

REPORTABLE (80)

CECK ENTERPRISES (PRIVATE) LIMITED

v

(1) MARIA SITHOLE (2) MATHIAS SITHOLE

**(Duly represented by TAKURA MUKWESHA in her capacity as the
duly appointed Executrix Dative of his estate)**

(3) REGISTRAR OF DEEDS (4) MASTER OF THE HIGH COURT

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, HLATSHWAYO JA & BHUNU JA
HARARE, JANUARY 30, 2020 & JUNE 29, 2020**

E. Jera, for the appellant

M. Moyo, for the first respondent

Second respondent in person

GWAUNZA DCJ

[1] This is an appeal against the whole judgement of the High Court handed down on 14 March 2018, dismissing the appellant’s counter claim against the first respondent.

FACTUAL BACKGROUND

[2] The first and the second respondents were married and later on divorced. They owned a property, namely, Stand No. 2395 Glen View (“the property”). Unbeknown to the first respondent, the appellant purchased the property from the second respondent in or about September 1997. In the court *a quo*, the first respondent averred that she only became aware of the sale when ‘strangers came to view the house’ pursuant to the offer they had received from the second respondent.

- [3] The first respondent accordingly, on 11 September 1997, successfully filed an urgent chamber application seeking a provisional order interdicting the second respondent from selling, ceding or otherwise disposing of his right, title and interest in the property pending the hearing of an appeal that she had noted in the divorce proceedings. The order, which was not opposed by the second respondent who was then alive, also interdicted the third respondent from registering or giving effect to any sale or disposal of the second respondent's title in the said property. This was followed by a letter addressed to the Registrar of the High Court, on behalf of the first respondent, requesting that a *caveat* be registered over the Title Deed of the property.¹
- [4] The second respondent, nevertheless, proceeded to transfer the said property to the appellant on 3 November 1997, contrary to the terms of the order interdicting him from doing so. The transfer was executed through the same law firm that had failed, on his behalf, to oppose the application that culminated in the order interdicting him from effecting transfer of the property. The appellant thereafter attempted to enforce its perceived rights in the property by seeking the eviction therefrom of the first respondent. The latter immediately filled an urgent chamber application and obtained a provisional order interdicting the appellant from evicting her from the property or interfering with her peaceful occupation thereof in any way.
- [5] In May 2002, the appellant filed a counter application seeking an order compelling the first respondent to deliver to it the title deeds of the property. The first respondent in response then filed an application *a quo* for confirmation of the provisional order

¹ It is noted in this respect that this letter should properly have been addressed to the Registrar of Deeds

granted in her favour in 1997. The appellant opposed the application and averred that it was not aware of the 1997 order interdicting the second respondent from selling or otherwise disposing of the property.

The court *a quo* held that notwithstanding the fact that the appellant may have been an innocent purchaser, the sale and transfer were done in breach of a court order and therefore of no legal force or effect. The court found the second respondent's non-compliance with the provisional order in question to have been wilful and *mala fide*. In the result, the counter claim was dismissed and the court confirmed the 1997 provisional order. The court also set aside the sale of the property to the appellant and ordered cancellation of the Title Deed issued in favour of the appellant pursuant to the sale to it, of the property.

- [6] Aggrieved by this decision, the appellant filed this appeal on the following grounds: -
1. The court *a quo* erred in cancelling the title deeds in the name of the appellant notwithstanding the fact that the sale and subsequent transfer of the property to it was valid in the circumstances of the case.
 2. The court *a quo* erred in failing to consider the position of the appellant as an innocent purchaser.
 3. The court *a quo* grossly misdirected itself in making an order for costs against the appellant in view of the circumstances of this case.

I will consider these grounds in relation to the evidence before the court.

WHETHER OR NOT THE COURT A *QUO* ERRED IN CANCELLING THE TITLE DEED IN THE NAME OF THE APPELLANT.

