

REPORTABLE (39)

Judgment No SC 46/05
Civil Appeal No 38/04

TWIN WIRE AGENCIES (PRIVATE) LIMITED vs CENTRAL
AFRICA BUILDING SOCIETY

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA
HARARE JULY 19, 2005

The appellant in person, through J.M. Mabureki

T. Biti, for the respondent

CHIDYAUSIKU CJ: At the conclusion of submissions by the parties in this matter the appeal was dismissed with costs. Reasons for judgment were to follow. The following are the reasons for judgment.

The facts of this case are common cause and are aptly summarised by the judge in the court *a quo*. The respondent is the registered owner of Stand 2796 KweKwe of Stand 2999 KweKwe Township situate in the district of KweKwe (hereinafter referred to as the property). The property is held by the respondent under Deed of Transfer Number 4525/01 dated 27 November 2001. The respondent purchased this property on

27 April 2001 following a Sheriff's sale in execution in a matter where the respondent was the plaintiff and the appellant was the defendant. The respondent had foreclosed on a mortgage bond registered by the appellant on the security of Stand 2796 for a failure by the appellant to maintain its mortgage repayment in terms of the bond.

The appellant refused to vacate the property notwithstanding its purchase and subsequent transfer to the respondent. The respondent launched a court action for the eviction of the appellant. The appellant entered an appearance to defend. The respondent applied for summary judgment. The appellant opposed the application for summary judgment for eviction on three grounds.

The first ground that the appellant gave was that the sale was not properly made and done above board. The second was that the purchase price fetched at the auction was unreasonably low. The third was that the appellant had the capacity to pay off what was due to the respondent and retain its property and, therefore, should have been given the opportunity to sell the property by way of private treaty.

The court *a quo* granted the summary judgment for the eviction of the appellant from the property. In doing so the court concluded that the appellant had raised no defence to the claim for eviction and that there were no triable issues that would necessitate the matter proceeding to trial.

The appellant was dissatisfied with this judgment and now appeals to this Court.

A perusal of the appellant's heads of argument reveals that the basis of its appeal to this Court is captured in paragraph III(b) of its heads of argument which reads:-

“The appellant submitted to the Court *a quo* that it must not grant the relief of ejection summarily because the appellant had instituted proceedings against the Sheriff challenging the sale under Case Number HC 3750/01 referred to by his hardships (sic) of the Court *a quo*'s judgment. The Court must have considered this and other defences and referred the matter to a full blown trial. Further, the Court erred in finding for the respondent that the proceedings in Case Number HC 3750/01 were withdrawn. Appellant had not withdrawn the claims and if there was any withdrawal such withdrawal was made without his consent.”

In my view the conclusion of the learned judge in the court *a quo* that case number HC3750/01 was withdrawn cannot be faulted. The record clearly shows that the case was withdrawn. No evidence was placed before the court to show that the withdrawal was not in accordance with the rules or that the matter had been reinstated.

Accordingly the court *a quo*, in my view, was correct in proceeding on the basis that the proceedings which the appellant alleged were pending, and because they were pending, afforded him a defence, were in fact not pending. But even if those proceedings were pending they would not afford the appellant any defence to a claim for eviction. In Case Number HC 3750/01 the appellant was seeking to prevent eviction on the basis that it was challenging the sale in execution. A challenge to a sale in execution

does not constitute a defence against a claim for eviction by the registered owner of the property.

In *Mapedzamombe v Commercial Bank of Zimbabwe & Anor* 1996 (1)

ZLR 257 at pp 260D-261A GUBBAY CJ had this to say:-

“Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla v Bhura, supra* at 283A-B. Once confirmed by the sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran v Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at pp 6-7. 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 conform strictly with the principles of the common law.

This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf, such as the unreasonably 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 of execution, or fraud. See *Sookdeyi & Ors v Sahadeo & Ors* 1952 (4) SA 568 (A) at 571H-572A; *Gibson NO v Iscor Housing Utility Co Ltd & Ors* 1963 (3) SA 783 (T) at 787A-B; *Maponga v Jabangwe* 1983 (2) ZLR 395 (S) at 396D-E; *van den Berg v Transkei Development Corporation* 1991 (4) SA 78 (TkG) at 80G-J; *Erasmus v Michael James (Pty) Ltd* 1994 (2) SA 528 (C) at 552F.

This principle of the common law has been codified in s 70 of the South African Magistrates Court Act of 1944, but not in the comparable Zimbabwean Act or Rules.”

It is quite clear from the remarks of the learned CHIEF JUSTICE that the remedy to set aside a sale in execution in terms of rule 359 of the High Court Rules is only open to a litigant in circumstances where transfer has not taken place. After transfer any application to set aside such transfer should conform strictly with the principles of the common law and falls outside the ambit of Rule 359 of the High Court Rules.

Thus even if the proceedings in HC 3750/01 were still pending such proceedings would not amount to an adequate challenge of the respondent's ownership of the property in question and his entitlement to possession or occupation of the property. The appellant in the above case sought to set aside the confirmation of the sale in execution by the Sheriff and was not seeking transfer of the property from the respondent to itself. The other proffered defence that the appellant can now pay the purchase price is no defence at all. The question of ability to pay is irrelevant.

I am satisfied that on the papers the appellant did not allege any facts that would constitute a defence if the matter had gone to trial.

Accordingly the court *a quo* was correct in granting the summary judgment.

It was for these reasons that the appeal was dismissed with costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Masawi Mangwana & Partners, appellant's legal practitioners

Wilmot & Bennet, respondent's legal practitioners