

THE SHERIFF OF THE HIGH COURT
versus
GRAPNOTE STEEL (PVT) LTD
and
MONICA HAKUNA
and
KUDZANAI MAPANGA
and
NYARAI UZANDE
and
REGINA SITHOLE
and
WILLDALE LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 13 July 2017 and 23 August 2017

Opposed Application

Mr. N Mugandiwa, for the applicant

Ms. P Makumure, for the 1st and 2nd Claimants

Mr. P Chakanyuka, for the 3rd and 4th Claimants

Ms. E Mukwehwa, for the Judgment Creditor

MAKONI J: This is an interpleader application. The judgment creditor Willdale Limited, obtained judgment in case no HC 11096 on 25th of February 2015 in the sum of USD\$74 700 against the judgment debtor, Freewin Investments (Pvt) Ltd. In the discharge of his duties as Sheriff the applicant placed the following property under attachment:

- a) An undivided 2, 380952381% Share being share No. 4 in a certain piece of land situate in the District of Salisbury called the Remainder of stand 3084 Glen Lorne Township measuring 9500sqms.
- b) Certain piece of land situate in the District of Salisbury measuring 4315 square metres called stand 4056 Glen Lorne Township of stand 3084 Glen Lorne Township.

The property that was placed under attachment, in pursuance of the writ of execution, is being claimed by five claimants.

The first claimant Grapnote Steel (Pvt) Ltd, purchased and undivided 10% share being share number 6 on the attached property.

The 2nd claimant Monica Hakuna, purchased an undivided 10% share being number 9 on the property attached by the Sheriff.

The 3rd claimant is Kudzanai Mapanga, who was once a director and shareholder of the Judgment debtor, and she claims an undivided 2, 380952381% Share being share No. 4 in a certain piece of land situate in the District of Salisbury called the Remainder of stand 3084 Glen Lorne Township measuring 9500sqms. However, at the hearing of the matter it was noted that the 3rd claimant had not file a Notice of Opposition and was therefore barred. The 3rd claimant was therefore not properly before me and her claim was dismissed.

The 4th claimant, Nyarai Uzande claims Block 12 of stand No 3084 of Lot 41 Glen Lorne Township Salisbury and avers that she paid the full purchase price of the property, the transfer fees and VAT. However, at hearing of the matter the 4th claimant withdrew its claim.

The 5th Claimant Regina Sithole, claims flat number 3 and 10 in certain piece of land situate in the district of Salisbury called stand number 3084 Glen Lorne Township of Lot 41 Glen Lorne. She entered into an agreement of sale with the judgment debtor and paid USD\$135 000.00 as the purchase price.

At the hearing and at the outset, Mrs. *Rubaya* indicated that the 5th claimant was withdrawing the claim in respect of block 10. When asked to address the court later on in respect of block 3, she submitted that she had noted that block 3 does not exist. By 20 September 2013, when the claimant purchased the property, Tittle Deed No. 7953/94 has ceased to exist and had been replaced by Certificate of Registered Tittle No. 2578/13. The claim by the 5th claimant in respect of block 3 was therefore dismissed.

I will therefore deal with the 1st and 2nd claimants' claims only.

It is trite law that in applications of this nature, the claimant bears the onus of proving ownership of the property. The general rule is that, he who alleges must prove. The claimants *in casu* must place before the court facts that prove to the court that they are the legal owners of the property. See *Bruce N.O v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 (R) at 70 C-E.

Ms. *Makurumure*, for the 1st and 2nd claimants submitted that there are special circumstances which must justify the setting aside of the attachment and sale in execution of the

property despite the existence of a *pignus judiciale*. She relied heavily on the authority of *Sheriff For Zimbabwe v Brighton Bako and Another* HH387/17, where this court examined cases which sets out the law regarding the rights conferred by a *pignus judiciale* versus personal rights and that the court will set aside a *pignus judiciale* in very compelling circumstances. I must emphasise that these compelling circumstances must have been beyond the control of the claimant. No fault must be attributed to the claimant.

Ms. *Makurumure*, submitted that the special circumstances existed are that firstly, 1st claimant entered into an agreement of sale in 2014 and the judgment creditor only obtained judgment on the 25th of February 2015. The 2nd claimant entered into an agreement of sale on the 2nd of July 2015 after the judgment creditor obtained judgment, but prior to the attachment of the property on 2 July 2016.

