

THE SHERIFF FOR ZIMBABWE
and
ENERST LEKANI
and
MERCEY TENDAI MAMBURE
versus
ZB BANK LIMITED

APPLICANT
1ST CLAIMANT
2ND CLAIMANT
JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 27 July 2017 and 13 September 2017

Opposed application

A Mugandiwa, for the applicant
C Ndhlovu, for the claimant
O Mutero, for the judgment creditor

MAKONI J: This is an interpleader application.

On 9 October 2012, the following consent order was granted in favour of the judgment creditor ZB Bank Limited, wherein the judgment debtors were ordered to pay the sum of USD\$80 845.64 plus interest at Plaintiff's maximum overdraft lending from the 9th of October 2012 to date of payment.

On the basis of the above court order and on the instructions of the Judgment Creditor, on 6 October 2016, the Sheriff of Zimbabwe, the applicant, attached a certain piece of land in the district of Umtali being Stand 1933 Chikanga Township of Devonshire measuring 543 square metre, held under Deed of Transfer Number 7347/02 (the property).

The 1st claimant, Ernest Lekani together with the 2nd claimant Mercy Tendai Mambure, a couple married in terms of customary law, laid a claim in respect of the property attached by the applicant. The basis for the claim is that, the judgment debtor Godfrey Kombo, entered into an agreement of sale with the 1st and 2nd claimants (the claimants) in 2010, whereby he sold the

property to the claimants. The claimants paid the full purchase price and took occupation of the property. The claimants failed to secure transfer of the property to their names due to financial constraints.

In its heads of argument, the judgment creditor raised a point in *limine*, namely that the 2nd claimant does not have locus *standi* to sue in the present claim in that she is not a party to the alleged contract. At the hearing, the judgment creditor did not pursue the point *in limine*. In my view, the point *in limine* was properly abandoned as it is clear from the agreement of sale that the 2nd claimant is a joint purchaser. I will therefore dismiss the point *in limine*.

Mr *Ndlovu*, for the claimants, raised a point in *limine* that the deponent to the judgment creditor's affidavit did not attach any document showing that she had authority to depose the affidavit. The opposing affidavit was deposed to by Ms Memory Kumirai, the judgment creditor's Head of Recoveries on behalf of the judgement creditor.

In *Mall (Cape) (Pty.) Ltd v Merino Ko-operasie BPK 1957 (2) C-D* it was held that:

“When an artificial person, such as a company, commences notice of motion proceedings some evidence must be placed before the Court that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Though the best evidence that the proceedings have been properly authorized would be provided by an affidavit made by an official of the company annexing a copy of the resolution, such form of proof is not necessarily in every case. Each case must be considered on its merits and then Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not the same unauthorized person.”

In casu, the deponent, in para 1 of the opposing affidavit states:

“I am the Judgment Creditor's Head of Recoveries for the time being and have been duly authorized to depose to this affidavit on its behalf the facts of which are true and correct and within my personal knowledge.”

From the above it is clear that the deponent makes a clear averment that she has authority to depose to the affidavit. She is the Head of Recoveries and is seized with day to day running of the department which is responsible for credit collection. She would be privy to the facts relevant to this application. The scope of work makes her competent enough to depose to the affidavit and swear positively to the facts. There is enough evidence to show that the deponent has authority to depose to the affidavit. I will therefore dismiss the point *in limine*.

Mr *Ndlovu* submitted that there are special circumstances which warrant that the property must not be sold to satisfy a debt incurred by the judgment debtor. He submitted that the sale was a *bona fide* sale between the judgment debtor and the claimants. The claimants occupied the property immediately after the sale in 2010 and regard the property as their home.

He further submitted that the claimants failed to secure transfer due to financial problems. The claimants exhausted all their financial resources paying the purchase price of the property and they were unable to raise transfer fees. They negotiated with their conveyancers for payment of conveyancing fees in installments but they demanded full payment upfront.

He further submitted that the judgment was issued in 2012 way after the sale and occupation of the property. The judgment creditor sat on the judgment until 5 years later and then decided to take action.

Mr *Mutero* for the judgment creditor submitted that the agreement between the claimants and the judgment debtor created personal rights in favor of the claimants in the property and such rights are not enforceable against the whole world. The judgment creditor by virtue of judicial attachment acquired real rights which are enforceable against the whole world. He further submitted that sale of land should be accompanied by delivery, which is through registration at the Deeds Office. See s 14 of the Deeds Registries Act [*Chapter 20:05*].

Mr *Ndlovu* submitted that the new Constitution of Zimbabwe has expanded the scope of the rights and entitlements of the claimants. He did not specify the relevant sections of the new Constitution he was relating to.

Once interpleader proceedings have been initiated, the claimant bears the onus of proving that he is the owner of the property subject to attachment. This can only be done by placing adequate evidence before the court showing that he is the owner. The claimant must state facts and allegations which constitute proof of ownership. See *Bruce & Anor v Josiah Parkes & Sons Rhodesia (Private) Limited* 1971 RLR 154.

