

BARIADIE INVESTMENTS (PVT) LTD
versus
PUWAYI CHIUTSI
and
TENDAI MASHAMHANDA
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O
and
ELLIOT ROGERS

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 7 August and 9 October 2019 and 24 December 2019

Opposed Application

T. Mpofo, for the applicant
1st respondent in person
T.W Nyamakura, for the 2nd respondent
T. Biti, for the 5th respondent

CHITAPI J: The applicant prays for an order that Deed of Transfer No. 708/19 made in favour of the second respondent should be cancelled and that the prior deed of transfer no. 8421/2000 in the name of the first respondent and from which transfer in favour of second respondent was made should be revived. Upon revival of the prior deed, the applicant prays for an order that the property conveyanced therein called Remainder of Subdivision C of Lot 6 of Lot 1890 to 195 (inclusive) measuring 4 377 square metres be transferred by the third respondent into the applicant's name. I must note that the part of the order sought directing transfer by the third respondent is incompetent. The third respondent is the Registrar of Deeds. The Registrar of Deeds does not transfer properties but registers them. A conveyancer acting under a power of attorney

given by the owner of the property or transferor is the one who transfers the property to the transferee. The Registrar of Deeds as the name clearly denotes, registers the transfer documents subject to all requirements imposed by applicable law being met. For the benefit of the applicant, the duties of a Registrar are set out in Section 5 of the Deeds Registries Act, [Chapter 20:05] as read with the Deeds Registries Regulations S.I 236/18. The court does not create a duty outside what the law permits for the Registrar to perform. The relief sought for the court to order the third respondent to transfer the property, assuming that the current holding Deed is cancelled as prayed for is therefore a *non sequitur* and cannot be granted.

The applicant also prays for costs against the first respondent and any other respondent who opposes the application on the scale of legal practitioner and client.

The basis of the application is succinctly set out in paragraph 8 of the founding affidavit deposed to by the applicant company's Managing Director, Kingstone Hamutendi Munyawarara who stated that he is aware of the facts of the matter. He states as follows in paragraph 8 of the said affidavit:-

“8. The application is premised on the fact that the said property was sold to the applicant by the fourth respondent in execution proceedings against the first respondent in HC 3331/14. First respondent, whilst aware that the property had already been sold to the applicant by the Sheriff, fourth respondent hereto purported to sell and transfer the property to the second respondent.”

The hearing of the application was punctuated by sustained attacks on the alleged unprofessional and unethical conduct of the first respondent given his background of being a registered and practising legal practitioner in this jurisdiction. A number of judgments were cited in which adverse comments were made in relation to the first respondent's conduct concerning his abuse of trust funds which led to judgment in HC 3331/14 being granted against him to repay the fifth respondent his money paid into the first respondents trust account and which money was converted by the first respondent to his own use. Further, adverse comments were also made in regard to the first respondent's alleged abuse of court process to frustrate execution of the property the subject matter of this application. In arguments before me, the applicant and fifth respondent's counsel mounted a sustained attack on what they alleged to be fraudulent conduct by the first respondent in selling the property in issue herein to the second respondent when the first

respondent was aware that the property was under attachment by the fourth respondent. The attacks on the first respondent's character and alleged unprofessional and unethical conduct is an issue that I cautioned myself to exercise restraint on because the conduct would need to be investigated and first respondent disciplined in terms of the Law Society Act and Regulations governing the conduct of legal practitioners. Fraud and forgery allegations made against the first respondent being criminal offences would have to be determined in the fullness of time. I warned myself against making determinative findings on the allegations made mainly because to do so would preempt whatever findings may be made against the first respondent in terms of the disciplinary and criminal laws of the country. I therefore decided to apply my mind to the pertinent facts of the case without being influenced by the scathing attacks made on the first respondent as aforesaid.

