DISTRIBUTABLE (2)

JULIANA SABARAUTA
v
(1) LOCAL AUTHORITIES PENSION FUND (2) THE SHERIFF

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & ZIYAMBI AJA
HARARE, JUNE 8, 2017

A. Mubaiwa, for appellant

R. Mabwe, for respondent

UCHENA JA: The appellant appealed to this court against the decision of the High Court. After reading the record and hearing submissions from counsel for the parties, we dismissed the appeal with costs. We indicated that reasons for judgment would follow in due course. These are they.

FACTUAL BACKGROUND

The appellant was a director of a company called Plant Haven (Private) Limited (hereinafter referred to as Plant Haven). The appellant resides at No.5 Sir Herbert Taylor Drive, Belvedere, in Harare.

The first respondent was Plant Haven's landlord in terms of a lease agreement. Upon breach of that lease agreement, the first respondent obtained judgment in HC 2584/12,

against Plant Heaven and one Mr Mantozo, for eviction, arrear rentals, holding over damages, interest and costs.

On vacating the first respondent's premises in terms of that judgement, Plant Haven relocated to the appellant's residence at No 5 Sir Herbert Taylor Drive Belvedere Harare. On 9 October 2015, the second respondent acting on behalf of the first respondent, attached a motor vehicle at the appellant's residence for the satisfaction of a debt owed to the first respondent by Plant Haven. The second respondent instituted interpleader proceedings in the court *a quo* because the appellant was claiming ownership of the motor vehicle he had attached at her residence. The basis of her claim was that the motor vehicle was registered in her name, and was therefore hers. Other than the assertions that the vehicle was hers and the registration book which she argued to be proof of ownership, no evidence was adduced in her affidavits before the court *a quo*, to show when, where and how she acquired the vehicle.

When the motor vehicle was attached Messrs T.K Hove who were Plant Haven's Legal Practitioners wrote to the second respondent as follows:

> "Your office attached our client's property in terms of a writ of Execution for the capital sum of US 5 386-31".

The letter is headed "Re Local Authorities Pension Fund v Plant Haven (Private) Limited Case No. HC 2584/12." There can therefore be no doubt that T. K Hove Legal Practitioners were raising issues with the Sheriff on behalf of the judgment debtor as the content of the letter confirms their mandate.

The High Court consequently found that the appellant failed to prove ownership of the motor vehicle in question on a balance of probabilities and the appellant aggrieved by that finding, appealed to this court on the following grounds:

1. The court *a quo* grossly misdirected itself in finding that the judgment debtor had relocated to the appellant's premises, a fact which was not borne by the papers.
2. As a result of the finding in (1), the court *a quo* grossly misdirected itself in concluding that the property belonged to the judgment debtor.
3. The court *a quo* grossly misdirected itself in concluding that possession of the vehicle by the appellant at the time of attachment could not weigh in favour of the appellant's ownership of the motor vehicle.
4. The court *a quo* erred at law in concluding that the vehicle's registration book did not form prima facie proof of ownership.
5. The court *a quo* erred in holding the appellant liable to satisfy the debts of the judgment debtor when she was not a party to the judgment in HC 2584/12.

From the facts and grounds of appeal it is clear that the sole issue for determination is whether or not the appellant was able to prove ownership of the motor vehicle on a balance of probabilities.

Miss *Mabwe* for the appellant, submitted that ownership was proved on a balance of probabilities because the appellant was in possession of the motor vehicle which was registered in her name, when it was attached at her residence. She contends that, by failing to accept these two facts, the court *a quo* erred in coming to the conclusion it did.

Relying on the argument that the motor vehicle was in the appellant's possession when it was attached, Miss *Mabwe* drew the court's attention to the fact that, possession at the time of attachment, raises a presumption that one owns the property in dispute.

She submitted that ownership of the motor vehicle was proved by the registration book which showed that the motor vehicle was registered in her name. She argued that a vehicle registration book issued in the name of the holder thereof constitutes *prima facie* proof of ownership such that once it is produced the onus to prove otherwise rests on the party contending otherwise.

In support of this argument, Miss Mabwe relied on the case of *Deputy Sheriff, Marondera v Traverse Investments (Pvt) Ltd & Anor* HH 11/03 where the court held that;

> "In respect of the said 2 vehicles, the first claimant produced vehicle registration books which were obtained in April and May, 2000, way before these proceedings were contemplated. Proof of registration of the said vehicles in the first claimant's name, is in the court's view, *prima facie* evidence of ownership. The onus then shifted to the second claimant to try to disprove the first claimant's *prima facie* entitlement to the said vehicles."

During argument Miss *Mabwe* however conceded that a registration book is not conclusive proof of ownership but merely creates a presumption of ownership of the vehicle.

On the basis of the above Miss *Mabwe* submitted that the court *a quo* erred in concluding that the appellant failed to prove ownership of the motor vehicle on a balance of probabilities when it was clear that the motor vehicle was registered in her name and had been attached while in her possession.

Mr *Mubaiwa* for the first respondent submitted that, the court *a quo* correctly found that the appellant failed to prove ownership on a balance of probabilities. He submitted that a registration book on its own cannot be proof of ownership of a motor vehicle. He relied on the cases of *Sheriff of the High Court v Mayaya & Ors* HH 494-15 and *The Sheriff of High Court v Orimbahuru & Ano*r HH 128-16.

Mr *Mubaiwa* further submitted that the purpose of a registration book, as set out in s 6 of the Vehicle Registration and Licencing Act [*Chapter 13:14*], is to enable a motor vehicle to be used on the road. He further submitted that the registration book showing the motor vehicle was registered in her name was not enough to rebut the presumption that the property belonged to the judgment debtor.

