KERENZA MUSHATI
versus
LUISE KUDAKWASHE MUSHATI
and
SMART MTETWA
and
REGISTRAR OF DEES

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 28 and 30 September 2011

FAMILY LAW COURT

Urgent Chamber Application

J Zindi, for the applicant
D Gapare, for the 1st respondent
No appearance for the 2nd and 3rd respondents

MAWADZE J: This is an urgent chamber application for a provisional order whose interim relief sought is stated as follows:

"TERMS OF INTERIM RELIEF SOUGHT

It is ordered that:

1. The sale of the property known as LOT 5 of LOT 264 Greendale Township, Harare also known as No 1 Sancha Close, Greendale, Harare be and is hereby suspended pending the final determination of this application.
2. The applicant and the first respondent be given until the 14th October 2011 to come to an agreement on the property failing which the applicant shall institute any necessary proceedings within seven days of the 14th October 2011. (*sic*)
3. In the event of the applicant instituting further proceedings that the first respondent be and is hereby interdicted from selling or in any other way disposing of the matrimonial home pending the final determination of such proceedings.
4. The first respondent pay the costs of this application."

The terms of the final order sought are couched as follows:

"TERMS OF FINAL ORDER

1. The first respondent be and is hereby interdicted from selling or in any other way disposing of the property known as LOT 5 of LOT 264 Greendale Township,

Harare, also known as No. 1 Sancha Close, Greendale, Harare without the applicant's consent and before the finalization of any associated proceedings.

2. The first respondent pay costs of this application.

SERVICE OF PROVISIONA ORDER

Service of this provisional order will be made by the applicant's legal practitioners".

The brief history of the matter is as follows:

The applicant filed this urgent chamber application on Friday 23 September 2011. I was only allocated this matter on Monday 26 September 2011. I attended to the matter the same day and upon considering the application I declined to set down the matter for hearing on account that the matter is not urgent. An endorsement to that effect dated 26 September 2011 was made.

The following day on 27 September 2011 the applicant through her legal practitioners sought audience with this court to argue on the urgency of the matter. The relevant letter is dated 27 September 2011. The applicant's request was acceded to as the applicant is perfectly entitled to be heard on the issue of urgency of the matter. I proceeded to set down the matter for hearing on the same day 27 September 2011 at 1430 hours for the parties to argue on the issue of urgency. Mrs *Mtetwa* who appeared then for the applicant appeared before me in chambers and the hearing of the matter was deferred to the following day 28 September 2011 at 1000 hours to allow service to be effected on the respondents. On 28 September the first respondent before the hearing of the matter filed a notice of opposition and an opposing affidavit to which was attached annextures "A1" and "A2" being agreements of sale relevant to the property in issue (hereafter referred to as matrimonial house). I proceeded to hear arguments on the question of urgency of the matter.

I now turn the facts of the case giving rise to this urgent application.

The applicant and the first respondent are wife and husband respectively. Before contracting a civil marriage the applicant and respondent were "married" to each other under customary law since April 1998. The civil marriage was solemnised on 22 October 2005 in terms of the Marriage Act [*Cap 5*:*11*]. Three minor children were born out of the marriage namely Julita born on 14 September 1998, Kudakwashe Sean born on 20 January 2001 and Tatenda Karen born on 16 December 2006.

The second respondent who is alleged to be a personal friend of the first respondent is cited in his capacity as the person who purchased the matrimonial house from the first

respondent. As per the first respondent's opposing affidavit the second respondent has already paid the purchase price of the matrimonial house as per the agreement of sale "Annexture A1". However transfer is still to be effected.

Let me briefly address my mind to the status of this property in issue No. 1 Sancha Close, Greendale, Harare ("the matrimonial house".) Both parties did not attach the title deed of the matrimonial house. The applicant's position is that this property belongs to the first respondent and she does not aver that the property is registered in the joint names of the applicant and the first respondent. According to the first respondent, the applicant, first respondent and the children who are still residing at the matrimonial house first took occupation of the house as tenants in 2008. They commenced purchasing the property in October 2009 under a deed of sale from one Peter Norman Cox. See "Annexure A2". This agreement of sale was between the first respondent and Peter Norman Cox. The applicant contends that the full purchase price was paid to Peter Norman Cox in April 2011.

