

THE SHERIFF FOR ZIMBABWE
versus
PARKLANE BUTCHERY (1973) (PVT) LTD
and
WILLDALE LIMITED t/a
WILLDALE BRICKS

APPLICANT
CLAIMANT
JUDGMENT CREDITOR

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17 August, 2017 and 29 August, 2018

Opposed Application

No appearance for applicant
D. Sanhanga, for Claimant
F. Mukwehwa, for Judgment Creditor

CHITAPI J: I reserved judgment after hearing argument in this application on 17 August, 2017. There has been a delay in the delivery of judgment owing to the fact that I am assigned to the Criminal Division. This and other applications were allocated to judges by the Judge President irrespective of whatever Division they were assigned to as a measure to mitigate the large backlog of civil applications pending in this court. Judges had to find a way of accommodating the extra work without compromising their usual court rolls. I heard this matter at 9.00 am before retiring to chambers to change robes and continue with my criminal court scheduled work set down for 10.00 am. Regrettably, the criminal case roll has left me with little time to juggle between contending with the work assigned from the Civil Division and the Criminal Court. To this end, the several follow letters on the delivery of judgment which were written by the applicant's legal practitioners are acknowledged. The applicant is accordingly advised on the cause for the delay as above. I turn to the merits of the application.

The applicant in the discharge of his duties attached in execution of a judgment of this court in case No. 11096/14 granted in favour of the judgment creditor against Freewin Investments (Private) Limited, the judgment creditor. The applicant duly instructed by the judgment creditor, placed under attachment two immovable properties described in the notice of attachment as:

- (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 9500 square metres.

- (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 was placed under attachment on 26 July, 2016. A caveat number 341/16 was noted over the properties by the Registrar of Deeds as per procedure following attachment of registered property.

The further details on the background to the attachment was that the judgment creditor wanted to have the property sold so that it would recover \$74 700-00 with interest and other charges as per the judgment of this court entered in favour of the judgment creditor against the judgment debtor on 25 February, 2015.

Following the attachment aforesaid, the claimant laid claim to part of the attached property. The claimant filed with the applicant, an affidavit on 5 October, 2016 in which it averred that it held a 10% share in the property described in the second property as described in (b) above. The claimant averred that the 10% share was represented by a garden flat, No 7, held under a certificate of registered title no. 1043/2016.

Faced with the adverse, claim, the applicant issued interpleader pleadings under order 30 r 205 as read with r 207 of the High Court Rules 1971. In the interpleader, the applicant petitions this court to make a determination on the validity of the claim made by the claimant. The applicant also prays for his costs incurred in making the application.

In further amplification of its claim, the claimant averred that it purchased the property in dispute from the judgment creditor and paid the full purchase. Additionally the claimant averred that it took occupation of the property and was awaiting transfer to it to be conveyanced at the time that the attachment was effected by the applicant. The claimant deposed that the property in issue is held under a separate certificate of title from the parent deed. The claimant attached to its affidavit a certificate of registered title no. 1043/16 dated 29 February, 2015. The certificate is issued in terms of s 41 of the Deeds Registries Act, [*Chapter 20:05*].

A certificate of registered title is issued to and upon the application of the owner of land who has surveyed a piece of land and wishes to detach the surveyed portion from the parent deed. The owner can deal in the detached portion separately from the rest of the land of which the portion was part including *inter alia* selling and managing the detached portion separately or as a stand-alone property. Upon registration of the portion, the Registrar of Deeds issues a

certificate of Registered Title wherein the portion detached is separately described as a portion of the hitherto undivided portion. The certificate of registered title involved in this case describes the property as:

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 certificate of registered title with its separate diagram also informs that the subdivided portion aforesaid was detached from:

certain : piece of land situate in the district of Salisbury
measuring : 1,3815 hectares
called : Stand 3084 Glen Lorne Township
held : Under Certificate of Consolidated Title No. 2578/13 dated 3 July, 2013.

Both the parent deed and the detached portion are in the name of the judgment debtor.

The applicant deposed that on taking occupation of the property it assumed all risk and profit in the property. The claimant averred that transfer to it of the portion was underway. It did not elaborate further on the stages of transfer which had been commenced or was underway. The claimant also attached a copy of the sale agreement between it and the judgment debtor to back up its claim to having purchased the subdivided portion.

