor. The Sheriff of High Court who is the applicant in this matter, in the exercise of his functions, attached the following immovable property:

- a) An undivided 10% share being share number 1 in the property known as a certain piece of land situate in the District of Salisbury measuring 1.3815 hectares called Stand 4056 Glen Lorne Township of Stand 3084 Glen Lorne Township held under certificate of Registered Title No. 1043/2016 (the property).

After the attachment, the claimant, Brighton Bako, laid a claim in respect of the property. He claims that he has rights in several shares in the property.

In interpleader proceedings, the claimant bears the onus of proving ownership of the property. The basic rule is that he who alleges must prove his case. The claimant must prove on balance of probabilities that the immovable property in question is his.

In *Bruce N.O v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 (R) at 70 C-E the same was stated as follows:

“In my view, in proceedings of this nature the claimant must set out the facts and allegations which constitute proof of ownership”

The claimant attached a memorandum of agreement of sale of the property which was made and entered into by and between the judgment debtor and the claimant on the 17th of July 2015, to his opposing affidavit. The claimant also attached a declaration which was made the judgement debtor, confirming the sale of the property.

The claimant averred in paragraph 8 of his heads of argument that his claim to the property is valid and it entitles him to launch interpleader proceedings because:

- “a) The transfer process is almost complete and the Capital Gains Tax Clearance Certificate and Rates Clearance Certificate have already been issued;
- b) The initiation of the transfer process inadvertently shows Judgment Debtor’s willingness to deliver the property to Claimant;
- c) Claimant took occupation of the property;
- d) The judgement Creditor is at liberty to sell all other uncontested undivided shares to the immovable property in question.”

In support of its claim the Claimant referred to the case of *Hersel Investments (Pvt) Ltd v The Registrar Deeds N.O and Ors* HC 10443/13 where Honourable TAGU J made the following remarks:

“In casu, the applicant’s right is clear and all the other requisites are present. The applicant purchased the property in question and paid the purchase price in full. The applicant took vacant possession of the property. What was left was the transfer of Title Deeds to the applicant. The property was therefore no longer the property of the fourth respondent at the time it was attached in execution. Had the applicant known of the attachment the applicant could have issued interpleader summons or contest the sale and or the subsequent confirmation of the sale. Had the correct status of the property been disclosed to the Sheriff of the High Court, the property could have been excluded from the property that was attached.”

The judgement creditor opposed the application on the basis that the claimant does not have any title to the property. It argued that it holds real rights over the property on the basis of judicial attachment whilst the claimant holds personal rights as against the judgment debtor.

Mr *Zvobgo* submitted that judicial attachment of property creates a *pignus giudiciale*, that is, a judicial mortgage which is a real right enforceable against the whole world. The judgement creditor *in casu*, therefore holds a *pignus giudiciale* over the property.

Mr *Zvobgo* further submitted that in terms of the section 2 of the Deeds Registries Act Chapter 20:05 (the Act), the term “owner”, in relation to an immovable property, means the

party that is registered as such in the Deeds Registry. The claimant has not produced title deeds in respect of the subdivision hence cannot be regarded as the owner thereof in terms of the Act.

The question is whether the claimant has set out facts and allegations which constitute proof of ownership of the property.

As correctly submitted by Mr *Zvobgo*, the Act defines ‘owner’, in relation to property, as the person registered as the owner or holder thereof. The claimant *in casu* does not fall under the definition of owner in terms of the Act since he is not the registered owner of the immovable property. The property is still registered in the name of the judgement debtor.

The position of the law on this point is settled. In *Mavhundise v UDC Ltd & Ors* 2001 (2) ZLR 337 (H) at F-G Smith J, as then he was, stated:

“Even though the agreement between the Consortium and the applicant provides that the plot is sold to the applicant and that freehold title shall be granted to the applicant when all moneys owed to the Agricultural Finance Corporation and the Consortium have been paid in full, such title had not been granted to the applicant. Therefore, the applicant had not acquired ownership of plot 216. Ownership of land can only be acquired by transfer of the ownership from the previous owner and such transfer must be registered in the Deeds Registry. 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.”

Silberberg and Shoeman in *The Law of Property* 5th edition pg 65 provides that

“A real right is adequately protected by its registration in the Deeds Office. The Deeds Registries Act provides that ownership in land must be conveyed from one person to another by a process of publicising and recording the transfer at the deeds registry..... Registration for land serves dual function: (i) it indicates the act of delivery in respect of derivative acquisition of ownership of immovable or real rights to land; and (ii) it provides a public record of real rights in land.”

The issue of registration of rights in immovable property was also settled in *Takafuma v Takafuma* 1994 (2) ZLR 103(S) at pp 105-106 where the court said:

“The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of ‘real rights’ in s 2 of the Act. The real right of ownership, or *jus in re propria*, is the ‘sum total of all the possible rights in a thing’

In *Mavhundise supra* Smith J quoted the learned authors Joubert *Law of South Africa* vol. 27 para 35 as follows:

“Thus all real rights over immovable things are themselves to be classified as immovable property; whereas all real rights over movables and all personal rights are regarded as movable even if the performance concerned consists, for example in the transfer of immovable property”

The Act defines real right as any right which becomes a real right upon registration. As is clear from the above, the claimant never acquired any real right in the property as he did not become the registered owner of the property. The real right in the property therefore resides in the Judgement debtor who is the registered owner of the property at the Office of the Registrar of Deeds. All the claimant acquired, when he bought the property is a personal right to the immovable property which constitute movable property, as per Joubert *supra*. Such personal rights of the Claimant are only enforceable against the judgement debtor.

