

1. INNOCENT PARADZAYI MAKWIRAMITI
versus
THE SHERIFF FOR ZIMBABWE
and
SOLOMON SIGAUKE
and
FANUEL MADYIRAPANZE
and
PINIEL MATIZANADZO
and
THE REGISTRAR OF DEEDS
and
KENNETH ARTHUR MAVHUNGA
HC 8866/14
2. SOLOMON SIGAUKE
versus
INNOCENT PARADZAI MAKWIRAMITI
HC 8193/14

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 22-24 February 2017, 3 March 2017 & 26 July 2017

Civil Trial

K Kamdefwere, for the plaintiff
T Militao, for the defendant

MUREMBA J: As the two matters involve the same subject matter they were consolidated for purposes of this trial. The determination of HC 8866/14 automatically determines the outcome of HC 8193/14. Although in HC 8866/14 Innocent Paradzayi Makwiramiti (Mr. Makwiramiti) sued 6 defendants it is only Solomon Sigauke (Mr Sigauke) who defended the matter, so he is the only defendant in that matter. So these two cases HC 8866/14 and HC 8193/14 involve Mr. Makwiramiti and Mr. Sigauke only.

The summons in HC 8193/14 show that Mr. Sigauke was the first to sue Mr. Makwiramiti on 17 September 2014 for an order for his eviction and all those claiming occupation through him from Stand no. 102 Logan Park of Lot 6A Hatfield, Harare. On 7 October 2014 Mr. Makwiramiti counter sued Mr. Sigauke seeking an order cancelling the sale and transfer of Stand no. 102 Logan Park Township of Lot 6A Hatfield which was done by the Sheriff of Zimbabwe to Mr. Sigauke in a judicial sale which was conducted pursuant to a default judgment which was granted in favour of Fanuel Madyirapanze against Mr. Makwiramiti on 29 June 2011 under HC 4245/11.

Mr. Sigauke having bought the immovable property after confirmation of the sale, he had its title transferred to him. It is on the basis that since he is now the registered owner of the property he now wants Mr. Makwiramiti who has remained in occupation to be evicted, so that he takes occupation.

Pursuant to the consolidation of the two matters the parties agreed that Mr. Makwiramiti be the plaintiff and Mr. Sigauke be the defendant. I will thus be referring to them as such in this judgment.

In his plea to the claim for eviction and in his claim for cancellation of the sale and transfer of title the plaintiff averred that the defendant's title to the property is null and void *ab initio* as the Sheriff in conducting the sale was compromised and acted *mala fide* and irregularly against the rules of the court in that:-

- a) He should not have attached and sold in execution the immovable property without having exhausted or attached the movable property, as the movables would have satisfied the judgment debt.
- b) The sale was done to the defendant by private treaty for a price less than the price that was offered at the public auction which sale was not even authorised by this court or by the plaintiff himself.
- c) The confirmation of the sale was null and void as all the parties who were involved were compromised and Piniel Matizanadzo who is a legal practitioner had no *locus standi* to represent the plaintiff at the confirmation hearing or to consent to the confirmation of the sale.

- d) The default judgment in HC 4245/11 was defective in that it bound the plaintiff to pay a debt jointly and severally with Kenneth Mavhunga yet it is a debt which Kenneth Mavhunga was liable to pay alone. Apparently the plaintiff and Kenneth Mavhunga, the 6th defendant in HC 8866/14 were tenants doing different businesses at Fanuel Madyirapanze's premises. In addition, there were other tenants at these premises. An electricity bill of US\$17 607.88 accumulated and this is what resulted in the plaintiff together with Kenneth Mavhunga being sued by Fanuel Madyirapanze and the default judgment being obtained.

The plaintiff in his claim in HC 8866/14 further averred that after the default judgment had been granted, the Sheriff attached his movable goods in July 2011 and the date for their removal was set as 30 August 2011. These goods were neither removed nor sold in execution, yet they could have been sufficient to satisfy the debt. On 30 September 2011 another writ of execution against movable and immovable property was issued which resulted in the Sheriff attaching the plaintiff's immovable property, Stand number 102 Logan Park Township. The plaintiff said that this was wrong since the movable property that had been attached had not been sold in execution.

