

SIFISO MAHLANGU
versus
COLLINS KABAIRA
and
COKASA LEADS (PVT) LTD

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 9 May 2016 & 28 June 2017

Trial

O.D Mawadze, for the plaintiff
V. Mkwachari & T. Zhuwarara, for the 1st & 2nd defendants

FOROMA J: This is an action in which the plaintiff sued the defendants for an eviction from a property called Stand 421 Borrowdale Township 26 of Subdivision D of Lot 8 Borrowdale Estate also known as Number 421 Lockerby Close Borrowdale Harare hereinafter referred to as “the property”. The property previously was registered in the second defendant’s name and the first defendant is the second defendant’s director. The plaintiff purchased the property at a Sheriff’s sale by public auction for the sum of \$270 500.00 and took transfer of same on 16 May 2013 after the sale had been confirmed. The plaintiff is the current holder of title to the property under deed A transfer No 0001809/13. The defendants defended the claim for eviction and their defence as pleaded is a *lis pendens*. At the time of instituting the claim for eviction the following cases were pending and all in some way or other involved the challenge by the defendants of the sale of the property SC 138/12, HC 6194/12, HC 3680/13, HC 8561/13 and SC 42/14 which the defendants incorporated in this matter by reference. As a result of the defendants losing in the case No SC 42/14 the property was attached and sold in execution. Case Nos. HC 6194/12, HC 8561/13 and HC 42/14 have been disposed of through the disposal of SC 42/14 but case No. Hc 3680/13 is still pending.

At the pre-trial conference of this matter the sole issue between the parties was agreed to be:

- “(1) whether or not the plaintiff who is a registered owner and an innocent third party purchaser of immovable property at a public auction is entitled to eviction proceedings against the defendant in the face of pending proceedings challenging confirmation of the sale.”

Because the factual conspectus of the dispute was largely common cause between the parties the parties agreed to refer the matter for determination as a stated case in terms of the rules of this court.

The parties agreed and filed a statement of agreed facts which by reason of its brevity is reproduced herein below. The statement of agreed facts reads as follows:

“Be Pleased To Take Notice That the following issues are agreed to be common cause as between the parties in this matter:

1. That the plaintiff purchased the house in question being No 421 Lockerby Close Borrowdale Harare at a judicial sale by public auction in response to an advertisement.
2. That the Sheriff confirmed the sale in terms of the rules of the court which confirmation is under challenge by the first and second defendants under HC 3680/13 which is pending in this court.
3. That plaintiff took title interest and rights therein and is the registered owner in terms of Deeds Registries Act which title is held under Deed of Transfer No. 0001889/2013.
4. That transfer of title was done through the Acting Sheriff of the High Court Mr Madega signing the necessary papers by virtue of a court order dated 23 of May 2012 issued by the High Court in HC 3958/12.
5. The 1st and 2nd defendants mounted High Court challenges in HC 6914 and SC 42/14 and the matters were dismissed. After Pre-trial conference before Honourable Justice MATHONSI on the 13th of January of 2015 the defendants subsequently mounted a challenge to Sheriff's sale and plaintiff's title under case No HC 3680/13 which together with HC 2103/15 are still pending.
6. The 1st defendant together with his family and children are still in occupation of the property in question through 2nd defendant.
7. Issues For Trial (as per joint – Pre-Trial Conference Minute) as above.

The plaintiff represented by Mr Mawadze of Mawadze and Mujaya filed heads of argument in which in summary he made the following points:

- (1) That the sale in execution of the property in question to the plaintiff was confirmed when no objections were received to the sale by the Sheriff of this court.
- (2) Once a sale in execution has been confirmed by the Sheriff in compliance with r 360 the sale of property is no longer conditional – *Mapedzamombe v*

Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257 at pp 260-261 A a judgment of GUBBAY CJ (as the he then was).

