REPORTABLE (78)

FRANK HUMBE
V
(1) DESMOND MUCHINA (2) SPARKLES SERVICES (PRIVATE) LIMITED (3) GODFREY MUNYAMANA (4) THE SHERIFF OF ZIMBABWE (5) FADZAYI MUNYAMANA

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & KUDYA AJA
HARARE: 10 MAY 2021 & 01 JULY 2021.

T. S. T. Dzvetero with Ms *T. M. Dzvetero,* for the appellant.

E. K. Muhlekiwa, for the second, third and fifth respondents.

MATHONSI JA: The appellant brought an urgent chamber application in the High Court for a stay of the execution of a judgment obtained by the first respondent against the second and third respondents on 12 February 2018 in the sum of US$352 851,30 together with interest and costs of suit.

By judgment delivered on 21 August 2020, the High Court dismissed the application with costs. This appeal is against that judgment dismissing the appellant's urgent application.

THE FACTS

The third and fifth respondents, who are husband and wife, hold title to Stand 67 Guildford Estate Township of Subdivision H of Guildford of Borrowdale Estate, also known as No 67 Guildford Crescent, Borrowdale Harare, (the house) by Deed of

Transfer Number 1447/2009. On 15 November 2013 they entered into a deed of sale in terms of which they sold the house to the appellant for US$380 000.00 payable in certain instalments from 30 November 2013 to 30 June 2014.

There is no convergence between them as to whether the full purchase price was paid. The appellant alleges having paid part of the purchase price through the sale of his own neighbouring house through the agency of the second respondent and part of it through the sale to the third respondent of his Mercedes Benz S Class motor vehicle.

The appellant alleges further that although he failed to pay the cash balance of the purchase price in accordance with the agreement, he has however paid it in full. On the other hand the third and fifth respondents' position is that the appellant defaulted in his payments and after giving him the requisite 30 days notice in terms of the deed of sale, they duly cancelled the agreement.

Notwithstanding such cancellation the appellant still sued the second, third and fifth respondents in case number HC 11367/15, which was filed on 20 November 2015, for an order compelling transfer of the house to himself and for their eviction from it. The summons action in question was defended and does not appear to have been prosecuted with any zeal thereafter.

Meanwhile the second and third respondents were sued by the first respondent in case number HC 11601/17 which summons action was filed on 14 December 2017. He obtained judgment against them on 12 February 2018 in the sum of US$352 851.30 plus interest and costs of suit aforesaid. A writ was thereafter issued which the fourth respondent

was instructed to execute. In pursuance whereof the house in dispute was placed under judicial attachment.

Following the attachment, the appellant lay a claim to the house motivating the fourth respondent to institute interpleader proceedings under case number HC 7525/19. By judgment delivered on 9 June 2020 in *The Sheriff for Zimbabwe v Humbe & Anor* HH 378/20, CHINAMORA J dismissed the appellant's interpleader claim and declared the house executable. The judgment remains extant and has not been appealed against.

Instead, the appellant filed a further application on 21 July 2020 under case number HC 3805/20. He sought an order setting aside the writ of execution in terms of which the house was attached. The basis of the application was that the Sheriff was enjoined by r 326 of the High Court Rules to first diligently pursue the attachment of a debtor's movable property before going against immovable property. In addition, the appellant took the view that the house could not be the subject of execution as it was *res litigiosa* having been the subject of litigation in HC 11367/15.

In the same application the appellant also sought a declaration that his rights in the house "preceded" those of the first respondent. He also sought an order that the house be transferred to him. This, the appellant sought, in spite of the judgment of CHINAMORA J issued on 9 June 2020 which, as I have said, remains extant.

At the same time that the appellant filed the court application in case number HC 3805/20, he also filed the urgent chamber application for interim relief of a stay of execution which is the subject of the present appeal. The application was opposed by the

first, second, third and fifth respondents. The stay of execution was sought pending the finalisation of his claim in HC 11367/15 and his application for a declaratory order and the setting aside of the writ which is case number HC 3805/20.

DECISION *A QUO*

The court *a quo* found that the appellant had failed to pay the full purchase price for the house in terms of the deed of sale. In doing so the court *a quo* was fortified by the fact that the deed of settlement signed by the appellant and the third respondent on 12 December 2017 which, although later repudiated by the third respondent as having been procured by duress, acknowledged that there was still an outstanding sum of US$50 000.00.

The court *a quo* recognised that both rules 326 and 327 of the High Court Rules provide for options to a party which applied for the issuance of a writ. They do not provide a remedy to the appellant. After criticizing the interim relief sought by the appellant which was the same as the final order sought, the court *a quo* wondered how the appellant could have filed further applications in the face of the judgment of CHINAMORA J which I have alluded to above.

