TENDAYI GURUWO
versus
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE
and
CASPER MASVIKENI FAMILY TRUST
and
SANCTUARY INSURANCE (PVT) LTD
and
THE REGISTRAR OF DEEDS (N.O.)

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 12 & 22 November 2021 & 28 September 2022

Opposed Application

Mr *S M Hashiti*, for the applicant
Mr *T Magwaliba with* Mr *S Mahuni*, for the second respondent

MUSITHU J:

BACKGROUND

The applicant is the former registered owner of an immovable property known as a certain piece of land situate in the District of Salisbury called Stand 425 Marlborough Township Extension 2 of Marlborough measuring 6 808 square metres which he held under Deed of Transfer Number 10289/2002 (the property). The property was sold in execution of a judgment debt of US$39, 000.00 and costs of suit granted in favour of the third respondent herein against the applicant and Micromart (Private) Limited (Micromart) on 15 February 2016, under HC 9923/14. The second respondent purchased the property from a Sheriff's sale. Its bid was accepted and confirmed on 4 January 2017. The second respondent received title on 1 September 2017. The applicant has approached the court for an order to set aside the Sheriff's sale in execution on common law grounds. The relief sought is set out in the draft order as follows:

"IT IS ORDERED THAT:

1. The application to set aside the sale in execution of Applicant's property described as stand 425 Marlborough Township, Extension 2 of Marlborough measuring 6 808 square meters and held under Deed of Transfer No. 10289/02 be and is hereby granted.
2. The fourth respondent be and is hereby ordered to revive Deed of Transfer 10289/02 and cancel Deed of Transfer 3282/17.
3. The second respondents to pay costs on an attorney and client scale."

The application was opposed by the second respondent only. This application was not the first of its kind. The sale of the property to the second respondent triggered a wave of litigation by the applicant, and at the time the matter was argued before me, the second respondent had approached this court for a decree of perpetual silence against the applicant under HC4271/20. On 11 June 2021, this court granted an order interdicting the applicant acting either personally or through or on behalf of any other person, from instituting or prosecuting any proceedings of whatever nature in connection with the property without the leave of the court. The applicant was also ordered to pay the costs of suit on the higher scale.

The Applicant's Case

The application advanced three grounds for the setting aside of the Sheriff's sale under the common law. These are that: the first respondent exhibited gross unreasonableness in transferring the property without the second respondent having paid the full purchase price; the first respondent exhibited bias and favour towards the second respondent to the prejudice of the applicant; and that the sale in execution was replete with procedural irregularities which justified its setting aside. I shall deal with these later in the judgment.

The applicant claims that the judgment granted against him under HC 9923/14 was obtained fraudulently. He averred that all the issues pertaining to this judgment had since been resolved. That judgment was rescinded by CHIKOWERO J on 26 September 2018. He was ordered to file his appearance to defend and plea to the claim within 48 hours of the order.[1] On 16 January 2019, MATHONSI J (as he then was), upheld his special plea to the plaintiff's claim (third respondent's herein). The court proceeded to dismiss the plaintiff's claim[2]. On 13 November 2019, under HC 5025/19, MUSHORE J dismissed for want of prosecution, the third

[1] Court order on p14 of the record.
[2] Court order on p 15 of the record.

respondent's application for rescission of the judgment that had upheld the applicant's special plea[3].

According to the applicant, the property is ordinarily know as No. 92 Harare Drive, Marlborough, Harare. Despite being aware of the physical address, the first respondent served the notice of attachment at No. 92 Suffolk Road, Avondale, Harare, which was a wrong address. The applicant claimed that he never saw the papers concerning the attachment of his property. The applicant further claimed that no evaluation of the property was ever conducted prior to the sale. He was also unaware that the property was being sold as this court had granted judgment in his favour on 11 November 2015 under HH 896/15. In that case, MATANDA-MOYO J dismissed the third respondent's application for provisional sentence with costs.

Coming to the grounds for review, the applicant averred that the first respondent's decision to accept late payment of the purchase price and on terms was grossly unreasonable. Clauses 11 and 12 of the agreement of sale between the first and second respondents required the full purchase price, all costs and charges to be made within seven days. Failure to do so would result in the sale being deemed cancelled. The purchase price was not paid within seven days. The agreement of sale required payment to be made on signing of the agreement. Confirmation of the highest bidder required payment to be made within seven days.

The applicant expected that in the event of a breach of any condition of the agreement of sale, which breach was not remedied within 14 days of a written notice to do so, then the first respondent was obliged to cancel the agreement of sale. This was also consistent with r 357 of the High Court rules. The first respondent was expected to place the second respondent in *mora* before cancelling the agreement. It was grossly unprocedural and irregular for the first respondent to accept the buyer's purchase price after the due date. The first respondent had no discretion to exercise, other than comply with the strict requirements of the agreement of sale.

Further, the auctioneer's commission of 5% was not paid in terms of clause 8(a) of the agreement of sale. The same also applied to the capital gains tax. Allowing the transaction to proceed under the circumstances was grossly unreasonable and irregular, and for that reason the sale in execution could not be allowed to stand.

[3] Court order on p16 of the record.

On procedural irregularities and fraud, the applicant submitted as follows: he was never given an opportunity to challenge the sale by the first respondent. The letter declaring the highest bidder was served at the wrong address yet the first respondent was aware of the correct address since it was the property he was going to sell and had served process on that address before. Service of process on the wrong address other than the chosen address for service was in breach of the rules of court and consequently a nullity. The applicant claimed that he was denied the chance to challenge the sale in terms of r 359(1) and r 359(8) of the rules. The applicant also contended that he had a legitimate expectation to be heard before the decision to confirm the sale was made.

