

THE SHERIFF OF ZIMBABWE
versus
LOVEMORE BUWU
and
INTERFIN BANKING CORPORATION t/a INTERFIN

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 11 October 2018

Opposed Application

F Mabhunyu, for the applicant
T.R Marezani, for the claimant
D Halimani, for the judgment creditor

MUNANGATI-MANONGWA J: In pursuant of execution of an order granted by this court on the 2 May 2017 in favour of Interfin Banking Corporation Limited t/a Interfin the judgment creditor, the Sheriff of Zimbabwe attached Stand No. 6279 Ruwa Township of Dispute Estate measuring 992 square metres. The property is registered in the name of one of the judgment debtors namely Rodney Ndangariro Chiteme. One Lovemore Buwu has claimed that the attached immovable property does not belong to the judgment debtor but to him. This led the Sheriff, the applicant herein to institute these inter-pleader proceedings.

It is the claimant's case that on 4 April 2011 he bought the attached property from Rodney Ndangariro Chiteme the registered owner paying the full purchase price of USD\$20 000.00. An agreement of sale to that effect has been duly provided. Claimant avers that he took occupation in 2011 and he has since developed the property. However change of ownership has not been effected as he has not been able to raise the transfer fees although he is in the process. As he has nothing to do with the judgment debtor he wants the immovable property released from attachment.

It is common cause that the property in issue is registered in the judgment debtor's names. A mortgage bond had been passed over the property in 2010 securing a debt incurred by

the judgment debtor in the course of their dealings with the judgment creditor. This was prior to the claimant's cause of action as claimant purports to have bought the property in 2011. In essence and fact the claimant holds no title to the property.

That the property is registered in the judgment debtor's name has a legal significance, it means he is the owner. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) it was held that:

“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 the 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 right” in s 20 of the Act. The real right of ownership or *ius in re propria*, is the sum total of all possible rights in a thing – See *Willies Principles of South African Law* 8 Ed p 255.” See also *Chapeyama v Chapeyama* 2000 (2) ZLR 103 (S).

Thus the claimant not being a registered owner has no real rights over the property, nor has he received the total of all possible rights in the property. If anything he has no rights that he can exercise against the whole world, his rights are limited as he can only exercise same against the seller. Such rights are personal with nothing to do with the world at large. Herbstein and Van Winsen in the *Civil Practice of the Superior Courts in South African 3rd Edition* at p 597 state 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 before 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 or *pignus judiciale*.”

Apart from the fact that an attachment creates a judicial mortgage the property in issue had a mortgage bond over it; the judgment creditor had a secured interest above the property. Thus, despite payment of the purported purchase price, the claimant only has personal rights claimable against the registered owner. That in itself does not prevent the judgment creditor from having the property sold.

Equally, Silberberg and Schoeman in the *Law of Property*, 5th Edition at p 47 state *viz* a mortgage that it

“provides the creditor with real security for payment of his or her claim for if the debtor is unable to raise the necessary funds to pay the debt which is thus 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 the proceeds of such a sale are used for the satisfaction of his claim”

The claimant was not diligent as the fact that the property is mortgaged should have alerted claimant to the judgment creditor's secured interest. He should have demanded that the property be released by way of the seller paying off the debt. The claimant took a risk. As the law stands,

the claimant's personal rights cannot affect the judgment creditor's preferential and secured rights over the property. It is surprising why the claimant's legal representative did not impress it upon his client that the case had no merit whatsoever given that the law is clear on what ownership entails. There was absolutely no legal basis upon which the claimant could have claimed ownership rights over the attached immovable property in light of the facts characterizing this case. In future this court shall not hesitate to order costs *de bonis propriis* where a legal practitioner presents a hopeless case devoid of merit where the law is settled. The claim having no merit, it is hereby dismissed.

Accordingly the following order is made;

1. The Claimant's claim of immovable property namely a piece of land in the district of Goromonzi called stand number 6279 Ruwa Township of Dispute Estate, measuring 992 square metres which was placed under attachment in execution of judgment in HC 213/13 is hereby dismissed.
2. The immovable property attached, described as a piece of land in the district of Goromonzi called stand number 6279 Ruwa Township, of Dispute Estate, measuring 992 square metres issued by applicant is hereby declared executable.
3. The Claimant is to pay the judgment Creditor and Applicant's costs on an attorney-client scale.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Dzoro & Partners, claimant's legal practitioners
Wintertons, judgment creditor's legal practitioners