

DISTRIBUTABLE (41)

Judgment No. SC 47/03
Civil Appeal No. 79/02

RAYMOND DOKOTELA MOYO v
TIMOTHY GRASIANO MUWANDI

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
BULAWAYO, DECEMBER 1, 2003 & JANUARY 15, 2004

T Ndhlovu, for the appellant

G Nyoni, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which confirmed a provisional order granted on 24 May 2000, calling upon the appellant (“Moyo”) to show cause why the sale to him by public auction of house no. 11542 Thorngrove Township, Bulawayo (“the property”) should not be set aside and the respondent (“Muwandi”) declared the sole owner of the right, title or interest therein.

The factual background is as follows. The property belonged to the City of Bulawayo and Ernest Peters (“Peters”) occupied it with his family on a lease-to-buy scheme. On 17 August 1999 Peters and Muwandi concluded an agreement of sale in terms of which Peters sold his right, title or interest in the property to Muwandi for \$260 000.00.

The sale agreement provided that the full purchase price was to be paid on the date of the signing of the agreement, that the transfer of the property to Muwandi was to be effected immediately after the signing of the agreement, and that Muwandi was to be given vacant possession of the property on 30 September 1999.

On 19 August 1999 Peters and Muwandi took the written agreement of sale to the offices of the City of Bulawayo and requested the officials there to transfer Peters' right, title or interest in the property to Muwandi. However, as the officials were too busy to attend to the transfer, they advised the parties to leave the agreement of sale with them on the understanding that the transfer would be effected in due course.

Thereafter, Muwandi was granted vacant possession of the property on 30 September 1999 as agreed. However, in December 1999 Peters' right, title or interest in the property was attached by the Deputy Sheriff at the instance of Nancy Joyce Van Heerden ("the judgment creditor"), who was owed some money by Peters. It was attached because it had not been transferred to Muwandi as the Council officials had been too busy to attend to the transfer. It was, therefore, still registered in Peters' name.

Subsequently, on 16 March 2000 Peters' right, title or interest in the property was sold by public auction to Moyo for \$225 000.00. It was only after the conclusion of that sale that Moyo discovered that Peters had earlier sold the same right, title or interest to Muwandi.

Not surprisingly, when Moyo sought the transfer to him of Peters' right, title or interest in the property, Muwandi filed an urgent chamber application in the High Court seeking an order restraining the transfer of the right, title or interest to Moyo, setting aside the sale in execution, and declaring Muwandi the sole owner of the right, title or interest. As already indicated, a provisional order was granted on 24 May 2000 and was thereafter confirmed on 16 November 2001. Aggrieved by that decision, Moyo appealed to this Court.

Before dealing with the issues arising in this appeal, I wish to point out that the legal practitioners in this matter have erroneously used the word "sale" to describe what in fact is a cession of rights. That is so because the property belonged to the City of Bulawayo and not to Peters.

As McNALLY JA stated in *Gomba v Makwarimba* 1992 (2) ZLR 26 (S) at 27G-28B:

"As so often happens, the parties have used the word 'sale' to describe what is in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council. It is unfortunate that legal practitioners persist in ignoring the distinctions between sale and cession of rights in these cases, both because there are many such cases and because there are many such distinctions.

In this case the respondent was not the owner of the disputed immovable property but merely a 'lessee-to-buy'. The contract in terms of which the respondent acquired and held her rights in the property, and which defined her rights in the property, was not before the Court. Nor was the owner cited as a party."

In casu, although in the court *a quo* the owner of the property was cited, Peters, the lessee-to-buy, was not cited as one of the respondents. In addition,

the contract in terms of which Peters acquired and held his rights in the property, and which defined his rights in that property, was not placed before the court. It should have been.

Having said that, I would like to state the issues which arise in this appeal. There are two main issues. The first is whether at the time the right, title or interest in the property was attached by the Deputy Sheriff it had already been transferred to Muwandi; and the second is whether, if it had not yet been transferred, there was any basis for setting aside the sale in execution. I shall deal with the two issues in turn.