The applicant also claimed that the property was sold for an unreasonably low price if regard was had to its market value. The applicant contended that he was unable to raise this objection in light of the first respondent's failure to follow the rules and laid down procedures.

The applicant averred that first respondent failed to notify the mortgage bond holders CBZ Bank of the sale. Had the bank been notified of the sale, it would have paid off the US$36, 000.00 that was due to the judgment creditor or offered the applicant a secondary mortgage bond to secure the property. The applicant claimed that the sale was conducted only a few months after the bank had offered him US$150,000.00 to restore the property to its original state after it was damaged by fire.

The applicant also claimed that the fact that both the first and second respondents were aware that correspondence was being directed to the wrong address, that is 92 Suffolk Road, Avondale, Harare pointed to connivance. The first respondent knew that 92 Suffolk Road, Avondale, Harare was not the property that he was selling. The second respondent was also aware that 92 Suffolk Road, Avondale, Harare was not the property that he was buying. Neither of the two parties bothered to ensure that the anomaly was corrected. The fact that the first respondent proceeded to grant the second respondent an indulgence to purchase the property on terms confirmed the applicant's fears of connivance, collusion and fraud.

After declaring the highest bidder, the first respondent was expected to invite objections to that declaration before he confirmed the sale. The first respondent failed to invite objections which rendered the sale invalid. Further, the fact that the judgment debtor was not advised of the sale proceedings, was unaware of the declaration of the highest bidder and confirmation of

the sale, and was not afforded an opportunity to object to the sale, rendered the sale irregular and susceptible to being aside.

On the allegation of bias, the applicant claimed that the first respondent was biased towards the second respondent for the following reasons. The second respondent was supposed to pay capital gains tax and value added tax in terms of the agreement of sale. These taxes were not paid in breach of the law. The second respondent was also required to pay the Sheriff's costs. The Sheriff's costs were instead deducted from the proceeds of the sale. The same thing happened to the auctioneer's charges that were supposed to be paid by the purchaser in terms of clause 8(a) of the agreement of sale. Those costs were also deducted from the proceeds of the sale.

The applicant averred that the first respondent's bias towards the second respondent showed that he was determined to give the property to the second respondent at all costs. Such conduct could not be countenanced. It was unsustainable at law and the sale had to be set aside. The court was urged to grant the order sought.

The second respondent's case

The opposing affidavit was deposed to by Judith Taonerera Masvikeni. It raised the following preliminary points. The first point pertained to proceedings for a decree of perpetual silence under that were pending at the time the affidavit was deposed to. As noted already, these proceedings had been concluded by the time the parties appeared before me. The point made was that the applicant had abused court processes by filing several litigation cases, and in the processes obtaining default judgments fraudulently. These judgments would be rescinded subsequently. Some of the cases would be withdrawn for no apparent reasons.

The second respondent claimed that two of the applicant's matters were withdrawn before CHINAMORA J on 6 August 2020. They served to illustrate the applicant's abuse of court process. These were HC 9580/18 and HC 9859/17. HC 9580/18 was similar to the present application in that it was an application for the setting aside of the Sheriff's sale under the common law. It also sought the ancillary relief of eviction. HC 9859/17 was a court application for rescission of a default judgment. The applicant had earlier made a court application for the setting aside of the Sheriff's sale in HC 9860/17. Accordingly the present application was the applicant's third application to set aside the sheriff's sale on common law grounds. The three applications were substantially similar and the circumstances had not changed.

It was the conduct of the applicant that prompted the second respondent to approach the court for a decree of perpetual silence. The second respondent further claimed that the present application was meant to counter its application for a decree of perpetual silence under HC 4271/20. It was on that basis that the second respondent urged the court to first hear its application under HC 4271/20, before the present application. By the time I heard the present matter, this court had already granted a decree of perpetual silence in favour of the second respondent against the applicant. That order was granted after this application was already pending before this court as it was filed on 20 August 2020.

The second preliminary point was that the property at the centre of the dispute had since been sold. Following the withdrawal of the applicant's only pending matters in HC9580/18 and HC9859/17, the second respondent claimed that it had proceeded to sell the property in question. The property was sold to Chinya Investments (Pvt) Ltd (Chinya). All processes leading to the transfer of title had been accomplished and what remained was just the transfer of title. Second respondent no longer had any interests in the property.

Coming to the merits of the application, the second respondent averred that the sale of the property occurred around 17 January 2017 when the agreement of sale was signed. Transfer was effected on 1 September 2017. The court orders alluded to by the applicant as having the effect of setting aside the original order which paved the way for the transfer of the property, were granted after the transfer of the property to the second respondent. The dispute was no longer between the applicant and the third respondent. It now involved the applicant and the second respondent, an innocent purchaser. The applicant could not claim that the matter was resolved as between him and the third respondent without regard to the rights of the second respondent.

The second respondent could not comment on why some documents were served at the wrong address, as this was the prerogative of the first respondent. It however noted from a perusal of the first respondent's file that on 14 June 2016, a notice of attachment against the immovable property was served at the correct address being 92 Harare Drive, Harare. The applicant was also served with the sale instructions on the correct address on 19 September 2020[4]. The second respondent argued that the applicant was therefore aware that the property

[4] Page 112 of the record

was being sold. The only reason why the applicant took no action was because he was aware that the debt was still owing and he had no means of settling it.

