

LINDA MUDAWADZURI
versus
KINGDOM BANK AFRICA LTD
and
REAL DISTRIBUTORS PRIVATE LIMITED
and
KUNYETU LAMBERT FAMILY TRUST
and
DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 2 February 2015

Urgent Chamber Application

R Bwanali & T Zhwarara, for the applicant
F Siyakurima, for 1st the respondent

CHATUKUTA J: The applicant owns an undivided half share of the remainder of Lot 417 Highlands Estate of Welmoed (herein referred to as “the property”). The other undivided half share was owned by the third respondent. The third respondent is a Trust created by the applicant and her husband, one Joseph Kanyeta Lambert.

The third respondent, a bank, advanced a credit facility to a company called Real Distributors (Pvt) Ltd. The third respondent bound itself as surety for all amounts drawn down by Real Distributors (Pvt) Ltd. On 12 April 2011, the first respondent issued summons in case no HC 3630/11 against Real Distributors (Pvt) Ltd, the third respondent, the applicant’s husband and three others for the recovery of amounts owing under the credit facility. On 29 October 2013, the third respondent entered into a deed of settlement with the first respondent accepting liability. Upon failing to meet the terms of the deed of settlement, the first respondent obtained judgment on 29 October 2013 against the third respondent. The judgment was by consent of the third respondent. The third respondent was duly represented by Messrs Bherebhende Law Chambers. The fourth respondent attached the third respondent's undivided half share in the property on 24 July 2014, in pursuance of a writ of execution and has instructions to dispose of the undivided half share.

It is this attachment and intended disposal of the share that prompted the applicant to file the present application. The application is for stay of execution of the judgment in HC 3630/11 pending a determination of the applicant's rights and extent thereof in the property.

The applicant contends that she was not aware of and is not a party to the proceedings in HC 3630/1. She did not consent to the granting of that judgment. The third respondent intends to dispose of the entire property. Such disposal will affect her real rights in the property. She is not willing to dispose of her undivided half share as she resides in the property with her family and considers the property to be the matrimonial home. *Ms Bwanali* referred to the case of *Gonyora v Zenith Distributors (Pvt) 2004 (1) ZLR 195* in support of the above proposition.

The first respondent responded that it does not intend to dispose of the entire property. The order in HC 3630/11 is clear that it was awarded the third respondent's undivided half share. It is that share that has been attached and that it wishes to dispose of in satisfaction of the judgment. It is not required to secure the applicant's consent. *Mr. Siyakurima* submitted that *Gonyora v Zenith Distributors (Pvt) (supra)* is distinguishable from the present case in that the entire property, including the applicant's undivided share had been sold at a sale in execution. The applicant had not been a party to the proceedings and had not consented to the sale.

The second and the fourth respondents were in default. *Mr Chivhinga* submitted that the third respondent was consenting to the relief sought. No further submissions were made for the third respondent.

The issue for determination is in my view whether a co-owner cannot alienate his or her undivided share in an immovable property. Put in the context of the present case, the issue is whether or not the first respondent is precluded at law to dispose of the third respondent's undivided half share.

The law is set out in *Silberberg and Schoeman's The Law of Property* 5th ed at p 135. It is stated that:

“Every co-owner has the right freely and without reference to co-owners to alienate his or her share, or even part of his or her share subject of course to the provision of the subdivision of Agricultural Land Act. It is this right which is probably the most important characteristic which distinguishes a co-owner per-se from all other forms of co-ownership such as partnerships and associations. It is clear that the exercise of this right may lead to friction in that it enables one co-owner to force the others into a legal relationship with a party or parties which they do not desire.”

This pronouncement has been made in a number of cases. In *Masubey v Masubey* 1993 (2) ZLR 36 (HC) the court was confronted with an issue whether or not a deceased was, during his lifetime, entitled to grant a usufruct over or *usus* or *habitatio* of part of immovable property co-owned without the consent of a co-owner (the applicant in that matter). SMITH J, as he then was, observed at p 39 G that:

“From the above, it seems clear to me that whilst the deceased was entitled, prior to his death, to dispose of his half share of the property to the respondent, either by donation *inter vivos* or by testamentary disposition, he was not entitled to grant a usufruct over or *usus* or *habitatio* of part of the property without the consent of the applicant. The rights of the applicant would clearly be infringed by any such right being granted to a third person.”

As rightly noted by *Mr Siyakurima, Gonyora v Zenith Distributors (Pvt)* (*supra*) is clearly distinguishable from the present. The facts of that case were that the applicant and the fourth respondent were husband and wife. They co-owned the property in issue. The first respondent obtained an order against the fourth respondent for the discharge of a debt owed to it by the fourth respondent. The Deputy Sheriff attached and sold the property by auction. The applicant had not been a party to the proceedings and had not consent to the sale. In holding that the sale was irregular, GOWORA J observed at p 198 D-F as follows:

“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.”

The above does not therefore support the applicant’s proposition. The judgment and the writ of execution only refer to the third respondent’s undivided share. It is clear from the above that there is nothing to prevent the alienation of the third respondent’s

undivided share. The first respondent can alienate, as it wishes, the undivided half share of the property

In the result the application is dismissed with costs.

Chiminya & Associates, Applicants' Legal Practitioners
Sawyer & Mkushi, 1st Respondent's Legal Practitioners