The first respondent is not clear as to when the full purchase price was paid, if it was paid at all. Instead the first respondent contends that the matrimonial house is still registered in the name of Peter Norman Cox and that Peter Norman Cox, the first respondent and second respondent have agreed that a simultaneous transfer would be done from Peter Norman Cost to the first respondent and then to the second respondent. This would imply that the matrimonial house is still registered in the name of Peter Norman Cox although the first respondent may have paid the full purchase price and has in turn received the full purchase price of the same property from the second respondent. This issue however is besides point.

It is however apparent from the facts of the matter that the matrimonial house is not registered in the joint names of the applicant and the first respondent (even assuming the first respondent owns the matrimonial house). There is no basis to infer that there is such an intention even as and when the actual transfer from Peter Norman Cox to the first respondent is to be done. The assumption derived from the applicant's founding affidavit is that the matrimonial house in issue is registered in the first respondent's name. I shall therefore proceed to deal with the issue at hand on that basis.

What has prompted this application according to the applicant is that the first respondent has sold the matrimonial property to his friend the second respondent, firstly without consulting and seeking the applicant's consent and secondly without making alternative provisions for the applicant, and the minor children's needs especially in respect of accommodation. As already said the first respondent does not dispute this fact as per

"Annexutre 1" agreement of sale between the first respondent and the second respondent. The full purchase price has been paid and all what is left is the transfer of the matrimonial house into the second respondent's name.

It is common cause that there are marital problems between the applicant and the first respondent. Both the applicant and the first respondent were very candid with the court on this issue. They both confessed to have strayed away from the dictates of the holy matrimony by engaging in extra marital affairs although both allege to have repented by terminating their respective affairs. The applicant stated that she had an intimate relationship with another man from January 2011 to June 2011 when the first respondent discovered the affair and has since sued the paramour for adultery damages. The first respondent identifies this paramour as the applicant's obstetrician and gynaecologist. The first respondent on his part admits to have engaged in an extra marital affair and has sired a child with another woman.

According to the applicant this matter is urgent because of the following reasons:

a) That the property in issue is matrimonial residence where the applicant lives with the three children hence if it is clandestinely disposed of irreparable harm and prejudice would be occasioned to the applicant and the children who would be rendered homeless;
b) That the first respondent is in an long adulterous relationship and intends to relocate to South Africa presumably to join his concubine and squander all the cash realised from the sale of the matrimonial house;
c) That the applicant and the first respondent should agree to sell the matrimonial house and that the sale should be transparent, in the open market and to the best advantage of the parties;
d) That if this court allows the sale to go through and the first respondent receives the full purchase price, the applicant would not have any other recourse as the first respondent has no other assets except some vehicles which the first respondent can still easily dispose of.

The question which falls for determination at this stage is whether this is an urgent matter. As already said I had formed the opinion that this matter is not urgent. My view has not changed even after hearing submissions from counsel for both the applicant and the first respondent.

The question of what constitutes urgency in my view is now settled in our law. See *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 at 193 F (H) In the case of *Gifford* v *Muzire & Ors* 2007 (2) ZLR 13, (H) at 134H – 135 A KUDYA J had this to say in dealing with the question of urgency:

> "All that the applicant has to show is that the matter cannot wait the observance of normal procedures and time frames set by the rules of the court for ordinary applications without rendering nugatory the relief that he seeks."