The second respondent averred that the dismissal of the summons for provisional sentence meant that the applicant was expected to file his appearance to defend the claim but he failed to do so. That led to the granting of the default judgment in favour of the third respondent under HC 9923/14. The order was served on the applicant on 24 November 2015[5]. It was that default judgment that led to the sale of the property to the second respondent. As regards the alleged non-valuation of the property, the second respondent claimed that it was the applicant who denied the evaluators access to the property as confirmed by the agreement of sale between the first and second respondents. The applicant could not complain that the property was sold before it was evaluated since he frustrated that process.

Further, the fact that the applicant denied valuators access to the property confirmed that he was aware that the property was up for sale. The evaluators would also have told him that the property was up for sale, since they would have in their possession documents authorising them to carry out the assignment. The nature of the improvements stated in the agreement of sale were similar to the improvements set out in paragraph 7 of the applicant's affidavit. It could only be the applicant who gave the valuators that information since they did not physically inspect the property themselves. Any minor discrepancies in the description of the property could only be attributed to the fact that the valuators were not given the minute details of those improvements.

As regards the applicant's averment that the full purchase price was not paid in full and timeously, the second respondent commented as follows. The bank statement from CBZ Bank[6] showed that a deposit of $10,000.00 was made into the bank account of Amazon Real Estate (Amazon) from CP Chemicals CBZ Bank Account, Avondale Branch, Harare on 25 November 2016[7]. The amount represented the refundable deposit paid on behalf of the second respondent at the public auction. The public auction did not attract the expected bids that matched the value of the property. The sale was subsequently conducted by private treaty. The refundable deposit remained with Amazon. It was from the deposit that the agent's commission was apparently

[5] Page 113 of the record
[6] Pages 114-138
[7] Page 117 of the record

deducted by Amazon. This position was confirmed by a letter of 27 August 2020 from Amazon to the first respondent in which Amazon confirmed payment of "$ 3 596.00 to the Sheriff from the deposit of $10 000.00 paid by the purchaser. The balance was taken as agent's commission……"[8]

The second respondent argued that it was wrong for the applicant to then allege that the applicant did not pay the agent's commission. According to the second respondent, the second and final payment was made on 23 January 2017. A transfer of $101, 200.00 was made from the account of CP Chemicals P/L held at the CBZ Avondale Branch.[9] The funds transfer confirmation form also confirmed that an amount of $101, 200.00 was transferred into the Sheriff's Account Number 02123886430017 on 23 January 2017 from CP Chemicals' CBZ Avondale Branch account[10]. That transaction is referenced Marlborough Property.

The $10, 000.00 paid on 25 November 2016 and the $101, 200.00 paid on 23 January gave a total of $111, 200.00, which represented the full purchase price. The second respondent claimed that it paid a further $6, 400.00 to the first respondent on 3 February 2017 over and above the purchase price. That amount was more than the capital gains tax amount which was pegged at $5 560.00. Even assuming that the first respondent had deducted the capital gains tax from the purchase price, still that would not have been irregular as capital gains tax was paid by the seller. According to the applicant, a total of $117, 600.00 was paid to the first respondent apart from stamp duty and conveyancing fees.

The second respondent further averred that in reckoning the time within which payment was supposed to be made, the applicant made reference to seven calendar days instead seven working days. On that basis, the second respondent averred that there was no need for the second respondent to be placed in *mora*. Even assuming that payment was not made timeously, cancellation of the agreement was not the only remedy available because clause 11 of the agreement made provision for the payment of interest on unpaid balances. The deed of transfer showed that the power of attorney to pass transfer was given to the conveyancer on 14 March 2017. That confirmed that transfer documents were signed after all payments had been made. The transfer of the property was therefore done properly. If the first respondent made any errors

[8] Page 138 of the record
[9] Page 130 of the record
[10] Page 139 of the record

in calculating the disbursements, then the applicant would have to claim a refund of any amounts erroneously paid from the first respondent. He could not seek a wholesale cancellation of the agreement of sale.

The second respondent contended that the decision to challenge the sale was an afterthought on the part of the applicant. He had only challenged the sale after his indebtedness was cleared by the second respondent. That explained why he challenged the judgment that resulted in the transfer of the property only after the property was transferred to the second respondent. The applicant had failed to prove any *malafides* on the part of the second respondent. The second respondent was just an innocent purchaser who deserved the protection of the law. No sound legal basis had been laid for the setting aside of the sale. The court was implored to express its displeasure with the conduct of the applicant by dismissing the application with costs on the higher scale.

The Answering Affidavit

The applicant insisted that the third respondent had fraudulently obtained judgment against him and that judgment was never served on him. The third respondent had also fraudulently connived with officers of the first respondent. The applicant insisted that contrary to the rules governing judicial sales, the full purchase price was not paid at the time that transfer took place. A fake capital gains tax clearance certificate was used. No rates clearance certificate was also placed before the court. Stamp duty was also understated. The first respondent ought not to have confirmed the sale in the circumstances.

The applicant contended that the second respondent was supposed to pay $110, 200.00 as the purchase price. In addition to this amount he was required to pay value added tax of $16, 530.00, agent's commission in the sum of $5, 560.00, Sheriff's fees of 5, 560.00, value added tax on the Sheriff and agent's fees of $1, 668.00, making a total of $139, 518.00. The distribution list also showed that the agent's fee as well as the first respondent's fee were deducted from the purchase price. That deduction was prejudicial to the applicant. It resulted in a shortfall of $22, 234.00, which was never paid.