The applicant's case as set out in the founding affidavit was to the following effect. It averred that it was declared the highest bidder at a judicial auction held on 18 September, 2017 wherein the first respondent's property which had been judicially attached was up for sale to satisfy the judgment in case no. HC 3331/14 made in favour of the fifth respondent against the first respondent. The applicant was declared the highest bidder having offered US\$270 000.00 for the property. Following the dismissal of an objection to the confirmation of the sale filed by the first respondent, the applicant avers that it paid the purchase price of \$270 000.00 to the fourth respondent as confirmed by the letter from the fourth respondent dated 6 November, 2018 addressed to the fifth respondent's legal practitioners as execution creditor. The applicant paid transfer fees to the fifth respondent's legal practitioners in the sum of US\$23 100.00 on 9 November, 2018 as per proforma invoice of the same date prepared by the fifth respondent's legal practitioners. The applicant attached a copy of judgment no. HH 604/18 by MATHONSI J (as he then was) wherein the first respondent had in case no. HC 11349/17 challenged the fourth respondent's decision to confirm the sale of the property to the applicant. Judgment HH 604/18 was delivered on 3 October, 2018 and the first respondent's challenge to confirmation was dismissed. Judgment no. HH 604/18 also disposed of case no. HC 2650/18 brought by the fifth respondent herein as applicant therein. Case no's HC 11349/17 and HC 2650/18 were consolidated for purposes of hearing.

In case no. HC 2650/18, the fifth respondent prayed for a *declaratur* to be made by the court to the effect that once the Sheriff had confirmed a sale after dismissal of any objection(s) made in terms of Rule 359 (7), then the Sheriff was obliged to pass transfer to the purchaser as provided for in rule 361 of the High Court Rules (1971). The court dismissed the application for the *declaratur*. In dismissing the application for the *declaratur*, the learned judge albeit agreeing that rule 361 in its wording appeared to support, the fifth applicant's interpretation that following confirmation of the sale and compliance with sale conditions the Sheriff was required to transfer the property to the purchaser against payment of the purchase price, it made sense for the Sheriff to await giving transfer to the purchaser until all objection procedures had been exhausted. The learned judge also held that the court had the discretion to regulate its processes. In commenting on the provisions of section 14 of the High Court Act, [*Chapter 7:06*] which gives this court jurisdiction to determine existing, future and contingent rights, the learned judge after referring to several decided cases correctly held that the grant of a declaratory order was a discretionary matter for the court.

In my view there is a further consideration which attaches to the interpretation of rule 361. The consideration has to do with rules of statutory interpretation. Rules of court as with other legislative statutes are read as a whole and not as a collection of isolated phrases. Rule 361 should be read together with the rest of the rules regarding execution on immovable property. Rule 359 (8) and (9) provide that the sheriff's decision to confirm a sale is open to challenge by "any person" who is aggrieved by the sheriff's decision made in terms of rule 359 (7), that is, to confirm or cancel the sale. The person challenges the decision by way of court application made within one month of the sheriff's decision. In terms of subrule 9 of rule 359, the court may confirm, vary or set aside the sheriff's decision or "make such order as the court considers appropriate in the circumstances." It cannot have been the rule maker's intention that the sheriff should carry out a concomitant transfer of the property upon his or her confirmation of the sale without allowing for the exercise by aggrieved parties of their right to object to court. Such interpretation would render nugatory the rights of objectors aggrieved by the Sheriff's decision. Therefore rule 361 should be read as directing the sheriff to transfer the property following his or her confirmation of the sale, only after allowing for the objection period of one month to lapse and no aggrieved party has

applied to court to set aside the sheriff's decision or after all court processes have been exhausted in the event that an aggrieved party has applied to court. This includes the appeal process which would need to be exhausted where the challenge by an aggrieved person has progressed that far. It must therefore follow, that even if I was to cancel the deed of transfer in favour of second respondent, an order of the transfer of the property to the applicant by the fourth respondent can only be made if all court processes have been completed to finality.

In the judgment HH604/18, the learned judge made an order that "this order shall not be suspended by any appeal by either party but shall remain in force notwithstanding such appeal." The first respondent was dissatisfied with the judgment. He noted an appeal against that judgment. The notice of appeal was not attached to the papers but it appears common cause that such appeal was noted. The applicant in its founding affidavit did not relate to the appeal nor deny its existence save in the answering affidavit in paragraph 4 where in denying that the matter is *lis pendens*, the applicant contended that an order was made that the noting of an appeal would not suspend the operation of judgment no. HH 604/18. The first respondent on the other hand averred that his appeal was also against the order decreeing the judgment to remain operational despite the noting of the appeal. The applicant also averred that the "purported" appeal did not affect this application. I cannot agree in view of my interpretation that transfer in terms of rule 361 cannot be proceeded with until the court challenge processes given in rules 359 (8) and (9) have been finalized.

