

ERNEST LEKANI
and
MERCY TENDAI MAMBURE
versus
ZB BANK LIMITED
and
SHERIFF OF THE HIGH COURT
and
BARD REAL ESTATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 2 & 22 February 2017

URGENT CHAMBER APPLICATION

I Gonese, for applicants
O Mutero with *S Muzondiwa*, for 1st respondent
No appearance, for 2nd respondent
No appearance, for 3rd respondent

TAGU J: The applicants are husband and wife. They are married in terms of the customary law of Zimbabwe and have two children. In April 2010 the couple bought a piece of property, being Stand 1933 Chikanga Township of Devonshire measuring 543 square metres held under Deed of Transfer number 7347/02 from one Godfrey Kombo through a registered firm of Estate Agents namely CK Holland t/a Hollands. They paid the full purchase price and moved into occupation sometime in 2010. They were referred to Messrs Bere Brothers by Hollands who had been appointed to do the conveyancing. Messrs Bere Brothers gave them the pro forma invoice for the conveyancing charges. They failed to immediately raise the fees since they had exhausted all their cash in purchasing the house. Not anticipating anything a notice of attachment was served at their newly acquired dwelling house on the 25th October 2016. They immediately approached Mr Kamangira of Hollands who had handled the sale and he advised them to contact Mr Godfrey Kombo. They did so and handed over to him the documents. Mr Kombo acknowledged that he owed the first respondent some money which he borrowed well after the house was sold to them. He assured them that the house had not been used as a security for any debt. Mr Kombo then asked for the agreement of sale so that he could hand them to his lawyers who would handle

the matter since the first respondent did not have any Mortgage bond over the property. They got worried when the notice of sale was served again upon them at their new house and they approached the current legal practitioners who then wrote to the first respondent's legal practitioners for an explanation. When they got the response that their claim to the house had been rejected by the first respondent they then proceeded to lodge a formal claim with the Sheriff's office so that Interpleader proceedings could be instituted. The interpleader Summons was eventually filed simultaneously with this application and is still pending.

They now approached this court on an urgent basis seeking the following relief-

“TERMS OF FINAL ORDER SOUGHT

1. That the 3rd Respondent be ordered not to sell the property, Stand No. 1933 Chikanga 2 by Public Auction until the final determination of the claim lodged by the Applicants in terms of the Interpleader Proceedings that they have initiated.
2. That the 2nd Respondent be ordered to release the property from judicial attachment pending the finalisation of the Interpleader Proceedings.
3. That the 1st respondent pays the costs of application.

INTERIM RELIEF GRANTED

1. That pending finalization of this dispute the 3rd Respondent be and is hereby ordered not to proceed with sale by Public Auction of the property in question namely Stand No. 1933 Chikanga 2 Mutare scheduled for Friday the 3rd February 2017.
2. That 2nd Respondent be and is hereby ordered to temporarily stay the execution of the Warrant of Execution Against Property issued by this Honourable Court against the Property in question, Stand No. 1933 Chikanga 2 forthwith.

SERVICE OF PROVISIONAL ORDER

3. The order may be served by the Deputy Sheriff of Applicant's Legal Practitioners.”

Only the first respondent opposed the application. At the hearing of the matter the first respondent stated that the matter was not urgent because the applicants were served three months ago but did nothing about it. Secondly the first respondent opposed the application on the basis that the property in question was registered in the name of r Mr Godfrey Kombo as per the Deed of transfer. It argued that what the applicants have are personal rights over the property as opposed to real rights possessed by Mr Godfrey Kombo.

The applicants on the other hand submitted that the matter was urgent. Several case authorities were cited. They conceded that they have a prima facie right to the house though open to doubt.

As to what constitutes urgency the position was clearly stated by CHATIKOBO J in *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H) at p193 where he said-

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead –line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”(underlining is mine)

In casu there was a delay of 3 months. However, the court noted that the applicants were not just seated within those three months. As lay persons they thought that Mr Kombo who was a party in case HC 1786/11 was better placed to deal with the notice of attachment. In my view they took immediate steps to contact Mr Kombo who assured them that his lawyers were handling the matter. They were not parties to the dispute between Mr Kombo and the first respondent. In my view they explained in their supporting affidavit the steps they took. The steps may not have been the best but they explained what transpired within the three months. On the other hand the court took the view that this matter involved a dwelling house hence treated this matter as urgent. For these reasons I found that the matter was urgent and needed to be treated as such.

Coming to the merits of the matter the applicants are simply asking the court to temporarily halt the sale of the house in question by public auction pending the finalization of the Interpleader proceedings they have instituted through this court. They are claiming that they are innocent and genuine purchasers of the property and finalization of the sale before an exhaustive and comprehensive assessment of their claim would be a traumatic and shattering experience from which there will be no suitable or appropriate remedy and in fact the property would have been alienated through the sale in execution. Put simply it would be akin to closing the stable door when the horse has already bolted.

In my view I agree that the applicants have *prima facie* rights to the house though open to doubt. I do agree that theirs are currently personal rights against the real rights of Mr Godfrey Kombo because the property has not yet been transferred into their names. Be that as it may, where an application for Interpleader Summons has been filed albeit simultaneously with this application, the balance of convenience favours that it be disposed of first before any other action is taken. What has to be considered are the purpose and effect of an Interpleader Summons. In my view an Interpleader process has the effect of staying all executions and other processes to dispose of the property in question. To allow the sale at this stage before the hearing of the Interpleader process which will determine the rights of the parties would prejudice the applicants in the event that their Interpleader summons succeeds. Whatever order they may get will be a *brutum fulman*. In the event that their application fails the respondents can still execute and they would not suffer any prejudice.

For the above reasons I am persuaded to grant the application.

In the result the application is granted in terms of the provisional order.

Gonese and Ndlovu, applicant's legal practitioners
Sawyer & Mkushi, 1st respondent's legal practitioners