In *Liquidators Union and Rhodesia Wholesale Limited v Brown & Company* 1922 AD 549 at p588 KOTZE JA stated that:

“...While an ordinary arrest of the property under the Roman-Dutch law gives no preference, an arrest effected on property in execution of a judgment creates a *pignus praetorium* or to speak more correctly, a *pignus judiciale*, over such property. The effect of such a judicial arrest is that the goods attached are thereby placed in the hands or custody of the officer of the Court. They pass out of the estate of the judgement debtor, so that in the event of the debtor’s insolvency the curator of the latter’s estate cannot claim to have the property attached delivered up to him to be dealt with in the distribution of the insolvent’s estate.”

In *Maphosa & Anor v Cook & Ors* 1997 (2) ZLR 314 (HC) at 316 MALABA J, as he then was, stated as follows:

“Herbstein and Van Winsen Civil Practice of the Superior Courts in South Africa 3 ed state at p597:

‘A judgement 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 judgement creditor’s cause of action and of which the judgement creditor had notice when the attachment was made. An attachment in execution creates a judicial mortgage or *pignus judiciale*.’”

In casu, the judgement creditor obtained a real right over the property when it was attached by the Sheriff on 18 November 2015. The attachment of property created a *pignus judiciale* in favour of the Judgement Creditor. Therefore, the Judgement Creditor's real rights takes precedence over personal rights of the claimant who had entered into an agreement of sale with the Judgement Debtor but had not yet taken ownership of the property.

Mr *Chigudu* submitted that there are special circumstances why the property should be released from attachment.

In *Van Niekerk v Fortuin* 1913 CPD at 458 KOTZE J said

“It seems to me that the plaintiff being a judgement 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 question which now arises is whether the claimant *in casu*, established that there are special circumstances why the property should not have been attached and sold. In my view, such special circumstances should be very compelling for them to defeat a *pignus judiciale*.

In *Raymond Dokotela Moyo v Timothy Grasiano Muwadi* SC 47/03 by SUNDURA JA had occasion to consider what could be considered as special circumstances:

“In the resent case, after the conclusion of the written agreement of sale on 17 August 1999 Muwadi acted promptly. He and Peters took the document to the Council offices on 19 Aug 1999 in order to have the cession of Peter's right, title or interest in the property effected. Regrettably as the officials at the Council Offices were too busy to attend to the cession on that day they asked Muwadi and Peters to leave the document with them and indicated that the cession would be effected in due course. The cession was not attended to for at least eight months thereafter, and the only reason given for that unacceptable situation was that the officials concerned were too busy to attend to the cession.”

In casu, there is no evidence showing that the claimant acted ‘promptly’ to secure the transfer of the property to him. From his submissions, it is clear that after concluding the agreement of sale on the 17th of July 2015 no transfer was effected up until the property was attached and then sold. The claimant only started making efforts of securing the transfer after learning of the attachment and sale of the property in the Herald Newspaper. He was then jolted into obtaining the Capital Gains Certificate on 24 January 2017 and Rates Clearance Certificate on 30 January 2017.

In *Moyo's* case, *supra* Muwadi took occupation of the property long before the attachment of the sale in execution. The court considered this as special circumstances justifying the setting aside of the attachment and sale in execution of the property. *In casu*, the claimant took occupation of the property only after it was attached.

I am therefore satisfied that the real rights in the property reside in the judgment debtor since it is the party registered as the owner of the immovable property at the office of the Registrar of Deeds. I further hold the view that the claimant only holds personal rights against the registered owner of the real rights, the judgment debtor. Judicial attachment of the immovable property by the applicant created a *pignus judiciale*, a real right in favour of the Judgment Creditor and can only be released from attachment if there are special circumstances.

Before concluding, I would like to make one observation. In paragraph 7 of the opposing affidavit the claimant states:

“On the above premises, I seek that the sale in execution of my property conducted on 7th October 2016 be set aside. Further, the Applicant should be directed to reverse the sale in execution of my property”

In my view, interpleader proceedings are instituted upon attachment and before sale of the property. Once the sale has been conducted, any aggrieved party must apply for the setting aside of the sale in terms of Order 40 r 359 of the High Court Rules. There would be other parties such as the purchaser of the property, who would have an interest in the matter. The claimant in this matter should not have therefore instituted interpleader proceedings but rather seek the setting aside of the sale.

In result, I am satisfied that claimant has failed to establish special circumstances which justify removing the property from the attachment and for setting aside the sale.

I, accordingly make the following order:

- 1) The Claimant's claim to an undivided 10% share being share number 1 in the property known as a certain piece of land situate in the District of Salisbury measuring 1.3815 hectares called Stand 4056 Glen Lorne Township of Stand 3084 Glen Lorne Township held under certificate of Registered Title No. 1043/2016, which was placed under attachment in the execution of the order in HC 11096/14 is hereby dismissed.

- 2) The above mentioned property attached in terms of the Notice of Attachment of Immovable Property dated 26 July 2016 by the applicant is hereby declared executable.
- 3) The claimant is to pay the Judgement Creditor's and the Applicant costs.

Kantor and Immerman, applicant's legal practitioners

Moyo and Jera, claimant's legal practitioners

Dube, Manikai and Hwacha, judgment creditor's legal practitioners