

TARIRO LEBOGANG MUTENDA
versus
UPENYU IGNOSTIOUS PROSPER MASHANGWA
and
THE MASHANGWA TRUST
and
DAVIDSON BRIGHTON CHIROMBO N.O
and
HARRICANOS HENRY MAUNGANIDZE N.O
and
REGISTRAR OF DEEDS N.O
and
JEMINA GUMBO N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; 16 July & 22 November 2024

Opposed Application

Mr *Mabulala*, for the applicant
Mr *T Mpofu*, for the 6th respondent
No appearance by 1st, 2nd, 3rd, 4th and 5th respondents

TSANGA J:

The application before me is for confirmation of a final order following the granting of a provisional order which was as follows:

1. The first respondent be and is hereby interdicted from disposing of Stand 655 Borrowdale Brooke Township of Stand 137 Borrowdale Brooke measuring 4428 square metres with title currently registered under Deed of Transfer No. 6402/2003 pending the finalisation of this application.
2. The disposal of Stand 655 Borrowdale Brooke Township of Stand 137 Borrowdale Brooke measuring 4428 square metres be and is suspended pending the finalisation of this application.
3. The first respondent be and is hereby ordered and directed to allow the applicant have to access to the house at Number 655 Brooke Drive, Borrowdale Brooke, Harare.

The final order sought is an amended one to the following effect:

1. The applicant be and is hereby confirmed as a trustee of the second respondent, The Mashangwa Trust, in terms of clause 8.2.2 as read with clause 7.3 of the Notarial Deed of Trust No. MA662/2012.
2. The decision by the first and sixth respondents and or the resolution purportedly made by the second respondent to dispose of Stand 655 Borrowdale Brooke Township of Stand 137 Borrowdale Brooke measuring 4428 square metres be and is hereby nullified.
3. The first and sixth respondents be and are hereby interdicted from disposing of Stand 655 Borrowdale Brooke Township of Stand 137 Borrowdale Brooke measuring 4428 square metres.
4. The first and sixth respondents shall bear the costs of the application jointly and severally one paying the other to be absolved.

The background facts are that on the 17th of April 2012 the first respondent Upenyu Mashangwa and his now late wife Blessing Mashangwa bought property described Stand 655 Borrowdale Brooke Township of Stand 137 Borrowdale Brooke, measuring 4428 square metres. It was bought in the name of Mashangwa Family Trust which was not yet registered at the time. It was later registered on the 18th of June 2012 but did not take transfer of the property. The property was their matrimonial home.

It is further common cause that the Mashangwas incurred a financial liability against the sixth Respondent which they were ordered to pay in the sum of US\$800 000.00 in October 2019. By reason of interest and other charges the debt owed had since grown to US\$1650 000.00.

It is not in dispute that the property in question was then attached pursuant to a writ issued on the 5th of March 2020. Interpleader proceedings pertaining to the property were equally dismissed on the 20th of November 2022 under HC 7156/22. Further, under case HC1387/23, the property was said to constitute matrimonial property in the sense of being owned by the Mashangwas themselves. Additionally, under HC 1306/23 and HC 1436/23, applications for stay of execution were struck off the roll. None of the decisions were ever appealed and therefore remain extant.

Desirous to finally honour the debt in light of the extant judgments, and, also arising from his own Damascene moment following his wife's death on the precariousness of life and

the need to do what is right, Mr Mashangwa then entered into an agreement with Jemina Gumbo the creditor to sell the property by private treaty. It was in light of this development that the applicant had quickly filed an urgent application that no executor had been appointed to her mother's estate and that the executor would need to be joined to the matter. The provisional order granted is now sought to be confirmed.

Applicant's arguments as submitted by Mr Mabulala her counsel, underscored that what she is seeking to impugn is the decision by the judgment creditor and Upenyu Mashangwa to dispose of the property outside the provisions of the High Court Rules 2021, in particular rule 71. He argued that in terms of that rule, the process of execution to enforce a court order is only carried out by the Sheriff. As such, the agreement and deed of settlement by the judgment creditor and the judgment debtor to sell the property and share the proceeds were thus said to be a nullity. Moreover, he argued that the agreement was done at the time that Upenyu's wife, Blessing, had died and when he had no authority to represent her estate.

Additionally, he submitted that upon the death of her mother, the applicant became a trustee by virtue of the Trust Deed. He argued that it was therefore unlawful for the two to sell the property without the Trust's involvement and that of herself as trustee. The requirements for granting an interdict were also argued to have been established, namely a clear right established on a balance probabilities, irreparable injury and the absence of similar remedy were all said to have been met. Specifically emphasised at the hearing was the submission that s44 of the Administration of Estates Act [*Chapter 6:01*] forbids the issuing out of a writ against the property of a deceased person. For all the above reasons Mr Mabulala sought that the provisional order should be confirmed.

Mr Mpofu, on behalf of the sixth respondent, zeroed in on the fact that the property in question had already been declared executable and any relief claiming otherwise would be contrary to extant judgments. His thrust was that once the writ was issued, the property became executable until the writ is satisfied. He submitted that interdicting the writ is unlawful and contrary to the law. Regarding the submission on behalf of the applicant that she is a Trustee and that the Trust owns the property and that she has not participated as a trustee in the sale, he argued that once a property is attached in it is no longer in the hands of the owner but that of the judgment creditor. In this instance he emphasised the judgments that have already confirmed that the property is not owned by the Trust. Moreover, he argued that the judgment creditor decides when and how to execute and has the protection of judicial mortgaged

property, which effectively takes away rights of the former owner. As such, he maintained that there is no basis for the applicant coming as a Trustee to seek to interdict the process.