The applicant also attached the judgment of the Honourable BERE JA delivered under case no. SC 843/18 and bearing case citation SC 2/19. In that application, the first respondent filed an urgent application seeking interim relief that transfer of the property be stayed pending the determination of his appeal against the judgment HH 604/18. The learned judge dismissed the application for want of form and for the first respondent's failure to apply for condonation or to give an explanation for not using form 29 or 29B of the rules of court. The learned judge expressed his displeasure at what he described as "errant conduct" by the first respondent in engaging in endless and hopeless litigation to frustrate full execution on the judgment. The learned judge's remarks were expressed *obiter* because the first respondent's application was found lacking or wanting as to form. What however did not escape my attention was that neither MATHONSI J (as he then was) nor BERE JA made an order specific that the fourth respondent should transfer the

property to the applicant. The learned judges ruled in favour of the continuation of due process of execution.

The first respondent then purported to correct his defective application which had been dismissed by BERE JA for want of form by filing another application on 21 January, 2019 seeking the same relief as sought in the dismissed application. Under case no SC 15/19, the Honourable GWAUNZWA DCJ struck the application off the roll. I imagine that since the same application had not been struck off the roll by BERE JA but dismissed, it was incompetent for the first respondent to file the same application seeking the same relief. The earlier dismissal had the effect of res judicata on the issue. The first respondent however indicated that his appeal was still pending, a fact which was not disputed by the applicant.

The applicant referred to the judgment of this court in HH 209/19 in case no HC 1444/2019 delivered by MANZUNZU J on 14 March, 2019. In that case the applicant filed an urgent application in which he cited all the other parties in the application before me as respondents. Significantly the applicant herein was the fifth respondent therein. The first respondent herein was first respondent therein, the second respondent herein was also second respondent therein and the third and fourth respondents herein were therein third and fourth respondents. There was a fifth respondent, namely the Law Society of Zimbabwe which is not cited in the current application. In the interim relief and in particular in paragraph (i) of that application, the fifth respondent as applicant therein sought the following relief;

“That Deed of Transfer NO. 708/19, issued in the name of Tendai Mashayamunda in respect of a piece of land in the district of Salisbury called the remainder of Subdivision C of Lot 6 of Lot 190, 191, 192, 193, 194 and 195 Highlands Estate of Welmold measuring 4,377 square metres be and is hereby cancelled.”

The rest of the relief sought in both the interim relief and final relief concerned prayers for orders of the de-registration of the first respondent herein as a legal practitioner, the placement of his legal firm under curatorship and incidental relief including costs.

It is common cause that application HC 1444/19 was dismissed with costs by MANZUNZU J. The case was determined on the merits and the decision by MANZUNZU J was therefore final. In his judgment, MANZUNZU J made certain observations which I find apposite in so far as the present

application is concerned. The learned judge stated as follows on page 3 of the cyclostyled judgment;

“Despite the judicial attachment of Chiutsi’s immovable property and in fact with a sale having been confirmed by the Sheriff, against all odds, Chiutsi sold the property and transferred ownership to the second respondent/

The applicant’s interest in this application is for him to get his money from Chiutsi. The sale of Chiutsi’s immovable property to the fifth respondent by the Sheriff had at least guaranteed him of his money. He fears the second respondent may pass title to a third party complicating his chances of recovering his money.

Chiutsi said he has now paid \$115 000.00 to the applicant through his lawyers’ trust account. The payment has been acknowledged though there is a dispute as to whether or not such payment is considered as payment towards the judgment debt because, as Mr *Biti* argued, it goes towards costs. As I have already pointed out, the applicant’s interest is to get his money, otherwise he cannot be seen fighting a case for the fifth respondent as to whether the sale between fifth respondent and sheriff should proceed. He has no mandate to do so.“

The above pronouncements hold true in the application before me in so far as the interests of the fifth respondent is concerned. His interest as the judgment creditor in case no. HC 3331/14 is to have the judgment order satisfied and must remain so. What however happened is that in the case before MANZUNZU J, the fifth respondent prayed for cancellation of the deed of transfer no. 708/19 in favour of the second respondent and left it at that. He did not ask for any other relief as would have ensured that he gets payment in terms of the judgment granted in his favour. The fifth respondent noted an appeal to the Supreme Court against the judgment of MANZUNZU J. The appeal was noted on 15 March, 2019. It is pending before the Supreme Court under case no. SC 140/19.