The applicant denied that valuators came to view the property. He further denied the allegations that the said valuators were not allowed access to the property.

The applicant denied owing the third respondent anything, insisting that its claim was dismissed by the court. The second respondent could therefore not claim to have cleared a non-

existent debt. The applicant further averred that the second respondent was not an innocent purchaser for as long as the sale was fraught with irregularities. The second respondent would not suffer any irreparable harm as it had an alternative remedy in the form of damages against the first respondent.

The applicant further contended that the order of this court that paved the way for the transfer of the property to the applicant had since been overturned. The default judgment in favour of the judgment creditor in HC 9923/14 had become a legal nullity. It meant that the first respondent sold a property that he had no authority to sell. The sale, and the subsequent transfer of title were all legal nullities. The transfer of title in the property had been achieved through fraud and chicanery and it had to be set aside.

The Submissions

The parties first appeared before me on 12 November 2021. At that hearing, Mr *Mahuni* appearing for the second respondent drew the court's attention to the order for a decree of perpetual silence granted by MUZOFA J. He submitted that the applicant could not be heard in the present matter without the leave of the court. The applicant had appealed against that order. The appeal was unsuccessful as it was struck off the roll by the Supreme Court on two occasions. Mr *Mahuni* urged the court to strike the matter off the roll.

In response, Mr *Hashiti* for the applicant argued that the order by MUZOFA J was ambiguous. Paragraph 2 of the order interdicted the Casper Masvikeni Family Trust, the applicant therein, and instead of Tendayi Guruwo (the first respondent therein). Paragraph 2 of the order by MUZOFA stated as follows:

> "2. The applicant either personally or through or on behalf of any other person, is hereby interdicted from instituting or prosecuting any proceedings of whatever nature in connection with the property described above without the leave of this court."

Paragraph 2 of the order was clearly defective as it sought to interdict the party that had approached the court from instituting proceedings without the leave of the court. At the time the parties appeared before me, that error had not been corrected. Mr *Hashiti* further submitted that in any case, the order by MUZOFA J was issued well after the current proceedings had commenced. The matter was ready for hearing after pleadings were closed.

Mr *Mahuni* conceded that the order of perpetual silence was not binding on Guruwo given the ambiguous manner in which it was structured. There was need to have it rectified.

That error was subsequently rectified after I had already heard the matter. The corrected order therefore has no bearing on the determination of this matter. Mr *Mahuni* applied for a postponement of the matter to allow counsel of choice, Mr *Magwaliba* to appear and argue the matter on behalf of the second respondent. I postponed the matter to 22 November 2022.

In his submissions at the resumption of the hearing, Mr *Hashiti* argued that the effect of the court orders granted by CHIKOWERO J and MATHONSI J (as he was then), was to set aside the writ of execution which led to the transfer of title to the second respondent. The principal debt was also cancelled. There was nothing on which the writ of execution was predicated. Counsel also argued that in his report, the first respondent conceded to flouting the rules of judicial sales. That made the process irregular. The title that the second respondent received was also defective.

In a brief exchange with the court on whether it was competent for the applicant to persist with the relief sought, since the property had been sold to a third party, Mr *Hashiti* submitted that the mere fact that title had passed to a third party did not matter. He however conceded that it was desirable to cite the third party. He urged the court to exercise its discretion and order the joinder of the third party.

Mr *Magwaliba* for the second respondent submitted that the applicant was aware that the property had been sold since September 2020. He filed his answering affidavit and heads of argument, but did not bother to apply for the joinder of the third party purchaser. Even at the hearing stage, no such application for joinder had been made. The applicant merely highlighted the court's power to order the joinder of a party to proceedings. The present matter had to be resolved on the papers before the court.

Mr *Magwaliba* further submitted that what the application sought to achieve was the setting aside of a sale in execution. What was impugned was the process leading to the sale of the property on 17 January 2017. The applicant was aware that subsequent to the sale in execution, title had passed to the second respondent. The applicant did not seek to impugn the second respondent's title. That title had since been passed on to a third party who was not before the court. The matter had become moot.

Mr *Magwaliba* also argued that the applicant's claims had prescribed. The Prescription Act[11] defined a debt as anything that one could sue for. The claims were therefor not properly before the court.

Counsel further submitted that at common law, the applicant was not entitled to an order setting aside the Sheriff's sale. The setting aside of a sale under the common law could not be achieved if the applicant unsuccessfully attempted to set aside the sale in terms of r 360 of the old High Court rules 1971 (the rules). The applicant ought to have prosecuted his application in terms of r 360. The applicant could not just be allowed to cherry pick court procedures as it were.

Concerning the grounds for review, counsel submitted that even though a court had discretion to set aside a sale under the common law, courts were always reluctant to set aside a confirmed sale. Counsel referred to the case of *Mapedzamombe* v *CBZ*[12]. It was worse in cases where such sale was followed by the transfer of title to a third party. In the present matter, the applicant ought to have pleaded special circumstances to persuade the court to set aside the sale.

It was submitted that the applicant had not alleged that the first respondent had a fraudulent state of mind when he conducted the sale. Neither was the applicant able to point to any collusion between the applicant and the first respondent. The applicant also failed to demonstrate that the second respondent was aware of the alleged irregularities.