As for the reliance on s 44 of the Administration of Estates Act he submitted that the applicant does not have a legal interest to activate this section as the property is not even owned by the deceased. He observed that the applicant was reading the provision wrongly as it simply provides for a moratorium on execution before expiration of the period mentioned in the gazette. The applicant had not shown that a notice had been published on a particular date and that the sale occurred before such date. Section 44 (2) was also said to be inapplicable as it deals with obtaining a writ within six months of letters of administration which is not the case in this instance.

He emphasised that the Trust does not own the property and in any event the Trust was created *in fraudulem legis* for purposes of defeating creditors. Moreover, the property was acquired before the Trust was constituted yet applicant argues that it had been acquired by the Trust. He also highlighted that there was never a board of Trustees to deal with the issues of the Trust as captured in Upenyu Mashangwa's sworn affidavit. He thus sought that in light of all the above submissions, the application be dismissed with costs for lacking merit and that the provisional order be discharged.

Analysis

Section 44 of the Administration of Estates Act which applicant's lawyer particularly emphasised at the hearing provides as follows:

44 Suspension of execution against deceased estate

- (1) No person who has obtained the judgment of any court against any deceased person in his lifetime, or against his executor in any suit or action commenced against such executor, or which, having been pending against the deceased at the time of his death, has thereafter been continued against the executor of such person, may sue out or obtain any process in execution of any such judgment before the expiration of the period notified in the *Gazette* in manner in this Act provided.
- (2) No such person as aforesaid shall sue out and obtain any process in execution of any such judgment as aforesaid within six months from the time when letters of administration have been granted to the executor against whom execution of such judgment is sought without first obtaining an order from the High Court or some judge thereof for the issue of such process.

These two provisions have been interpreted in *Malawusi v Marufu & Ors* 2003 (1) ZLR 151 (S) where the argument was rejected that the section affects not only the issuing of a writ after the death of a judgment debtor but also the continuation of the process of execution where the writ was issued before the death of the judgment debt. As succinctly explained by SANDURA JA as he then was:

“In my view, the section is clear and unambiguous. Subsection (1), in relevant part, reads:
“No person who has obtained the judgment of any court against any deceased person in his lifetime ... may sue out or obtain any process in execution of any such judgment ...”. (emphasis added)

Clearly, what is prohibited is suing out or obtaining a writ of execution after the death of the judgment debtor.

Subsection (2), in relevant part, reads:

“No such person ... shall sue out and obtain any process in execution of any such judgment ... without first obtaining an order from the Court or some Judge thereof for the issue of such process.” (emphasis added)

Again, subs (2) makes it clear beyond doubt that what is affected is suing out and obtaining any process in execution of the judgment after the judgment debtor’s death. In other words, what is affected is applying for and obtaining the writ of execution after the debtor’s death.

Neither subs (1) nor subs (2) affects the continuation of the process of execution where the writ was issued before the debtor’s death, as was the position in the present case.

In this instance the writ was obtained on the 20th of March 2020 before the death of the co-debtor deeming the property executable. Mr Mpofo is therefore correct that the writ itself cannot be interfered with until satisfied.

Turning to the argument that it is only the Sheriff who should deal with any sale not the debtor and creditor themselves entering into their own private arrangement, r 71 of the High Court Rules 2021 deals generally with execution against immovable property. Regarding a sale of immovable property otherwise than by public auction r 71 (36) specifically provides as follows:

(36) Where all persons interested including the judgment debtor consent thereto, or otherwise with the consent of a judge, the sheriff may sell immovable property attached in execution otherwise than by public auction, if he or she is satisfied that the price

offered is fair and reasonable and that the property is unlikely to realise a larger sum by a sale at public auction.

The provision clearly deals with the process of a sale being done through the Sherriff but clearly permits the interested parties who include among them the creditor and the judgment debtor, to consent to a private sale. It is not the Sheriff who consents save that he is involved in the sale. There is no need to put a stop to the agreement simply because the parties have agreed to sell the property other than by public auction. The Sheriff, simply put is a conduit. That in essence is the principle that is being articulated by Rule 71 (36).

Indeed, the judgments dealing with the writ, ownership of property and its execution have not been set aside and remain effective. In *Commissioner of Police v Commercial Farmers Union 2000 (1) ZLR 503 (H)* it was held that a court order must be obeyed until it is set aside. Also, in terms of s 69 (3) a writ remains valid until executed. Further, upon attachment the judicial mortgage that was created which placed the property in the hands of the creditor and if a public auction is not beneficial, a creditor is at liberty to enter into an agreement to sell by private treaty. Given that all these processes are legitimate, the arguments by the applicant that she satisfies the requirements of an interdict have no bearing since the courts cannot interdict lawful processes.

Accordingly:

1. The application is dismissed with costs.
2. The Provisional Order is discharged.

Mabulala & Dembure, applicant's legal practitioners
Mafongoya and Matapura, sixth respondent's legal practitioners