The first respondent in the application before me also raised the defence of *lis pendens*. He averred in his opposing affidavit that there was a pending case HC 649/17 in which he challenged the attachment of the property in question and that the matter was still to be resolved. He also averred that there was further pending litigation in case no. HC 8122/17 and that the fourth respondent should not have proceeded with the sale in execution. He lastly averred that he had a pending appeal before the Supreme Court and that in any event the Judicial Services Commission had directed the fourth respondent to stay execution until the Supreme Court had determined the first respondent’s appeal made against the judgment of MATHONSI J (as he then was). The applicant attached copy of a letter from the Secretary of the Judicial Service Commission dated 12 November, 2018 directing the fourth respondent to stay execution pending appeal.

In response to the defence of *lis pendens*, the applicant in its answering affidavit did not deny the existence of the alleged pending litigations nor the appeal. It took the position that the gist of its application was that the first respondent had sold to the second respondent the property in question in the full knowledge that the property had been attached by the fourth respondent. The applicant further averred that the matter was not *lis pendens* by virtue of the first respondent's pending appeal because the appeal was also against the order that the judgment would remain operational despite the noting of any appeal. The applicant also averred that Bere JA had dismissed the first respondent's attempt to interdict the transfer of the property to the applicant on the basis of a pending appeal. The applicant stated in the final sentence in paragraph 4 of the answering affidavit, thus –

“Therefore, the fact that first respondent has noted a purported appeal against Justice MATHONSI'S judgment does not affect this application.”

In regard to *res judicata*, the first respondent averred that the applicant filed an affidavit in case no. HC 1444/19 specifically requesting the court to cancel the title deed in favour of the second respondent. The applicant further averred that the dismissal of case no. HC 1444/19 by MANZUNZU J rendered the issue of cancellation of the deed of transfer to second respondent *res judicata* and that this court was *functus officio* on the issue. In response to the defence of *res judicata*, the applicant averred that the judgment of MANZUNZU J did not deal with the merits of application. The applicant averred that whilst application HC 1444/19 was concerned with the protection of the fifth respondent's rights, the applicant in *casu* was seeking to enforce its rights to transfer to itself the property in question as purchaser.

In regard to the preliminary defences raised, it is trite that the court has an unfettered right to refer to its records see *Mhungu v Mtindi* 1986 (2) ZLR 171 in which MCNALLY JA at p 173A – B stated –

“It seems clear from the judgment in which the learned judge a quo granted summary judgment that he made reference to the papers in case no. HC 3406/84. In so doing he was undoubtedly right. In general the court is always entitled to make reference to its own records and proceedings and to take note of their contents...”

Guided by the above *dicta*, I perused the records referred to by the second respondent. Significantly and in relation to case no. HC 1449/19 decided by MANZUNZU J, the applicant herein did not oppose the application. The applicant in fact supported in the application as shown in the affidavit which was filed of record on 28 February, 2019. In paragraph 2 of the applicant's affidavit thereon, it is stated;

“2. I have perused the urgent chamber application for the cancellation and setting aside of Title Deed No 708/2019, together with the certificate of urgency and the founding affidavit of the applicant in support of the application. I confirm that fifth respondent is in support of the application and the relief sought as fifth respondent has an inherent interest in this matter as is apparent from applicant's affidavit itself.”

The applicant then chronicled the history of how it bought the property on the sheriff's auction, the declaration made by the Sheriff that the applicant was the highest bidder and purchaser, the challenges mounted by the first respondent including attacking the court judgment by MATHONSI J (as then he was); that applicant paid the purchase price and transfer fees, the failed interdict applications made by the first respondent in the Supreme Court and determined by BERE JA and GWAUNZA DCJ, the allegation that first respondent's appeal no. SC 734/18 was dismissed for non-compliance with the rules and that the sale of the property by the first respondent was fraudulent as the first respondent was aware of the prior sale to the applicant made on 18 September, 2017. The applicant in paragraph 13 of the affidavit accused the first respondent herein of having connived with officials of the third respondent herein to perpetrate a fraud by registering the transfer to the second respondent herein. The applicant states as follows in paragraphs 13 – 16 of its affidavit.

“13.... The sale and transfer of the property to the second respondent is void and that void transaction must be quashed.

14. The fact is the title deed in favour of the second respondent is a fraud and it must be cancelled. The actions of the first respondent are criminal in nature and should not be condoned.

15. Fifth respondent has and continues to suffer prejudice at the actions of the first respondent which if allowed to stand, will greatly prejudice the applicant, fifth respondent and our justice system.

16. It is therefore fifth respondent's position that there is sufficient basis for this Honourable Court to grant the relief sought for by the applicant. First respondent also ought to be ordered to pay the costs on a punitive scale.”

