FELISTAS MASIYA
versus
GEZANI CHAUKE
and
THOMAS MHURU
and
WYCLIFF RUZVIDZO
and
REGISTRAR OF DEEDS
and
MESSENGER OF COURT MASVINGO

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 23 September 2014 & 20 August 2015

Opposed Application

C. Chitopota for applicant
V. Makuku for 2nd respondent
Adv. R. Bwanali for 3rd respondent

CHITAKUNYE J: The applicant married first respondent in 1988 under an unregistered customary law union. Four children were born from their union. On 4 December 2012 their marriage was solemnised in terms of the Marriages Act, [*Chapter 5:11*].

During the subsistence of their customary law union the first respondent borrowed some money from the second respondent. He provided his immovable property namely Stand number 7950 Gwaivhi Street, Rujeko B, Masvingo as security and authorised the second respondent to sell it in the event of default in the repayments. The first respondent duly surrendered his title deeds of the aforementioned property to the second respondent.

When the first respondent defaulted in the loan repayments, the second respondent successfully instituted legal proceedings against the first respondent. A default judgment was duly granted on 21 October 2011 thus paving the way for the second respondent to dispose the property in order to recover the loan amount. The second respondent caused the attachment of the property in question and its subsequent sale in execution. The sale by the messenger of court was duly confirmed.

The first respondent unsuccessfully applied for the rescission of the default judgment.

He also sued for the cancellation of the sale in execution to no avail.

He further appealed against the magistrate's judgment without success.

It was only after the first respondent had failed in the above processes that on 4 February 2013 the applicant filed this application.

In this application the applicant purports to seek what she terms 'Restitutory interdict'.

In the draft order she seeks an order that:-

"1. That the applicant be restored possession of the property.

2. That the sale in execution of house no. 7950 Gwaivhi Street, Rujeko B, Masvingo be set aside.

3. That the eviction order granted in favour of 3rd respondent be and is hereby set aside.

4. That if the property was already transferred to the 3rd respondent and the 4th respondent be and is hereby ordered to reverse that transfer.

5. That this order shall operate as a rule nisi returnable to this court on… day of … 2013 calling upon the respondents to come and show cause why this order should not be made final."

At the time of lodging the application applicant was a self actor. She subsequently secured the services of legal practitioners. Despite securing the services of a legal practitioner her claim and basis thereof remained the same.

After hearing arguments from the parties I dismissed the application with costs on the higher scale.

The reasons for the decision were as follows.

From the applicant's founding affidavit it is apparent that the reason for approaching court is because she is married to the first respondent and she believes she has ownership rights in the property by virtue of such marriage. From the dates of the registered marriage it is clear the registration of their marriage took place after the sale in execution. In any case marriage per se does not grant a spouse real rights in immovable property registered in the name of another spouse. As the property was owned by first respondent by virtue of being registered in his sole name, it follows he could do as he pleased with the property. There was

no need for the applicant's consent to him providing the house as security and to its subsequent sale.

In *Muswere* v *Makanza* 2004 (2) ZLR 262(H) this court held that: -

> "..However, the law of property does not recognise the existence of the matrimonial estate. A wife cannot stop her husband from selling the matrimonial home or any other immovable property forming the joint matrimonial estate if it is registered in his sole name, even if she contributed directly and indirectly towards the acquisition of that property. Anachronistic as it is, the legal position at present is the right of a wife to the matrimonial estate, as determined by the principles of family law, are inferior to the rights of her husband in the same property as determined by the principle of the law of property."

It is apparent that a husband does not need the consent of his wife to offer his immovable property as security and equally the creditor does not need the consent of the debtor's wife to accept such security. In consequence the Messenger of Court did not need the applicant's consent to sell the property in execution. The applicant's assertion in her founding affidavit attacking the sale on the basis that her consent had not been obtained is without merit.

If the applicant were to succeed in her application for an interdict, she had to meet the legal requirements. She has to show that she has clear right to the property since she is seeking final interdict; actual injury /harm committed or well founded apprehension of injury; and lack of any other remedy.

In *casu*, the applicant could not establish a clear right in the property. Being in a marriage union was not enough. The property belonged to first respondent.

Another issue was on the nature of that application. The applicant seemed unclear as to what application to pursue; the application was thus devoid of any credence.