It was the court *a quo*'s finding that given that the house was registered in the names of the third and fifth respondents they hold real rights over the house. The appellant never acquired any real rights over it. The attachment of the house by the Sheriff in pursuance of a writ of execution gave the first respondent, as the judgment creditor in whose favour the writ was issued, a *pignus judiciale* on it created by the attachment. That is to say an attachment creates a judicial mortgage on the property so attached.

The conclusion of the court *a quo* was that the appellant failed to establish a *prima facie* right over the house as would entitle him to a stay of execution. His claim through interpleader proceedings having failed and the house declared executable, the appellant was seeking "to mount a second bid based on essentially the same facts." He was precluded from doing so because the court *a quo* had already pronounced itself on the issue.

Overcome by grief as a result, the appellant launched this appeal on grounds set out below:

GROUNDS OF APPEAL

1. The court *a quo* erred in fact and grossly misdirected itself in finding that the appellant breached the contract of sale by failing to pay the full purchase price by the date that the price was due.
2. The court *a quo* erred in fact and grossly misdirected itself in finding that the appellant caused the arrest and prosecution of the fifth respondent on fabricated allegations of fraud and coerced the third respondent to sign the deed of settlement using the fifth respondent's arrest.
3. The court *a quo* erred at law and grossly misdirected itself in finding that the dispute between the parties in the instant matter is *res judicata*.
4. The court *a quo* erred at law and grossly misdirected itself in disregarding that the property in dispute is *res litigiosa* and in further failing to give any reasons for such discount.
5. The court *a quo* erred at law and grossly misdirected itself in disregarding that the application was an application for stay of execution pending a court application in

terms of r 340 of the Rules of the High Court and in failing to give any reasons for such discount.

6. The court *a quo* erred at law and grossly misdirected itself in determining that the interim relief was the same as the final relief and as such the relief could not be granted when in fact the interim and final reliefs were different and even if the reliefs were the same, the court could and it ought to have granted it either way even if it were to be found to be the same.
7. The court *a quo* erred at law and grossly misdirected itself in exercising its discretion without addressing the requirements of and purpose for proceedings for stay of execution.
8. The court *a quo* erred at law and grossly misdirected itself in finding that r 326 of the High Court Rules can only be invoked by a person who applied for the writ of execution.

ISSUE FOR DETERMINATION

Clearly the grounds of appeal stray from the field of discourse. They seem to attack every pronouncement in the judgment *a quo* without identifying the *ratio decidendi*. The court *a quo* dismissed the application because it made a finding that the appellant failed to prove a *prima facie* right over the house. This was more so regard being had that the same court had already pronounced itself when it declared the house executable.

In that regard, only one issue commends itself for determination in this appeal. It is whether the court *a quo* erred in dismissing the application for stay of execution.

THE LAW

The appellant approached the court *a quo* for a stay of execution pending the prosecution of a summons claim to compel transfer of the house to himself, which by then had been pending for 5 years, and a court application which seeks both a declaratory order that he possesses superior rights in the house and that the house be transferred to him. The court application also seeks the setting aside of a writ issued in favour of the first respondent against a house not registered in the appellant's name but those of the judgment debtors in that suit.

The execution of a judgment is a process of the court. The court therefore retains an inherent power to manage that process having regard to the applicable rules of procedure. What is required for a litigant to persuade the court to exercise its discretion in favour of granting a stay in the execution of the court's judgment has been stated in a number of cases.

In *Mupini v Makoni* 1993 (1) ZLR 80(S) at 83 B–D this Court stated the position of the law quite clearly:

> "In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as in casu, the judgment is for ejectment or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen v Cohen* (1) 1979 ZLR 184(G) at 187C, *Santam Ins Company Limited v Paget* (2) 1981 ZLR 132(G) at 134 G–135B; *Chibanda v King* 1983(1) ZLR 116(H) at 119 C-H; *Strime v Strime* 1983 (4) SA 850(C) at 852 A."

It is settled in this jurisdiction that a judgment creditor is entitled to attach and have sold in execution the property belonging to the judgment debtor. This is so even in a situation where a third party has a personal right against such a debtor in respect of the same property. The position is the same even where the personal right of the third party preceded the attachment of the property. See Herbstein and Van Winsen, *Civil Practice of The Superior Courts in South Africa* 3 Ed at p 597 (quoted with approval in *Maphosa & Anor v Cook & Ors* 1997 (2) ZLR 314 (H) at p 316 G).

To that should be added the hallowed principle of our law that the conveyance of ownership in immovable property from person to person is achieved through the registration of transfer at the deeds registry. Real rights in an immovable property are held only by registration at the deeds registry. This was underscored by this Court in the seminal remarks made in *Takafuma v Takafuma* 1994 (2) ZLR 103(S) at 105 G-106A;

> "The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 20:05*] is not a mere matter of form. Nor is it simply a devise 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."

