

THE SHERIFF OF ZIMBABWE
and
KUDZANAI MAPANGA
and
JOHN RASAI MAPANGA
and
SITHOKOZILE T MUREWA
versus
EVE CHRISTINE GAHADZIKWA

IN THE HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 15 March, 2018

Opposed Matter

Ms F. Mabungu, for the applicant
P Chakanyuka, for the claimant
Ms S. Mangwengwende, for the judgment creditor

MAKONI J: These are interpleader proceedings instituted by the applicant on the instructions of the three claimants who are laying a claim to a property that was attached by the applicant. The judgment creditor had obtained a judgment against the judgment debtor who is the owner of the property in issue. The parties are agreed on the law regarding onus of proof in interpleader proceedings and the requirements to be satisfied by the claimants. Parties are also agreed on the law relating to ownership of immovable property specifically that one can only acquire real rights upon registration of title in the deeds registry office and that a party such as the claimant in this matter, who have agreements of sale only have personal rights which can only be exercised against the judgment debtor or the seller. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (5) pp 105-106 where the court said;

“The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere matter of form. Nor is it simply a device to confound creditors or tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of ‘real rights’ in s 2 of the Act. The real right of ownership, or *jus in re propria*, is the ‘sum total of all the possible rights in a thing.’”

The parties are also agreed on the law that where the applicant attaches an immovable property a *pignus judiciale* is created and that *pignus judiciale* takes precedence over personal rights. The parties also agreed that in circumstances where the claimants lay claim to property where there is a *pignus judiciale* they must establish special circumstances that will warrant the courts allowing the property under *pignus judiciale* to be released from attachment. See *Raymond Dokotela Moyo v Timothy Grasiano Muwadi* SC 47/03. Mr *Chakanyuka* for the claimants, as a result, concentrated in his submissions on the special circumstances of the claimants in this matter.

He submitted that the claimants bought their properties some years back and the reason why transfer had not taken place is because of the fault of the judgment debtor. He also submitted that a caveat was placed on the property by Willdale Private Limited in 2014, and that transfer had not taken effect because of failure by the judgment debtor to comply with some requirements of the City of Harare. He further submitted that the 1st claimant bought her property in 2015, the 2nd claimant in 2009 and the 3rd claimant in 2013. The properties were bought before the applicant had instituted her proceedings in this matter. He also submitted that there is some element of selfishness on the part of the judgment creditor in that at one point she was in the same predicament as the three claimants but she then cancelled her agreement of sale and sued the judgment debtor. It was his view that the judgment creditor should have executed against the property that she had purchased.

Ms Mangwengwende for the judgment creditor submitted that there are no special circumstances warranting this court to interfere with a *pignus judiciale*. She submitted that although the parties were in the same predicament at one point, the judgment creditor chose a different route. The claimants have not shown any evidence, have not produced any evidence to show what efforts they have made to get transfer. They blame everything on the judgment creditor and yet in her view there were other procedures that they could take as was done by the judgment creditor.

I won't go into the law as both parties ably addressed the law in their heads of arguments. I will focus my attention on the special circumstances in this matter. In the judgment referred to by Mr *Chakanyuka* HH 546/17, which happens to be my judgment, I made the point that the special circumstances that are required in such a situation, as the present one, must be compelling special circumstances, such that the court will then remove the property from attachment. So the issue is

whether the claimants have been able to put forward compelling circumstances to warrant that the *pignus judiciale* be overridden by their personal rights.

My view is that such special circumstances should be canvassed in the founding affidavit and that the greater part of the founding affidavit should be dealing with the special circumstances especially in circumstances where parties are agreed on the law. Looking at the founding affidavits filed in this matter it is my view that the claimants have not been able to establish compelling circumstances that would persuade this court to override the *pignus judiciale*.

One needs not to go very far from this matter but the judgment creditor herself. She was, at one point, in the same predicament with the claimants. She realized that the judgment debtor was not forthcoming with transfer of the property that she bought. She then resorted to suing the judgment debtor and obtained a judgment and now she is in the process of executing that judgment.

The claimants have not explained, in their affidavits, why they have not sought to compel the judgment debtor to pass transfer to them. If we look at claimant number one he or she bought the property in 2009 and up to date has not instituted or has not provided the court with any suits that he or she might have instituted against the judgment debtor. The same can be said of the other two claimants who bought in 2013 and 2015. The one in respect of 2013 has not done anything. Some other claimants successfully sued the judgement debtor and had a caveat placed on the property in 2014.

The 1st claimant bought her property in 2015. By that time there was a caveat placed on that property which is a *pignus judiciale*. The three claimants sat on their laurels and did not do anything to demand transfer from the judgment debtor and it is trite that the law does not protect the sluggard but the vigilant. And the court finds itself in a situation where it cannot protect the claimants in this matter. In the result the claimants claims will be dismissed and I will order that execution proceeds in respect of their properties. In other words I am granting the order in the main and dismissing the alternative.

In the result I made the following order

1. The claimants' claims are dismissed.
2. The claimants to pay the applicant's and the judgment creditor's costs.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Chakanyuka and Associates, claimant's legal practitioners
Phillips Law, judgment creditor's legal practitioners