REPORTABLE ZLR (57)

Judgment No. SC 68/06
Civil Appeal No. 318/04

LAMECK KANOYANGWA

v

(1) MESSENGER OF COURT (2) LAZARUS MANDEYA (3) UDC LIMITED (4) MRS MAKONESE (5) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, NOVEMBER 7 2006 & MARCH 6, 2007

O Takaendesa, for the appellant

L Mazonde, for the second respondent

No appearance for the first, third, fourth and fifth respondents

GWAUNZA JA: The appellant, in the court *a quo*, unsuccessfully sought an order setting aside the sale by public auction, of stand 110 Marlborough Township of Marlborough. The property in question, which, at the time of the sale, was registered in the appellant's name, had been attached in pursuance of a judgment obtained against the appellant and four others. The second respondent, who was declared the highest bidder, in July 2002 took transfer of the property after the sale had been duly confirmed.

In December 2002 the appellant applied to the High Court to have the sale in execution set aside. His main grounds for seeking such an order were -

(i) that he had not been served with a notice warning him of the sale, by the first respondent;

(ii) that the first respondent had failed to advertise the sale of the property in the manner prescribed by Order 26 r 7(6)(b) of the Magistrates Court (Civil) Rules; and

(iii) that the first respondent had not sent notices to the magistrate, nor had the magistrate sent a notice to the Secretary of the Ministry responsible for the administration of the Housing and Building Act [*Cap 22:07*], concerning the attachment and proposed sale of the house, as required by Order 26 r 8(2) and (3) of the Magistrates Court (Civil) Rules.

The appellant argues on the basis of this, and on what he referred to as "a plethora of errors and omissions traceable to court officials", that the sale was not properly conducted and should be set aside.

The court *a quo*, which was not swayed by the appellant's contentions, found that the appellant, who bore the burden of rebutting the inference of regularity in sales in execution, had failed to prove that the sale of the property had been improperly conducted.

In dismissing ground (i) referred to above, the court *a quo* found, "as a fact" that the appellant was aware that his property was going to be auctioned.

I find no fault in the conclusion reached by the court *a quo* on this point.

According to the evidence before the court, the appellant was aware that a number of judgments had been entered against him, jointly and severally with three others. He knew as far back as January 2001 that the property in question had been advertised for a sale in execution. He did not aver that he and his co-debtors had discharged any of the debts that had led to his property, and maybe others, being attached and advertised for sale by public auction. Therefore he must have remained aware of the real danger of his property being so sold. Specific evidence of his awareness of this particular sale is to be found in the letter dated 2 January 2002, copied to the appellant and referred to by the court *a quo*, in which an instruction was given by the first respondent to the auctioneers to advertise, and conduct, the sale of the property on 25 January 2002.

After the property was sold to the second respondent, a letter was written by him to the appellant on 1 August 2002 giving him notice to vacate the property within 30 days. This was followed in September 2002 by an application for the appellant's eviction from the property. The second respondent was by then the registered owner of the property. These two letters clearly gave the lie to the appellant's assertion in his founding affidavit that, until he was served with the application for his eviction, he was unaware of the attachment and subsequent sale of the property in question. It is evident that being thus aware of the sale, the applicant was lax in taking appropriate action to protect his interests. His argument that he was not properly served with notice of the sale in my view comes rather late in

the day. Such argument has, in any case, been effectively countered by the first respondent who has taken refuge against the consequences of any inadvertence on his part, under Rule 4 (A) 2 of Order 26b of the Magistrates Court Civil Rules. The rule indemnifies the messenger of court and condones any inadvertent failure by him to deliver a notice on the judgment debtor, warning him of the date of the proposed execution of a warrant against his property. It reads as follows:

> "An inadvertent failure by the messenger to deliver or leave a notice in terms of subrule (1) shall not invalidate any attachment, sale in execution or ejectment effected in accordance with a warrant."

The court *a quo* was, in the face of this evidence, quite correct in its conclusion that despite his denials the appellant was fully aware of the attachment and subsequent sale by public auction, of the property in question.

