

NELLY GONYORA
versus
ZENITH DISTRIBUTORS (PVT)
THE MESSENGER OF COURT HARARE
SARAH GWANYANYA
A GONYORA t/a ABBY'S KITCHENS
and
REGISTRAR OF DEEDS

Opposed Court Application

HIGH COURT OF ZIMBABWE
GOWORA J,
HARARE 29 October 2003 and 25 February, 2004

R K H Mapondera for the applicant
O C Gutu for the respondents

GOWORA J: On 29th October 2003 I granted an order in favour of the applicant and I indicated thereat that my reasons would follow. These are they.

On 31st May 2002 HLATSHWAYO J granted the applicant a Provisional Order in the following terms:

"TERMS OF ORDER MADE

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

That the sale in execution in respect of Case No. 19871/00 of the Magistrate's Court Harare of Stand No 215 Glen Lorne Township 8 of 10140A Salisbury Township held on the 5th of October 2001 by 2nd Respondent and the subsequent purchase by the 3rd Respondent be and is hereby set aside.

That the 1st and 2nd Respondents be and are hereby ordered to instruct their conveyancer to stop any transfer process of the Stand 215 Glen Lorne Township 8 of Lot 40A Glen Lorne Township Salisbury.

That Respondents who oppose this application pay the costs of suit.

INTERIM RELIEF GRANTED

Pending the finalization or discharge of this order ;

IT IS HEREBY ORDERED THAT:-

1st and 2nd Respondents be and are hereby interdicted from proceeding with the intended transfer of the Stand 215 Glen Lorne Township 8 Lot 40A Glen Lorne Salisbury to 3rd Respondent.

That 1st and 2nd Respondents be and are hereby directed to instruct their chosen conveyancers,

Messrs Mabuye and Company Legal Practitioners to stay any transfer efforts in respect of the said Stand.

SERVICE OF THE ORDER

Leave be and is hereby granted for this provisional order to be served on the Respondents by applicant's legal practitioners. Leave be and is hereby granted for service to be effected on the 3rd Respondent through publication of notice in a daily newspaper".

The order thus granted was served on all five respondents. Only the 3rd respondent has filed papers opposing the confirmation of the provisional order.

At the centre of the dispute is an undeveloped stand which is registered in the joint names of the applicant and the 4th respondent.

The applicant states that she and the 4th respondent are husband and wife. She does not describe in detail the Matrimonial regime under which they happen to be married and in my view the details thereof are not pertinent for the purpose of resolution of the matter currently in issue.

On 7 July 2000 through its legal practitioners the 1st respondent issued summons against the 4th respondent in the Magistrate's Court in Harare for an amount not exceeding \$31 722.73. On 10 October 2000 the Magistrate's Court granted a summary judgment with costs against the fourth respondent in favour of the first respondent. Subsequent to that a warrant of execution was issued against the fourth respondent. There is no reference to an immovable property in the said warrant. The date on which the warrant was issued is not clear on the stamp. It is common cause however that the stand was sold at an auction conducted on the instructions of the second respondent on 5 October 2001 and the third respondent was the third highest bidder. On 30 November 2001 the Magistrate wrote to the second respondent confirming that the sale of the stand to the third respondent had been confirmed. The second respondent thereafter set in motion procedures to have the stand transferred to the third respondent. It was suggested by the applicant that the property was mortgaged to C.A.B.S and an enquiry by the conveyancers to C.A B.S who happen to be her employers then alerted to the fact that the property in question had been sold at a sale in execution.

The debt to the first respondent by the fourth is not in dispute, and in fact it would seem that the debt has now been settled in full, albeit that the payment was after the sale in execution of the stand in Glen

Lorne. In my view the payment of the debt after the sale would not affect the outcome of these proceedings.

It is contended on behalf of the applicant that a sale in execution may be set aside on any good ground.¹ It was submitted further that what constitutes good grounds will depend upon the merits of each case.²

The contention on behalf of the applicant is that the sale was defective right from its inception and that for that reason the sale ought to be set aside. It was the further submission on behalf of the applicant that the second respondent instead of attaching the fourth respondent's half share of the property had attached the whole stand even though the applicant was not a party to the proceedings between the first respondent and the fourth respondent and there had been no judgment entered against the applicant justifying the disposal of an asset belonging to her at a forced sale. It was also submitted that the public auction was unlawful in that the first respondent caused the attachment of property which did not solely belong to the judgment debtor when it was apparent that the property did not belong to the judgment debtor alone. As a result the question had to be asked as to what the *causa* for transferring the applicant's share was.

