

KHOLIWE NDLELA

Versus

ENZYMA SPIWE SHUMBA

And

KHULUMANI MOYO

And

NKOSILATHI SOLOMON ABU-BASUTU

And

SHERIFF OF THE HIGH COURT OF ZIMBABWE

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 20 JULY 2023 & 18 JANUARY 2024

Court Application

T. Abraham for the applicant
B. Dube with L. Muleya for the 1st & 3rd respondents

TAKUVA J: In this application, applicant seeks a declaratory order to the effect that 4th respondent's attachment, subsequent sale of applicant's undivided share in her matrimonial home and also his failure to immediately remit her share of the proceeds of the auction thereof were unlawful.

However, the relief prayed for in the draft order is;

- “1. That 4th respondent's failure to timeously remit to applicant her share of proceeds, from the auction and sale of stand number 3983 Bulawayo Township lands measuring 1 190 square metres be and is hereby declared unlawful and an infringement on the applicant's real right to the aforesaid immovable property in particular applicant's right to realize the value of her 50% undivided share.
2. Costs of suit.”

Applicant and 2nd respondent are husband and wife. During the subsistence of their marriage they acquired matrimonial assets together in particular an immovable property being stand number 3983 Bulawayo Township lands measuring 1 190 square metres.

In 2011, applicant went to South Africa where she remained until 2022. Upon her return she discovered that sometime in 2013, 2nd respondent was sued by his then business partner. The 3rd respondent for ZAR2 450 000,00 being damages arising from the latter's detention by South Africa authorities. The detention was caused by fraud perpetrated by the 2nd respondent. The claim went unopposed by the 2nd respondent and accordingly a default judgment was granted against him. Later, the 3rd respondent made the matrimonial property especially executable and instructed 4th respondent to attach it. Third respondent subsequently made a chamber application for an amendment of the default judgment to reflect that the matrimonial property could be sold as long as applicant was paid her half share of the proceeds.

Unknown to the applicant, on 9th August 2019, the property was sold to the 1st respondent by way of auction for \$610 000,00 cash. The 3rd respondent received \$44 741,00 to satisfy the judgment debt. Applicant was entitled to ZWL305 000,00. On 22 May 2023 while on sabbatical from work in South Africa applicant intercepted a letter from 3rd respondent's legal practitioners to 2nd respondent with instructions to evict 2nd respondent and all those claiming occupation through him from the property.

For two years since the property was sold, 4th respondent has held on to the proceeds of applicant's half share in the immovable property. There was no communication to the applicant regarding the proceeds.

The Law

The requirements of a declaratory order emanate from the provisions of section 14 of the High Court Act (Chapter 7:06) which states;

“The High Court may in its discretion at the instance of an interested person inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

In *Mpukuta vs Motor Insurance Pool & Ors* 2012 (1) ZLR 192, it was held that;

“The condition precedent to the grant of a declaratory order is that the applicant must be an interested person in the sense of having a direct or substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must relate to an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest.”

It is evident from the above that there are basically two requirements for such an order namely;

- (1) An interested party in the sense of having a direct and substantial interest in the subject matter;
- (2) The interest must concern an existing, future or contingent right.

In casu, applicant has a direct and substantial interest in the subject matter in that she owns 50% of the property. The applicant is entitled to receive the proceeds of the half share.

At the hearing, 2nd, 4th and 5th respondents did not appear. *Mr Abraham* for the applicant submitted that they were abandoning paragraphs 2 and 3 of the daft order. *Mr Dube* for the 1st and 3rd respondents submitted that they will not contest the 1st paragraph of the order but it will be up to the applicant to prove that the 4th respondent acted unlawfully.

On the papers, 4th respondent was served with a notice of set down. He should have appeared in court. His non-appearance shows he is in wilful default. In any event the 4th respondent has not bothered to explain why he delayed for over one year to pay applicant's share. The 4th respondent did not undertake his mandate in line with his duties. Quite clearly the 4th respondent simply abandoned his duty. He cannot escape liability. As regards 1st, 2nd and 3rd respondents the applicant withdrew her case against all of them with a tender of costs.

Accordingly, I make the following order;

1. Applicant has withdrawn her case against the 1st, 2nd, and 3rd respondents with costs.
2. That 4th respondent's failure to timeously remit to applicant her share of proceeds from the auction and sale of stand number 3983 Bulawayo Township lands measuring 1 190 square metres, be and is hereby declared unlawful and an infringement on the applicant's real right to the aforesaid immovable

property in particular applicant's right to realise the value of her 50% undivided share.

3. The 4th respondent to pay applicant's costs of suit.

Tanaka Law Chambers, applicant's legal practitioners
Messrs Moyo & Nyoni, 1st & 3rd respondents' legal practitioners