In the alternative, the plaintiff averred that the attachment of the immovable property by the Sheriff and Fanuel Madyirapanze, the judgment creditor was a fraud calculated to deprive him of his home on the misrepresentation and connivance that the movable goods were insufficient to satisfy the judgment debt. The immovable property was then sold by public auction to one Siyawamwaya who was the highest bidder for US\$71 000.00. He failed to pay the purchase price resulting in the Sheriff selling the property by private treaty to the defendant for US\$55 000.00. This act was in gross violation of the rules of court as the property was sold for much less than what was offered at the public auction. Furthermore, the sale by private treaty was not with his consent or that of the judge.

The plaintiff said alternatively the Sheriff, the defendant and the judgment creditor, Mr Fanuel Madyirapanze connived to misrepresent that the price that was offered by the defendant was the best that could be obtained at the time. This misrepresentation and connivance was a fraud against him designed to take his property from him. The sale to the defendant was

conducted on 7 March 2012 but a letter dated 26 January 2012 was dispatched to the plaintiff calling for objections to confirmation of the sale. The plaintiff lodged written objections to the sale by a letter dated 21 March 2012. The Sheriff convened a hearing for the objections which was presided over by his subordinate on 12 April 2012. At the hearing the plaintiff who was incapacitated was to be represented by his wife and the fourth defendant, Piniel Matizanadzo in HC 8193/14 who purported to be registered a legal practitioner at the material time. In gross act of bad faith, gross negligence and unlawfulness Piniel Matizanadzo turned away Mrs Makwiramiti from the hearing and consented to the confirmation of the sale by private treaty with a condition that the plaintiff would satisfy the entire judgment debt on that very same day. It later turned out that Piniel Matizanadzo was not a registered legal practitioner at the time and had fraudulently misrepresented to the plaintiff that he could lawfully act on his behalf at the hearing of the objections to confirmation.

The plaintiff averred that all the acts that were done by Piniel Matizanadzo at the hearing were null and void. Consequently, the resolutions that were made at the hearing were null and void *ab initio*. He had not been authorised or instructed to consent to the confirmation of the sale. He agreed to an impossible condition that the plaintiff would pay US\$17 607.88 on that very day. Piniel Matizanadzo thus unlawfully and wrongfully consented to the confirmation of the sale by private treaty.

The plaintiff said alternatively, Piniel Matizanadzo had no *locus standi in judicio* to represent him at the hearing of the objection proceedings by reason that he suffered from insanity and or diminished mental capacity. The consent he tendered without the instructions of the plaintiff was therefore null and void *ab initio* for want of *locus standi* rendering the entire confirmation proceedings a nullity.

The plaintiff said alternatively, the Sheriff, the defendant, Fanuel Madyirapanze and Piniel Matizanadzo acted in common purpose, connived and fraudulently misrepresented that he (the plaintiff) had consented to the confirmation of the sale on condition that he would pay the amount due by end of day. The confirmation proceedings and the confirmation of the sale itself were therefore null and void as they were actuated by fraud and *mala fides*.

The plaintiff averred that the Sheriff refused to re-open the confirmation proceedings after having been advised of the irregularities therein. He said that this was wrongful and unlawful.

The plaintiff further averred that the transfer of the property to the defendant on 24 July 2014 was without the knowledge of Allied Bank which held a bond over the property for a debt he owed to it. He said that the transfer was wrongful and unlawful as it was a result of a sale in execution arising out of a defective default judgment, a *mala fide* attachment and sale in execution and a grossly irregular, null and void confirmation process actuated by fraud and misrepresentation. The plaintiff averred that he had settled the bill in a much reduced amount of US\$12 550.79 on 24 February 2014 before transfer of the property to the defendant. He stated that the Sheriff, the defendant and Fanuel Madyirapanze were aware of this.