The alleged bad faith could not be attributed to the second respondent. Even as against the first respondent, no evidence was placed before the court to prove the alleged bad faith. The only irregularity established pertained to the service of the notice of confirmation of the sale on a wrong address. But that was not sufficient to justify the setting aside of the sale since the applicant was aware of the sale of the property.

In response to the submission by Mr *Hashiti* that the setting aside of the judgments against the applicant also meant that all processes done pursuant to those judgments had collapsed, Mr *Magwaliba* argued that the rescinded judgments were of no effect since they only occurred long after the sale in execution and transfer of title to the second respondent.

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[11] [*Chapter 8:11*]
[12] 1996 (1) ZLR 257

Counsel further submitted that the alleged admissions by the first respondent pertaining to some procedural infractions would have mattered if what was before the court was a r360 application.

In his brief reply Mr *Hashiti* argued that an order of court had dictates and consequences. Once an order which gave rights to a litigant was set aside, then its effect also fell away. As regards the question of prescription, he submitted that s 20(1) of the Prescription Act did not permit the court to raise the question of prescription on its own volition. Further, that question could not be raised from the bar. It had to be taken in the pleadings.

On the question of joinder, counsel insisted that r 32 (8)(11)(12b) all made the point that if joinder was necessary, the court had to grant such joinder. The application could not just be dismissed because of the non-joinder of a party.

Counsel submitted that the irregularities attributed to the first respondent, violated s 68 of the Constitution. The applicant's right to appear and object to the sale was negated. Mr *Hashiti* applied to amend the draft order in order to include the consequential relief of the setting aside of the second respondent's title in the property. The application was opposed by Mr *Magwaliba* who dismissed it as a belated attempt to counter the dismissal of a hopeless application.

The Analysis

Before I determine the substantive issues raised in the application, I need to dispose of the preliminary matters that counsels alluded to in their oral submissions. Mr *Hashiti* urged the court to consider joining the third party purchaser, Chinya Investments to these proceedings. That request must have been an afterthought following exchanges between counsel and the court. As correctly submitted by Mr *Magwaliba*, the applicant was informed of the sale to the third party through the second respondent's notice of opposition. The agreement of sale between the second respondent and Chinya Investments was an attachment to the notice of opposition.[13] It was signed on 7 August 2020. The opposing affidavit was filed on 3 September 2020 and served on the applicant's legal practitioners.

The applicant filed an answering affidavit which did not even address the sale of the property to the third party. The heads of argument did not hint on the joinder of the third party. No application was made for the joinder of Chinya Investments at the commencement of the

[13] Page 109 of the record

oral submissions despite the applicant's knowledge of the sale and the likelihood of the transfer of title to the new purchaser. There being no application for joinder, there is nothing for the court to determine. The matter must be resolved on the basis of the parties before the court.

Mr *Magwaliba* submitted that the claims by the applicant had prescribed. Two applications for the setting aside of the sale on common law grounds were filed and withdrawn within three years. The present application was filed in 2020, well outside the three year prescription period. No further submissions were made as regards the period from which the court should consider the cause of action to have arisen for purposes of determining whether the claim had prescribed or not. The date or the time when the cause of action arose is critical in determining when prescription started to run. In the absence of further submissions on that point, then the court is constrained from making a determination on that point.

Coming to the merits of the application, it is common cause that three grounds for review were motivated in pursuit of the relief sought. The first respondent's conduct was impugned on the basis of: gross unreasonableness; bias in favour of the second respondent; and gross procedural irregularities in the manner in which the sale in execution was conducted.

An application to set aside a sale that has been confirmed, with title having already passed to a third party is no mean task. Courts are generally slow to interfere with judicial sales, especially where title has changed hands. This is justifiably so because the integrity of judicial sales must be preserved in order to foster confidence in the justice delivery system. Creditors resort to courts of law in order to recover their debts, because they have confidence in the justice delivery system. Third parties who purchase properties at auction sales also look to the law and the courts for protection. For that reason, it will only be in exceptional circumstances that a court will set aside a sale that has not only been confirmed, but title has already passed to a third party. In *Chiwanza* v *Matanda and 5 others*[14] MAKARAU J (as she then was) remarked as follows on page 3 of her judgment:

> "The approach to this court after a sale in execution has been confirmed and in the absence of a prior approach to the Sheriff in terms of the rules is in my view to be based on the general grounds of review as provided for at common law. These would include such considerations as gross unreasonableness, bias and procedural irregularities but cannot include such grounds as an unreasonably low price or that the sale was not properly conducted as provided for under the rules unless such can be subsumed in the recognised grounds of review at common law".

[14] HH 170/04

In *Mapedzamombe* v *Commercial Bank of Zimbabwe and Another*,[15] GUBBAY CJ had laid the foundation of the law when 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 for emphasis)

Rule 359 of the old rules permitted any person with an interest in a sale to approach the Sheriff to set aside such sale on the grounds that: the sale was improperly conducted; the property was sold for an unreasonably low price, or on any other good ground. An attempt to set aside a sale in execution based on submissions that ought to have made under a r 359 challenge cannot be sustained under a common law challenge. The applicant approached the court on common law grounds. I now turn to consider these common law grounds to determine if there exists basis for granting the relief sought.