- [7] In its first ground of appeal the appellant avers that the court *a quo* erred in cancelling the title deed in the name of the appellant notwithstanding the fact that the sale and subsequent transfer of the property to it was valid in the circumstances. This ground

will be discussed together with the second ground of appeal which contends that the court *a quo* failed to consider the position of the appellant as an innocent purchaser.

[8] It is not in dispute that the sale of the property was effected sometime in September 1997. The order in HC 8638/97 interdicting the second respondent from selling or otherwise disposing of his right, title and interest in the property pending the finalisation of the appeal by the first respondent in the divorce proceedings, was only granted on 8 October 1997. That being the case the sale, which was conducted prior to the granting of the provisional order in question, was lawful as it did not violate the terms of this or any other order of the court. In this respect, the court *a quo*'s finding that both the sale and transfer of the property to the appellant were null and void was in part, misconceived, as it was only the transfer which was afflicted by this defect. Accordingly, para 3 of the order of the court *a quo* purporting to set aside the sale of the property, was incompetent and must be vacated.

[9] The same however cannot be said of the transfer of the property to the appellant. It is evident from the record that the property was transferred on 3 November 2017. This was well after the same order in HC 8638/97, interdicted the third respondent *in casu* from registering or giving effect to any sale, cession or encumbrance of the first respondent's rights in the property in violation of the interdict issued against the first respondent. The order reads as follows: -

“That the second Respondent (third respondent *in casu*) be and is hereby interdicted and restrained from registering or in any way giving effect to any sale, cession, encumbrance or disposal by any means of first respondents' right, title and interest in Stand No. 2395 Glen View Township of Glen View situate in the District of Salisbury.”

[10] The appellant, in a supporting affidavit deposed to by one of its directors, Charles Siziba, indicated that the appellant became aware, soon after the transfer of the property to it was effected, that the transaction had been done in violation of the court order in HC 8638/97 interdicting the third respondent from transferring the property to a third party. Charles Siziba also averred that the second respondent's legal practitioners (*Hove, Dzimba and Associates*) were fully aware of the order interdicting the third respondent from effecting transfer of the said property but nevertheless, proceeded to have the transfer into the appellant's name, effected. It is noted in this respect that despite the Registrar of Deeds having been cited in HC 8638/97, no *caveat* had been registered against the title deed of the property, to alert registry officers to the fact that an interdict against the registration of transfer of the property had been issued against the Registrar. As already noted, this was because the first respondent's legal practitioners misguidedly addressed the request for registration of the *caveat* to the Registrar of the High Court instead of the Registrar of Deeds. Be that as it may, the fact remained that the transfer of the property to the appellant was effected in direct violation of an extant order of the court.

[11] There is cogent authority to the effect that where the transfer of property is done in defiance of an order of court, the transferee obtains defective title thereto. In *Gong v Mayor Logistics (Pvt) Ltd* SC2/17, the court stated as follows at pp 6-7: -

“At this juncture, it does not seem to matter to me whether or not the appellant was the first purchaser as he alleges. **What is material at this stage is that he obtained defective invalid title in defiance of a valid court order and caveat. It is an established principle of our law that anything done contrary to the law is a nullity.** For that reason, no fault can be ascribed to the learned judge's finding in the court *a quo* that the conduct of the appellant and his lawyer in obtaining registration of the disputed property in the face of a court order and *caveat* to the contrary was reprehensible. On the basis of such finding the appeal can only fail.” (*my emphasis*)

[12] These sentiments are eminently apposite *in casu*. The second respondent through his legal practitioners reprehensibly transferred the property to the appellant in defiance of an extant court order. On the basis of the law, and the authority cited, no valid title could be transferred to the appellant by the second respondent. The court *a quo* in my view correctly opined that this result was not changed by the fact that the appeal pending before the magistrates' court at the time the provisional order was granted, had subsequently been determined. The court reasoned that the judgment of the magistrates' court did not make lawful the transfer of the property to the appellant, in circumstances where it was done contrary to an extant order of the court. While the sale of the property to the appellant was done before the provisional order interdicting him from so selling the property was issued, the second respondent subsequently knew of the provisional order and its terms. He ought not to have proceeded to have transfer of the property to the appellant effected. This conduct was clearly *mala fide*.