The judgment creditor opposes the claimant's claim and prays that the court should dismiss the challenge and allow the applicant to proceed with execution. The judgment creditor does not deny the factual averments by the claimant that it purchased the attached property, took occupation and that transfer of the property to the claimant is underway. The judgment creditor raised a legal argument that, until the claimant has taken transfer of the property, its rights in the property are personal as opposed to real. It postulates that the real rights in the property remain with the registered owner of the property. The registered owner of the property after the issue of the certificate of registered title remained the judgment creditor. The claimant according to the judgment creditor, did not have legal title to the property and hence could not ask a court to protect a non-existent title or title which was still to come into being.

In addition to the argument of lack of title, the judgment creditor averred that it holds a *pignus judiciale* over the property by reason of the attachment of the same and that the noting of a caveat over the property by the Registrar of Deeds acting on the instructions of the judgment creditor.

Unfortunately, a lot of cases as the present one flood the courts whereby a buyer of an immovable property loses the property in execution of the same to satisfy the liabilities of the seller. In such circumstances, the seller benefits from the purchase price and further benefits in having the seller's liabilities discharged through execution of the same property which the seller has otherwise divested him or herself of save that the entity to whom the seller sold the property has yet to take transfer. Cases abound of unscrupulous land barons and indeed some well-meaning sellers who dispose of property but transfer of the property to the purchasers is delayed for one reason or another with the result that the *bona fide* purchasers end up having the purchased properties attached in execution of liabilities of the sellers. This is the sad reality of what is happening.

Property law is clear that ownership of an immovable property is evidenced by registration of title over the property in the Deeds Office. SMITH J in *Mavhundise v UDC & Ors* 2001 (2) ZLR 337 (H) states thus

“.....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 registered in the Deeds Registry in the name of the particular planter, all that the applicant and purchaser can acquire are rights and interests in the plot. Such rights are personal to the holder thereof; they are not real rights.”

In the case, *The Sheriff for Zimbabwe and Anor v Willdale Limited Bricks*, HH 387/17, a must read case for every student and practitioner of property law, MAKONI J (as she then was) quoted several useful and instructive decisions of the superior courts and authoritative texts in elucidating the law on real and personal rights which persons may acquire over immovable property. It is settled law that until a purchaser of an immovable property has taken transfer of the property by registration in the Deeds Registry, such purchaser retains a personal and not a real right over the property.

In this case as in many similar cases which come before this court following attachment of an immovable property sold by the seller but not yet transferred to the purchaser, to satisfy the seller's liabilities, the issue which the court must grapple with is whether the personal rights acquired by the purchaser who is claimant in interpleader proceedings, should be protected as an exception to the default legal position that ownership of immovable property is evidenced by registration of transfer.

In *Raymond Dokotela Moyo v Timothy Grasiano Muwandi* SC 47/03, SANDURA JA stated at p 5 of the cyclostyled judgment as follows:

“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.”

The learned judge cited and quoted with approval, the judgment of KOTZE J in *Van Neikerk v Fortuin* 1913 CAD 457 at 458-459 as follows

“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 a 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...”

The position with execution in this case is therefore that the right of the judgment creditor to execute on the attached property is not absolute. It is only a *prima facie* right. In his heads of argument, counsel for the judgment creditor submitted that the issues for determination are firstly whether the claimant is the owner of the attached subdivision and secondly whether the judgment creditor is entitled to execution. It is common cause that the claimant has not yet taken transfer of the attached property. It cannot be an issue that the claimant has personal rights in the subdivision. Similarly, the claimant’s assertion that it is the owner of the property is only true to the extent that it owns personal rights in the said property.

The issue for the court to determine is whether or not in the circumstances of the case, there exists special circumstances which merit that the court exercises a judicious discretion to set aside the attachment. In other words, the starting point is to accept that that court has a discretion to set aside the execution of a property registered in the name of a judgment debtor in special circumstances. What amounts to special circumstances depends on the facts of each case and the court gives a value judgment after considering the facts placed before it. The onus to show the existence of special circumstances on a balance of probabilities is on the claimant.

The process of execution is a process of this court. In terms of s 176 of the Constitution, this court has inherent powers to protect and regulate its processes. The writ of execution issued in this matter is an example of a process of this court. Its regulation entails *inter-alia* that the court can order whether in relation to a *pignus judiciale* arising from the act of attachment, such judicial order should be carried into execution or discharged. In relation to discharging the *pignus judiciale* in an application by a purchaser of the attached property who has not taken transfer of the property in question and the property is registered in the name of the judgment debtor (seller), the court will grant the order to stay the execution where the claimant demonstrates special circumstances to warrant the grant of the indulgence. This appears to me to be the correct approach which a court must adopt in such circumstances. I have already

indicated that whether or not special circumstances exist in any given case depends on the facts of each case.