My view is that this matter is not urgent because this court is being asked to grant an incompetent order, albeit interim relief. The first issue which exercised my mind in perusing the papers is whether this court can competently bar the first respondent from disposing of the immovable property registered in his name (I have made that assumption) in the absence of any pending divorce proceedings. The legal relation of a wife or spouse to property registered in the sole name of the husband (or other spouse) has been dealt with by our courts. See *Cattle Breeders Farm* (*Pvt*) *Ltd* v *Veldman* (2) 1973 RLR 261 D wherein BEADLE CJ quoted LORD HODSON in *National Provincial Bank Ltd* v *Ainsworth* [1965] ALL ER 472 at 479 which quotation is at pp 266 F:

> "Where there is a genuine transfer there is no reason why the wife's personal rights against her husband which are derived from her status, should enter the field of real property law so as to clog title of an owner".

See also *Muzanenhamo & Anor* v *Katanga* 1991 (1) ZLR 182 (S) and in *Muganga* v *Sakupwanya* 1996 (1) ZLR 217 (S).

The question I have posed as to whether a wife can stop her husband from selling a matrimonial home or any other property registered in the sole name of the husband was in my view aptly answered by MAKARAU JP (as she then was) in the two cases which were consolidated at the hearing of:

1. *Godfrey Muswere* v *Getrude Rudo Makanza* and
2. *Getrude Rudo Makanza* v *Godfrey Maswere & Ors* HH 16-2005 at p 4 of the cycostyled judgment wherein the learned judge had this to say:

> "The position in our law is therefore that a wife can not even stop her husband from selling the matrimonial home or any other immovable property registered in his sole name but forming the joint matrimonial estate … There must be some evidence that in disposing the property the husband is disposing it under value and to a scoundrel …. mere know knowledge that the seller of the property is a married man who does not have

consent of his wife to dispose of the property is not enough. See *Pretorius* v *Pretorius* 1948 (1) SA 250 (A)".

In *casu* the applicant has no real right in the matrimonial house which is presumably registered in her husband's name. The applicant's rights are personal to her husband. The applicant can therefore compel her husband the first respondent to meet his obligations under the realm of family law like providing alternative accommodation or an order for contributory maintenance in relation to her and the children. Such rights which are personal against the first respondent cannot override the real rights the first respondent enjoys as the registered owner of the matrimonial house. Such protection as envisaged in this application may only be available for the applicant in terms of s 7 of the Matrimonial Causes Act *Chapter 5*:*13* if the applicant had instituted divorce proceedings. There is no evidence to suggest that the applicant has instituted divorce proceedings. Although the marital relationship between the applicant and the first respondent is strained no divorce proceedings have been instituted.

In my view the applicant has not shown that she has a legal interest which should be protected by the way of an urgent application even assuming that all her averments in the founding affidavit are correct. The observation by MAKARAU JP (as she then was) in *Document Support Centre* (*Pvt*) *Ltd* v *Mapuvire* 2006 (2) ZLR 240 at 243 E – F is poignant:

> "I need to digress a little at this stage and observe that it further appears to me that it is not every legal interest that is capable of protection by way of an urgent application no matter how compelling the circumstances. Thus, while the general position is that when the need to act arises, an applicant may approach the court for immediate redress without delay, it is not on every cause of action that such an approach may be made … without attempting to classify the causes of action that are incapable of redress by way of urgent application, it appears to me that the nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications" (my emphasis)

In *casu* it is not even clear as to the nature of the interim relief sought. It is also not clear as to whether even the first respondent at law is the registered owner of the immovable property in issue. In addition to that there is nothing to show that the first respondent has disposed the property to a scoundrel and or at a give-away price. (See annextures A1 and A2). Most importantly there are no divorce proceedings pending before this court in which the matrimonial house is a subject of dispute between the applicant and the first respondent.

It is for the reasons outlined above that I hold the firm view that this matter is not urgent. It is only fair and just that I award costs against the applicant. There was no need in my view for the applicant to pursue the matter in view of the facts of the case and after the court had intimated that the matter is not urgent

IT IS ORDERED THAT:

1. Case No. HC 9401/11 be and is hereby declared as not urgent.
2. The applicant is to pay the costs.

Mtetwa & Nyambirai, applicant's legal practitioners
Scanlen & Holderness, 1st respondent's legal practitioners