MUNYARADZI DAMSON
versus
LOVERIDGE LAMBERT
and
MARGARET LAMBERT

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 5 February 2019 & 5 June 2019

Special Plea

E. N Dube, for the plaintiff
P Seda, for the 1st & 2nd respondents

MUZOFA J: The plaintiff sued the respondents for the following relief;

"a. Eviction of the defendants and all those claiming the right of ownership through them from premises commonly known as No. 1458 Midlands Township 2, Waterfalls, Harare.

b. Payment of August 2018 and September 2018 rentals in the total sum of US$1300.00.

c. Payment of holding over damages at the rate of US$650.00 *per* month calculated from 1 October 2018 to date of vacation from the premises in (a) above.

d. Payment of interest on the rental arrears at the legally prescribed rate calculated date of full and final payment.

e. Payment of costs final payment and client scale.

In their opposition the respondents raised a special plea that the plaintiff's ownership of the property is in dispute. The property was *res litigiosa* at the time it was sold and transferred to the plaintiff. The applicant's title is defective and therefore he cannot evict the respondents and claim any rentals.

In response to the special plea, the plaintiff alleged that the respondents have no *locus standi in judicio* to raise the special plea since the property was not registered in their names prior to applicant receiving title. They have no legal rights to the property. Further, that the pending matter could not impede the transfer of the property to the applicant and nothing should stand in the way of the applicant's vindicatory action.

The background facts to the case are common cause. On 12 April 2011 Kingdom Bank Africa Ltd (KBAL) (the bank) issued summons under HC 3630/11 against Real Distributors (Pvt) Ltd, Kunyetu Lambert Family Trust, Joseph Kunyetu Lambert, Paul Mushonga Kembo and Tapiwa Taruvinga claiming US$124 508.10. Judgment was entered by consent and stand number 1458 Midlands Township 2, Waterfalls Harare (the property), registered in the Kunyetu Lambert Family Trust (the Trust) was declared especially executable. On 14 December 2014 the Sheriff was instructed to sell the property by public auction. The bank successfully bid for the property and was declared the highest bidder. On 22 January 2015 the Sheriff confirmed the sale having received no objections. The bank subsequently fell into difficult times and it went into liquidation. As part of the liquidation process the property was sold to the applicant. On the 18th of August 2017 the Bank entered into an agreement of sale with the applicant for the sale of the property and the property was transferred to the applicant. Before the property was sold to the applicant by the bank, on 17 April 2017 the second respondent had filed a court application for a declaratory order for the setting aside of the sale in execution under case number HC 3748/17. The basis of the application was that she held a life usufruct over the property and the Sheriff had not complied with r 348A of the rules when the property was disposed. This was the pending litigation that the respondents rely on in raising the special plea of *res letigiosa*.

The issue of the respondents' *locus standi* raised by the applicant does not arise in this case. *Locus standi* refers to one's legal capacity to bring legal proceedings against another. In *Makarudze and Another* v *Bungu and others* 2015 (1) ZLR 15 AT 23 B-C the court had this to say about it,

> "*Locus standi in judicio* refers to one's right, ability and capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the subject matter and outcome of the litigation."

The capacity to bring legal proceedings and the capacity to raise a plea are different concepts. Where a party is sued, the issuer of process has clothed such party with capacity to

defend themselves. In respect of pleas a party can only be estopped from raising a plea and not that they have no *locus standi*.

The issue that falls for determination is whether or not the principle of *res litigiosa* applies in the present case. In *Waikiki Shipping Company Limited* v *Thomas Barlaw and Sons (Natal) Ltd and Another* 1978 (1) SA 671 at 676 H the court defined "*res litigiosa"* as objects that are the subject matter of litigation. In *Zimbabwe Banking Corporation Ltd & Anor v Shiku Distributors (Pvt) Ltd and Ors* 2000 (2) ZLR 11 (H) at 18F the court held that:

> "- - - a *res litigiosa* may not be sold after institution of action as there is no-one who can be enriched by the right as everyone has an equal right to prosecute it."

Where the alienation takes place without protecting the rights of the non alienating party the courts have found the sale a nullity *Claudius Chenga v Virginia Chikadaya and 3 Others* SC 7/2013 at p.10 . The authors Silberberg & Shoeman, in The Law of Property 3rd Ed at page 304 set out the position where alienation has already taken place as follows;

> "This means that the sale of a *res litigiosa* is valid *inter partes*, but the purchaser is bound by the judgment in the action and the successful plaintiff can recover it from the new possessor by execution and without fresh proceedings".

The authorities are in agreement that personal actions render the subject matter *res letigiosa* at the stage of *litis contestatio,* while in an action in *rem* the subject matter becomes *res letigiosa* on the service of summons See *Opera House (Grand Parade) Restaurant (Pvt) Ltd v Cape Town City Council* 1986 (2) SA 656 (C).

In this case the pending litigation for a declarator is premised on the second respondent's claim of a life *usufruct* over the property. A *usufruct* is a limited real right found in the civil law. Since the pending litigation was an action in *rem* the property became *res letigiosa* on issuance of the process. There can be no doubt, that at the time of alienation of the property the subject matter had become *res letigiosa*. Applying the principles in the *Chenga* case *supra* if the second respondent's rights are proved the special plea may succeed but for the circumstances of this case that are distinguishable from the *Chenga* case. Since the principle recognizes that at times the subject matter would have been alienated it seems it accommodates the alienation subject to the

outcome of the pending matter. It then becomes an issue whether in its strict sense the principle of *res litigiosa* renders alienation of the subject matter a nullity where there is pending litigation or the court can consider the pending matter and test its merits.