- (3) Registration of rights in immovable property in terms of the Deeds Registries Act Chapter 20:05 is not a mere matter of form. Nor is it simply a devise to confound creditors and tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered – *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 05 HL 106 A. MCNALLY JA (as he then was).
- (4) That in light of the transfer of title and its consequences defendants had no defence to an *actio rei vindicatio* by plaintiff – *Twin Wire Agencies Plaintiff v Central Africa Building Society* SC 46/05 CHIDYAUSIKU CJ (as he then was). Counsel Stressed the following observation by the CJ in his judgment – The appellant in the above case sought to set aside the confirmation of the sale in execution of the sale in execution by the Sheriff and was not seeking transfer of the property from the respondent to itself.”

Mr *Mawadze* in his argument missed a very important and yet critical aspect of the plaintiff’s case. Forceful though the judgment of GUBBAY CJ (as he then was) in *Mapedzamombe* case (*supra*) it is important to observe that the case is distinguishable on the basis that it was based on the now repealed r 360. Rule 360 was repealed by S.I 180/2000. Accordingly the quoted judgment does not articulate the current legal position contrary to the contention by the plaintiff in para 9 of its heads of argument where counsel submitted:

“It is therefore submitted that our law is that once the Sheriff has confirmed a sale in terms of r 360 the sale becomes unconditional so much so that the courts even in the face of a challenge would be very very very reluctant to set it aside. The defendants had all the time in the world to have the sale lawfully disturbed at a time when it was conditional and cannot succeed once the Sheriff has complied with the provisions of r 361 of Order 40. They did nothing until the law stood in their way.”

The plaintiff’s counsel appears to have been badly lagging behind in an important duty –updating amendments to the rules of court. He appears to have been unaware that r 359 360 and 361 were amended a long time ago. Previously r 359 consisted of only 2 paragraphs. These were deleted and substituted with r 359 which has 1-10 subrules. Thus in para 9 of his heads of argument the plaintiff’s counsel makes the following startling submission citing r 361 as authority therefore:

“The defendants had all the time in the world to have the sale lawfully disturbed at a time when it was conditional (before confirmation) and cannot succeed once the Sheriff has complied with the provisions of r 361 of order 40.”

A perusal of the High Court Rules 1971 will show that r 361 is not part of the rules

under order 40 anymore. In fact transfer of property to purchaser is now governed by r 367 (2).

Rule 359 (8) provides that a person who is aggrieved by the Sheriff's decision in terms of sub-rule (7) may within one month after he was notified of it apply to the court by way of a court application to have the decision set aside and r 359 (9) provides that in an application in terms of subr (8) the court may confirm vary or set aside the Sheriff's decision.

It is clear therefore that any transfer of property(sold in execution to a purchaser) authorised by the Sheriff before the expiry of one month from the date of the confirmation of sale of the immovable property (assuming that the earliest date by which a debtor or such other person is notified of confirmation by the Sheriff in terms of r 359 (7) is the actual date of confirmation) would not only be pre-mature and precipitate but also invalid.

The Sheriff's letter dated 15 April 2013 to Musimwa and Associates instructing them to transfer the (disputed) property to the plaintiff as the highest bidder was written on 12 April 2013. It was on 12 April 2013 that the Sheriff declared and confirmed the highest bidder Mr and Mrs Mahlangu to be the purchaser at the sum of \$270 500.00. This of course was totally irregular as the Sheriff did not give the process the one month period for interested parties to challenge his decision. The correct procedure is to declare the highest bidder as the purchaser and allow a period of 15 days for any objections to the sale to be raised in terms of r 359 (2) before confirmation of sale. After confirmation the Sheriff should allow a month from date of notification of confirmation for any interested party to apply for the setting aside of the confirmation of sale in terms of sub-rule (8).

In light of the foregoing would it be fair and just to ignore the defendant's challenge to the sale and subsequent transfer of second defendant's title to the plaintiff and eject them without giving defendants an opportunity to be heard as is being suggested by the plaintiff in his prayer namely that the defendants be evicted without awaiting determination of their challenge?

The defendants in their plea oppose the determination of plaintiff's claim for ejectment pending their challenge and argue that it (ejectment) await determination of the pending challenge to the confirmation of sale and consequent transfer of the property to the plaintiff.