The papers filed of record are a ball of confusion as to whether the application is for review or for the setting aside of the sale in execution in terms of order 26 of the Magistrates Court (Civil) Rules. Whichever one decided upon the procedure for such were not complied with.

The applicant seeks the setting aside of a confirmed sale in execution. Order 26 r 7(15c) of the Magistrates Court (Civil) Rules, 1980, as amended states that:-

> "Any person having an interest in a sale may apply to court to have it set aside on the ground that the sale was improperly conducted or that the property was sold for an unreasonably low sum or any other reasonable ground:

> Provided that any person making such application shall give due notice of the application to the messenger stating the grounds of his objection to the confirmation of the sale."

A time frame for lodging such objection is provided for in sub-rule (15d) which provides that:-

> "If no objection is made to court within seven days from the date that a provincial magistrate declares the highest bidder to be the purchaser in terms of subrule (15a) or from the date of sale by private treaty in terms of subrule (15b) as the case maybe, the provincial magistrate shall confirm the sale."

In *casu*, the applicant does not state that she complied with the above rule neither does the legal practitioner address his mind to the fact that applicant may in fact not have lodged any objection within the time frame provided.

Though the applicant claimed to have approached the magistrate court it was not within the time frame stated. The nature of the application as evident from her affidavit annexed as 'J' appears not to have been in terms of the rules.

Instead of addressing the shortcomings in that application both the applicant and her legal practitioner lamented the fact that the magistrate indicated he had no jurisdiction to deal with the application lodged.

I am of the view that the applicant, not having complied with the magistrates court (civil) rules alluded to above, had no cause to cry.

In his heads of arguments the applicant's counsel argued that the magistrate's decision to decline to hear the application for setting aside the confirmed sale in execution was wrong at law. He argued therefore that:

> "Not only does this court have power to review that decision, but acts of the Messenger of Court as well. It is however to the acts of the Messenger of Court that attention is drawn.''

The question that arises is from such submissions whose decision is this court being asked to review? Is it the decision by the magistrate in declining to entertain the application to set aside? Is it the confirmation of the sale or is it the conduct of the Messenger of Court? One may also ask: is it a review of the decisions and conduct of all the above cited officials?

If as counsel later on seemed to emphasis it is the conduct of the Messenger of Court surely the Magistrates Court (Civil) Rules, 1980 provide remedy for such. In any case the sale was confirmed by an appropriate authority in terms of the Magistrates Court (Civil)

Rules 1980. Such confirmations of both the conduct of the sale and the sale itself have not been successfully challenged.

Another hurdle in the applicant's case is that if she now seeks a review by this court she ought to comply with the rules of this court. The applicant's counsel aptly referred to the power of this court to sit in review of proceedings and decisions of all inferior Courts of justice, tribunals and administrative authorities in Zimbabwe.

In terms of r 257 of the High Court Rules, 1971, as amended, an application for review must state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for. In *casu*, no grounds of review were set out in the application. The grounds counsel sought to highlight in his submissions were sprinkled in the founding affidavit and some were referred to in the heads of arguments.

Rule 259 provides that an application for review must be instituted within eight weeks from the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred. In *casu*, the present application was instituted well after the 8 week period from when the Messenger of Court conducted the sale in execution. It is also well outside the 8 week period from when the sale was confirmed. So from which ever angle one looks at the case it is well outside the period for review.

Where a party has fallen foul of the time limit the rules provide that they can apply for condonation. Such condonation for late filing of the application for review may only be granted where good cause has been shown. In *casu*, no application for condonation was made and so no good cause was shown.

I was of the view that the application was clearly unmerited. Counsel for the applicant should have properly advised applicant of the challenges in her case rather than cause respondent to defend such an application. I thus agreed with the second and third respondents' counsel that this was a good case to order costs against the applicant at legal practitioner-client scale. It is a case that should have ended at the advisory stage and not seen the doors of this court.

Accordingly the application is hereby dismissed with applicant to bear costs on the legal practitioner - client scale.

Zuze Law Chambers, applicant's legal practitioners
Ndlovu & Hwacha, 2nd respondent's legal practitioners
Mwonzora & Associates, 3rd respondent's legal practitioners