In opposing the relief being sought the third respondent submits that Rule 352 of the High Court Rules of Zimbabwe makes it mandatory for any sale in execution to be advertised, and in *casu* the sale was advertised on two occasions. It is submitted further that the third respondent was a genuine purchaser who responded to the adverts and what she and the second respondent did when the sale was effected was within the confines of the law. The respondent sought reliance on *Chizikani v CABS*³.

In my view the starting point is the examination of the Magistrate's Court Rules and the provisions thereof relating to the attachment of and sales in execution of immovable property. Order 26 Rule 7(2) provides for the attachment of an immovable property by service of the warrant of execution on the execution debtor as owner thereof, the Registrar of Deeds and all other interested parties including bondholders and any occupiers of the property in question. The Messenger is also required to ascertain

1 See *Bhura v Lalla* 1974(1) RLR31

2 See *Cairns' Executors v Gaarn* 1912 AD181, *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345, *Bhura v Lalla* (*supra*)

3 1998(1)ZLR 371

whether there is any claim ranking in priority to that of the execution creditor and inform the same accordingly. The Messenger is also enjoined in terms of subrule 4 of the same to require the debtor to deliver to him all documents relating to title in the property.

From the circumstances of this sale it is not in doubt that the Messenger did not ask the fourth respondent to deliver documents in proof of ownership of the immovable property, as such documents would have shown that the property sought to be attached was jointly owned with the applicant who could not by any stretch of the imagination be described as an execution debtor thereby entitling the Messenger to attach and sell in execution her half share in the immovable property. The applicant as a joint owner to the stand would be entitled to deal with her property in a manner she found appropriate. This includes alienation of her share. It is inconceivable and legally impossible that her share could be lawfully attached and sold in execution without *causa*. As there was no attachment in respect of the applicant's half share of the immovable stand it could not be sold in execution to satisfy the first respondent's claim against the fourth respondent.

I find merit in the submission by the applicant that the sale was defective from the onset as the property of an innocent party was attached and sold in execution.

It was the contention of the applicant that an owner has the right to deal with his or her property as he or she wishes and in this instance in view of the defective sale the transfer could not be effected as the applicant would have to consent to the transfer. Indeed it is incomprehensible how the third respondent would be able to take transfer as the Messenger would have only been able to sign transfer documents on behalf of the fourth respondent.

The further contention on behalf of the respondent is that she was a bona fide purchaser who was not privy to the events that occurred prior to the sale. That may be the true position, the question however that asks is whether the bona fide of the purchaser would validate a sale in execution the basis of which was defective from the attachment of the item eventually sold. In this matter it is not the sale per se which is being impugned, rather it is the whole process from the attachment to the very sale itself. The sale is not capable of being divorced from the process of attachment and as long as that is defective from the point of

view that the property of a party who was not a party to the dispute had been mistakenly attached when no debt was owing would render such an attachment a nullity. In those circumstances it is irrelevant whether or not the purchaser was *bona fide*.

In the result the applicant succeeds and an order is granted in her favour in the following terms:-

1. The sale in execution in respect of Case No 19871/2000 in the Magistrate's Court Harare in respect of Stand No 215 Glen Lorne Township 8 of 10140A Salisbury Township held on the 5th October 2001 held by the second respondent and the subsequent purchase by the third respondent be and is hereby set aside.

2. That the first and second respondents be and are hereby ordered to instruct their conveyancers to stop any transfer process of the stand 215 Glen Lorne Township 8 of Lot 40A Glen Lorne Salisbury

3. The third respondent pays the costs of this application.

Madanhi & Associates, legal practitioners for applicant
Scanlen Holderness, legal practitioners for 1st respondent
The Messenger of Court Harare, for 2nd respondent
Gutu & Chikowero, legal practitioners for 3rd respondent