The defendants also raised a constitutional argument. It is however not necessary to determine the constitutional argument in light of the findings I have made above. The plaintiff also argued that the defendants have been dilatory in their challenge under HC

3860/13. He submitted that defendants having mounted the challenge of confirmation of sale in HC 3958/12 in 2012 through application proceedings which are faster if diligently pursued than action proceedings have been lackadaisical in their approach in the prosecution of that case i.e HC 3680/13 as the matter is still pending. The plaintiff cites the case of *Ndebele v Ndebele* 1992 (1) ZLR 288 SC where MCNALLY JA is reported to have said;

“The time has come to remind the legal profession of the old adage *vigilantibus non dormientibus jura subveniunt* roughly translated the law will help the vigilant but not the sluggard.”

This adage applies with equal force against the plaintiff as there is no explanation by plaintiff why it has not availed itself the remedy available to it for the dismissal of defendant’s application for want of prosecution in terms of Order 32 Rule 236.

A perusal of HC 3680/13 shows that:

- i. That first applicant (second defendant *in casu*) and Gertrude Tupiri (second applicant) sued second respondent (the plaintiff *in casu*) and Nelhurst Trading P/L for an order seeking to set aside the decision of the Sheriff dated 10 May 2013 confirming the highest bid. The highest bid in question is the bid through which plaintiff purchased second defendant (*in casu*)’s property at an auction sale in execution in case no. HC 3958/12 It should be noted that declaration of highest bidder as the purchaser in fact took place on the 19 March 2013 as in fact the letter of the 15th April 2013 deals with confirmation of sale only. In HC 3680/13 a letter from the Sheriff’s office is attached dated 10 May 2013 addressed to Messrs Ngarava Moyo and Chikomo in which the Sheriff indicates that the highest bidder was accepted on 19 March 2013. The letter dated 12 April 2013 date stamped 15 April 2013 which the Sheriff addressed to Musimwa and Associates reads as follows:

“I refer to the sale in the above matter and advise that no objections were received and on 12 April 2013 the Sheriff declared and confirmed the highest bidder Mr and Mrs S V Mahlangu to be the purchaser at the sum of USD270 500.00.”

I have commented on the irregularity of the procedure taken by the Sheriff after confirmation above. In terms of r 356 of Order 40 of the Sheriff is required if so satisfied to “declare the highest bidder to be the purchaser, subject to confirmation as hereinafter prescribed”. The declaration of the highest bidder as purchaser is not before me but I will assume that it was on 19 March 2013.

While the plaintiff is dismissive of defendant's prospects in HC 3680/13 I have demonstrated above that its argument in support of the contention may be misplaced especially in light of the irregularity indicated.

There is definitely a need for the case HC 3680/13 to be determined before plaintiff's claim for evicting the defendants can be determined or at the very least that the matters be consolidated and be heard at the same time.

The plaintiff in its heads of argument also argues that case no. 2103/15 cannot be pleaded as *lis pendens* and cannot stand in the way of plaintiff's title in this matter. This argument has merit. Defendants did not obtain an amendment of its plea to include a prayer or plea of *lis pendens* in respect of case no. 2103/15. It is pertinent to note that the defendants' counsel placed emphasis on the fact that case no. HC 2103/15 is *lis pendens*. This argument in the absence of an amendment to the defendants' plea is misplaced. The only matter that is *lis pendens* is HC 3680/13 given that some of the cases considered as pending at the time defendants' plea was filed have since been determined or finalized. The case HC 3680/13 was properly filed in terms of Order 40 r 359. In the circumstances it is only fair and just that plaintiff's claim for the ejectment of the defendants ought to have been stayed pending determination of the pending proceedings challenging confirmation of the sale. Surely if the second defendant succeeds in setting aside confirmation of the sale in execution in question second defendant may in the vent be entitled to cancellation of the transfer based on the said confirmation with the restoration of title to second defendant being a direct consequence thereof.

In the result I find that the plea of *lis pendens* has merit and order as follows:

It is ordered that

1. Plaintiff's is not entitled to eviction proceedings in the face of pending proceedings challenging confirmation of the sale in execution per HC 3680/13
2. Plaintiff pays the costs of suit.

Manase and Manase, plaintiff's legal practitioners
T. H Chitapi & Associates, 1st & 2nd defendants' legal practitioners