

THE SHERIFF FOR ZIMBABWE  
and  
CELESTINO CHENJERAI KANYEKANYE  
versus  
PREMIER BANKING CORPORATION

HIGH COURT OF ZIMBABWE  
MWAYERA J  
HARARE, 14 March 2017

### **Interpleader**

Ms *F Chikwanha*, for the applicant  
Mrs *S Ndlovu*, for the claimant  
*C.K. Nyamundanda*, for the judgment creditor

MWAYERA J: On 14 March 2017, after reading documents filed of record and hearing counsels I ordered that:-

1. The claimant's claim to the immovable property known as a certain piece of land situate in the District of Salisbury measuring 5 121m<sup>2</sup> called stand 693 Quinington Township of Lot EA Quinington, which was placed under attachment in execution of the order HC4560/10 be and is hereby granted.
2. The above property attached by the applicant is hereby declared not executable.
3. The judgment creditors are to pay the claimant and the applicant's costs on an ordinary scale.

I gave an *ex tempore* judgment, and a request has been made for the written reasons for the disposition. The reasons are captioned herein. The brief background to the matter is as follows. The judgment creditor obtained a judgment against Blendvalue Investments (Private) Limited and Benard Mahara Mutanga. Pursuant to the judgment the judgment creditor instructed the applicant to attach and take into execution the judgment debtor's immovable property. The applicant attached property known as certain piece of land situate in the District of Salisbury measuring 5121m<sup>2</sup> called stand 693 Quinington Township of Lot 13 of Lot EA Quinington. The claimant Celestino Chenjerai Kanyekanye caused an interpleader summons to be issued by the applicant. The claimant Celestino Chenjerai Kanyekanye

claimed to be the owner of the property attached. The claimant claimed to have purchased the property in question from the second defendant one Bernard Mutangu. The claimant stated that he took possession of the property he purchased in 2007 and made improvements thereon. Further claimant stated that even though transfer had not yet been effected the process was in progress. He was in possession of the property and did not have anything to do with the debt owed to the judgment creditor by the judgment debtor.

At the time of hearing it was apparent that the applicant's heads of argument were filed on 6 December 2016 and served on 7 December 2012. The claimant's heads were filed on 13 December 2016 and the judgment creditor filed heads of argument on 7 March 2017. The judgment creditor's heads were filed out of time, about 3 months after the applicant and claimant's heads were filed. The judgment creditor, at the time of hearing was barred for late filing of heads. The judgment creditor sought unsuccessfully for upliftment of the bar.

Central to the application for upliftment of bar is the explanation for the delay or non-compliance with the rules and prospects of success in the main matter. The judgment creditor advanced that they skipped filing heads of argument because the parties were negotiating settlement. Clearly the parties negotiating settlement would have been the judgment debtor and the judgment creditor. The claimant is not party to the main matter and had caused interpleader proceedings to be instituted on basis that the property attached in execution was the claimant's property not the judgment debtor's property. Attached to the interpleader were documents to show the claimant had purchased the property as way back as 2007 and had effected improvement thereon. The claimant had further, taken possession of the property. In the face of such a claim to ignore filing process because of negotiation of settlement with a third part in this case the judgment debtor would not be a satisfactory explanation for not complying with the rules of the court. In any event on prospects of success it was clear the judgment creditor was desirous to holding on to the attached property in a bid to persuade the judgment debtors to discharge the debt they owed. The judgment creditor was interested in negotiating settlement and holding on to the claimed property as a bet in circumstances were clearly the claimant had purchased the property in 2007. The claimant attached the following evidence to confirm that the property attached belonged to the claimant.

1. Agreement of sale
2. Receipt of payment
3. Approval; permit by the City of Harare in claimant's house.
4. Approval of building plans by City of Harare in claimant's house.

5. A photograph of developments effected on the property.
6. Undisputed submission that claimant has resided on the property since 2009.

It is settled that a claimant who seeks to assert that the property in dispute belongs to him has to produce such evidence. See *Sheriff of the High Court v Chimbaturu (Pvt) Ltd and Anor* HH 128/16. *Sheriff of the High Court v Tiritose Consulting (Pvt) Ltd and Anor* HH 347/15. Also see *Sheriff of the High Court v Majoni and Ors* HH 685/15. In this case it is clear the property was purchased in 2007 being an undeveloped land which was still to be subdivided and thus the delay in transfer to the claimant's name is explained. The claimant in this case paid the purchase price, he was given vacant possession and he made improvements on the property. The transfer process had been set in motion. The remarks by MUREMBA J in *Deputy Sheriff Harare v Moyo and Anor* HH 640/15 ring true in the circumstances of this case. She held that:

... save for the registration of the property into his name from the judgment debtor and her husband, the claimant did everything else which a purchaser of an immovable property is expected to do.”

In *Moyo v Muwandi* SC 47/03 where the judgment debtor sought execution upon an immovable property that was purchased but title had not been changed to purchaser the Supreme Court considered:

“Whether Muwandi had managed to show that there were special circumstances why the judgment debtor's right, title or interest should not have been attached. It made a finding that he had.”

In the present case the claimant paid the purchase price developed the land and took occupation way before the attachment in execution. The claimant was a genuine purchaser who did everything that a purchaser ought to have done and clearly the delay in transfer given the subdivision process is understandable. The process was beyond his control. He initiated all relevant process under the circumstances. To allow execution to proceed simply because the property is still registered in the second defendant's name in the face of clear evidence that the property belongs to the claimant would offend against justice. The claimant developed the property which he took possession of way before execution. The level to which the claimant developed the property when juxtaposed to the judgment debt of about US\$28 000 are parallels apart as they are clearly not proportionate.

In fact in the absence of any evidence of collusion on the part of the claimant and judgment debtor I find no reason why property which for all intents and purposes has been

purchased by the claimant prior to the judgment debt ought to be attached to satisfy a debt for which the claimant has no link with. Further the judgment creditor counsel in oral submissions made it clear that the judgment creditor and judgment debtors had made progress in so far as settling the debt. There was no mention of involvement of the claimant. It was apparent from counsel that the property had to remain attached so as to persuade the judgment debtors to make good what they owed. Upon considering that the judgment creditor had no satisfactory explanation for not filing heads timeously and that they had no prospects of success in seeking to execute a 3<sup>rd</sup> part, the claimant's property, the claimant's application was granted and the claimant's property declared not executable.

*Kantor and Immerman*, applicant's legal practitioners  
*Ndlovu & Pratt Law Chambers*, claimant's legal practitioners  
*Danziger & Partners*, judgment creditor's legal practitioners