There is some merit, however, in the appellant's assertion that the sale of the property was not properly advertised. No evidence has been placed before the court to show that such advertisement was indeed published. The evidence could, for instance, have been a copy of the advertisement in question. The advertisement which, by his own admission, the first respondent relied on for his submission that the sale was properly advertised, clearly related to a different case to the one *in casu*, even though it advertised the sale of the same immovable property. However, the date on which that sale was to take place was exactly a year earlier than that of the sale at hand. The first respondent does not explain why he would seek to rely on this old and incorrect advertisement when, by letter of 2 January 2002, he directed the auctioneers to advertise the sale of the property for 25 January 2002. In that letter, which, as indicated, was also copied to the appellant, the first respondent correctly

cited UDC as the judgment creditor, the appellant and three others as the judgment debtors, and the case numbers pertinent to the dispute in question. If the auctioneers complied with the request to advertise the sale of the property, they would therefore not have failed to set out the details given to them by the first respondent in that letter. Be that as it may, the fact that the sale might have in fact been properly advertised can be inferred from the fact that on 25 January, 2002 prospective buyers, among them the second respondent, attended the auction and bid for the property.

Against this background, the reliance by the first respondent on an outdated advertisement containing the wrong information remains somewhat of a mystery. The learned judge *a quo,* in spite of this anomaly, preferred the evidence of the first respondent over what he referred to as the appellant's "bald unsupported statement" to the effect that the property was not properly advertised. He stated that the appellant should have produced evidence showing that the sale was not properly advertised. There is, in my view, a degree of misdirection on the part of the court *a quo*. The appellant did tender proof to support his assertions. He attached to his founding affidavit an advertisement forwarded to him by the first respondent, which was tendered as proof of a proper advertisement of the sale of the property. The advertisement pertained to a different case altogether.

While inferences can be made to the contrary, I find the fact remains that no evidence was placed before the court to show that an advertisement relating specifically to the case at hand, and involving the parties *in casu*, was published. On the face of it, therefore, the first respondent disregarded the provisions of the Magistrates Court Rules specifically requiring him to advertise the sale.

The appellant asserts in ground (iii) that the first respondent and the magistrate, respectively, disregarded subrules (2) and (3) of r 8 of Order 26 of the Magistrates Court Rules. Subrule (2) requires the messenger of the court, in the case where a dwelling house has been attached, to send written notification to the magistrate of the court from which the warrant of execution was issued, that the dwelling has been attached and is to be sold in execution. In his/her turn, the magistrate to whom the notification is sent, is required by subrule (3) to "forthwith" send the same notification to the Secretary responsible for National Housing. Thereafter a response from the latter, as to whether or not he would pay the debt on behalf of the appellant, was to be awaited before the property was sold.

The appellant is correct in his assertion that the only correct reading of the first respondent's response is that it is possible he might have made mistakes but that such mistakes would not be deliberate.

It is in this respect pertinent to consider the first respondent's response to these allegations, as it appears in his opposing affidavit:

> "6 Ad para 17-18
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> Save to deny that there were irregularities, I have to state that notices were given, and where these were not, it was no (*sic*) deliberate and I would pray in aid order 26 R 4A(2)."

As indicated earlier, the rule referred to by the first respondent relates to the service by him, on the judgment debtor, of a notice concerning the imminent sale of the property of the latter, by public auction. That being the case, the first respondent's attempt to hide behind this rule for his failure to send the notice in

question to the magistrate, is clearly misplaced. In the face of his failure to tender proof that the notice in question was sent to the magistrate, the inference that no such notice was served, is inescapable. For her part, the magistrate, cited *in casu* as the fourth respondent, has tendered no evidence to show whether or not she received the notification in terms of r 8(2), nor whether she had then forwarded it to the Secretary for National Housing. The fourth respondent, in fact, did not file any opposing papers in this matter. Even though the learned trial judge considered the allegations by the appellant regarding non-compliance by the messenger and the magistrate with order 26 rr 8(2) and (3) of the Magistrates Court Rules, he was not persuaded by the appellant's contentions and noted:

> "These allegations were denied by the first respondent. He said there was no irregularity at all since the requisite notice was given. I am inclined to believe the messenger of court as he is an officer of the court who had no interest in the matter …".

This reasoning I find is not sustainable on the evidence before the court. The messenger of court failed to adequately explain his failure to comply with r 8(2) of order 26. The magistrate concerned did not make the effort to enlighten the court as to whether or not she received the notice in question, and forwarded it to the Secretary for National Housing. The provisions in question require that the notices be written and it should not have been difficult for the second and fourth respondents to obtain copies thereof (i.e. if the notices existed) and tender them to the court as evidence of compliance. Without satisfactory explanation, and in the absence of concrete evidence of the fact, it is difficult to see how the first respondent's evidence could have been preferred over that of the appellant. Clearly the appellant's averment of misdirection on the part of the court *a quo* has some merit.