A party which lays a claim to property which has been placed under judicial attachment by the Sheriff in the discharge of his or her duties as the executive of the court, has remedies provided for in the rules of court. Such a party is required to submit a claim to the Sheriff in order to trigger the institution by the latter of interpleader proceedings in terms of Order 30 of the High Court Rules.

The court resolves the conflicting claims of parties in interpleader proceedings by either upholding the claimant's claim or dismissing it. Where it finds the claimant's claim to

be without merit, the court, in addition to dismissing the claim, ordinarily declares the property under attachment executable. The result is the opposite where the claim is upheld.

In the present case, after raising essentially the same arguments as in the urgent chamber application the subject of this appeal, the appellants' interpleader claim was dismissed by the court *a quo*. It declared the house executable at the instance of the first respondent.

APPLICATION OF THE LAW TO THE FACTS

The first respondent has an extant judgment in his favour issued against the second and third respondents. The judgment is sounding in money and it was in pursuance of it that a writ of execution was issued against the house.

The house is registered at the Deeds Registry in the name of one of the judgment debtors. It is the same house which the appellant lays a claim to by virtue of a deed of sale which ran into turbulence. The dispute between the appellant and those of the respondents who sold the house to him had not been resolved by the courts at the time that the first respondent instructed the Sheriff to attach the house for sale in execution.

On the authorities that I have made reference to above the judgment creditor, who is the first respondent, was entitled at law to have attached and sold in execution, the house which is registered in the name of his debtor. The appellant is a third party who only has personal rights exercisable against the debtor in respect of the ownership and possession of the house. As much as those personal rights came about prior to the attachment, or may have arisen prior to the first respondent's cause of action that is of no moment in law.

The court *a quo* cannot be faulted for its finding that the attachment of the house in execution created a judicial mortgage or *pignus judiciale*. The appellant's situation is exacerbated by the failure of his interpleader claim and the prior declaration made by the court *a quo,* that the house was executable in favour of the first respondent.

In dismissing the appellant's claim to the same house CHINAMORA J, who determined the interpleader, relied on a line of authorities to the effect that where the house is registered in the name of the judgment debtor, he or she remains the owner of the property. For that reason it is susceptible to execution. The learned Judge concluded:

> "In *casu*, the judgment debtor has title to the property. It is indeed immovable property. However I propose to equate possession in the case of movable goods to title in respect of immovable property. To the extent that possession and title raise a rebuttable presumption of ownership, the principle in *Zandberg v Van Zyl* (1910 AD 258 at 272) applies to immovable property. The starting point is to examine the legal implication of title. Title confers real rights in immovable property. It cannot be gain said that a title deed is *prima facie* proof that a person enjoys real rights over the immovable property defined in the deed."

(The Sheriff for Zimbabwe v Humbe and Another, *supra*).

It is against the foregoing background that the appellant approached the court *a quo* for the second time, seeking a stay of execution to enable him to pursue the determination of the parties' rights in the house all over again. Those rights had already been determined by the same court in a judgment that was not impugned and remains extant.

In my view the court *a quo* cannot be faulted for coming to the conclusion that after the appellant had chosen to pursue interpleader proceedings, which failed, he could not mount a second bid in the same court based, essentially, on the same facts. It is true that the court *a quo* had already pronounced itself on the status of the house having declared it

executable. It is not the number of times that a litigant approaches the court seeking recourse which determines a matter in the litigant's favour, but the existence of a sustainable cause of action. In this case there was none.

DISPOSITION

I have set out what an applicant for a stay of execution is required to establish in order to motivate the exercise of the court's discretion in his or her favour, namely that special circumstances exist for the court to halt its own execution process.

The appellant dismally failed to discharge that onus. This is a case in which the same property had been declared executable by judgment of the same court. He had not appealed that judgment leaving it binding against the parties. It would have been extremely incompetent for the court *a quo* to grant a stay of two judgments of its own definitively settling the rights of the parties.

In addition, the house lawfully registered in the name of a judgment debtor had been placed under attachment in execution of a valid judgment. The appellant only possessed personal rights against the debtor which could not override real rights in law. There was no legal basis for a stay and certainly no special circumstances as would invite the court to grant it.

I do not agree with Mr *Muhlekiwa's* submissions that the appropriate order should have been the striking off of the application from the roll. The reasons advanced for that proposition are clearly wrong. The application was determined on the merits, the court having found that it lacked merit. It could only be disposed of by its dismissal.

Regarding the question of costs, this is an ill-conceived appeal, wholly without merit and predicated on extraneous grounds. I see no reason why costs should not follow the result.

In the result it be and is hereby ordered as follows:

1. That the appeal is dismissed.
2. That the appellant shall bear the costs.

BHUNU JA: I agree

KUDYA AJA: I agree

Antonio & Dzvetero, the appellant's legal practitioners.

Muhlekiwa Legal Practitioners, the 2nd, 3rd and 5th respondent's legal practitioners.