After hearing submissions from both legal representatives, I granted the parties leave to file supplementary heads of argument addressing an issue that arose during submissions whether this Court can consider the merits under case number HC3748/17.The respondents submitted that this court cannot consider the merits of the pending matter. The court was referred to numerous cases where the principle was considered and the courts therein did not consider the merits of the pending matter. However there was no case where the court had to address this issue. In a nutshell the thrust of the submissions were that where it is established that the alienation of the subject matter took place when there was pending litigation the alienation should be held to be a nullity. The court cannot decide on a matter that is not before it. For the applicant it was submitted that for the sake of achieving justice between parties the court should be able to consider the merits of the pending matter and consider whether it is meritorious.

Although l was not referred to any authority on the proposition advanced for the applicant it appears to be the more reasonable one .I also found persuasive the reasoning by CHAREWA J in the case of *Godfrey Munyamana and Others* v *Alec Makurumure and Others* HH 618/16 where the learned Judge considered the issue and concluded;

> "I do not believe that it was the intention of the authorities that the principle of *res litigiosa* would cover all manner of litigation. For a party to successfully rely on the principle, it is only proper that the litigation contemplated should be *bona fide* and reasonably meritorious. This is after all the standard for most actions and applications. I am of the view therefore that it is proper, nay, required of a judge assessing reliance on *res litigiosa*, to assess the *prima facie* merits of the litigation concerned with respect to its seriousness and reasonable prospects of success."

It is a truism that a court cannot deal with a matter that is not placed before it. However in a case where the principle of *res letigiosa* arises, it should be taken that the pending matter has been placed before the court for the purposes of making certain conclusions which do not necessarily dispose of the matter. The court should therefore be able to peruse the file in respect of the pending matter and make a value decision considering both matters.

A perusal of HC3748/17 shows that the first respondent is not a party to the litigation. He cannot therefore succeed in raising the special plea. He has no right or claim over the property.

In respect of the second respondent the special plea cannot succeed too. This was a judicial sale. A judgment debtor or any person who has an interest in the sale is entitled to bring objections challenging the conduct of a judicial sale by the Sheriff before confirmation of the sale in terms of r 359 (1). Where the sale has been confirmed by the Sheriff, an application challenging a judicial sale must strictly conform with the principles of the common law *Mapedzamombe* v *Commercial Bank of Zimbabwe and Another* 1996 (1) ZLR 257 (S) . In terms of the common law immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of bad faith, or knowledge of the prior irregularities in the sale in execution or fraud. The second respondent does not allege bad faith or fraud in the sale in execution, but claims some irregularities for non-compliance with r 348A.In the cases of *Meda* v *Homelink (Pvt) Ltd and Another* HB 195/11, *Electroforce Wholesellers (Pvt) Ltd* v *FBC* HH 14/15 and *Nyadindu and Another* v *Barclays Bank of Zimbabwe Ltd and Others* HH 135/16 the courts have limited the application of r 348 A in the sale of a dwelling and held that it does not apply in foreclosure proceedings. In the *Meda* case (*supra*) the court noted;

> "the only interpretation that makes sense rather than a mockery of justice is one which says that r 348 A is not applicable to foreclosure proceedings."

It would not be in the interest of justice for a judgment debtor to surrender their property as security to obtain a loan and when foreclosure proceedings are instituted to be allowed to redeem the property on the basis that the property is a dwelling yet at the time they surrendered the property as security they were well aware of the fact. Rule 348A can only apply where the dwelling is not linked to the debt sought to be recovered. On this basis alone the pending matter may not succeed. Secondly the second respondent has not provided proof that she holds the right she claims in the pending litigation. The Trust which was the title holder surrendered the property to the Bank. The Trust did not challenge the sale in execution. The second respondent's rights are premised on a life *usufruct*. A perusal of HC 3748/17 shows no proof that she indeed held such right. A *usufruct* is classified as a personal servitude which can be registered in terms of the Deeds Registries Act [*Chapter 20:05*].Where the *usufruct* is registered the property is sold subject to the right. In the pending litigation there is no such proof of registration. It then leaves the second respondent with a bare claim that she holds such a right. If it existed contractually between her and the Trust it can only be binding between the parties and not the subsequent owners like the applicant since it was

a personal right. When the Trust was divested of its ownership rights in the property, it became a natural corollary that the second respondent's rights fell away. Since the alleged owner who supposedly gave the right was no longer the holder of title and interests in the property, the second respondent would have not even have the personal rights to enforce.

The pending litigation has no prospects of success. It only serves to delay the inevitable. The applicant is an innocent purchaser who holds title. At law the applicant is entitled to vindicate his property against the whole world. The applicant's title is not defective. Even if my conclusion is misdirected the second respondent does not remain without recourse. Where the subject matter has been alienated the plaintiff, if successful, can recover it from the possessor. In the unlikely event that the second respondent succeeds under case number HC 3748/17, that judgment would be binding on the applicant.

In the final, my finding is that although at the time of alienation the property was *res letigiosa*, the sale to the applicant was not a nullity because the pending litigation is frivolous and lacks merit. This is the only conclusion that achieves justice between parties.

The special plea is accordingly dismissed with costs.

Sawyer & Mkushi, plaintiff's legal practitioners
Chinawa Law Chambers, 1st & 2nd defendants' legal practitioners