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Judgment No. SC. 3/05

Civil Appeal No. 133/04

YOUNG GOO CHO v

(1) STALIN MAU MAU (2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, JANUARY 25 & FEBRUARY 10, 2005

T Chibwana, for the appellant

Z M Kamusasa, for the first respondent

No appearance for the second respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for the rescission of a default judgment granted against him on 26 September 2002.

The background facts in this matter may be tabulated conveniently as follows –

1. On 11 May 1998 Percy Chiwandamira and Nellie Chiwandamira ("the plaintiffs") instituted a civil action in the High Court against the appellant ("Cho"), claiming payment of the sum of $210 000.00 together with interest and costs of suit. No appearance to defend the action was entered, and the plaintiffs were granted a default judgment on 17 July 1998.

2. On 5 October 1998 a writ of execution was issued against Cho, and Cho's immovable property in the suburb of Greendale, Harare ("the property") was attached and subsequently sold by public auction for $1 700 000.00. The highest bidder was the first respondent ("Stalin").

3. On 19 November 1999 the Sheriff wrote to Cho, informing him that unless an objection in proper form was filed, the sale would be confirmed on 23 November 1999. When no such objection was filed, the sale was confirmed on that date.

4. On 24 January 2000 Cho filed a court application in the High Court (case no. HC 1224/2000) seeking an order setting aside the confirmation of the sale on the ground that the property had been sold for an unreasonably low price. However, before that application was heard, the Sheriff cancelled the sale on 28 December 2000 on the ground that Stalin had not paid the purchase price in full. Having cancelled the sale, the Sheriff ordered that the property be re-advertised for sale.

5. On 30 January 2002 Stalin filed a court application in the High Court (case no. HC 864/2002) seeking an order setting aside the cancellation of the sale and the order by the Sheriff that the property be re-advertised for sale. That application was not opposed by Cho's legal practitioner, and the order sought was granted on 20 March 2002.

6. On 2 May 2002 Cho filed a court application in the High Court (case

no. HC 4049/2002), seeking the rescission of the default judgment granted in case no. HC 864/2002. The reason given by Cho's legal practitioner for not having opposed Stalin's court application (i.e. case no. HC 864/2002) was that at the relevant time he believed that Cho had died. Nevertheless, the application for the rescission of the default judgment was opposed by Stalin.

7. On 3 May 2002 Cho filed an urgent chamber application in the High Court (case no. HC 4076/2002) seeking an order interdicting the Registrar of Deeds from transferring the property to Stalin pending the determination of the application for the rescission of the default judgment (i.e. case no. HC 4049/2002). A provisional order was granted on 10 May 2002.

8. On 7 August 2002, when Stalin's legal practitioners had not received Cho's answering affidavit in the application for the rescission of the default judgment (i.e. case no. HC 4049/2002) they wrote to Cho's legal practitioners as follows:

> "We note that it is now over two months since we served on you our client's opposing papers and the matter has not been prosecuted further.
>
> If we do not receive your client's answering affidavit by 15 August 2002, we have received instructions to either proceed and set the matter down or alternatively apply for its dismissal for want of prosecution."

There was no reply to this letter, and no answering affidavit was filed

on behalf of Cho by 15 August 2002.

9. On 27 August 2002 Stalin filed a chamber application in the High Court ("the application for dismissal") under case no. HC 4049/2002, seeking the dismissal of the following cases for want of prosecution – HC 1224/2000 (i.e. the application for an order setting aside the sale); HC 4049/2002 (i.e. the application for the rescission of the default judgment granted in favour of Stalin in case no. HC 864/2002); and HC 4076/2002 (i.e. the application for an order interdicting the Registrar of Deeds from transferring the property to Stalin).

10. On 28 August 2002 Cho filed his answering affidavit in case no. HC 4049/2002, i.e. thirteen days after the deadline set by Stalin's legal practitioners.

11. On 26 September 2002 a default judgment was granted in the application for dismissal, and the three applications referred to above were dismissed for want of prosecution. In addition, Cho was ordered to pay the costs of the application on the legal practitioner and client scale.

12. On 31 October 2002 the property was transferred to Stalin.

13. On 14 January 2003 Cho, aggrieved by the dismissal of the three applications already referred to, filed a court application in the High Court (case no. HC 298/2003), seeking the rescission of the default judgment granted against him in the application for dismissal on 26 September 2002. That application was subsequently dismissed

with costs on 24 March 2004.

Dissatisfied with that result, Cho appealed to this Court.

The basis on which Cho sought the rescission of the default judgment was set out in his founding affidavit as follows:

> "4. In this application I seek rescission of a default judgment entered in chambers by this Honourable Court on 26 September 2002. …
>
> 5. In case no. 4049, I had applied to this Court for rescission of judgment and a few days before I filed my answering affidavit, the first respondent (Stalin) filed an application for dismissal of the said application alleging that I was failing to prosecute the same.
>
> 6. I opposed the application for the dismissal of my claim and filed the notice of opposition together with the answering affidavit alluded to earlier on 9 September 2002. …
>
> 7. Thereafter this Honourable Court, and I believe in genuine error, proceeded to grant the first respondent's application for the dismissal of my claim notwithstanding the notice of opposition I had filed, and it did so in chambers without warning to myself. It appears that the court failed to see the notice of opposition I had filed of record, but my legal practitioner assures me that on checking the record on 10th January 2003 the notice of opposition was still in the record."