[13] In view of the foregoing, I find that the court *a quo* properly confirmed the provisional order in question. By the same token, the court's decision dismissing the appellant's claim is beyond fault. The appellant's title to the property was tainted with an illegality and therefore void. A nullity is like an event that never happened in the eyes of the law. The words of Lord Denning in *Macfoy v United Africa co. Ltd* [1961] 3 All ER 1169 (PC) at 1172 are apposite.² As stated in *Gong v Mayor Logistics (Pvt) Ltd (supra)* the appellant's predicament cannot be salvaged by the fact that he was an innocent

² "If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court, for it to be set aside. it is automatically null and void without more ado, although it is sometimes convenient to have a court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

purchaser of the property as of the date the sale was effected. The transfer into its name was a nullity.

I find, accordingly, that the appellant's first and second grounds of appeal are devoid of merit.

WHETHER OR NOT THE COURT A *QUO* ERRED IN AWARDING COSTS AGAINST THE APPELLANT.

[14] In its third ground of appeal, the appellant contends that the court *a quo* grossly misdirected itself in making an award of costs against the appellant 'in view of the circumstances' of the case. In particular, the appellant argues that it was an innocent purchaser of the property, as the court *a quo* itself found. Further, that the first respondent had exhibited lack of diligence in protecting her rights, given that she had only sought to have the 1998 provisional order confirmed, after the appellant had instituted vindicatory action against her in the court *a quo*.

[15] The general rule is that costs follow the cause. In view of this, it cannot in my view be said that the court *a quo* ought not to have made an award of costs against the appellant who was the unsuccessful party in the proceedings. The cancellation of the Title Deed that was in the appellant's name was not ordered on the basis of whether or not the appellant was an innocent purchaser. There simply was no basis for the issuance of the Title Deed, since the transfer that it purported to perfect was, at law, a nullity. There is also no evidence that the timing of the application for confirmation of the 1998 provisional order brought by the 1st respondent, was an issue before the court *a quo*.

[16] It is settled law that costs are at the discretion of the presiding officer. In *Barros and Wasserman v Ruskin* 1918 AD 63 at 66, the court stated as follows: -

“The rule of our law is that all costs unless expressly enacted are in the discretion of the judge. His discretion must be judiciously exercised but it cannot be challenged taken alone and apart from the main order without his permission.” (*my emphasis*)

It is also a settled position of the law that a court of appeal will not lightly interfere with the exercise of discretion by a lower court, unless it is shown that it was not judiciously exercised. See *Barros and Anor v Champonda* 1999 (1) ZLR 58 (S) where it was stated as follows at 62G – 63A: -

“... If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its discretion in substitution, provided always (that it) has the materials for so doing.”

I do not find, in view of the above, that there is anything to show that the discretion of the court *a quo* to award costs on an ordinary scale was not exercised judiciously. The appellant has therefore not proved a case for interference, by this Court, with the order of costs made against it.

In the result, the appellant’s third ground of appeal is dismissed for lack of merit.

DISPOSITION

[17] I have found that the transfer of the disputed property to the appellant was done contrary to an order of the court *a quo*. The transfer being a nullity, no legal right can flow from it. In this regard, the appellant’s three grounds of appeal are devoid of any merit. The appeal accordingly ought to be dismissed. Costs will follow the cause.

It is in the premises ordered as follows: -

“The appeal be and is dismissed with costs.”

HLATSHWAYO JA : I agree

BHUNU JA : I agree

Moyo & Bera, appellant’s legal practitioners

Matsikidze & Mucheche, 1st respondent’s legal practitioners

Dube-Banda Nzarayapenga, 2nd respondent’s legal practitioners