In his plea to the plaintiff's claim the defendant averred that this was not the forum for the plaintiff to challenge the default judgment as he had once filed an application for its rescission, but later withdrew it. The defendant averred that if the movable goods were not sufficient to satisfy the judgment debt there was nothing wrong in the Sheriff attaching the immovable property. The plaintiff averred that the sum of US\$71 000.00 that was offered at the public auction was irrelevant as the bidder had then failed to pay the money. The defendant also denied allegations of connivance and misrepresentations stating that the sale and confirmation of the sale were done above board. He stated that the plaintiff had had numerous opportunities to save his house from 2011 to 2014, but he had no financial resources to do so. The defendant said that he was not privy to what transpired to the plaintiff's wife on the date of the hearing of the objections to confirmation as Piniel Matizanadzo was the plaintiff's legal representative. The defendant averred that the plaintiff is bound by the negligent conduct of his legal practitioner as he was his chosen agent. He said that the plaintiff's recourse is to sue his then legal representatives for any prejudice suffered. The defendant averred that he had no knowledge that Piniel Matizanadzo was insane. He further said that even then it needed to be proven by the plaintiff that Piniel Matizanadzo's consent to confirmation of the sale was a direct result of insanity and that such consent was contrary to express instructions. The defendant averred that the plaintiff cannot purport to speak on behalf of Allied Bank and in any case the bank was paid its dues from the purchase price by the Sheriff after the sale of the property. He further stated

that the transfer was legally and procedurally done. The defendant stated that he had no knowledge that the plaintiff had settled the debt after the sale had been confirmed. He said that in any event trying to settle the debt after confirmation of the sale was inconsequential.

The evidence

The way the plaintiff drafted his pleadings was such that he was actually outlining the evidence of his case. He induced the defendant to also outline his evidence in pleading to the claim for cancellation of the sale and transfer of the property. When the parties led evidence during trial they simply repeated what they had outlined in their pleadings. I will thus not regurgitate the evidence as it is simply a repeat of their pleadings. Put differently, the evidence that was led by the parties is no different from what they said in their pleadings.

The law

In *Chiwadza v Matanda & Others* 2004 (2) ZLR 203 (H) it was held that there are 3 different stages at which an interested party can approach this court to have a sale in execution set aside. Firstly, it is before the sale is confirmed by the Sheriff in terms of r 359 of the High Court Rules, 1971 on the grounds specified in the rule. Secondly, if aggrieved by the Sheriff's decision, he may approach the court to have the decision set aside. This happens after the sale has been confirmed, but before the property has been transferred to the purchaser. An interested or aggrieved party may approach this court by way of ordinary review based on the grounds of review provided for at law such as gross unreasonableness, bias or procedural irregularities. Thirdly, it is after the sale has been confirmed and transfer has been effected to the purchaser. At this stage the challenge to the sale is based on the common law. The challenge is however, not on the grounds of alleged violations of the rules of court or on the general grounds of review under common law. Bad faith or fraud or knowledge of prior irregularities on the part of the purchaser should be shown. The rationale behind this is that an innocent third party in commercial transactions is protected in our legal system.

In casu it is common cause that the challenge to the sale is being made after confirmation of the sale and transfer of the property has been made to the purchaser, the defendant. The case of *Makuyana & Another v Standard Chartered Bank of Zimbabwe and Others* HB 52/07

reiterates what was said in the *Chiwadza* case (*supra*) that the sale of property by judicial decree cannot, after transfer has been passed, be challenged unless there was

- i) fraud on the part of the purchaser; or
- ii) an allegation of bad faith on the part of the purchaser; or
- iii) knowledge of prior irregularities in the sale in execution by the purchaser.

In *Mupedzomombe v CBZ & Anor* 1996 (1) ZLR 257 (S) which was referred to in the above cited cases at page 260 GUBBAY CJ (as he then was) outlined the mammoth task the aggrieved party faces at this stage. He said,

“When the sale of the property not only has been properly confirmed by the Sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must confirm strictly with the principles of common law.

This is the insurmountable task which now besets the appellant – the features urged on his behalf, such as the unnecessarily low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale by execution or fraud.”

