

GODFREY ZACHARIA NYAHONZO

Versus

ONIAS GASELA

And

THE CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 26 MAY 2022 & 2 JUNE 2022

Unopposed court application

S. Shenje, for the applicant

DUBE-BANDA J

Introduction

1. This matter has been making rounds and turns on the unopposed motion court. On 23 December 2021, it was placed before NDLOVU J who raised certain queries and removed it from the roll. On 27 January 2022, it was placed before MOYO J who also raised certain queries and directed applicant to file heads of argument in support of the application. It was then removed from the roll. On the 26 May 2022, it was placed before me, and Mr *Shenje* counsel for the applicant sought a postponement to a date when MOYO J would be presiding on the unopposed motion court. Counsel sought this postponement on the basis that it was MOYO J who directed that applicant files heads of argument in support of this application. I asked counsel whether that was the only basis for seeking the postponement, and he answered in the affirmative.
2. My view is that if a judge raises a query in respect of a matter in motion court, it does not follow that the matter would have to be dealt with only by that judge. Further if a judge directs counsel to file heads of argument in motion court, it does not follow that only that judge should hear the matter, any other judge sitting in the motion court subsequent to that can hear the matter. It is on this basis that I directed that the matter must be heard and

invited counsel to make submissions. Counsel was content to stand by heads of argument filed of record.

3. This is an application for a declaratory order. Applicant seeks an order couched in the following terms:
 - i. That Stand 25259 Pumula South is for all intents and purposes at law the property of the 1st respondent and is accordingly declared executable in satisfaction of a judgment granted by the Magistrates' Court, Tredgold, under Case No. 261/21.
 - ii. That 1st respondent pays costs of suit on the attorney and client scale.
4. Despite being served with the court application the 1st and 2nd respondents did not file any opposing papers. The application is therefore not opposed.

Factual background

5. This application will be better understood against the background that follows. At the Magistrates' Court in Case No. 261/2021, applicant obtained a judgment against 1st respondent for payment of the sum of USD12 000.00 or the RTGS equivalent thereof; interest at the prescribed rate from the date of summons to the date of final payment; and costs of suit of an legal practitioner and client scale.
6. This application is anchored on the fact that the Messenger of Court made a *nulla bona* return, and according to applicant 1st respondent is the owner of Stand 25259 Pumula South, Bulawayo (property), and therefore attachable in execution of his judgment debt. It is contended that although the property is registered in the name of a third party, it is 1st respondent's property. In his founding affidavit applicant avers that he is aware that 1st respondent is the owner of the property, but he has not taken steps to take cession or transfer of it. Applicant contends further that through his investigations he established that 1st respondent bought the property as an undeveloped piece of land sometime in 2010 or 2011. It is said the property was purchased from one Valencia Gumbo (third party). It is averred that applicant developed the property, and he is in occupation of it. It is contended

that the Messenger of Court's return of service shows that on more than one occasion one Silundule Khumalo was found present at the property, and she is 1st respondent's wife.

7. One Buthelezi Dhlamini filed a supporting affidavit and he avers that he introduced 1st respondent to Valencia Gumbo, his mother in law. He also persuaded 1st respondent to buy the property from Valencia Gumbo. Valencia Gumbo had earlier purchased the property from 2nd respondent, and at the time she sold it to 1st respondent it was an undeveloped piece of land. The dwelling house was built by 1st respondent. He avers further that Valencia Gumbo died in 2020, and at the time of her death she had no interest in the property.
8. Applicant seeks that the property be attached and sold in execution in respect of a judgment against 1st respondent. It is against this background that applicant has launched this application seeking the relief mentioned above.

