

ANGELINA SIMANGELE ZACHARIAH
versus
SHUPIKAI VITO
and
TINASHE CHAVI
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 23 October 2018

Urgent Chamber Application

G.R.J Sithole, with him *T.S.T Dzvettero*, for applicants
B Deza, for 1st respondent

ZHOU J: This is an urgent chamber application for an order staying the processing or finalization or confirmation of the sale of an immovable property known as Stand No. 567 Eagles Place, Borrowdale Broke, Harare. The property was sold to the second respondent by the Sheriff, the third respondent herein, on 12 October 2018 pursuant to a divorce order granted by this court in case No. HC 4713/05. The application is opposed by the first respondent. The first respondent has raised objections *in limine* to the determination of the matter on the merits. The objection that the matter is not urgent was abandoned at the hearing. The second objection is the alleged non-disclosure of material facts by the applicant. The first respondent submitted that the applicant failed to disclose fully the extent of the communication between the parties in an attempt to comply with the order in HC 4713/05 regarding the appointment of a valuer. While the applicant did not attach all the correspondence exchanged by the parties on the question of appointment of a person to value the property it cannot be said that the failure to attach some letters relevant to the discussion amounts to a non-disclosure. What is clear from those letters produced and the averments in the affidavit is that there was discussion on the subject. There is therefore no material non-disclosure of facts established. For that reason the objection *in limine* is dismissed.

The second ground of objection is that the interim relief sought is final in its effect and is similar to the final relief sought. While it is undesirable to have interim relief which is similar to the final relief sought that on its own does not invalidate the application. Each case must be looked at on its own facts and circumstances regard being had always to the fact that at this stage only *prima facie* proof is required and also that if a party obtains interim relief which is final in effect then they would have no motivation to seek confirmation of the provisional order. In the present case even the final order sought is also temporary in the sense that it is sought pending the determination of another matter filed under case number HC 9531/18. For that reason, the effect of the relief being sought in the interim would strictly speaking never be final even if the provisional order was not to be confirmed prior to the hearing of HC 9531/18. The objection is therefore not one that goes to the validity of the present application. It is not the kind of objection which should dispose of the matter. After all the court is always at large to amend the draft order as it sees it fit as it is not bound by the proposed terms thereof.

On the merits, the facts which are common cause are as follows. The applicant is the first respondent's former wife. The parties' marriage was terminated by divorce on first August 2008. The divorce order which was granted in HC 4713/05 provided that the applicant was entitled to remain in occupation of the parties' immovable property referred to earlier on until the youngest of their then minor children attained the age of 18 years. Thereafter the parties were entitled to appoint an evaluator to value the property within 14 days of that youngest child becoming 18 years old. If the parties failed to reach agreement on the appointment of the evaluator within the 14 days the sheriff was ordered to appoint an evaluator from his own list of evaluators within a period of 7 days of the failure to comply with paragraph 6.2 of the order. The order provided, *inter alia*, that after the valuation the applicant would be required to make payments to the first respondent of his 50% share of the net value of the property within 90 days of the valuation. In the event that the applicant failed to effect such payment within the prescribed period the property was to be sold to the best advantage of the parties and the net proceeds thereof shared equally between them.

It is common cause that the parties failed to agree on an evaluator within the period prescribed in the order of court. There were attempts to engage each other for that purpose outside the period. The parties never held a proposed meeting to try to agree on the appointment

of an evaluator. They blame each other for the failure of that meeting. But nothing turns on that because the order itself is clear as to when such agreement ought to have been reached as well as the consequences of failure to reach agreement, it being common cause that the youngest child reached the age of 18 years in March 2017.

The sheriff, as he was obliged to do, proceeded to appoint an evaluator. The valuation report was furnished to the applicant by delivery of a copy thereof to her erstwhile legal practitioners on 18 May 2018. The valuation report is dated 23 April 2018. It is common cause that the applicant did not pay to the first respondent his share based on the valuation report within the period of 90 days from the date of the valuation. Even, if one was to count the period of 90 days from the date that the applicants received the valuation report the fact remains the same. Consequently, the Sheriff proceeded to sell the property to the second respondent.

An earlier application instituted by the applicant in terms of s 348 was struck off the roll on 12 October 2018. Thereafter the applicant instituted a court application under case No. HC 9531/18 on 16 October 2018. Although the application proclaims itself as one for declaratory relief the draft order therein shows that essentially consequential relief is being sought. That however is not for consideration in this matter. For the purposes of this matter I need only to be satisfied that real and substantial justice demands that the enforcement of the order granted in case No. HC 4713/05 be stayed pending the determination firstly of this matter and in the case of the final order sought, pending determination of case No. HC 9531/18. The basis of the complaint is the alleged failure to comply with the requirements of the order granted in case No. HC 4713/05. As outlined above, there was no such non-compliance. The instant application if granted would only unnecessarily delay the already delayed enforcement of that order. The matter raised by the applicant about the first respondent's alleged failure to contribute to the children's fees is not an excuse for stopping the sale of the property by the Sheriff. Those are matters that should be enforced through the relevant procedures provided by the law. There is therefore no valid case for this court to stop the Sheriff from proceeding with the sale of the property.

The first respondent has asked for costs to be awarded against the applicant on the attorney-client scale. Such an award of costs is reserved for special cases. While the application is clearly misconceived, it is not vexatious to warrant awarding of the special order of costs.

In the result, the application is dismissed with costs.

Antonio & Dzvetero, applicant's legal practitioners

Mhishi Nkomo Legal Practitioners, respondent's legal practitioners