

TIEDZEI PHIRI

Versus

RAPHAEL PHIRI

And

MR MAZURA

And

REGISTRAR OF DEEDS, BULAWAYO

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 20 OCTOBER AND 3 NOVEMBER 2011

Applicant in person

Mrs N. Tachiona for the 2nd respondent

Opposed Application

NDOU J: On 19 April 2011, the applicant obtained a provisional order in the following terms:

“A. Terms of the final order sought

1. That the 1st respondent be and is hereby interdicted and prohibited from disposing, transferring, alienating, pledging, assigning or dealing with the property being stand number 6905 Nketa 9, Bulawayo.
2. That the 1st respondent is ordered to pay the costs of this application on an attorney/client scale.

B. Interim relief granted

Pending the finalization of the summons proceedings to be instituted by the applicant in 10 days, applicant be and is hereby granted the following interim relief:

1. That the 3rd respondent forthwith registers a caveat over the property being stand number 6905 Nketa 9, Bulawayo.”

Having obtained the provisional order, the applicant did not set the matter for hearing on the merits. This compelled the 2nd respondent to set down the matter.

The salient facts of the matter are the following. On 12 March 2011 the 2nd respondent entered into an agreement of sale of stand number 6905 Nketa 9, being a 4 roomed house with Raphael Phiri (1st respondent) on his own behalf and on behalf of the estate of his late mother, Betty Phiri. This house is registered in both Raphael Phiri and Betty Phiri’s names. The purchase price was US\$12 500,00 which was paid in full upon signature of the agreement of sale. The 2nd respondent was not advised by the 1st respondent or 1st respondent’s agent through whom he bought the property of the existence of the applicant.

The 2nd respondent entered into the agreement of sale as an innocent purchaser. Even in her founding affidavit the applicant does not allege that the 2nd respondent is not an innocent third party purchaser. The applicant did not file an answering affidavit to dispute this averment by the 2nd respondent that he is an innocent third party who was not aware of the applicant’s personal rights. It is trite law that the rights a wife as to the property of her husband are governed by common law. They are personal rights.

The rights are personal against husband and cannot hold against a genuine claim by a third party. The wife’s status as such does not grant her any right to property that the husband has that is not the matrimonial home. She only has limited rights to the matrimonial home that she and the husband set up. These rights are personal against the husband and can be defeated by the husband providing her with alternative suitable accommodation or the means to acquire one. The husband can sell the roof from above her head if he does so to a third party who has not notice of the wife’s claims, thus completely alienating the matrimonial home without making any reference to the wife. Only where the third party associated with her husband to defraud the wife of her right on the matrimonial home is the wife’s right, derived from her status, upheld.

However, the wife must prove collusion between her husband and the third party to render her homeless – *Maponga v Maponga & Ors* 2004(1) ZLR 63 (H) and *Muswere v Makonza* 2004(2) ZLR 262(H). *In casu*, there is no averment of such collusion. Further, this property was registered in the joint names of 1st respondent and his late mother. The 1st respondent was the executor of his mother’s estate. From the foregoing, the provisional order is without merit. Accordingly, the provisional order granted by this court on 19 April 2001 be and is hereby dismissed with costs.

Judgment No. HB 164/11
Case No. HC 1096/11

Bulawayo Legal Projects Centre, 2nd respondent's legal practitioners