The appellant urges this Court to set aside the sale at hand, despite its confirmation, and transfer of the property to a third party having taken place, because "the rules of this court and administrative procedures governing judicial sales were flouted". He relies for this argument on *Bobby Maparanyanga v the Sheriff of the High Court and Four Ors* SC 132/02 where a judicial sale was set aside on similar grounds. The Court in that case noted that allowing the sale to stand in those circumstances would bring judicial sales into disrepute. While the sale in *Maparanyanga*'s case (*supra*) was indeed set aside on the basis of blatant disregard of the rules for judicial sales, what distinguishes that case from the one at hand is the fact that *in casu*, there was no collusion between the Sheriff and the purchaser of the property, to disregard the rules in question. In the *Maparanyanga* case, the purchaser's *bona fides* as questionable. *In casu* the appellant has in fact properly made the concession that transfer of the property has taken place and that there is no imputation of irregular behaviour alleged against the purchaser, whose purchase was, admittedly, *bona fide*.

What presents itself in the final analysis is a situation where, on the one hand, there is a judgment debtor who was aware of the impending sale of his property by public auction, even though some requisite pre-sale formalities concerning advertisement of, and the service of certain notices concerning, the sale, were not observed by the relevant officials.

Against this, is the situation where -

(i) the sale by public auction was successfully conducted and the highest bidder declared;

(ii) the sale was then confirmed by the magistrate as required by the rules of the court;

(iii) the said highest bidder – the second respondent *in casu* - in good faith took transfer of the property after duly paying the purchase price and other related charges like auctioneers' fees, council rates and conveyancing fees; and

(iv) the proceeds of the sale were paid to the judgment creditor, that is, UDC.

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Added to all this is the fact that the sale in question took place some three to four years ago.

Given the situation outlined above, the determination of this dispute, in my view, requires that the interests of the appellant on one side, be balanced against those of the respondents, on the other. In other words, the case must be determined on the basis of equities and balance of convenience. This is what I shall proceed to do.

While the appellant under other circumstances (for instance, a timeous objection to the sale and its confirmation), might have been entitled to the relief that he is seeking *in casu*, I find in the circumstances of this case that, in weighing his

interests against those of the respondents and a *bona fide* purchaser who has taken transfer of property after the sale had been properly confirmed, the equities clearly favour a finding in favour of the second respondent.

While I do not in any way condone the disregard of clearly laid down rules for judicial sales, by officers of the court, I am nevertheless moved to observe that the appellant was, to an extent, the author of his own misfortune. What is aptly noted by the learned judge in *Morfopoulos v Zimbank Limited & Ors* 1996 (1) ZLR 626 (H) at p 634D clearly applies to the appellant in *casu*:

> "All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his case precisely because of his own failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problems, a debtor cannot hope to persuade a court that equitable relief is his due."

Despite being aware of the attachment of his property in execution, the appellant, on the evidence before the court, failed to speedily move to protect his interests. The property was under attachment for at least one year, yet he took no steps to avert its sale. After the sale, the appellant did nothing to stop its confirmation and subsequent transfer into the name of the second respondent.

As correctly argued for the second respondent, it is trite that the courts will not readily interfere with judicial sales in execution, in order to protect the efficacy of such sales, especially after confirmation and transfer. The sale itself vested in others -particularly the second respondent- rights that, after being exercised, would be difficult to reverse. Clearly too much water has, as it were, passed under the bridge.

Although it is my finding that the equities do not favour a finding in favour of the appellant, I find it necessary to stress the point that the Court does not condone the blatant disregard of rules governing judicial sales, by the officers whose mandate it is to uphold the rules. Such disregard does have the undesirable effect, as correctly noted by the appellant, of bringing judicial sales into disrepute, and should be discouraged in the strongest terms. Given this circumstance, it would in my view not be fair and just to order the appellant to pay the costs (if any) of the other respondents except the second respondent's.

In the result, I make the following order -

(i) The appeal be and is hereby dismissed.

(ii) The appellant shall pay only the costs of the second respondent.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Chinamasa, Mudimu, Chinongwenya & Dondo, appellant's legal practitioners

Matipano & Musimwa, second respondent's legal practitioners.