It is therefore clear that in case no HC 1449/19 the applicant took advantage of the application filed by the fifth respondent to present its own case to the court. The relief sought by the fifth respondent was in effect for the benefit of the applicant as well. In a manner of speaking, the applicant took the position of a co-applicant and prayed to the court that the relief sought by the fifth respondent herein should be granted. The applicant argued before MANZUNZU J for the relief of cancellation of the Deed of Transfer made in favour of the second respondent to be cancelled. In paragraph 15 of its affidavit, the applicant averred that it continued to suffer prejudice as did the fifth respondent. The applicant adopted the applicant's cause as its own. The cancellation of the deed of transfer had such relief sought been granted would have benefitted the applicant. The present application would not have been made. The applicant has by this application sought the same relief which it looked forward to getting in case no. HC 1449/19 before MANZUNZU J. The extension to the same order then and now sought that the prior deed be revived would simply have followed as a *causa causans* of the cancellation of the now holding deed which was *the causa sine qua non* of the revival of the prior deed. The same reasoning would apply to the faulty relief sought that the third respondent transfers the property to the applicant. I have already pointed out that the third respondent does not transfer property but registers transfers. Transfers are done by the seller to the purchaser.

There can be no doubt the dismissal of the application by MANZUNZU J resulted in the fifth respondent and the applicant being denied the common relief which they sought. In deciding whether the plea of *res judicata* applies against the applicant in this case and similarly against the fifth respondent, I need to restate the requirements for a successful plea of *res judicata*. In the case of *Wilson Nakunyunda Banda and 45 others v Zimbabwe Iron and Steel Corporation* SC 54/99, SANDURA JA stated on p 3 of the cyclostyled judgment –

“The requisites of the plea of *res judicata* have been set out in a number of previous cases. In *Pretorius v Barkly East Divisional Council* 1914 AD 407. SEARLE J set them out as follows at p 409:-

:As to the first point the requisites for a plea of *res judicata* have several times been laid down in this court.

The three requisites of a plea of *res judicata*, said the Chief Justice in *Hiddingh v Denysson* L (3 Juta p 424) quoting Voet (44.2.3) are that the action in respect of which judgment has been given must have been between the same parties or their privies, concerning the same subject matter and

founded upon the same cause of complaint as the action in which the defence is raised. In order to determine the cause of complaint, the pleadings and not the evidence in the case must be looked at.”

The pleadings in case no. 1449/19 and in *casu* are similar. What has simply happened is that the applicant herein having made cause with the fifth respondent as applicant in HC 1449/19 and lost the case has decided out of misplaced ingenuity to file this application which otherwise involves the same parties, the same subject matter and founded on the same cause of complaint as was before the court in case no. HC 1449/19 which MANZUNZU J dismissed. The fact that the applicant was a respondent does not alter the position. A respondent who participates in an application is as much a party to the case as the applicant. Such respondent becomes an interested party who will be affected and bound by the order which the court may grant. The respondent as much as the applicant has a right of appeal against the judgment in which such respondent is a party. In *casu*, the applicant herein did not appeal against the judgment of MANZUNZU J which means that it did not take issue with the dismissal of the application. The dismissal of the application meant that the current deed in the name of the second respondent remained extant yet in the application case no HC 1449/19 the applicant had prayed for the order of cancellation of the deed as sought by the fifth respondent to be granted.

In the current application, the applicant now took the leading role and petitioned the court for the same relief as previously sought in case no. HC 1449/19 with the fifth respondent who was applicant in case no. HC 1449/19 being now cited again as fifth respondent. The fifth respondent for its part filed what it terms a supporting affidavit on 12 April, 2019. It is a curious supporting affidavit in that it comprises 33 pages compared to only 7 pages which make up the founding affidavit of the applicant. The affidavit has 169 individualized paragraphs containing separate allegations in line with rule 227 (1) (b). The annexures to the supporting affidavit comprise 24 pages. In totality therefore the fifth respondent’s so called supporting affidavit with annexures comprises 57 pages. The fifth respondent’s affidavit goes further than the applicant’s affidavit in expanding on the grounds on which the relief sought by the applicant should be granted. Significantly, the fifth respondent in the penultimate paragraph of the supporting affidavit in paragraph 168 stated:

“Ad paragraphs 1 to 28 of the applicant’s founding affidavit

168. I have read the founding affidavit of Mr Kingstone Hamutendi Munyawarara. I associate myself with the same. I agree with every contention made therein and I seek that an order be granted in terms of the draft.”