The law and the facts

9. Applicant's version is not controverted. There is nothing to gainsay it. I therefore, for the purposes of this application accept that sometime in 2010 or 2011 Valencia Gumbo sold the property to the 1st respondent, and that notwithstanding the sale the property has not been transferred to the 1st respondent. The undisputed evidence shows that 1st respondent has taken occupation of the property.
10. Applicant is not clear whether the property is held under a deed of transfer or registration of cession. In his founding affidavit he avers that the property is "registered" in the name of a third party. In the same affidavit he says he is aware that 1st respondent is the owner of the property but has not taken steps to change ownership through "cession or transfer." Again in the same affidavit he further avers that notwithstanding the "registration" of the property in the name of Valencia Gumbo, for all intents and purposes it belongs to the 1st respondent. He contends further that 1st respondent should not be allowed to shield behind the fact of "registration." In the heads of argument it is contended that the property sought to be declared executable is "registered" in the name of Valencia Gumbo. Applicant

attaches to his application a copy of Council offer letter to Valencia Gumbo, which shows that the property is title surveyed. My view is that a title surveyed property is held under a deed of registration, therefore this property is held under a deed of transfer.

11. The only issue for determination is whether at law, this court may declare the property registered in the name of a third party specifically executable in respect of a judgment debt against 1st respondent? Who at law is the owner of the property? The ownership of immovable property is determined by registration of title at the Deeds Registry Office. According to applicant's version, the property is registered in the name of the third party, i.e. Valencia Gumbo.
12. It follows therefore that the third party is the registered owner of the property in question, and as a registered owner she or her estate enjoys unfettered rights except as maybe subject to the deed of transfer. In *Takafuma v Takafuma* 1994 (2) ZLR 103 (5) pp 105-106 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.

13. The law relating to ownership of immovable property is that one can only acquire real rights upon registration of title in the deeds registry office. GOWORA J as she then was in the case of *Agro Chem Dealers (Pvt) Ltd v Gomo and Ors.* HC 3342/08 quoted with approval the words of Lord De Villiers in the case of *Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd* 1913 AD 267 @ 276 which he said;

There is no principle more clearly established in our law than that a clear transfer of land *coram legi loci*, which is in the nature of a semi judicial act, passes the dominieon to the transferee, and that, except perhaps in the case of ownership acquired by presumption, the title appearing on the title deed is conclusive in favour of a bona fide purchaser, to whom such transfer has been effected. Even when land has been acquired by prescription the practice is for

the party who has so acquired it to institute an action for duly registering his acquired rights in the Deed Office.

14. In *casu*, it is the third party that has real rights in the property, it is therefore at law the owner of the property. The fact that the 1st respondent has taken occupation of the property is of no moment. With respect to immovable property delivery is achieved through registration in the Deeds Office, as was decided in *Harris v Buissine's Trustee, 2 M*, as cited in *Agro Chem Dealers (Pvt) Ltd v Gomo and Ors. HC 3342/08*. The pertinent passage from the judgment is this:

By the law of Holland the *dominium* or *ius in re* of immovable property can only be conveyed by transfer made *coram lege loci*, and this species of transfer is essential to divest the seller of, and invest the buyer with, the *dominium or ius in re* of the immovable property, as actual tradition is to convey the *dominium* of movables and that the delivery of the actual possession of immovable property has no force or legal effect whatever in transferring its *dominium*. (My emphasis).

15. In *casu*, 1st respondent only has a personal right to claim transfer of the property from the seller. See: *Moyo v Fraser and Others (362/99) (SC 5 of 2006*. According to the learned authors Herbstein & van Winsen: *The Civil Practice of the Supreme Court of South Africa* (2nd ed.), at p. 1044 the common law rule is that where the debtor has bought but not taken transfer of the property and has only a *jus ad rem* to it, his creditors cannot execute on it. Therefore, a party such as the 2nd respondent, who has purchased a property and not taken transfer has personal rights which he can only exercise against the seller. The property cannot be placed under judicial attachment and executed by his judgment creditor.
16. Applicant's contention that 1st respondent bought the property either in 2010 or 2011 and that the reason he has not taken transfer is because he wants to shield it from creditors is of no moment.
17. To the extent that the Stand number 25259 Pumula South, Bulawayo is registered in the name of Valencia Gumbo, it cannot at law be declared executable and sold in execution in

respect of the judgment obtained against the 1st respondent. It is for these reasons that this application cannot succeed. It has no merit and it falls to be dismissed.

In the result, I order as follows:

This application be and is hereby dismissed with no order as to costs.

Shenje & Company, applicant's legal practitioners