Secondly, the value of the claimant's property is far above the amount that the judgment creditor seeks to recover from the judgment debtor. The 1st and 2nd claimant are claiming only 20% share. There is an unclaimed 50% share. It is just and equitable that the judgment creditors instructs the applicant to execute against the 50% share.

Thirdly, the claimants took steps to ensure transfer was effected by suing the judgment debtor for specific performance and such orders have been granted. Transfer could not be effected because the judgment creditor had already placed a caveat.

The fact that the claimants had entered into an agreement of sale with the judgment debtor is neither here nor here. The acquisition of personal rights which are expected to lead to the acquisition of real rights does not mean that real rights have accrued ipso facto.

The learned authors Silberberg and Schoeman, *The Law of Property* 3 ed p 68 state that:

“If A acquires a personal right to have a real right to an immovable thing, belonging to another, transferred to him ... he would have a potential real right... It is of course not the personal right itself which is regarded as being potentially real, but the personal right envisages the transfer of a real right by means of registration.”

The personal rights they acquired are only enforceable against the judgment debtor. A judicial attachment on the other hand creates a judicial mortgage, which is a real right enforceable against the whole world. See *Sheriff for Zimbabwe v Barighton Bako supra*.

The claimants have not laid a factual basis for their submission that the judgment creditor can direct the applicant to execute against the unclaimed 50% share. As is apparent from this

application, there is confusion regarding the shares in the property which resulted in some of the claimants withdrawing their claims. It would not be up to the court to direct the applicant as to which property to attach.

The claimants only instituted proceedings in October 2016 after the properties in issue had been already attached on 26 July 2016. It appears the claimants were jolted into action by the attachment of the property. Even then, it took them three months to file the applications.

It is my view that the claimants have not established special circumstances that would persuade this court to set aside a judicial mortgage.

The rights of the 1st and 2nd claimants in the immovable property in question are personal rights which are only enforceable against a party owing such personal rights, in this case the judgment debtor. The judgement creditor hold real rights over the property of the judgment debtor and is entitled to attach and sale in execution the property.

In my view, such special circumstances must be beyond the claimants' control for them to be taken into account. In *Raymond Dokotela Moyo v Timothy Grasiano Muwadi* SC 47/03, the court considered the council's failure to transfer the property into the claimant's name as a special circumstance and the fault was not on the claimant. In *casu*, the 1st and 2nd claimant failed to establish special circumstances which shows that the delay in getting transfer was beyond their control.

I am therefore satisfied that the 1st and 2nd failed to discharge the onus that rests upon them to prove ownership of the attached property. The real rights in the immovable property reside in the judgment creditor since judicial attachment of the property created a *pignus judiciale*. Furthermore, there are no special circumstances warranting the granting of the claimant's claims.

In result I will make the following order:

- 1) The 1st Claimant's claim to an undivided 10% share being share number 6 in the property known as a certain piece of land situate in the District of Salisbury measuring 4315m² called Stand 4056 Glen Lorne Township of Stand 3084 Glen Lorne Township held under Certificate of Registered Tittle No. 1043/2016, which was placed under attachment in execution of order in HC11096/14 be and is hereby dismissed. The above mentioned property attached in terms of the Notice of Attachment of Immovable Property dated 26 July 2016 by the Applicant is hereby declared executable.

- 2) The 2nd Claimant's claim an undivided 10% share being share number 9 in the property known as a certain piece of land situate in the District of Salisbury measuring 4315m² called Stand 4056 Glen Lorne Township of Stand 3084 Glen Lorne Township held under Certificate of Registered Title No. 1043/2016, which was placed under execution of the order in HC 11096/14 be and hereby dismissed. The abovementioned property attached in terms of the Notice of Attachment of Immovable Property dated 26 July 2016 by the Applicant is hereby declared executable.
- 3) The 1st, 2nd, 3rd, 4th and 5th claimants to pay the Judgment Creditor's and the Applicant's costs.

Kantor and Immerman, applicant's legal practitioners.

Makuku Law Firm, 1st and 2nd Claimants legal practitioners.

Chakanyuka and Associates, 3rd and 4th Claimant's legal practitioners.

Mandizha and Company, 5th Claimant's legal practitioners.

Dube, Manikai and Hwacha, Judgment Creditors legal practitioners.