SHAKESPEAR NYAMADZAWO
versus
SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O.
and
GODFREY MUNYAMANA
and
LINCOLN SIWA GOROGODO
and
PORTIA GOROGODO
and
PLAXEDES TARUVINGA
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 18 March, 8 April, 11 & 26 May 2021

COURT APPLICATION – CONDONATION

V C Maramba, for the applicant
E T Muhlekiwa, for the 2nd to 4th respondents

MANZUNZU J: This is a court application for condonation of late filing of a court application for review in terms of Order 40 r 359 (8) of the High Court Rules. This judgment is in respect to a preliminary point raised by the 2nd to 4th respondents (hereinafter referred to as the respondents).

The applicant seeks an order in the following terms;

> "IT IS ORDERED THAT:
>
> 1. The applicant be and are hereby condoned to file his court application for review in terms of r 359 (8) of the High Court of Zimbabwe Rules out of time.
> 2. The applicant be and are hereby condoned to file his court application for review in terms of r 359 (8) of the High Court of Zimbabwe Rules within seven (7) working days of granting this order.
> 3. That costs of this application be the costs in the cause in this matter."

The background to the matter is that applicant is a judgment debtor whose immovable property was attached and sold in execution by the Sheriff who is the first respondent. The 2nd respondent is the judgment creditor. The 3rd and 4th respondents were the highest bidders to whom the sale was confirmed. The 5th respondent is applicant's former wife who has not shown any interest in the matter as she filed no papers. The Registrar of Deeds, the 6th respondent is cited in his official capacity.

The sequence of events is that the 2nd respondent obtained judgment against the applicant under case number HC 2681/18. The Sheriff attached and sold in execution the applicant's immovable property being stand number 1866 Marlborough Township, Harare. The property was sold by private treaty. The Sheriff wrote to all interested persons to file objections, if any, with him. This was after the Sheriff had accepted the 3rd respondent as the highest bidder on 28 August 2019. The applicant raised an objection which failed and the sale was subsequently confirmed by the Sheriff on 15 November 2019. Transfer of the property to 3rd and 4th respondents was on 8 May 2020. This application for condonation was filed on 24 June 2020.

The respondents have raised a preliminary point that the application is incompetent and bad at law. They pray that the application be dismissed with costs at a legal practitioner and client scale. The applicant maintained that the application was proper at law.

The only issue for determination in so far as the point *in limine* is concerned is, is it legally competent for one to bring an application for the review of the Sheriff's decision in terms of rule 359 (8) of the High Court Rules, 1971 after transfer of the property has passed to the purchaser. Applicant's position is that one can and respondents say one cannot.

In the event that one cannot, it means an application for condonation will fall away because it is dependent upon the validity of what is to be filed.

Rule 359 (8) provides that; "Any person who is aggrieved by the Sheriff's decision in terms of subrule (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."

Rule 359 (7) provides that; "On receipt of a request in terms of subrule (1) and any opposing or replying papers filed in terms of this rule, the Sheriff shall advise the parties when he will hear them and,

after giving them or their legal representatives, if any, an opportunity to make their submissions, he shall either—

(*a*) confirm the sale; or
(*b*) cancel the sale and make such order as he considers appropriate in the circumstances;
and shall without delay notify the parties in writing of his decision."

What one discerns from these two subrules is that the Sheriff is empowered to hear and determine a request to set aside a sale. The outcome of the hearing is either a confirmation of the sale or its cancellation or some other appropriate order. The decision arrived at in terms of subrule (8) can be challenged through a court application.

The question then is, are there any limitations when it comes to its challenge. Subrule (8) says such challenge must be within one month after one is notified of the decision. This is in respect to time but what about in respect to events. What is clear though, is that a remedy through rule 359 (8) is available to an applicant who initially requested the Sheriff to set aside the sale. In other words, one cannot seek recourse through rule 359 (8) in the absence of an initial request to set aside the sale in terms of rule 359 (1).

Mr Muhlekiwa who represents 2nd to 4th respondents said, where ownership has been passed to an innocent purchaser, a person such as the applicant cannot make an application in terms of rule 359 (8) seeking to impeach the sale. For this proposition he relied on the authority of *Chiwanza* v *Matanda & Ors* 2004 (2) ZLR 203 (H) at p 206 where MAKARAU J (as she then was) held that; "After a sale has not only been confirmed but transfer of the property has been effected to a third party, interested parties may still approach this court at common law for the sale and transfer to be set aside. It further appears to me that an approach at this stage, after the property has been transferred to a third party, cannot be sustained on alleged violations of the rules of this court nor on the general grounds of review at common law but only on the equitable considerations aptly summarized by GUBBAY CJ (as he then was) in *Mapedzamombe* v *Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S) when at 260D he said:

> "Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla* v *Bhura* supra at 283A-B. Once confirmed by the sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran* v *Midlands Chemical Industries (Private) limited* S 220/91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the sheriff but transfer effected by him to the purchaser

> against payment of the price, any application to set aside the transfer falls outside r359 and must conform strictly with the principles of the common law.
>
> This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law, immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale in execution, or fraud." (underlining is mine)

Nothing stands clearer than these authorities. Simply put, one cannot rely on rule 359 (8) to challenge a Sheriff's sale after transfer has been effected to a third party. The door is not however totally shut against such applicant because one can seek a review under common law or section 27 of the High Court Act, [*Chapter 7:06*]. In such circumstances one is precluded from resorting to the grounds laid down in rule 359 (1) i.e. that of the sale being improperly conducted or the property being sold for unreasonably low price, "unless such can be subsumed in the recognized grounds of review at common law." See *Chiwanza* case *supra.*

Ms *Maramba* for the applicant relied on the *Chiwanza* case (*supra*) and case of *Chiutsi* v *Sheriff of the High Court & Others* HH 604/18. The authorities relied upon do not support her position that an applicant can competently file an application to set aside a sale in terms of r 359(8) after confirmation of the sale and transfer to third party been effected. It is admitted that the applicant initially filed with the Sheriff a request to set aside the sale before its confirmation in terms of r 359(1). It is then appropriate for the applicant to challenge the Sheriff's decision in terms of r 359(8) if no transfer of title has been passed to a third party. The applicant can no longer rely on r 359(8) after transfer because such, according to decide authorities, is no longer available to him.

An application for condonation can only be properly before this court if the application to be filed, when condoned, is competent at law. *In casu* the application intended to be filed is in terms of rule 359 (8) but as already been shown such will be incompetent. The point *in limine* must succeed.

Respondents asked for costs on a higher scale. I do not think such costs are justified. One cannot say there was deliberate abuse of court process. Applicant believed in his case. It is only that the law precludes him to rely on r 359(8).

DISPOSITION:

1. The point *in limine* succeeds.
2. The application for condonation be and is hereby dismissed with costs.

Muchirewesi & Zvenyika, applicant's legal practitioners
Muhlekiwa Legal Practice, 2nd – 4th respondents' legal practitioners