Gross Unreasonableness in the conduct of the first respondent

The applicant claimed that the purchase price was not paid in full within the required time frames in breach of the agreement of sale between the first and second respondents. The purchase price of the property was US$111, 200.00 in terms of the purchase price clause.[16] There were also allegations that the auctioneer's commission of 5%, VAT on the commission and Capital Gains Tax were either not paid or were deducted from the proceeds of the sale to the prejudice of the applicant. In terms of the mode of payment provision of the agreement of sale, the purchaser was required to pay cash on signing of the agreement of sale into the

[15] 1996 (1) ZLR 257 (S) at 260D
[16] Page 28 of the record

Sheriff's Account at CBZ Bank, Selous Avenue Branch, Harare. However clause 10 of the agreement stated that:

> "The purchase price if not paid in full to the Commissioner at the conclusion of the auction, shall be paid on or before the registration of the transfer of the property into the name of the Purchaser unless the Sheriff approves other arrangements for discharging the amount by the Purchaser."[17]

From a reading of the two clauses pertaining to payment and the mode of payment of the purchase price, the purchaser had an election to pay the purchase price either on the signing of the agreement of sale, or before transfer of title to the purchaser. In terms of clause 11 of the agreement of sale, the purchaser was liable to pay interest at the rate of 25% per annum in respect of any unpaid balance of the purchase price with effect from seven days after the date of confirmation of the sale by the Sheriff. In terms of clause 12, if the purchaser failed to pay the purchase price and other costs and charges in terms of the agreement, then the Sheriff had the right to cancel the sale and hold the purchaser liable for any loss or damages sustained.

The agreement of sale was signed on 17 January 2017. A sum of $101, 200.00 was deposited into the first respondent's CBZ Bank Account. On 25 November 2016, the second respondent had paid a refundable security deposit of US$10, 000.00 to Amazon, the auctioneer. According to Mr *Magwaliba*, that deposit was channelled towards the purchase price. I also note that on 27 February 2017, the first respondent wrote to the Amazon Real Estate requesting them to "transfer the deposit of $10, 000.00 into our account as a matter of urgency. We advise that we are already in receipt of the other $101, 200.00 from the purchaser. As such we need the balance to so that we proceed and sign the transfer documents"[18]. In his report, the first respondent confirmed that the purchase price was paid in two instalments. There was the deposit of $10, 000.00, which had not been refunded, and the balance of $101, 200.00 paid on 24 January 2017.[19]

The property was transferred to the second respondent on 1 September 2017. In one of the recital clauses of the deed of transfer it was noted that *"*Acknowledging that the whole of the purchase price, amounting to a sum of US$111, 200.00 (One Hundred and Eleven Thousand Two Hundred United States Dollars) has been satisfactorily paid"[20]. From a consideration of the parties' submissions and the evidence before the court, I find the applicant's averments that the first

[17] Page 30 of the record
[18] Page 45 of the record
[19] Page 38 of the record
[20] Page 142 of the record

respondent abused his position by accepting the late payment of the purchase price unsustainable. As already noted, the purchase price could be paid on signing of the agreement of sale or before transfer of title.

On the facts and the evidence before the court, I am satisfied that the purchase price of $111, 200.00 was paid before transfer of title to the second respondent. I do not believe that the office of the fourth respondent would have transferred title to the second respondent without being satisfied that all conditions precedent to such a process were satisfied.

The alleged non-payment of the auctioneer's commission of 5% is not supported by any evidence. In my view, the auctioneer would not have allowed transfer to be passed to the second respondent before its commission was paid. I note that in the annexures attached to the pleadings, Amazon confirmed that it had deducted its commission from the same deposit which is alleged to have been deployed towards the purchase price. The point still remains that the evidence before the court points to the payment of the purchase price in full. The agent's commission was not part of the purchase price as outlined in the preamble to the agreement of sale. The non-payment of the commission had no impact on the transfer of the property once the purchase price was paid in full. It was a matter to be resolved separately.

The same should be said of the alleged irregularities pertaining to the non-payment of capital gains tax or the submission of a fake capitals gains tax certificate. In the absence of proof to confirm these allegations, then the court can only conclude that the transaction was done above board. The transfer of the property would not have been achieved without payment of the said tax and related charges, unless there was some collusion involving officials of the Zimbabwe Revenue Authority and those of the fourth respondent. No such collusion was alleged and no evidence was placed before the court to suggest it either.

The court finds no merit in this ground for review.

Procedural Irregularities and Fraud

The applicant's submission was that the letter declaring the highest bidder was served at the wrong address. He was thus denied the opportunity to challenge the sale in terms of r 359(1) and r 359(8). He had a legitimate expectation to be heard before the sale was confirmed. In his report, the first respondent conceded that the acceptance letter and the confirmation letter were served at 92 Suffolk Road, Avondale, Harare, instead of No. 92 Harare Drive, Marlborough, Harare.

