

JAMILA OMAR  
versus  
SHABIR OMAR

HIGH OF ZIMBABWE  
DUBE J  
HARARE, 21 May 2013 and 9 October 2013

### **Opposed Application**

Ms D. *Mushambikwandwe*, for the applicant  
Mr T. *Magwaliba*, for the respondent

DUBE J: This is an application for eviction.

The brief facts of this matter are as follows. The applicant is the registered owner of stand 8141 Salisbury Township of Salisbury Township Lands, otherwise known as Number 17 St Dominic's road, Milton Park, Harare. Sometime in August 2011 the Sheriff of Zimbabwe advertised the sale of the stand. The property was to be sold by public auction in a suit involving Kingdom Bank Ltd, and Colforth Investments (Pvt) Ltd and 10 others under case No HC 5917/10. The plaintiff in that matter had obtained default judgment after the defendants had failed to attend a Pre Trial Conference. The Sheriff advertised the sale of this stand which was subject of this suit by public auction in execution of the default order. On 2 September 2011 the applicant's brother, Ayoob Omar attended the public auction and was declared the highest bidder. He purchased it for the applicant. On 6 October 2011 the respondent filed an objection to the confirmation of the sale. The sale was confirmed on 20 October 2011. Payment of the purchase price was made and the property was subsequently transferred into the applicant's name on 7 December 2011. The applicant has requested vacant possession of the said property and the respondent has refused to comply alleging that he has objected to the confirmation of the sale of the property. The applicant's prayer is for the eviction of the respondent from the property.

The respondent is opposed to the application for eviction. The respondent raised a preliminary issue which he requested the court to determine. He contends that this application is improperly before the court. The respondent submitted that the application is a nullity on the basis of non-compliance with the rules of the court. He asserts that in proceedings of this

nature, the Registrar of Deeds must be cited in compliance with r 250 of the High Court Rules. The respondent also took issue with the fact that the Deputy Sherriff has also not been cited. That he should have been cited as the application makes reference to a sale in execution. The respondent urges the court to dismiss the application with costs. The applicant in response to the preliminary issue responded as follows. Rule 250 requires that the Registrar of Deeds be served with a copy of the application only in the case of an application in connection with the performance of any act in the deeds registry. The applicant does not seek any recourse against any performance of any act by the Registrar of Deeds and ultimately there was no basis to cite the Registrar of Deeds. The Deputy Sherriff was not cited because he never conducted the sale, the Sheriff did. The applicant does not seek recourse or an order against the Deputy Sheriff. The court directed the parties to proceed and argue the matter on the merits and indicated that its ruling on this point would be encompassed in the main judgment.

On the merits, the applicant justified the confirmation of the sale on the basis that the objections were lodged out of time and are of no force and effect. The matter said to be pending is therefore a nullity as the objections were made after the sale was confirmed. The applicant maintained that the respondent did not file any opposition to the auction of his property and the sale was properly confirmed. There is nothing to show that an application was made to set aside the sale in terms of r 359. The allegation that the matter is pending before the courts does not suffice. The court was urged to consider that in practice once a sale is confirmed and transfer effected to the purchaser, courts are reluctant to set aside such sales. The court was referred to the case of *Mapedzamombe v Commercial Bank of Zimbabwe & Anor 1996 (1) ZLR 257* for that proposition. The applicant contends that she is the lawful owner of the property and the respondent has no lawful right to continue occupying the house.

On the merits Mr *Magwaliba* who represented the respondent submitted that although the respondent has not yet filed an application to set aside the sale in terms of s 359 of the rules it has filed objections with the Sheriff of Zimbabwe. He urged the court to consider that the sale giving rise to the transfer of the property to the applicant was objected to. This application cannot be granted whilst the main matter that gave rise to the default order is still pending. An application for rescission of judgment still has to be determined and it has prospects of success. The Sherriff of the High Court wrote to the respondent in October 2011 indicating that he would set down the objection and the matter has not been set down since then. There is a likelihood

that the court will set aside the sale despite that it has been confirmed. To uphold the application for eviction before the finalization of the main matter would defeat the purpose of litigation. If the application for eviction were to be granted, this would defeat the pending matter. Evicting the respondent at this stage would cause extreme hardship on the respondent and his family as they would be rendered homeless. That the validity of the sale is still an issue pending before the court and since that matter has not yet been determined, it is inappropriate to bring this application. That this application is premature.

Mr *Magwaliba* urged the court, in considering whether or not to order the ejection of the respondent from the property not to turn a blind eye to the irregularities that vitiate the sale or transfer of the property. He submitted that the Sheriff violated the provisions of r 347 which requires that a notice and writ of execution be served on the owner of the property. The respondent also took issue with the failure by the Sheriff to give notice of the attachment and imminent sale to the secretary of the Ministry responsible for the administration of Housing and Building Act [*Cap 22:07*] in terms of r 348 A(5a).