Cho's legal practitioner at the relevant time filed an affidavit supporting Cho's application for the rescission of the default judgment, and averred as follows:

> "The Notice of Opposition was filed on 9th September (2002), and I personally checked the court record on 10th January 2003, and it was there in the record. …

He (Cho) signed both the opposing papers and the Answering Affidavit which were both filed and served on the same day. The Answering Affidavit was not filed on 28 August 2002 as the first respondent (Stalin) claims, but on 9 September 2002 together with the opposing papers. He cannot claim to have one and not the other. The default judgment was entered in error."

The issue for determination in this appeal is whether the default judgment granted on 26 September 2002, in terms of which the three applications filed on behalf of Cho were dismissed for want of prosecution, was granted in error. The learned judge in the court *a quo* answered that question in the negative. In my view, that decision is undoubtedly correct.

Although Cho and his legal practitioner at the relevant time alleged that a notice of opposition had been filed, the file for case no. HC 4049/2002, i.e. the application for dismissal, does not have a notice of opposition. It has an opposing affidavit annexed to an answering affidavit.

The answering affidavit, which was filed in respect of Cho's application for the rescission of the default judgment granted against Cho in case no. HC 864/2002 (i.e. the application for an order setting aside the cancellation of the sale by the Sheriff), was filed, not on 9 September 2002, as alleged by Cho and his former legal practitioner, but on 28 August 2002. That is clear from the High Court date stamp on the answering affidavit.

On the other hand, the opposing affidavit allegedly filed in respect of case no. HC 4049/2002 (i.e. the application for dismissal) bears a High Court date stamp indicating that it was filed on 9 September 2002.

The two documents were and still are stapled together, the top document being the answering affidavit, which was filed on 28 August 2002, i.e. three weeks after Stalin's lawyers threatened to file the application for dismissal if the affidavit was not filed by 15 August 2002. Quite clearly, the two documents were filed on different dates, and were subsequently stapled together.

It is therefore incorrect to state, as Cho's former legal practitioner did, that the opposing papers and the answering affidavit "were both filed and served on the same day". The circumstances in which the opposing affidavit was filed are, therefore, not clear.

Consequently, in the opposing affidavit filed by Stalin in the court *a quo* in respect of Cho's application for the rescission of the default judgment granted on 26 September 2002, he averred as follows:

> "I maintain that the applicant never filed any notice of opposition nor any opposing affidavit, for those papers were not even served on my legal practitioners even to date, nor were the papers attached to the current application as an annexure to prove the allegation. If anything, I suspect that maybe those papers could have been fraudulently filed …".

In my view, that was a direct challenge to Cho to prove that the

documents in question had been properly filed with the High Court and served on Stalin's legal practitioners as required by the High Court Rules, 1971 ("the Rules"). If the documents in question had been properly filed and served, Cho should have attached to his answering affidavit copies of the documents and a certificate or certificates of service showing that the documents had indeed been served on Stalin's legal practitioners. The fact that he did not do so is significant. It is also significant that no attempt was made by Cho to apply for leave to place the documents in question before the court *a quo* when the application was heard, or before this Court.

In the circumstances, I am satisfied that Cho did not file a notice of opposition. The document is not in the relevant file, nor is it in any of the reference files placed before the learned judge on 26 September 2002. In addition, there is no evidence indicating that the document was served on Stalin's legal practitioners.

Furthermore, I am not satisfied, for the reasons already given, that the opposing affidavit was properly filed. In addition, there is no evidence indicating that the opposing affidavit was served on Stalin's legal practitioners.

In any event, in terms of the Rules, a respondent who intends to oppose a court application or chamber application is obliged to file a notice of opposition together with one or more opposing affidavits setting out the grounds on which the application is opposed. It would not be in compliance with the Rules to file an opposing affidavit only, because Rule 233(3) makes it

clear that a respondent who does not file a notice of opposition and an opposing affidavit is barred.

After filing the notice of opposition and opposing affidavit, the respondent is required to serve on the applicant copies of those documents. Thereafter, he should file with the registrar of the High Court proof of the service of the documents on the applicant.

In my view, it is clear that in the present case all the above requirements were not complied with. Accordingly, Cho was barred, and the default judgment was properly granted. It was not, therefore, granted in error.

That is the end of the matter. However, I shall briefly consider whether there is any basis for setting aside the sale of the property to Stalin. I do not think there is.

In *Mapedzamombe v Commercial Bank of Zimbabwe and Anor* 1996 (1) ZLR 257 (S) GUBBAY CJ set out the basis on which a sale in execution, where the property has been transferred to the purchaser, might be set aside, and at 260 C-G said:

> "Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla v Bhura* 1973 (2) RLR 280 (A) at 283 A-B. Once confirmed by the Sheriff in compliance with

r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Narran v Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the Sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must conform strictly with the principles of the common law.

This is the insurmountable difficulty which now besets the appellant. The features urged on his behalf, such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance. This is because under the common law immovable property sold by judicial decree after transfer has been passed cannot be impeached in the absence of an allegation of bad faith, or knowledge of the prior irregularities in the sale by execution, or fraud …".

In the present case, the sale was properly confirmed by the Sheriff on 23 November 1999, and on 31 October 2002 the property was transferred to Stalin. The only basis on which Cho sought to set aside the sale was that the property had been sold for an unreasonably low price. There was no allegation of bad faith or fraud, and there were no irregularities.

There is, therefore, no basis on which the sale in execution could be set aside at this stage.

In the circumstances, the appeal has no merit and is, therefore, dismissed with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

I E G Musimbe & Partners, appellant's legal practitioners

Kamusasa & Co, first respondent's legal practitioners