

THE SHERIFF OF HIGH COURT
versus
FBC BUILDING SOCIETY
and
WAYMARK INVESTMENTS (PVT) LTD
and
KREAMORN INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 6 November 2014 and 14 January 2015

Opposed Application

T. Tandi, for the applicant
Z.T Zvobgo, for first and second claimants
S.K Chivizhe, judgment creditor

NDEWERE J: The judgment creditor is Kreamorn Investments (Pvt) Ltd. On 5 March, 2013, the judgment creditor obtained judgment by consent against the judgment debtors and three others for US\$57 579-22 in case No. HC 12609/12. Pursuant to that judgment, the judgment creditor, through the applicant, attached Stand No. 4716 Prospect Township, also known as No. 4716 Mainway Meadows, Prospect, Waterfalls. The property awaits execution.

The first and second claimants wrote to the applicant, alleging that Stand No. 4716 was wrongly attached because it did not belong to the judgment debtors.

On 18 February, 2014, the applicant instituted interpleader proceedings in view of the conflicting claims inviting all three parties to file their claims.

On 28 February, 2014, the first and second claimants filed opposing papers, giving their reasons why they contended that Stand 4716 Prospect Township was wrongly attached. In paras 7,8,9,10,11,16,17,18,19, 22,23 and 24 of their opposing affidavit, the claimants argued that the attachment was wrong because the judgment debtors did not obtain the first claimant's consent to encumber Stand No. 4716 Prospect Township before they tendered it in the Consent Order of 5 March 2013.

The Consent Order of 5 March, 2013, read as follows:

- “1. The defendants shall jointly and severally the one paying the other to be absolved pay the plaintiff the sum of US\$ 57 579-22.
2. The defendants shall pay the amount in 1 above as follows:
 - 2.1. US\$ 10 000-00 on or before 30 March, 2013
 - 2.2. US\$ 20 000-00 on or before 30 April, 2013
 - 2.3. US\$ 14 000-00 on or before 31 May 2013 and
 - 2.4. US\$ 13 922-00 on or before 30 June, 2013.
3. The defendants shall jointly and severally the one paying the other to be absolved pay the plaintiff’s costs of suit on an attorney and client scale.
4. The fourth defendant shall tender his property in Park Meadowlands as additional security for the due performance of the defendant’s obligations in terms of this consent order and shall hand over all necessary documents to the plaintiff’s legal practitioners to perfect the security.”

The third and fourth defendants in Case No. HC 12609/12 were Lucia Marimo and Bernard Marimo. They are the ones in possession of Stand No. 4716 Prospect Township.

The first claimant is taking issue with para 4 of the consent order in case HC 12609/12 wherein the fourth defendant, Bernard Marimo, tendered “his property in Park Meadowlands.”

The first claimant is saying in terms of its own agreement with Bernard Marimo, the judgment debtor, Stand 4716 Prospect Township could not be encumbered without the first claimant’s consent. The first claimant referred to the relevant clause in its agreement with the judgment debtor which reads as follows:

“Until the stand is transferred by the Society (FBC) to the purchasers, the purchasers shall not cede or assign their rights and obligations under this agreement nor otherwise alienate or encumber their rights hereunder without the written consent of the Society.”

The claimants argued that because the attachment has been brought about by a consent order which encumbered stand No. 4716 without claimant’s written consent, the consent order is not valid and consequently the attachment is null and void and the applicant should release the property to the claimants.

Unfortunately, the claimants’ argument, though spirited is based on a wrong factual basis. What was tendered in para 4 of the consent order was “his property in Park Meadowlands”, not stand 4716 which is in Mainway meadows in the Waterfalls area. So the property which was attached by the applicant is not the property which was tendered in the

consent order. So the factual basis for the argument raised in the first claimant's opposing affidavit is wrong. If the factual basis is wrong, the conclusion also becomes wrong.

Indeed, the judgment creditor responded to that effect, that it did not attach the property in the consent order; it simply looked for a property in which the judgment debtor had real rights and attached it. During the oral hearing in court, first claimants' counsel conceded that the property referred to in the consent order is not the same property which was attached. This means that the basis for the claimants' opposition as given in the opposing affidavit, that the judgment debtor had no authority to encumber Stand 4716 Prospect Township falls away.

In addition the claimants claimed to be the owners of Stand 4716 Prospect Township. The second claimant has a certificate of registered title for a larger piece of land measuring 7, 6793 hectares in subdivision M of Prospect. The stand is called Stand 2491 Prospect Township of Subdivision M of Prospect.

In April, 2010, the second claimant sold Stand No. 4716 Prospect Township of Stand 2491, measuring 540 square metres to first claimant.

In September, 2010, the first claimant sold Stand No. 4716 Prospect Township of Stand 3202 measuring 540 square metres in the District of Salisbury. You will note that second claimant owned Stand 2491 albeit a larger portion and that is what it sold to the first claimant. But in the sale between first claimant and the judgment debtors, namely Bernard Marimo and Lucia Marimo, the stand number suddenly changed from 2491 to Stand 3202. No explanation is given for the appearance of this different stand number by the claimants either in their opposing affidavit or their Heads of Argument or during oral submissions. The judgment creditor raised this issue in its opposing affidavit, but still there was no explanation why the stand number which was 2491 in the certificate of registered title has now changed to Stand No. 3202. This creates doubt on whether the stand which is owned by the second claimant and was sold to first claimant is the one which was sold to the judgment debtors.

So second claimant has failed to adduce proof that it is the owner of the judgment debtors' property which was attached by the applicant.

To add to the confusion, the preamble to the agreement between first claimant and the judgment debtors on p 57 of the record, para 1 says the first claimant obtained right, title and interest in;

“Stand 4716 Prospect Township of Stand 3202 measuring 540 Square Metres in the District of Salisbury... in terms of an agreement of sale entered into on the 25th of April 2007 with Costains Africa Limited”

Yet the agreement of sale for Stand No. 4716 Prospect Township of stand 2491 was with Waymark Investments, the second claimant, on 9 April, 2010.

This issue was raised by the judgment creditor in its opposing papers yet it was not responded to or canvassed during oral submissions. This tends to confirm that the property which was attached is not the one which is owned by the second claimant. Second claimant does not feature at all in the sale agreement between the first claimant and the judgment debtors. The second claimant has therefore failed to prove that it owns the property which was attached.

First claimant alleges it bought Stand 4716 through an agreement of sale. We are no longer sure whether it bought the stand from the second claimant or from Costains Africa Limited but the fact of the matter is that it admits that all it has is an agreement of sale. It has no registered title. Then it entered into an agreement of sale with the judgment debtors and advanced certain sums of money to the judgment debtors, but it did not process a mortgage bond on the property as required by law. So on its own admission, the first claimant has no legal basis to stop the attachment of Stand 4716. The judgment debtors rights and interest in Stand 4716 is what has been attached and this is permissible in terms of r 343 and the first claimant has no legal basis to stop such attachment. Previously decided cases have also accepted that such rights can be attached and lawfully sold in execution. The case of *Mavhundise v UDC Ltd & Ors* 2001 (2) ZLR p 337 confirmed that the rights and interests in land can be lawfully sold in execution.

Accordingly the first and second claimants' claims to the attached property are hereby dismissed. Stand No. 4716, Prospect Township, also known as No. 4716 Mainway Meadows, Prospect, Waterfalls is hereby declared executable. The first and second claimants shall pay the applicant's and judgment creditor's costs.

Kantor & Immerman, applicant's legal practitioners
Dube, Manikai & Hwacha, 1st and 2nd claimant's legal practitioners
Wintertons, judgment creditor's legal practitioners