

MRS RONNAH MAFURIRANO

Versus

S.E. MATOVA

And

FELIX T. VAZHURE

IN THE HIGH COURT OF ZIMBABWE
BERE & MAKONESE JJ
BULAWAYO 26 FEBRUARY 2018 & 8 MARCH 2018

Civil Appeal

Applicant in person
Advocate L. Siziba for 2nd respondent

MAKONESE J: The appellant in this matter is determined to cling on to property that was sold through a judicial sale in execution way back in 2014. The 2nd respondent who is the purchaser of the property sold in execution paid the sum of US\$80 000 to the Deputy Sheriff in September 2014 but for over 3 years now the appellant has used all manner of tactics to frustrate the 2nd respondent from taking over occupation. On 6th October 2014 appellant filed an objection with the Deputy Sheriff alleging that the property was sold for an unreasonably low price. The sale was however confirmed by the Deputy Sheriff and the property being 10 Kirr Road, Khumalo, Bulawayo was duly transferred to the 2nd respondent under Deed of Transfer number 1332/15.

The appellant proceeded to file an application before this court in case number HC 2769/14 seeking to set aside the confirmation of the sale by the Deputy Sheriff. This application was filed on 25th November 2014. Opposing papers were filed on 13th October 2014. The 2nd respondent in that matter filed heads of argument on 26 June 2015. The appellant has done nothing to pursue the matter and is content to sit back for as long as she retains occupation of the property. Appellant has not taken steps to set the matter down and a perusal of the record under case number HC 2769/14 reveals that there has been no movement in that matter since 2015.

In a bid to enforce his rights of ownership over the property, 2nd respondent successfully obtained an order of eviction against the appellant and all those claiming occupation of the property through her. This order was granted by the Magistrates' Court sitting at Bulawayo on 10th August 2016. The appellant in this matter is seeking to challenge her eviction from the property claiming that she has a right to remain in occupation on the basis that she is still challenging the confirmation of the sale. The 2nd respondent contends that the appeal is without merit and should be dismissed with punitive costs as she has no lawful right to retain possession of the property that has been sold and transferred to the 2nd respondent.

The issue for determination

The sole issue for determination in this appeal is whether the appellant is entitled to reside at 2nd respondent's property and whether the court *a quo* erred in granting an order for eviction. It is common cause and beyond dispute that the property in dispute was sold by public auction in September 2014. The sale was confirmed by the Deputy Sheriff in spite of an objection raised by the appellant. The appellant has managed to drag this matter for a very long time. The appellant filed an application with this court seeking to set aside the sale. Since November 2014 the appellant has not diligently prosecuted her court application. She has managed to deliberately slow down the wheels of justice. She has neither filed heads of argument nor set the matter down for argument. She has succeeded in frustrating the 2nd respondent who purchased the property and paid the full purchase price of US\$80 000 in 2014. 2nd respondent is now the registered owner of the property with full title over the house in issue.

The word "**owner**" in relation to immovable property is defined in section 2 of the Deeds Registries Act (Chapter 20:05) as follows:

"Owner, in relation to immovable property, means the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, the liquidator of a company which is an owner and the representative recognized by law of any owner who has died or who is a minor or of unsound mind or is otherwise under disability so long as such trustee, liquidator or legal representative is acting within the authority conferred on him by law."

The 2nd respondent's title as the registered owner of the property is unassailable at law. The appellant's contention to the effect that registration of title is no proof of ownership is not applicable in the present scenario. The parameters of such notion were aptly stated in the case of *Machiva v Commercial Bank of Zimbabwe Ltd and Anor* 2000 (1) ZLR 302 at p303 to 304 where CHATIKOBO J remarked as follows:

“The principle that registration of title is not conclusive proof of ownership does not cause me any difficulty at all. It is the applicability of the principle to the facts of this matter which I find questionable. The principle can only be of application in those cases where, for purposes of expediency, property is registered in the name of an agent or where the true owner agreed to have the property in the name of a spouse or where for fraudulent reasons, the property is registered in the name of the wrong person or where the underlying cause for the registration aborts. It does not apply in a situation involving a buyer who has never taken transfer of title. (emphasis added)

The appellant's contention that she is entitled to be the owner of the property is entirely without any legal basis. The 2nd respondent's title stems from the contract of sale with the Deputy Sheriff which satisfied the three requirements for a valid sale, namely;

- (a) the agreement of the minds of the contracting parties (*consensus ad idem*)
- (b) the thing sold (*merx*)
- (c) the price (*pretium*)

The above requirements were laid down clearly in the case of *Kovi v Ashanti Goldfields & Anor* HH-83-07. In this present matter, with the transfer having been made in favour of a third party, it is submitted that the issues that the appellant seeks to raise are now water under the bridge as it is trite that the courts will not readily interfere with judicial sales in execution, more so, where the sale has been duly confirmed. It is essential to safeguard the efficacy of such sales in execution. See *Kanoyangwa v Messenger of Court and Others* SC-68-06, where GWAUNZA JA states as follows at page 9-10 of the cyclostyled judgment:

“.. I find in the circumstances of this case that, in weighing his interests against those of the respondents and a bona fide purchaser who has taken transfer of property after the sale has been properly confirmed, equities clearly favour a finding in favour of the second respondent.”

See also the remarks of the learned Judge in *Morfopoulos v ZIMBANK LTD & Ors* 1996 (1) ZLR 626 (H) at page 634D, which aptly apply in this matter:-

“All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his case precisely because of his own failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problems, a debtor cannot hope to persuade a court that equitable relief is due.”

There can be no doubt that the owner has a right to recover his property under the *actio rei vindication*, in terms of the law. The nature, efficiency and extent of this right was expounded by this court in the case of *Joseph Albert Servano v Micmas Sibanda & 63 Ors* HB-216-16.

It is my view that the 2nd respondent, having demonstrated before the court *a quo* that he was the lawful owner of the property in dispute, the court properly granted an order evicting the appellant from the property.

The argument raised by the appellant that the matter was *lis pendens* is not supported by the background as set out in this judgment. Once the sale was properly confirmed by the Deputy Sheriff, the sale could not be easily set aside by this court on the appellant's mere asking. I have already observed that the appellant has demonstrated an apparent unwillingness to pursue the matter under case number HC 2769/14. In any event a perusal of that record indicates that the matter has been lying dormant since June 2015. The appellant is clinging to the property and enjoying occupation at the expense of the 2nd respondent who is the registered owner and innocent purchaser. The appellant has no right to retain occupation of the property and the appeal has no merit.

Costs

The appellant who is a self actor has demonstrated a high degree of impropriety in her conduct by persistently refusing to vacate the property, when she no longer has title to it. She has no lease agreement with 2nd respondent and has occupied the property rent free from September 2014. The 2nd respondent has been put out of pocket for a considerable period of time

in trying to enforce his legal rights. 2nd respondent is entitled to an order for costs in his favour on a higher scale.

In the result, it is ordered as follows:

1. The appeal be and is hereby dismissed with costs on the legal practitioner and client scale.

Bere J I agree

Ndove & Associates, 2nd respondent's legal practitioners