Other than paragraph 168, the fifth respondent in the bulk of his affidavit was setting out facts which found the application more comprehensively in content and detail than the applicant had done in the founding affidavit.

In my view the procedures which was adopted by the fifth respondent is wrong. Form 29 referred to in rule 230 on application procedure calls upon the respondents to oppose the relief sought by the applicant if they wish to do so. This implies that the respondent can also consent to the application expressly by stating so or not file any papers in which case the respondent who does not file any opposing papers is deemed not to be opposed to the order sought. Where the respondent seeks to bring its own application and the cause of action, subject matter and the parties are the same, he or she can file his or her own application separately and apply for consolidation of the applications for purposes of hearing. The fifth respondent did not do this and instead sought to sneak in its own dispute for resolution by the court through the back door in an application brought by another party. To compound matters, the fifth respondent could not competently seek the court’s determination on issue which it brought before the court and judgment which he has appealed against was given by the same court. The matter is therefore *res judicata* as far as this court is concerned and *lis pendens* as far as the Supreme Court appeal is concerned. This court has inherent power in terms of section 176 of the Constitution to regulate its processes and in the process of doing so to guard against abuse of court process by litigants. The fifth respondent seeks to abuse the court process by asking the court to determine and grant an order which he failed to obtain in case no. HC 1449/19 and appealed against that decision. Obviously if the order is granted, the appeal becomes academic and may not be pursued leaving this court with two conflicting judgments.

In my view, what was before MANZUNZU J was a dispute which involved all the parties herein. A decision thereon was granted. One of the parties namely the fifth respondent herein appealed against the judgment. The others including the applicant did not do so. The court is not a

gambling place where parties take chances to try their luck where one who led the group failed to get relief which each member of the group was seeking in the prior or failed application. I therefore found merit in the first respondent's plea of *res judicata* for the reasons I have outlined. The dispute before me was determined in case no. HC 1449/19 and save for the fifth respondent herein who was applicant, parties who did not appeal against the judgment when in fact they were dissatisfied with it must live with the judgment. For the fifth respondent, the matter is not only *res judicata* in this court but is *lis pendens* in the Supreme Court.

Assuming that my findings upholding the plea of *res judicata* are not properly made, I would still determine the matter against the applicant on the basis that it would be inequitable in the circumstances of this case to cancel the deed of transfer in favour of the second respondent. The second respondent in a lengthy opposing affidavit chronicled how he came to buy the property in question. The second respondent did not connive with the first respondent when he purchased the property. The property was purchased through an estate agent company and the estate agent levied and was paid its commission. The second respondent paid transfer fees and registration cost and all taxes like capital gains tax. The second respondent before purchasing the property and taking transfer investigated whether there were any encumbrances and found none. Indeed, the legal practitioner who conveyanced the property did not find any caveats or other encumbrances noted against first respondent's title deed to the property. The property was to all intents and purposes and to an outsider free for sale, conveyance and transfer. The second respondent averred that he was an innocent purchaser who took all reasonable steps as could be expected of any astute and reasonable would be purchaser to investigate that the property was free of impediments to purchase and transfer.

In response to the averment by the second respondent that he was an innocent purchaser the applicant did not specifically deny the second respondent's assertion nor allege any facts tending to show otherwise. It stated in paragraph 18 of the answering affidavit:-

“18. I am also unable to comment on whether the second respondent was an innocent purchaser or not as I am not privy to the sale. Second applicant (sic) it to purchase the property from first respondent. However, my point still remains that first respondent had not right to dispose a property which was under judicial attachment and which he knew had already been sold to the applicant.”

In relation to the existence of a caveat on the property and the second respondent's assertions that there was no caveat noted on the property when he investigated whether or not the property was free for conveyance, the applicant stated in paragraph 22 of the answering affidavit as follows:-

"22. I should hasten to repeat that fourth respondent has already confirmed that a caveat had been attached to the property. This has been confirmed by the fifth respondent. I have no reason to believe that fourth respondent and the lawyers for fifth respondent, being officers of this Honourable Court, would have reason to mislead this Honourable Court that a caveat had been registered against the property."