Mr *Magwaliba* contented that there are grounds for objection to the sale in that the property was sold for \$160 000-00 when its value is placed at \$250 000-00. That there are good grounds for setting aside the sale if the respondent was to file that application. That for these reasons and that there is an application for rescission of judgment, the court cannot exercise its discretion to evict the respondent from the premises. That the failure of the Sheriff to comply with the rules cannot be ignored.

The court will deal with the preliminary point first. Order 32 r 250 reads as follows:-

“In any case of any application in connection with the performance of any act in the Deeds Registry, a copy of the application shall be served on the Registrar of Deeds concerned not less than ten days before the date of set down for his consideration, and for report by him if he considers it necessary or the court requires such a report”.

The property in issue was transferred into the applicant's name on 7 December 2011. The relief sought is for eviction and does not require that the Registrar of Deeds perform any act in “connection with the performance of any act in the Deeds Registry” as the property has already been transferred. The applicant is not seeking registration or revocation of registration which would require the registrar to perform any act in Deeds Registry. There was no legal basis to cite the Registrar as an order for eviction does not affect the title of the property and does not concern the Registrar of Deeds. The Registrar will not be affected by the decision of the court nor is he required to do anything resulting from the outcome of this application. There was no need to cite the Deputy Sherriff because the order sought does not

require him to perform any act in relation to it. The sale the respondent challenges was not conducted by the Deputy Sheriff but the Sheriff. No basis has been shown for the citation of both the Registrar of Deeds and the Deputy Sheriff. The point *in limine* does not find favour with the court and must fail.

The respondent erroneously supposes that he can challenge the confirmation of the sale through an application for eviction. That is not so. The procedures regulating sales by public auction are provided for in r 359. Whether or not the sale was confirmed in accordance with the law is not the subject of these proceedings. The court can only determine the propriety or otherwise of a sale where an application has been brought in terms of the relevant section. The irregularities concerning the conduct of the sale cannot be determined in this application and I am not going to deal with the merits of those objections. The respondent is attempting to set aside the sale through the back door.

On 30 September 2011 the respondent filed an application for rescission of judgment and no attempt has been made to set down that application for determination. The respondent's contention that this application is premature does not find favour with this court. The respondent submitted that he has applied to set aside the sale and argues that this application is premature and cannot be dealt with whilst the main matter that gave rise to the default order is still pending. No reference to that application was given. The applicant's assertion that there is no such application was not refuted. After default judgement was granted against the respondent the other side proceeded to execute the order in its favour. It cannot be blamed for taking that course. It does not appear that the respondent made any application to stay execution pending the application for rescission of judgment or nor made an application to set aside the sale. It is the duty of the courts to regulate their own orders and judgements. There was nothing to stop execution of the order. The respondent's ineptitude has proved futile for the respondent as ultimately there is nothing to stop execution and eviction of the respondent from that property. The respondent sat on his laurels and he only has himself to blame. The court has in the exercise of its discretion decided to proceed and deal with the application. An order for eviction does not bar the respondent from pursuing the objections. The court has been persuaded to proceed and deal with this application primarily because the respondent has not shown that it filed an application to set aside the sale and it is not known whether he will do so. This matter cannot be held in abeyance forever. The court cannot allow the applicant to endure the ineptitude of the respondent.

Once the property was registered in the Deeds Registry, the applicant acquired real and absolute rights over the property. The applicant now has the sole right and exclusive beneficial ownership of the property, See *Kassim v Kassim* 1989 (3) ZLR 234 (H), for that proposition. Similar sentiments were echoed in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S). At 105H-106A, where MCNALLY JA had this to say:

"The registration of rights in immovable property in terms of the Deeds Registries Act [Cap 139] now [Cap 20:05] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of 'real right' in s 2 of the Act. The real right of ownership, or *jus in re propria*, is 'the sum total of all the possible rights in a thing' - see Wille's Principles of South African Law 8 ed p 255."

The property is registered in the applicant's name. That registration is an announcement to the whole world that he now owns the property. Having acquired real rights over the property there is nothing to stop her exercising rights over the property. The respondent's rights over the property have ceased. He has no justification to remain on the property.

I am not persuaded that the respondent has shown good cause why he should not be evicted from the premises.

In the result it is ordered as follows:-

1. The respondent and all those claiming occupation through him from the property known as 8141 Salisbury Township of Salisbury Township Lands., otherwise known as Number 17 St Dominics road, Milton Park, Harare, vacate the property within 7 days.
2. The respondent is to pay costs of suit.

*Gula Ndebele and Partners*, applicant's legal practitioners  
*G.N. Mlotshwa & Company*, respondent's legal practitioners