In casu it is clear that the plaintiff’s averments that the Sheriff did not follow the rules of this court in conducting the sale, such as his failure to sell the movable goods which could have settled the debt before attaching and selling the immovable property; the selling of the property by private treaty without the consent of the plaintiff or that of the judge; the confirmation proceedings having been done irregularly as his wife was not allowed to attend and his legal practitioner, Piniel Matizanadzo who represented him having been mentally unsound, had no authority to consent to the confirmation of the sale and had no practising certificate which entitled him to practice; the property having been sold for an unreasonably low price and the averment that the plaintiff had now taken over the electricity debt and was now paying the electricity company, ZETDC are at this stage of no relevance, since transfer of title of the property was effected to the purchaser, the defendant. Even if it is proven that the Sheriff acted irregularly that alone is not enough to set aside the sale. It has to be shown that the purchaser was aware of these prior irregularities or acted in bad faith or fraudulently.

What the court therefore has to determine is whether there is evidence to show that in purchasing the property, the purchaser who is the defendant acted fraudulently or in bad faith or had knowledge of any prior irregularities such that he should be declared not to be an innocent purchaser.

When the plaintiff and his wife Eunice Grace Makwiramiti testified, they did not lead any evidence that proved fraud, bad faith or any knowledge of prior irregularities on the part of the defendant. They did not adduce any evidence showing when the defendant and how he compromised the Sheriff. They made averments that the Sheriff had made certain irregularities in conducting the sale and suspected that he acted in connivance with the defendant. Other than these being mere suspicions no evidence was led whatsoever linking these irregularities to the defendant. Evidence shows that the defendant only became involved in the sale when he saw an advert for the sale of the property well after its attachment had been made. He was not privy to anything that happened before i.e. the attachment of the movable property and the immovable property being sold at a public auction. At the hearing of the objections to confirmation the plaintiff was represented by a legal practitioner of his choice Piniel Matizanzozo who consented to the sale being confirmed if he (the plaintiff) failed to pay the judgment debt in full on that day. The then plaintiff's legal representative could have been insane and without a practising certificate but that had nothing to do with the defendant. It is not the defendant who chose that legal practitioner for the plaintiff. There is no evidence which was led which showed that the defendant connived to chase away the plaintiff's wife from the hearing. In fact at this hearing the defendant was not in attendance and neither was he legally represented.

With regards to the mixed up dates in certain correspondences which were written by the Sheriff with regards to the sale, the Sheriff managed to show in his evidence that these were just errors which arose as a result of copy and paste errors and typographical errors. They were not indicative of any fraud. In any case no evidence was led to show that these errors had the involvement of the defendant. In light of the foregoing, the plaintiff failed to prove his claim on a balance of probabilities.

Since the defendant has title deeds to the property, at law he is the owner of the property. He is entitled to sue for the eviction of the plaintiff based on the *actio rei vindicatio* which entitles the owner of a property to recover his property wherever it is found and from

whomsoever is holding it, without alleging anything further than that he is the owner and that the defendant is in possession of that property. See *Alspine Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 226 (H). Such is the scenario in the present matter. The plaintiff has no reason for remaining in possession of the property in dispute as he has failed to have the sale in execution and transfer of title to the property set aside. He ought to vacate.

Costs

I am inclined to order costs against the plaintiff on a higher scale as requested by the defendant because from the evidence which was led in this case it was clearly shown that from the time the proceedings were confirmed the plaintiff made several court applications challenging the sale some of which were not prosecuted and some of which were withdrawn. These several court applications even caused the defendant to delay in making payments of the purchase price. The plaintiff sought to delay the matter as much as possible and he knew that this was to his advantage as he is still in occupation of the property as we speak. This is further evidenced by the fact that he should have submitted his closing submissions by 14 March 2017, but he did not do so at all. I ended up writing this judgment without him having filed the submissions. The plaintiff knows that any delay in the finalisation of the matter works to his advantage as this prolongs his occupation of the property.

In the result, I order as follows.

1. The plaintiff's claim for the cancellation of the sale and transfer of Stand 102 Logan Park Township of Lot 6A, Hatfield, Harare to the defendant is hereby dismissed.
2. The plaintiff and all persons claiming occupation through him of Stand No. 102 Logan Park of Lot 6 A, Hatfield, Harare be and are hereby ordered to vacate the said property within 7 days of this order.
3. The plaintiff pays costs of suit on the scale of legal practitioner and client.

Muringi Kamdefwere, plaintiff's legal practitioners
Kwenda & Chagwiza, defendant's legal practitioners