The issue about the caveat being registered against the property is not about whether or not to believe the fourth respondent's or fifth respondent's lawyers on their say so that a caveat was registered against the property. The registration of a caveat against a registered title deed is a quasi-judicial act which is performed by the third respondent. The procedure for attachment of immovable property is set out in Rule 347 of the High Court Rules (1971). In terms thereof, the fourth respondent or his deputy should serve a notice in form no. 43 or 44 as applicable upon the property owner and the Registrar of the property. The notice to the owner of the property is in form 43 whilst the notice to the Registrar of Deeds is in form 44. The notice to the Registrar reads as follows in material particulars after listing of the parties and the case number:-

"Take notice that in pursuance of the writ of execution issued on the ...day of ... at, a copy of which is annexed hereto, I hereby lay under judicial attachment the undermentioned immovable property namely (*describe in full the immovable property attached*) in order to satisfy the exigency of the said writ of execution and the costs and charges thereof.

You are hereby requested to note against the said property in your books of registration that this judicial attachment has been made, and advise me that you have done so."

The noting of caveat is meant to alert the world at large that the property against which the caveat has been noted is under an encumbrance the details of which can be checked by reference to the caveat. The second respondent referred to the affidavit of the conveyancing legal practitioner Jacqueline Sande who stated that she took diligent steps to verify with the third respondent's offices that the property was not encumbered and thus she proceeded to transfer the property.

The fourth respondent did not oppose the application nor did the third respondent. It is customary for them not to participate and abide the court's determination instead. I however noted

that fourth respondent did not prepare and file his report as he did in case no. HC 1449/19. The court cannot therefore ascertain whether the fourth respondent complied with rule 347 (4) and served a form 44 notice. The respondent in his report in case no. HC 1449/19 indicated that he placed a caveat no. 364/16 on the property on 18 July, 2016. There was nothing placed before the court to indicate that caveat no. 364/16 if it existed related to the property in dispute. Mr *Mpofu* for the applicant faced with the naked reality that there was no proof of the caveat submitted without proof to that effect that the caveat must have been removed from the third respondent's records by the first respondent. I do not have proof of first respondent's shenanigans as alleged. The first respondent would have connived with the third respondent's and / or his or her officers. Again this would amount to speculation.

The applicant did however base its argument for relief on the fact that the property was under judicial attachment and that its sale by the first respondent was invalid. It was argued that the first respondent's conduct in selling the attached property violated section 22 of the High Court Act in that the first respondent acted fraudulently. In consequence thereof it was argued that since the sale of the property to the second respondent resulted from a fraud, it should be set aside and the deed of transfer cancelled since the sale was a nullity and nothing stands on a nullity. Section 22 (1) (2) (b) of the High Court Act, provides as follows:-

“Any person who –

(a).....

(b) being aware that goods are under arrest, interdict or attachment by the High Court, makes away with or deposes of those goods in a manner not authorized by law or knowingly permits those goods, if in his possession or under his control, to be made away with or disposed of in such a manner;

Shall be guilty of an offence and liable to a fine not exceeding six months or to both such fine and such imprisonment.”

The quoted legislation does not provide that an innocent third purchaser of attached goods will be deprived of the goods. Consideration must in any event be given to the fact that there is no proof which was placed before me to establish that the attachment itself was procedurally processed in terms of the rules. If nothing sits on a nullity then nothing would sit on an invalid attachment.

The applicant relying on the judgment of PATEL J (as he then was) in *Pambona Kudakwashe v Muzira Mathias and others* HH 52/2006 submitted that the transfer to the second respondent was not valid because the first respondent lost title to the property upon confirmation of the sale in execution. I disagree. Title in the property remained in the first respondent but would be encumbered by the attachment if such attachment was proven. Title would only be divested from the first respondent upon transfer to the applicant or any other party whereupon the transferee would acquire real rights to the property. The rule that no one can give what he does not have and no one can transfer any right greater than he himself possesses is correct provided that it proven that as in this case that the property had a caveat registered against it such registration being shown to have been procedurally done.

The applicant further relied on the judgments of this court in *Katsande v Katsande* 2010 (2) ZLR 82 and *Katirawu v Katirawu & Others* 2007 (2) ZLR 64 to content that nothing attaches on a nullity. I do accept the general rule and the general approach of the court but would caution that a case authority is only binding or persuasive if the *ratio decidendi* sought to be invoked pertains to a factual scenario which is similar to the case under determination because every case is determined on its own peculiar facts and circumstances. The facts in the judgments above were different from the facts of this application.