The court notes though that the notice of attachment was served at the correct address on 14 June 2016. Also served at the correct address was a copy of the sale instructions on 19 September 2016. This point was not addressed by the applicant's counsel in his submissions. I agree with the submission by the second respondent's that the applicant was aware that the property was being sold, but he did not take any action at that stage. The issue that arises is whether first respondent's failure to serve the confirmation letter at the correct address is sufficient enough to vitiate the sale of the property. In *Kanoyangwa* v *Messenger of Court & 4 Others*[21], a case which is almost on all fours with the present matter, the Supreme Court was faced with a scenario where some pre-sale and post-sale formalities were not complied with by the Messenger of Court. The issue before the court was whether the sale should be set aside in view of those irregularities after the property had been transferred to the purchaser. GWAUNZA JA (as she was then) reasoned as follows:

> "What presents itself in the final analysis is a situation where, on the one hand, there is a judgment debtor who was aware of the impending sale of his property by public auction, even though some requisite pre-sale formalities concerning advertisement of, and the service of certain notices concerning, the sale, were not observed by the relevant officials.
> Against this, is the situation where -
> (i) the sale by public auction was successfully conducted and the highest bidder declared;
> (ii) the sale was then confirmed by the magistrate as required by the rules of the court;
> (iii) the said highest bidder – the second respondent *in casu* - in good faith took transfer of the property after duly paying the purchase price and other related charges like auctioneers' fees, council rates and conveyancing fees; and
> (iv) the proceeds of the sale were paid to the judgment creditor, that is, UDC.
>
> Added to all this is the fact that the sale in question took place some three to four years ago. Given the situation outlined above, the determination of this dispute, in my view, requires that the interests of the appellant on one side, be balanced against those of the respondents, on the other. In other words, the case must be determined on the basis of equities and balance of convenience. This is what I shall proceed to do."

The court declined to set aside the sale by public auction even in the face of those irregularities. The court reiterated the point that courts should be slow to interfere with a judicial sale that has been confirmed, with transfer of title having passed to an innocent purchaser. At pages 10-11 of the judgment, the learned judge further made the following pertinent comments:

> "Despite being aware of the attachment of his property in execution, the appellant, on the evidence before the court, failed to speedily move to protect his interests. The property was

[21] SC 68/06 pages 8-9

> under attachment for at least one year, yet he took no steps to avert its sale. After the sale, the appellant did nothing to stop its confirmation and subsequent transfer into the name of the second respondent.
>
> As correctly argued for the second respondent, it is trite that the courts will not readily interfere with judicial sales in execution, in order to protect the efficacy of such sales, especially after confirmation and transfer. The sale itself vested in others -particularly the second respondent- rights that, after being exercised, would be difficult to reverse. Clearly too much water has, as it were, passed under the bridge".

The above comments apply with equal force to the dispute before this court. The rules of court provide not only the procedure for the conduct of judicial sales, but also in built safeguards which allow a judgment debtor to challenge each process right up to the Sheriff's decision to confirm a sale in terms of r 359(8) of the old rules. The purchaser was aware as far back as June 2016 that his property was up for sale when he was served with a notice of attachment. The present application was filed in August 2020, some four years later after the said notification, and three years after the transfer of title to the second respondent. All that delay was not explained. A lot has happened since the service of the notice of attachment on the applicant. The delay in challenging the sale is inexcusable.

The nature of the infractions that were submitted in aid of this ground for review are not so grave as to justify the setting aside of the sale, more so if regard is had to the circumstances preceding the confirmation of the sale and the subsequent transfer of title.

Bias

The allegation of bias was premised on the manner in which the first respondent is alleged to have conducted himself in relation to the second respondent. According to the applicant, the relevant taxes that were supposed to be paid were not paid in violation of the law. Certain costs that were supposed to be paid by the second respondent were instead deducted from the proceeds of the sale. Even the acceptance of payments from the second respondent outside the due date showed that the sale was heavily tilted in favour of the second respondent.

The test for bias was well explained in the case of *Leopard Rock Hotel Co (Pvt) Ltd* v *Walenn Construction (Pvt) Ltd*[22], a case cited in the applicant's heads of argument. The court said:

[22] 1994 (1) ZLR 255 (S) at p275E-G

> *"*In *R (Donoghue)* v *County Cork JJ* [1910] 2 IR 271 at 275 Lord O' Brien CJ said*: "*By bias 'I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds- was reasonably generated-but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision". (Underlining for emphasis).

The exercise of judicial power is wont to attract suspicions of bias especially in those cases where a party claims that a decision affecting their rights was made without their participation. It is not every allegation of bias that will always result in the court upsetting a quasi-judicial decision complained about. Courts are always mindful that administrative tribunals such as the one presided over by the first respondent are not courts of law. Rules of procedure and principles of law are not as rigorously applied as they are in courts of law.[23]

In terms of clause 8(a) of the agreement of sale, the purchaser was to pay: the auctioneer's commission, being 5% of the accepted purchase price plus VAT on the commission; the costs of transfer including conveyancers charges, stamp duty and any other fees; all arrear rates and any other charges necessary to complete the transfer. A perusal of the plan for distribution shows that the first respondent made a provision for deduction of: capital gains withholding tax in the sum of $5, 560.00; the auctioneer's costs in respect of Amazon in the sum of $425.00. It is not clear what these costs were for.

The distribution list shows that the sum of $49, 628.00 was to be paid to the judgment creditor. The distribution plan is dated 15 March 2017. Mr *Magwaliba* urged the court to take note of the fact that it is the second respondent's funds that were applied towards the discharge of the applicant's indebtedness. That payment was made pursuant to a lawful process. The applicant ought to have obtained an order to stay the distribution if he had any complaints about the manner in which disbursements were being made. Mr *Magwaliba* submitted that the said anomalies in the payment process could surely not be a basis for upsetting the sale.