A reading of decided cases reveals that the court has considered the explanation by the claimant seeking the discharge of the *pignus judiciale* as to why transfer to the claimant has not been conveyanced if the claimant claims to have bought the property. In other words, the court will come to the aid of a vigilant and not sluggish claimant. See *Deputy Sheriff Harare v Moyo & Anor* HH 640/15 where MUREMBA J granted the discharge of the *pignus judiciale* after considering that the claimants had taken all reasonable steps expected of them to get transfer which transfer could however not be registered on account of a caveat which posed an impediment on transfer. It is worth noting that at the time of writing this judgment, an appeal against the judgment of MUREMBA J aforesaid had been determined and dismissed by the Supreme Court as *per* the judgment of UCHENA JA in *CBA Bank Ltd v David Moyo & David Sheriff Harare* under case No. SC 17/18.

In *casu*, the following material averments by the claimant were not denied by the judgment creditor.

- a) that the claimant purchased the attached property and fully paid for it.
- b) that the claimant took the step of securing that the purchased property is detached by the certificate of registered title from the rest of the seller's property so that it could singularly be transferred to the claimant.
- c) that transfer of the property to the claimant was under way.
- d) That the claimant had taken occupation, risk and profit in the said property and had absolute control and enjoyment of the property.

The judgment creditor did not put into issue the claimant's factual averments as summarized. The judgment creditor's instead raised a legal issue that until the claimant had taken transfer of the property, it could not successfully claim ownership of the property. In my judgment, the judgment creditor was not properly advised in holding as absolute, the position that until the claimant had taken transfer, it could not enforce its personal rights as against the judgment creditor who has attached the property basing the right of attachment on the fact that the registered title holder is the judgment debtor. The judgment creditor failed to appreciate that a title deed is not conclusive proof of ownership rights. The existence of a title deed in the name of the judgment creditor is merely *prima facie* proof of ownership and such ownership rights can be challenged successfully by a claimant. Where a challenge has been made, the court will if the claimant proves special circumstances set aside the attachment.

Where an allegation made is not denied, it must be taken as admitted. The judgment creditor did not deny the material averments made by the claimant in regard to the existence of special circumstances for setting aside the attachment. It mistakenly held the position that for as long as the claimant had not taken transfer of the attached property, it could not lawfully seek the setting aside of the attachment. The judgment creditor was not minded to address the legal exception of setting aside the execution on the basis of the existence of special circumstances. It simply maintained that the claimant was not the legal owner until registration of transfer. This was hardly the issue. The issue was whether or not despite the fact that the claimant had not yet taken transfer of the property, there existed grounds amounting to special circumstances warranting that the attachment and execution should be set aside.

In the circumstances I am persuaded that special circumstances exist warranting the court to set aside the attachment. The claimant's averments that it took all necessary steps to get transfer of the property and had assumed occupation, risk and profit in the property were not controverted. It would be inequitable and certainly not in the interests of justice to allow the execution of the property. The judgment creditor's interest in the property was to all intents and purposes a paper one inasmuch as it could not and did not lay claim to ownership of the property. The property was therefore on paper registered in the judgment creditor's name but the judgment creditor had relinquished its rights in favour of the claimant. In terms of s 165 (1) (a) of the constitution, the courts must aim to do justice to all persons. This entails achieving fairness taking into account equities and the public policy considerations. The courts must also develop the common law as mandated in s 176 of the constitution. The position taken by the judgment creditor is supported by common law but then even the common law allows for exception where if there are special circumstances, execution of immovable property still registered in the name of a person who has disposed of it can be spared from execution at the instance of the purchaser who is yet to take transfer.

I therefore determine the application by order as follows:

- a) The claimant's claim succeeds and the attachment in execution by the applicant on 26 July 2016 in case No. HC 1096/14 of the property called an undivided 10% share being share No 7 in stand 4056 Glen Lorne Township of stand 3084 Glen Lorne Township held under Certificate of Registered Title Number 1632/14 dated 21 May 2014 is hereby set aside.
- b) The judgment creditor is ordered to pay the applicant and claimant's costs of the application.

Kantor & Immerman, applicant's legal practitioners
Chirenje Legal Practitioners, claimant's legal practitioners
Dube Manikai & Hwacha, judgment creditor's legal practitioners