

KANDAI CHISWO  
versus  
THE SHERIFF OF ZIMBABWE N.O.  
and  
FORMSCAFF (PVT) LTD  
and  
SHERMAN MBERI CHISWO  
and  
G. ZVARAVANHU  
and  
THE REGISTRAR OF DEEDS N.O.

HIGH OF COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 19 January 2016 and 6 April 2016

### **Opposed application**

*C Muteve*, for applicant  
*B Mugomezha*, for the 2<sup>nd</sup> respondent

MUREMBA J: When I heard this matter on 19 January 2016 the applicant was seeking to set aside the determination which was made by the first respondent on 18 September 2014 confirming the sale in execution of House No. 41 Camberly Road, Ashdown Park, Harare also known as stand 370 Tynwald Township 15 of Lot 13 A Tynwald registered under Deed of Transfer No. 728/98. The applicant's challenge to the confirmation of the sale was based on Order 40 r 359 (8) which says that any person who is aggrieved by the Sheriff's decision to confirm a sale, may within one month of being notified of the confirmation of the sale, apply to the court to have the decision set aside.

The sale was conducted in execution of a default judgment which was granted in favour of the second respondent against the third respondent who is the applicant's estranged husband who owed the second respondent some money. The default judgment was granted in case number HC6468/11. The applicant was not a party to those proceedings.

Pursuant to the judgment the second respondent who is the judgment creditor proceeded to issue a writ of execution for the attachment of 50% share belonging to the third respondent in property No. 41 Camberly Road, Ashdown Park, Harare. The other 50% share belongs to the applicant. The first respondent proceeded on the instruction of the second respondent to attach and sale the whole property at a public auction to the fourth respondent for US\$67 000.00. The applicant objected to the confirmation of the sale to the Sheriff on the grounds that as the owner of the other half share of the immovable property she was not agreeable to her half share being sold, but despite the objection the first respondent went ahead and confirmed the sale. In dismissing the objection to the confirmation of the sale, the first respondent said that the applicant is entitled to 50 % share of the proceeds of the sale since what was attached is a half share and not the whole share.

The applicant's challenge to the confirmation of the sale by the Sheriff was based on the following grounds:

- a) The applicant being the owner of the other half share, and not being a judgment debtor, her share cannot be attached and sold in execution without her consent.
- b) The first respondent's determination that she is entitled to 50% share of the sale proceeds and not the property is factually and legally wrong. The said property cannot be attached in execution because it is legally impossible and as such the writ authorising the attachment of the property is void.
- c) The sale is a forced sale which means that she will not realise the full value of her share on an open market sale.
- d) Assuming that the writ is valid, the writ directs the first respondent to attach only 50% which is the share of the third respondent. As a result, attaching and selling the whole property inclusive of her share is unlawful. There is no just cause for selling her half share of the property.
- e) The confirmation of the sale is a violation of her real right to the property which right is enshrined in s 71 (3) of the Constitution of Zimbabwe as she never asked that her share of the property be sold.
- f) Alienation of a jointly owned property can only be effected by the joint action of all the owners and if it is through execution of a judgment, such judgment should be against all co-owners or such other innocent co-owner should consent to the sale.

- g) The Sheriff's decision to confirm the sale is a nullity at law and the Registrar of Deeds who is the fifth respondent will not be able to pass transfer to the fourth respondent as the writ of execution only relates to the 50% share owned by the third respondent.