In any event emblazoned on every registration book is a warning that reads "This registration book is not proof of legal ownership". It cannot therefore be relied on to prove ownership when it warns against it. Accordingly the court *a quo* correctly found that the appellant did not prove ownership on a balance of probabilities in the light of a competing claim to ownership by Plant Haven which was also in possession of the motor vehicle, when it was attached.

Interpleader proceedings are instituted by the Sheriff in respect of property attached by him when a third party claims ownership of that property. In such proceedings, it is necessary for the party claiming the attached property to prove ownership by clear and satisfactory evidence. In *The Sheriff of the High Court v Mayaya and 2 Ors (supra*), the court held that;

> "In proceedings of this nature the claimant must set out facts and allegations which constitute proof of ownership. The claimant must prove on a balance of probabilities that the property is his or hers: *Bruce N.O v Josiah Parkers and Sons Ltd 1972 (1) SA 68 (R) at 70 C-E*"

In that case commenting of reliance on a registration book to prove ownership the court said:

> "It is therefore frivolous to argue that because the registration book is not in the name of the first claimant therefore he is not the owner of the motor vehicle. A registration

book on its own is not proof of legal ownership. This is even endorsed on registration books."

In the case of The Sheriff of the *High Court v Orimbahuru (supra*) the court held that:

> "It is trite that in interpleader applications the claimant who seeks to assert that the property in dispute belongs to him has to produce such evidence as clear receipts and registration books for the attached vehicles see *High Court Sheriff v S Rougxin Mining P/L & Anor* HH 542/15."

It is clear from the facts of this case that the appellant and Plant Haven shared the premises at which the motor vehicle was attached. The writ of attachment states that attachment took place at the appellant's residence from which the judgment debtor operated. This means that Plant Heaven was in possession of the motor vehicle. It is trite that where movable property is attached whilst in the possession of the judgment debtor the onus of proving ownership rests on the claimant.

In a bid to discharge the onus placed on her, the appellant produced a registration book of the motor vehicle showing that it was registered in her name. In my view the court *a quo* correctly found that the registration book did not conclusively prove that the motor vehicle belonged to the appellant. The appellant should have led evidence setting out facts as to when and how she had acquired the motor vehicle. The court *a quo's* reasoning cannot be faulted. It was based on the case of *Air Zimbabwe (Pvt) Ltd & Anor v Steven Nhuta & 2 Ors***,** SC 65/14 at pages 9 to 10 where ZIYAMBI JA said:

> "As to the ownership of property attached, it was alleged by the appellants that that property belonged to Air Zimbabwe and not to Air Zimbabwe Holdings. In support of this allegation a number of registration books were attached to the appellants' papers. The learned Judge determined this issue as follows:
>
> > 'Applicants alleged that the attached assets did not belong to Air Zimbabwe Holdings against which Nhuta had a judgment, but against Air Zimbabwe which

> not only was not indebted to Nhuta but also the assets for which are immune from attachment. But not a shred of evidence was placed before me that the assets belonged to Air Zimbabwe. During argument it was contended from the bar that the evidence of ownership was in the interpleader proceedings. It will be remembered that until I had requested a copy of the pleadings in those proceedings, none had been placed before me. No case reference number had been given. Nonetheless, having perused those papers I find that Air Zimbabwe laid claim to 20 out of 29 of the attached vehicles and to 1 motor cycle. As proof of ownership of those vehicles some registration books were copied and attached. From those registration books about six of the vehicles were in the name of "**Air Zimbabwe Corporation**" which could be either or both of the applicants according to their argument that both are successor companies. The rest of the vehicles were in the name of "**Air Zimbabwe**" which again could mean either or both of the applicants. At any rate emblazoned on every registration book was a "***WARNING***" that read "*This registration book* ***is not proof of legal ownership***. (My emphasis)'

I find no fault with the above reasoning. It is trite that registration books are not proof of ownership…"

It is not in dispute that the appellant was a director of Plant Haven and that when Plant Haven left first respondent's premises it relocated to the appellant's residence, namely No. 5 Sir Herbert Taylor Drive, Belvedere, Harare. The second respondent went to that address, to attach the judgment debtor's property. After the attachment the appellant claimed that the motor vehicle belonged her, hence the interpleader proceedings *a quo*. As a claimant, the appellant bore the onus of proving that the attached property did not belong to Plant Heaven despite its having been found in the possession of the latter. It was therefore incumbent upon the appellant to set out facts and allegations which constitute proof of ownership. See *The Sheriff of the High Court v Mayaya and 2 Ors (supra).* This, the appellant failed to do. Production of a registration book in her name did not according to the judgment in *Air Zimbabwe Pvt Ltd v Nhuta (supra*), amount to proof of ownership.

The appellant should have led real evidence of ownership to dispel the judgment debtor's claim of ownership of the same property.

The claim by Plant Heaven to ownership of the motor vehicle made it imperative that the appellant should have produced evidence in the form of receipts or letters showing how and when she bought the motor vehicle because the judgment debtor is presumed to be the owner of property, attached while in his or her possession.

A claimant in interpleader proceedings who shares possession of the attached property with a judgment debtor who also claims ownership of it cannot successfully rely on possession for his or her claim of ownership. He or she must produce clear and conclusive proof of ownership of the attached property.

In light of the above findings, I find no fault in the court *a quo's* decision that the appellant failed to prove on a balance of probabilities that the attached property belonged to her.

GUVAVA JA: I agree

ZIYAMBI AJA: I agree

T.K. Hove, appellant's legal practitioners

N. Bvekwa, 1st respondent's legal practitioners

Kantor & Immerman, 2nd respondent's legal practitioners