I agree with counsel's submissions. It is not the second respondent that prepared the distribution list. It is also not the second respondent that distributed the proceeds. The position of the second respondent as an innocent purchaser was all but confirmed by this court in *Casper*

[23] *Dunmore Mupandasekwa v Green Motor Services (Pvt) Ltd* SC 30/15

Masvikeni Family Trust v *Guruwo & Another*[24]. The court Dealt with three matters involving the same parties as in *casu*. The second respondent herein was the applicant in all the matters, while the applicant herein was the first respondent. The first respondent herein was the second respondent, while the third respondent was also third respondent in two of the matters. At pages 20-21 of the judgment, CHITAKUNYE J (as he then was), made the following point:

> "In *casu*, in responding to the applicants defence in paragraphs 53 to 57 of its founding affidavit, the first respondent did not rebut the fact that the applicant was an innocent purchaser and had in fact taken transfer at the time the judgment in HC 9850/18 was granted. The first respondent, instead, focused on issues of improvements that applicant said it had effected. A perusal of HC 9580/18 shows that in applying for the setting aside of a confirmed sale in execution the first respondent confirmed that the applicant had bought the property at a Sheriff's sale in execution and had obtained transfer. He did not state anywhere in that application that the applicant had acted in bad faith or with prior knowledge of any irregularities or that it acted fraudulently in its acquisition of the property and obtaining transfer. The first respondent's complaints in that application pertained to alleged irregularities in the first default judgment and subsequent sale by the Sheriff; these are aspects that related to Sanctuary Insurance Company and the Sheriff. The common law requirements alluded to above required him to allege bad faith or prior knowledge of irregularities or fraud on the part of the applicant, but this was lacking. The applicant's purchase of the property is protected by the law and the sale cannot be easily impugned in the absence of proof that applicant was guilty of any of the above common law requirements."

Further down in the same judgment the learned judge concluded as follows:

> "In the absence of allegations of bad faith or fraud or knowledge of prior irregularities on the part of the innocent purchaser, the 1st respondent's remedy is against Sanctuary Insurance Company as his complaint lay against that firm on a proper cause of action and an appropriate remedy that does not affect the innocent purchaser's rights and interests."

I associate myself with the sentiments of the learned judge. The applicant has failed to demonstrate that the first respondent was biased in favour of the second respondent. The mere fact that funds that were supposed to be paid directly by the second respondent, were deducted from the proceeds of the sale cannot be conclusive evidence of bias. It may well have been an error that can be easily regularised by the concerned parties. In the absence of clear evidence of collusion between the first and second respondents, pointing to the existence of bias, this court finds no basis on which to accept that imputation.

Prior court orders

Mr *Hashiti* urged the court to take note of the effect of the past orders of this court. It was submitted in particular that the order by CHIKOWERO J, had the effect of upsetting the very

[24] HH 22/20

judgment that the first respondent relied upon to pass title to the second respondent. This submission is ill-conceived primarily for three reasons. Firstly I dare say that the applicant sought to misrepresent the correct position on the ground. The order by CHIKOWERO J is one of the three orders that were set aside by CHITAKUNYE J on the basis they were granted in error. That judgment was delivered on 9 January 2020. The applicant did not make reference to that judgment at all. He must have been aware of its damaging consequences and chose to leave this court in the dark as it were.

If the order by CHIKOWERO J was overturned, then it meant that the original judgment granted against the applicant in HC 9923/14 remained extant, unless it was subsequently set aside again. CHITAKUNYE J had no kind words for the applicant herein and his legal practitioners concerning the manner in which they were abusing this court after the transfer of title to the second respondent. The granting of a decree of perpetual silence by this court against the applicant clearly demonstrated the disdain with which the applicant approached this court.

Secondly, the orders by CHIKOWERO J, MATHONSI J and MUSHORE J were granted in 2018 and 2019 respectively. Meanwhile the property had been transferred to the second respondent in September 2017, a year earlier. The application before this court does not seek to impeach the second respondent's title at all. The order by MATHONSI J did not concern itself with the second respondent. It was not a party to those proceedings. Further, that order was also affected by the setting aside of the order by CHIKOWERO J. The effect of setting aside of the order by CHIKOWERO J, in the judgment by CHITAKUNYE J meant that the applicant was left exposed. He had a judgment against him that he had to rescind first. The judgment by CHITAKUNYE J was the latest decision of the court on the same issue. It remains extant to this day.

Thirdly, the applicant was made aware that the property had since been sold to a third party, Chinya Investments. At the time this matter was argued, the applicant was already aware of this position, with the second respondent having intimated in its notice of opposition that it no longer had interest in the property hence the sale to the third party. The applicant chose not to approach the court for joinder of the third party. If the court were to upset the sale in execution, then that decision would have a bearing on the agreement of sale between the second respondent and Chinya Investments. Chinya Investments was not before the court, yet it ought to have been cited or joined to these proceedings as an interested party.

For the foregoing reasons, the court is satisfied that the applicant has failed to set out a case for the setting aside of the sale in execution on common law grounds. The balance of convenience does not favour interference with the sheriff's sale at this stage. The application is devoid of merit and ought to be dismissed.

COSTS

Mr *Magwaliba* urged the court to dismiss the application with costs. I see no reason to deny the second respondent its costs herein. The court would not have hesitated to dismiss the application with costs on the legal practitioner and client scale had such order been sought by the second respondent. The manner in which the applicant and his legal practitioners conducted themselves certainly deserved some censure by way of a punitive order of costs.

DISPOSITION

It is ordered that:

1. The application be and it is hereby dismissed.
2. The applicant shall pay the second respondent's costs.

B Chipadza Law Chambers, legal practitioners for the applicant
Mahuni and Mutatu Attorneys At Law, legal practitioners for the second respondent