The second respondent, the judgment creditor, is the only respondent who filed a notice of opposition to the application. In opposing the application the second respondent averred that there was no basis for setting aside the confirmation of the sale. It said that what was attached in execution by the Sheriff is the third respondent's 50% undivided share in the property. It averred that the attachment cannot be faulted in any way. It said that the applicant as the owner of the other 50% share is entitled to half the proceeds of the property as her half share was not attached in execution at all. The second respondent further said that the writ of execution was issued consequent to a judgment and it attaches only half share of the property belonging to the third respondent, as such it is not void. The second respondent argued that since this is an immovable property which is not capable of being physically divided the only way to dispose of it is to sell it wholly. It stated that any buyer would want to own the whole property. It further said that the applicant need not consent to the sale in execution by the first respondent. It said that the sale is justified because it is being done in consequence of the undivided share held by the third respondent. The second respondent also said that the applicant never objected to the purchase price realised at the auction. It said that is an issue which the applicant is bringing up for the first time now. It said that in any case the applicant does not say what the value of her share is. It further said that the applicant could have told the Sheriff that she wanted the sale to proceed by way of a private treaty so that she could realise the open market value of her share in the property, but she did not do that. The second respondent said that the property was sold consequent to the law and therefore there is no unlawful deprivation of property. The second respondent further said that it is immaterial whether the applicant is the judgment debtor or not. It stated that the fate of her 50% share is inextricably linked to the 50% share of the third respondent who is the judgment creditor. The applicant further averred that the property was properly sold at a public auction and as such there is no miscarriage of justice. The applicant also stated that the purchase price that was realised at the auction is way above the forced value of US\$ 55 000.00.

After hearing argument in the matter I reserved judgment. Before I wrote the judgment the applicant's counsel brought it to my attention by way of a letter that the fourth respondent, G. Zvaravanhu who had purchased the property in question at a public auction

had since cancelled the sale and had been refunded the deposit that she had paid excluding commission. Southbay Real Estate (Private) Ltd, the estate agent which conducted the auction is said to have insisted that the purchaser will only get a refund of the commission if the sale is not confirmed by the court. In light of these developments the applicant's counsel was of the view that there was no longer any need for me to write the judgment in the matter as there was no longer any Sheriff's sale to confirm. On the other hand the second respondent's counsel also wrote to me stating that he was of the view that I should proceed to pass judgment in the matter since the withdrawal of the purchaser from the sale did not finalise the matter between the parties. I felt inclined to hear the two counsels and called them to my chambers. After they had made oral submissions I decided that I would write the judgment for the reason that, as correctly submitted by the second respondent's counsel, the pulling out of the purchaser from the sale did not end or resolve matters between the applicant and the second respondent, the judgment creditor. The judgment creditor's judgment has not yet been satisfied and the writ of execution that was sued out pursuant to that judgment is still valid. The judgment creditor will still want to enforce its judgment by selling the judgment debtor's share in the property in question. It is therefore necessary for me to make a pronouncement on the law with regards to a sale in execution of an immovable property which is jointly owned by a judgment debtor and another person who is not a judgment debtor. In any case even if the purchaser withdrew from the sale, the Sheriff's decision confirming the sale still stands, so I have to either set it aside as the applicant wants me to do or confirm it.

### **The Law**

In arguing the matter the applicant's counsel, Mr. *Muteve*, referred to the case of *Gonyora v Zenith Distributors (Pvt) Ltd & Ors* 2004 (1) 195 (H) whose facts fall on all fours with the facts of the case in *casu*. In that case a writ was issued against a 50% share in the immovable property belonging to the husband. The Sheriff proceeded to sale in execution the whole of the property without the consent of the wife who was the co-owner. Gowora J held that the wife who was the applicant, as the joint owner of the property, was entitled to deal with her share of the property in a manner she finds appropriate. It was further held that it was inconceivable that the applicant's share could be attached and sold in execution without cause. The court held that the Sheriff's actions were unlawful as he had no legal basis to dispose of the applicant's share.

