

THE SHERIFF FOR ZIMBABWE
versus
ELINA ELIZABETH CHIKWAVA
and
ASPINAS MUKARATI
and
NHAMO ERTASTUS CHIKWAWA

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 9 February 2017 and 26 April 2017

Opposed Application

Ms F Chikwanha, for the Applicant
Ms B Ndoro, for the Claimant
S. Chako, for the Judgment Creditor

MAKONI J: The present matter relates to interpleader proceedings instituted by Claimant in terms of Order 30 of the High Court 1971 (The Rules) whereby the court is requested to determine competing rights of the parties.

The background to the matter is that the Judgment Creditor loaned and advanced some funds to the Judgment Debtor who later failed to repay necessitating litigation against him under case No. HC 532/13. The Judgment Debtor defended the proceedings and at pre-trial conference stage parties entered into a deed of Settlement. The Judgment Debtor then breached the terms of the deed of Settlement by not honoring its obligations resulting in Judgment Creditor obtaining a judgment against him. Consequently a writ of execution was issued. The applicant went on to attach property at the Judgment Debtors house on 25 November 2015 leading to these proceedings.

The claimant who is married to the Judgment Debtor, out of community of property, is claiming that the property attached is not the Judgment's Debtor's property because she bought it and has receipts as proof.

The claimant avers that the Judgment Debtor is her husband and that they are married out of community of property and the place where the property was attached is their matrimonial house. She said the applicant must have attached the property under a mistaken view that same belongs to the Judgment Debtor. She attached receipts to prove ownership to her interpleader affidavit. She further averred that the receipts are authentic and therefore cannot be challenged.

The law regarding interpleader proceedings is fairly settled. It was restated in the case of *Deputy Sheriff, Marondera v Traverse Investments (Private) Limited and Anor* HH 11/2003 as follows,

‘The case cited by Mr. Biti in his heads of argument is opposite namely: *Bruce N.O Josiah Parkes & Sons Ltd* 1972 (1) SA 68 (R) at 69G-H-

“In my view, in proceedings of this nature the claimant must set out facts and allegations which constitute proof of ownership so that the question whether or not to refer the matter to trial would arise only in the event of there being a conflict of fact which cannot be decided without hearing oral evidence.

This court therefore finds that the claimant has proved its ownership to the hides in question on a balance of probabilities.”

Also the case of *The Sheriff of The High Court v Kwekwe Consolidated Gold Mines (Pvt) Ltd & Anor* HH39/15, MANGOTA J put it this way,

“It is a well-established rule of civil procedure that he who avers must prove on a balance of probabilities what he is averring”

In *casu* the claimant has managed to prove, on a balance of probabilities, that she is the owner of the attached property by producing authentic documentary evidence in the form of receipts. The only issue raised by the Judgment Creditor is that the claimant and the Judgment Debtor are married in community of property. He contended that:

According to *Family Law in Zimbabwe* by Professor W, Ncube @ 168 marriages in community of property means that the property of the spouse, wherever situated, present and future, movable and immovable, including debts, is merged into a joint estate in which the spouses hold equal and indivisible shares regardless of their contributions. So if one spouse is reckless with their financial affairs, it will affect the other spouse, as they are each responsible for one another’s debts. Marriage in community of property means that all money, possessions, belongings to either of the spouses at the time of the marriage or acquired by them during the

time of the marriage cease to be private. The property belongs to both of them. The joint estate is shared equally including debts.

The whole confusion arose as a result of the fact that when the claimant filed her interpleader affidavit she, mistakenly, stated that her marriage was in community of property. The correct facts were put before the court at the hearing by a legal practitioner who assumed agent on her behalf. Therefore the above principles relied on by the Judgment Creditor do not apply in the case of the Claimant since her marriage to the Judgment Debtor is not in community of Property.

In terms of s 2 (1) of the Married Persons Property Act [*Chapter 5:07*], parties who marry in Zimbabwe are married out of community of property. The only exception is that parties can agree to be married in community of property by signing an ante nuptial contract before their marriage is solemnized. Thus in *Venencia Chiminya v Late Denis Mhirimo Chiminya & Ors* HH272/15, MWAYERA J, held, obiter, that:

“It is appreciated that marriage regimes in Zimbabwe in the absence of ante nuptial contract are out of community of property.”

It follows that property that parties acquire during the subsistence of marriage is owned by the person who has title over that property be it movable or immovable. It also follows that when people are married out of community of property the spouses are not at any given point liable for the other’s debts unless they jointly acquire that debt.

H.R Hahlo in *The South African Law of Husband and Wife 5th ed, @ p 288* had this to say on marriages out of community of property:

“The contracts and other juridical acts of one spouse are not binding on the other. If the husband alienates or encumbers his wife’s property without her consent, she may recover it from the third party with *rei vindicatio*. (This, of course, is subject to the general limitations on the *jus vindicandi*, for example, money and negotiable instruments cannot be followed up, and if the wife stands by while her husband alienates or hypothecates her property ,she may be estopped from reivindicating it.) In addition, the spouse whose property was improperly alienated, hypothecated or otherwise disposed of has a personal action for damages against the other.”

The position of the law with regards to marriages out of community of property confirms that the attached property in question belongs to the Claimant.

Section 26 of the Constitution provides the following:

“26 Marriage

The State must take appropriate measures to ensure that - ...

(c) There is equality of rights and obligations of spouses during marriage and at its dissolution”

I was hoping to get guidance from the Constitution on the issue. All that the Constitution does is to place an obligation on the State to ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution. This entails the State aligning the Constitution to the current Marriage Laws. Until that is done the law remains as put forward by the claimant.

From the above analysis is clear that the property attached should not have been attached as it belongs to the Claimant and cannot be used to settle debts of the Judgment Debtor since the Claimant was not involved in the legal dispute leading to the issuance of writ upon which execution was carried out. The fact that she is married to the Judgment Debtor does not make her liable since they are married out of community of property. At law the Claimant has also manage to prove on a balance of probabilities that she is the owner of the attached property.

Claimant’s property should therefore be released

I will therefore make the following order

1. The claimant’s claim is granted
2. The Judgment Creditor pays the Claimant’s costs

Kantor and Immerman, applicant’s legal practitioners
Mawire JT & Associates, Claimant’s legal practitioners
Mabuye Zvarevashe, Judgment Creditor’s Legal practitioners