With regard to the first issue, there can be no doubt that when the right, title or interest in the property was attached and subsequently sold by public auction on 16 March 2000 it had not yet been transferred to Muwandi. That is quite clear from Muwandi's founding affidavit, the relevant part of which reads as follows:

“On the 17th of August 1999 I purchased house number 11542 Redthorn Road, Thorngrove, Bulawayo ... in terms of a written agreement of sale which was given to the Housing Officer at Mzilikazi. I was in the process of transferring the property to my name as appears from the letter from the Director of Housing and Community Services dated the 7th April 2000 and attached as ‘A’.” (emphasis added).

The relevant part of the letter referred to reads as follows:

“We write to confirm that the sale of the above house ... was communicated to my Housing Officer – Mzilikazi – on 19th August 1999, with a copy of the Memorandum of Agreement of Sale made and signed by the two parties, who were seeking transfer of the property.

Due to workload, the transfer has not yet been effected.” (emphasis added)

As already indicated, the letter was dated 7 April 2000, about three weeks after the right, title or interest in the property had been sold by public auction.

It is clear, therefore, that when the right, title or interest was sold by public auction it belonged to Peters and not to Muwandi because it had not yet been transferred to Muwandi. *Prima facie*, therefore, the judgment creditor was entitled to have it attached and sold.

That being the case, I now consider the second issue, which is whether there was any basis for setting aside the sale in execution. I think there was.

Whilst it is correct that a judgment creditor has the right to have attached and sold in execution property registered in the name of the judgment debtor, that right is merely a *prima facie* one. As KOTZÉ J said in *Van Niekerk v Fortuin* 1913 CPD 457 at 458-459:

“It seems to me that the plaintiff being a judgment creditor, and the property being still registered in the name of the defendant, *prima facie* the plaintiff has the right to ask that the property shall be seized in execution, unless the party interested can show that there are special circumstances why such an order should not be granted. Here there was an alleged donation prior to the debt, and there is nothing to lead me to consider that it was not *bona fide*; but under the circumstances of the case that does not seem sufficient to deprive the judgment creditor of his right to seize the property in execution. Had the son acted a little more promptly transfer could have passed to him.”

That was a case in which a debtor had donated but not transferred the property in question to his son, and the son had not acted promptly to secure the transfer of the property to him.

The question which now arises is whether Muwandi showed that there were special circumstances why Peters' right, title or interest in the property should not have been attached and sold. I think he did.

In my view, the facts of the present case are different from those in *Van Niekerk's* case *supra*. In the present case, after the conclusion of the written "agreement of sale" on 17 August 1999, Muwandi acted promptly. He and Peters took the document to the Council Offices on 19 August 1999 in order to have the cession of Peters' right, title or interest in the property effected. Regrettably, as the officials at the Council Offices were too busy to attend to the cession on that day they advised Muwandi and Peters to leave the document with them and indicated that the cession would be effected in due course. The cession was not attended to for at least eight months thereafter, and the only reason given for that unacceptable situation was that the officials concerned were too busy to attend to the cession.

Quite apart from the fact that Muwandi acted promptly and was not to blame, there is the additional fact that Muwandi took occupation of the property on 30 September 1999 as agreed by the parties. This was long before the attachment and sale in execution.

I am therefore satisfied that Muwandi proved that special circumstances existed which justified the setting aside of the attachment and sale in execution of Peters' right, title or interest in the property, notwithstanding the fact that it was still registered in Peters' name. On that basis alone, Muwandi was entitled to succeed.

In the circumstances, the appeal is dismissed with costs.

ZIYAMBI JA: I agree.

GWAUNZA: JA: I agree.

Cheda & Partners, appellant's legal practitioners

James, Moyo-Majwabu & Nyoni, respondent's legal practitioners