On the other hand, Mr. *Mugomeza*, for the second respondent argued that in cases of this nature the applicable law is the law relating to co-ownership. He also summed up the position of the law on co- ownership as follows. Co-ownership denotes that two or more persons own a thing at the same time in undivided shares. He submitted that every co-owner has a right to freely alienate his or her share and no co-owner is obliged to remain a co-owner against his will and may at any time insist on a partition of the property. Citing the case of *Bennett NO v Le Roux* 1984 (2) SA 134 (ZH) Mr. *Mugomeza* said that in a case where co-owners cannot agree on how to share or divide the property, the court has a wide discretion in regard to the partition. It can (i) order one joint owner to pay a certain sum to the other(s) to equalise the division; or (ii) award the property to one of the joint owners subject to payment of compensation to the other; or (iii) order that the property be sold by public auction and that the proceeds be divided among the joint owners in accordance with their shares.

Mr. *Mugomeza* also referred to the case of *Stupendis Enterprises (Private) Limited v Admire Kasi & Sarah Kasi* HH 72/2012 wherein it was held that a spouse whose share had been sold by her husband without her knowledge was entitled to claim the proceeds of her share from the husband. Mr. *Mugomeza* urged me to follow this approach. I must confess that I did not see the relevance of this case because its facts are clearly distinguishable from the facts in *casu* in the sense that the wife in the *Stupendis Enterprises (Private) Limited* case instituted legal proceedings after the sale had already gone through. In *casu* the applicant who also happens to be the wife challenged the confirmation of the sale by the Sheriff, so the sale had not yet gone through.

However, I do agree with Mr. *Mugomeza* that the law which is applicable in a case of this nature is the law on co-ownership. I also agree with his submissions on the law on co-ownership. The immovable property that is the subject matter in this case is indivisible property. Each co-owner has the right to a share in the entire thing and one co-owner may not prevent another co-owner from using the joint property in proportion to his or her undivided share<sup>1</sup>. Every co-owner has the right to freely and without reference to co-owners alienate his or her share<sup>2</sup>. Every co-owner may insist on partition of the property at any time and if the co-owners cannot agree on the manner in which the property is to be divided amongst them,

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<sup>1</sup>Silberberg & Schoeman's *The Law of Property* 5<sup>th</sup> Edition p 133 &134

<sup>2</sup> *Ex parte Menzies et Uxor* 1993 (3) SA 799 (C) @812C-D.

the court will make an order which is fair and equitable in the circumstances<sup>3</sup>. The court will either order one of the co-owners to take it and pay out the others, or order that the property be sold and that the proceeds be divided among the co-owners according to their shares<sup>4</sup>.

In this country every person has a right to acquire property either individually or in association with others<sup>5</sup>. In terms of s 71 (3) of the Constitution of Zimbabwe Amendment (No.20) Act 2013 no person may be compulsorily deprived of their property except where the deprivation is in terms of a law of general application or the deprivation is necessary in the interests of defence, public safety, public order, public morality, public health, or town and country planning or for a purpose beneficial to the community. The scenario in the present case is not covered as one of the exceptions.

In *casu* what is pertinent is that in attaching and selling the share of the judgment debtor in the immovable property in question the Sheriff also attached and sold the share of the applicant yet the writ of execution is very clear that he should attach and take possession of undivided 50% share of the judgment debtor. The applicant did not consent to her share being sold. The above cited legal authorities make it clear that the owner of a property may not be deprived of his or her property against his or her will. As was correctly stated in the case of *Gonyora v Zenith Distributors & Ors supra* in attaching and selling the applicant's share the Sheriff had no *causa*. Neither is the applicant a judgment debtor in the matter which resulted in the attachment of the property nor did she consent to her share of the property being attached and sold in execution of the judgment debt. That her share is inextricably linked to the judgment debtor's share cannot be a legal basis for the sheriff to forcibly deprive her of her share. The Sheriff in attaching and selling property is directed by the writ of execution. He has no powers to act outside the jurisdiction or ambit of the writ and attach and sell property which he has not been directed to attach and sell.

Clearly the applicant is not in agreement with her share being attached and sold. The law makes it clear that if one co-owner wants to alienate his or her share but as co-owners they cannot agree on how this should be done the court will decide on what is fair and

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<sup>3</sup> Silberberg & Schoeman's *The Law of Property* 5<sup>th</sup> Edition p 135.