The applicant in its argument submitted as in paragraph 16 of the heads of argument that a caveat had been registered against the title deed and that consequently it was a wonder how transfer had been registered into the name of the second respondent. He who avers must of course prove. I have already noted that the so called caveat existed in name only and in the words of the applicant and counsel. It was just not proved to have been noted as I have already observed. It therefore appears to me that in considering the authorities cited herein, sight must not be lost that the attachment itself was not shown to have been done in terms of sale 347 (4). The case of *Maphosa & Another v Cook & Others* 1997 (2) ZLR 314 again cited by the applicant would be more persuasive. The distinction sought to be drawn by the applicant that in *casu*, the sale had been confirmed and the purchase price paid does not persuade me otherwise because the confirmation of the sale and payment of the purchase price is not an end itself. The sale remains suspensive until the challenge procedure provided for in rule 359 (8) and appeal procedures have been exhausted.

In a manner of speaking, one can say that the purchase of an immovable property consequent upon a judicial sale in execution can turn out to be a gamble when challenges are mounted because it can take forever before transfer is given to the purchaser in the event of the challenge process being exhausted in favour of upholding the sale.

The applicant raised what it coined as the real question as “can a judgment debtor sale (sic) and transfer property to a third party after a sale has been confirmed?” In my view the question cannot be answered by a simple yes or no. The intricate circumstances of each case must be considered against the determination I made that rule 361 must be read together with other relevant rules. I postulate that the real issue is to answer the question. “When is confirmation of a sale deemed to be perfecta?” It can only be perfecta and final after the exhaustion of the challenge process where a challenge has been mounted. It was not suggested that the challenge process had been exhausted. I already dealt with this issue.

The position which I consider to be the correct one is to understand that the rules of court are made for the convenience of the court. The court is not made for the rules. The process of execution of a judgment including a sale in execution is a process of the court and the court can regulate its processes. The circumstances of this case require that the equities of the case be considered. The applicant’s purchase price is held by the fourth respondent and thus by the court. The fourth respondent can refund the purchase price paid. The applicant already failed in its challenge in case no HC 1449/19 to the sale of the property wherein it was a respondent and the fifth respondent the applicant. Having ended up on the losing side when it made cause with the fifth respondent, the applicant did not appeal but launched this application which I ruled to be *res judicata* and *lis pendens* as against fifth respondent. The fifth respondent for his part as judgment creditor accepted a payment of \$115 000.00 made by the first respondent to his legal practitioner. The first respondent has offered to pay any balance found to be due since he disputes that the money he paid did not cover the debt but costs only. Further costs have not been taxed nor agreed other than the sum of \$38 873.00. The judgment debt was for \$70 000.00. The two can resolve the disputed balance. The second respondent took transfer of the property in the absence of a caveat having been noted against the property. If such caveat had been noted the second respondent would have been alerted to its existence. In my determination, taking into account the peculiar

circumstances of this case and that the process of execution is one which the court can regulate, there is no equitable reason to cancel the deed of transfer in favour of the second respondent. If the applicant considers himself hard done by the loss of the property he has the alternative remedy of suing for damages. There is in view of the payment made by the first respondent to the judgment creditor no just cause for continued execution.

I need to lastly deal with the question of costs. Costs are in the discretion of the court with the general rule being that costs follow the event. This means that if the application should be dismissed the applicant must bear the costs of suit. The circumstances of this case are however peculiar. The applicant and fifth respondent's positions were to pray for cancellation of the deed of transfer in the name of the second respondent. They mounted a sustained challenge to have the current deed cancelled despite the fact that in the case of the fifth respondent the same matter is pending determination on appeal by the Supreme Court. The third and fourth respondents did not file any papers and did not participate in the hearing. The second respondent is entirely blameless in this whole saga. He deserves to be awarded his costs. His attitude throughout the progress of the case has been to maintain his position that he is an innocent purchaser who is being dragged into the mud despite being blameless. Indeed none of the parties laid blame on him. He must be awarded his costs. The first respondent is the author of all the disputes which have culminated in this litigation. He did not disclose to the second respondent the correct history surrounding the property including the first respondent's battles to save it from execution. I am not persuaded to grant him his costs.

I accordingly dispose the application as follows:-

- i. For the reasons that the application is *res judicata* and in any event devoid of merit on the merits, it is hereby dismissed.
- ii. The applicant shall pay the 2nd respondent's costs of suit.
- iii. In regard to 1st and 5th respondents each party shall pay its own costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Mtewa & Nyambirai, 2nd respondent's legal practitioners

Tendai Biti Law, 5th respondent's legal practitioners