

THE SHERIFF OF THE HIGH COURT
versus
NOMVUYO HILARY MADZIRO
and
ANESUISHE MADZIRO
and
RUVARASHE MADZIRO
and
CBZ BANK LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYOJ
HARARE, 27 July 2015 & 4 August 2015

Opposed Matter

Ms R. Makamure, for the applicant
S. Zingono, for Claimants
A. Muchandiona, for Judgement Creditor

MATANDA-MOYOJ: The Judgment Creditor obtained judgment in its favour against Walter Madziro in HC 2110/12, for payment of the sum of \$86 965-36 with interest thereon at the rate of 36% per annum from 7 February 2012. Subsequent to that order the judgment creditor directed the applicant to attach and take into execution the judgment debtor's immovable property being stand 13594 Salisbury Township of Salisbury Township held by the judgment debtor under Deed of Transfer number 503/2002. The property is also known as number 28 Mac Gowan Road, Belvedere, Harare. The applicant attached the above property and subsequent to such attachment the claimant has laid a claim against the said property on the basis that, such property was awarded to her and her children by this court at the time of her divorce to the judgment debtor.

It is common cause that during the divorce proceedings the claimants were awarded the property in question, HC 3431B/11 refers. Paragraph 4 of the consent paper which forms part of the order read:

“4 The immovable property known as number 28 MacGowan Road, Belvedere, Harare shall be transferred to and registered in the names of the defendant (1st claimant here-in), and the

two minor children of the marriage namely Anesuishe and Ruvarashe Madziro. Transfer shall be conducted within 6 months of the divorce order and the plaintiff (judgment debtor herein) shall meet the costs of the transfer”.

To date the property is still in the judgment debtor’s name and no reasons were advanced for that position.

The question to be decided by this court is whether the claimants have managed to prove that the property belongs to them and falls outside the property which can be sold into execution to settle the judgment debtor’s obligations.

Counsel for the judgment creditor argued that ownership of immovable property is determined in terms of the Deeds Registries Act [*Chapter 20:05*]. Section 14 thereof provides that ownership of land maybe conveyed from one person to another “only by means of a deed of transfer executed or attested by a registrar”.

Counsel argued that at the time of attachment the claimants had not taken ownership of the property and therefore such ownership has never been taken by the claimants. He argued therefore that the applicants have failed to show that they own the property in question.

It is trite that in terms of the Deeds Registries Act, the owner of an immovable property is the registered owner. In *Takafuma v Takafuma* 1994 (2) ZLR 103(S) at pp 105-106 the court said:

“The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of ‘real rights’ in s 2 of the Act. The real right of ownership, or *jus in re propria*, is the ‘sum total of all the possible rights in a thing’ – see *Willie’s Principles of South African Law* 8 ed p 255”.

No doubt the property attached by the applicant in terms of the laws of this country is the judgment debtor’s property. Walter Madziro is the owner of the property so attached.

This brings me to claimants’ rights in the said property. The claimants have rights in the property conferred by this Honourable Court. The court in granting those rights was aware that ownership would only pass upon transfer of property to the claimants. The parties were also aware of the fact hence the inclusion of para 4 of the consent order requiring the claimants to take transfer within 6 months of the order. That has not happened. The claimants have failed to comply with the court order they seek to rely upon. No explanation has been given for such failure to comply with the court order. Failure to take transfer means that the

judgment debtor remains the owner of the said property. It is only the transfer of ownership of such property to the new owner that brings about an end to the legal basis of the judgment debtor's right to the use and ownership thereof.

I am of the view that the court order granted the claimants the right to transfer of property. Such right was not exercised by the claimants. Such right remained a personal right which would convert to a real right upon registration.

When a court order provides a time limit within which to do something, I am of the view that, such time limits ought to be followed. Failure to comply with such time limits lead to lapsing of the rights conferred therein. The law helps those who are awake and not the sluggard; "*lex subvernit vigilantibus nom dormientibus*".

The claimant sought to claim ownership of immovable property based on an order of this court, which order she has not complied with. If such application was made within the 6 months provided for in the court order, I was going to be persuaded that the claimants have discharged the onus on them of proving ownership of the attached immovable property. I am of the view that without registration in title claimants cannot succeed in proving that they own the said property. Such onus of proving ownership rested with the claimants: See *Bruce N O v Josiah Parkes & Sons (Rhodesia) Ltd & Anor* 1972 (1) 68 (R). It is trite that a claimant must show proof of ownership in order to succeed in interpleader proceedings. The claimants have failed to discharge such onus.

In the result I order as follows:

1. The claimants claim to Stand 13594 Salisbury Township of Salisbury Township lands measuring 1543 square metres in extent and held under Deed of Transfer Number 503/2002 dated 6 February 2002 also known as number 28 MacGowan Road, Belvedere, Harare placed under attachment in execution of judgment HC 2110/12 is hereby dismissed.
2. Stand 13594 Salisbury Township of Salisbury Township lands measuring 1543 square metres in extent and held under Deed of Transfer Number 503/2002 also known as Number 28 MacGowen Road, Belvedere, Harare as set out in the Notice of Attachment of immovable property dated 19 November 2014 issued by the applicant is declared executable.
3. The claimant to pay the costs of the Judgment Creditor and the applicant.

Kantor and Immerman, applicant's legal practitioners
Machekeche and Partners, Claimants' legal practitioners
Danziger and Partners, Judgment Creditor's legal practitioners