<sup>4</sup> Silberberg & Schoeman's *The Law of Property* 5<sup>th</sup> Edition p 135; Rademeyer v Rademeyer 1968 (3) SA 1.

<sup>5</sup> S 71 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

equitable. This implies that if co-owners cannot agree on how to partition the property the dispute should be brought before a court of law in order for the court to make a determination on how the property should be partitioned. No one co-owner has the right to do as he pleases with the property in light of such a dispute. Likewise in the present matter it is not for the Sheriff to make a unilateral decision to attach and sell the applicant's share when the applicant is opposed to it because the duty of the Sheriff is to enforce judgments of the court and nothing more. As I have already stated above, in enforcing the judgments he is directed on what to do by the writs of execution. If the writ of execution directs him to attach and sell 50% share on what basis then does he attach and sell 100% share? I do not believe that he has a right to make such a decision *mero motu*. All he can do is attach 50% share and sell it. I verily believe that if the whole property is to be attached and sold there has to be such an order first from the court. For the Sheriff to attach and sell the whole property in the manner he did in the absence of a court order amounts to a complete disregard of the applicant's rights to property which are protected in the Constitution. The applicant being the registered co-owner of the property in question means that she has real rights over the property. Her estranged husband's rights over the property do not prevail over her rights as a co-owner. What the judgment creditor has as a person who is owed money by the judgment debtor are personal rights over that property. Surely personal rights cannot prevail over real rights. I hold the view that for the Sheriff to attach and sell the whole property there is need for the applicant to have consented to it. In the absence of consent by the applicant there has to be recourse to the courts first for a determination before the Sheriff can proceed with the attachment and sell of the whole property.

I am strengthened in this conclusion because the parties then get an opportunity to present their cases fully for the court to then make an order which is fair and equitable in the circumstances. In the circumstances of the present case the court may either order the applicant to take the property and pay out the judgment debtor thereby enabling him to pay off the debt, or if she is not able to do so the court may order that the property be sold and that she be paid her share from the proceeds of the sale, or make some other order which it deems fit.

The fact the fourth respondent withdrew from the sale and was refunded her money does not affect my determination in this matter because the Sheriff's decision to confirm the sale still stands. In view of the foregoing I am granting the application.

Before I conclude the matter I need to highlight that the applicant was also correct in her averment that the writ of execution which gave rise to the attachment and sale in execution of the immovable property is incompetent in that it directs the Sheriff to attach and sell an undivided 50% share of the judgment debtor in the immovable property in order to satisfy the debt. The writ is incompetent because you cannot attach an undivided half because that share is indivisible.

On the issue of costs the applicant applied for costs on a higher scale against the first and second respondents, but I do not see the justification for punitive costs and for awarding costs against the first respondent who is the Sheriff. The respondents were labouring under the mistaken belief that they could proceed to sell the whole property and then pay the applicant 50% of the sale proceeds for her half share. They genuinely believed that they were correct at law.

**In the result, I order as follows:-**

1. The determination by the 1<sup>st</sup> respondent made on the 18<sup>th</sup> of September 2014 in confirming the sale in execution of House No. 41 Camberly Road, Ashdown Park, Harare also known as Stand 370 Tynwald Township 15 of Lot 13A Tynwald registered under Deed of Transfer No. 728/98 be and is hereby set aside.
2. The sale in execution of House No. 41 Camberly Road, Ashdown Park, Harare also known as Stand 370 Tynwald Township 15 of lot 13A Tynwald registered under Deed of Transfer No. 728/ 98 be and is hereby declared null and void.
3. The 5<sup>th</sup> respondent be and is hereby directed to uplift the Caveat No. 62/2014 placed on Stand 370 Tynwald Township 15 of Lot 13A Tynwald registered under Deed of Transfer No. 728/98.
4. The 2<sup>nd</sup> respondent be and is hereby ordered to pay costs of suit on the ordinary scale.