I would want to agree with Mr *Mutero* that for the completion of a sale of land, there should be three requirements thus:

- a) The property should be transferred to the purchaser at the deeds office.
- b) Physical possession thereof should be given to the purchaser at the Deeds office.
- c) The seller should guarantee the purchaser against eviction.

The point was made by the learned authors Lee and Honore *South African Law of Obligations* 3rd ed p241 where they stated:

“The seller is bound to deliver the thing sold to the purchaser. Delivery means, in the case of immovable property

- i) Registration in the office of the Registrar of Deeds Transfer into the name of the purchaser and
- ii) Giving possession to the purchaser”

See also *Wessels Law of Contract* 2nd ed p 498 wherein it is stated:

“Immovable property is not considered to have been delivered, and no ownership passes until registration has been effected and, therefore, there cannot be a delivery of land or house *longa man*. At the completion of sale, the purchaser acquires a right in *personam ad rem adquirendam* against the seller....but he acquires no *jus in re* until registration....”

In *casu*, the first requirement was not satisfied. The claimants did not take transfer of the property after purchase. The property is registered in the name of the judgment debtor. In terms of the Deeds Registry Act s 14 [*Chapter 20:05*] proof of ownership of immovable property is through registration of title in the Deeds Registry and the holder of such title acquires real and absolute rights over the property which are enforceable against the whole world. Legally the judgment debtor is the owner of the property. The claimants never owned the immovable property. They acquired personal rights only enforceable against the judgement debtor.

In *Mavhundise v UDC Ltd* 2001 (2) ZLR 337 (H) at and others SMITH J, as then he was, where he held that:

“Ownership of land can only be acquired by transfer of the ownership from the previous owner and such transfer must be registered in the Deeds Registry. Until such time as title deeds are issued in respect of plot 216 and ownership thereof is registered in the Deeds Registry in the name of a particular planter, all that the applicant and the purchaser can acquire are rights and interests in the plot. Such rights are personal to the holder thereof; they are not real rights.”

The learned authors Hebshtein and Van Winsen *The Civil Practice of the High Courts and Supreme Court of Appeal in South Africa* 5th ed volume 2 at p 1020 state:

“A judgment creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against the debtor to the ownership or possession of the property, even though the personal right arose prior to the accrual of the judgment creditor’s cause of action and the judgment creditor had notice the personal right at the time when the attachment was made. An attachment in execution creates a judicial mortgage or *pignus judiciale*.”

See also *Machiva v Commercial Bank of Zimbabwe Limited & Anor* 2000 (1) ZLR 302 where CHATIKOBO J (as he then was) held that:

“...ownership of the land could only have passed from the seller to the applicant upon registration of the transfer. As transfer had not been effected, legally the seller remained the true owner of the land when the mortgage was registered. The fact that the applicant had personal rights against the seller arising out of the sale did not make him the owner.”

As was correctly submitted by Mr *Mutero*, the sale was inchoate. No delivery took place. The property remained in the name of the judgment debtor. The claimants cannot therefore be the owners of the property.

With regards to special circumstances, the claimants bought the property in 2010 from the judgement debtor, and did not take transfer. They occupied the property soon after the sale and they have been living at the property for the past 6 or 7 years. In *Raymond Dokotela Moyo v Timothy Grasiانو Muwadi* SC 47/03, the claimant took immediate occupation of the property soon after its sale and acted promptly to take transfer which failed due to the incompetence of the Council officers. In *casu*, although there was immediate occupation of the property by the claimants, no action was taken to secure transfer of the property, for a period of to 6 or 7 years which period is long enough to allow the claimants to raise transfer fees. Failure to take transfer was through the claimants' fault. After buying the property they sat back and did nothing concerning transfer of the property. Special circumstances apply in situations where the delay in acting is beyond the control of the claimant. See *The Sheriff of Zimbabwe and Anor vs Willdale Limited t/a Willdale Bricks* HH387/17. Poverty cannot be regarded as a special circumstance. See *Moon v Moon* HB 94/05. As already indicated, if the claimants were serious about the issue, they could have raised the transfer fees in the 7 years they occupied the property.

In conclusion, real rights in the immovable property reside in the judgment debtor since he is the registered owner of the immovable property at the Deeds Registry. Judicial attachment of the immovable property by the applicant created a *pignus judiciale*, a real right in favour of the Judgment Creditor. On the other hand, the agreement of sale created personal rights in favour of the claimants which are only enforceable against the judgment debtor. The property is therefore executable.

In the result, I will make the following order:

1. The Claimants' claim to the immovable property known as a certain piece of land in the district of Umtali being Stand 1933 Chikanga Township of Devonshire measuring 543 square metre, held under Deed of Transfer Number 7347/02, which was placed under attachment in execution of the order in HC1786/11 be and is hereby dismissed.
2. The abovementioned property is hereby declared executable.
3. The claimant is to pay the judgment creditor's and the applicant's costs of this application.

Kantor and Immerman, for the Applicant
Gonese and Ndhlou, for the 1st and 2nd Claimants
Sawyer & Mkushi, for the judgment debtor