

REPORTABLE (15)

CBZ BANK LIMITED
v
(1) DAVID MOYO (2) DEPUTY SHERIFF HARARE

SUPREME COURT OF ZIMBABWE
BEFORE: PATEL JA, MAVANGIRA JA & UCHENA JA
HARARE, JULY 27, 2017 & MARCH 8, 2018

S.M. Hashiti and C Malaba, for the appellant

S. Evans, for the first respondent

UCHENA JA: This is an appeal against the whole judgement of the High Court.

The facts of this case are common cause.

On 28 November 2011, the Deputy Sheriff attached immovable property known as stand number 1301 Tynwald South Township of Stand 1042 Tynwald South measuring 383m², registered under Deed of Transfer No. 9072/2008 (hereinafter referred to as the property). The attachment was pursuant to a writ of execution issued in favour of the appellant (the judgment creditor *a quo*). The appellant had obtained judgment against one Nompiliso Maphosa in case number HC 6553/11.

The first respondent challenged the attachment. He claimed that he purchased the property from Nompiliso Maphosa and Tarisai Matsveru in August 2010, long before the appellant was granted the judgment for which it was attached. In view of the first respondent's claim the Deputy Sheriff filed an interpleader application before the court *a quo*.

The full purchase price was paid to the sellers in August 2010. Machekeche and Partners, the legal firm mandated to transfer the property to the first respondent, had obtained capital gains tax and rates clearance certificates, and subsequently lodged transfer papers with the Registrar of Deeds on 20 December 2010.

Transfer of the property could not be registered, because Lizhibowa Real Estate (Pvt) Ltd had on 15 December 2010 obtained a provisional order from the High Court which enabled it to subsequently register a caveat against the property in dispute. At the time this matter was heard in the court *a quo*, that order was still in force. At the time the caveat was registered, Lizhibowa Real Estate (Pvt) Ltd was the only known judgment creditor which had obtained an order against one of the sellers. This was several months after the first respondent had innocently bought the property from the sellers.

The appellant issued summons against Nompiliso Maphosa on 17 August 2011 under case No. HC 6553/11, a year after the first respondent had purchased the property in question. The summons was served on the first respondent who was already residing at the property in question.

The first respondent through his legal practitioners informed the appellant that he had purchased the property from the sellers and had taken possession. Undeterred by that information, the appellant obtained a default judgment against Nompiliso Maphosa and subsequently sought and obtained a writ of execution against her movable and immovable property, including the immovable property the first respondent had purchased.

On receiving the writ of execution, the first respondent applied to the court *a quo* for an order staying execution pending the institution and finalisation of interpleader proceedings. He had previously obtained a provisional order staying execution of the same property by Lizhibowa Real Estate (Pvt) Ltd.

The court *a quo* granted the first respondent's application. Whilst acknowledging that the property was still registered in the names of Nompiliso Maphosa and Tarisai Matsveru, the court *a quo* reasoned *inter alia* that there were special circumstances entitling it to find in favour of the first respondent. The appellant appealed to this court against the court *a quo*'s judgment on the following grounds of appeal:

1. "The court *a quo* erred in law and misdirected itself in accepting a claim of ownership from a person who is not the registered owner of the property.
2. The court *a quo* erred in law and misdirected itself in finding, as it did, that a purchaser of an immovable property who had not obtained transfer by way of registration had a better right of ownership than the appellant whose rights emanated from a judicial attachment in execution, where the property in question remained registered in the judgment debtor's name.
3. The court *a quo* erred and grossly misdirected itself on the facts in finding as it must be taken to have done, that there were special circumstances in favour of the 1st respondent, and in any case, that such special circumstances gave the first respondent the right of ownership of the immoveable property."

We are called upon to determine whether or not a *bona fide* purchaser has any protection at law other than having a personal right against the seller of the property.

Before addressing that issue it is important to state that the property in question was and is still registered in the names of the sellers.

The court *a quo* based its decision on this court's decision in *Moyo v Muwandi* SC 47/03. The appellant did not challenge the correctness of that decision, but it was submitted on its behalf that the circumstances in the case of *Moyo v Muwandi* can be distinguished from those of this case.

In the *Muwandi* case, this Court found that there were special circumstances on the basis of an incomplete cession of rights in property and not the transfer of ownership from a seller to a buyer. The two issues identified for determination in the *Muwandi* case were:

- a) whether at the time the right, title or interest in the property was attached by the Deputy Sheriff it had already been transferred to *Muwandi*; and
- b) whether, if it had not yet been transferred, there was any basis for setting aside the sale in execution.

The appeal in *Muwandi's* case therefore related to the cession of rights and interest in a third party's property and not the transfer of ownership in terms of s 14 (a) of the Deeds Registries Act [*Chapter 20:05*].

I must note the distinction between the sale of property and the cession of rights to property from one person to another. McNALLY JA in *Gomba v Makwarimba* 1992 (2) ZLR 26 (S) at 27G-28B said:

“As so often happens, the parties have used the word ‘sale’ to describe what is in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council. ... it is unfortunate that legal practitioners persist in ignoring the distinctions between sale and cession of rights in these cases, both because there are many such cases and because there are many such distinctions.”

There is a distinction between cession of rights and the transfer of ownership from one person to another. Where parties enter into a contract of sale of land, ownership is passed through registration in the Deeds Registry in terms of s 14 (a) of the Deeds Registries Act. Cession of rights over immovable property on the other hand does not result in ownership being passed from one person to the other. It simply passes limited rights which fall short of ownership, as ownership remains with the local authority.

In this case, the issue is whether or not the first respondent, a purchaser who has personal rights against the seller can stay execution of the property on the basis that he bought it, notwithstanding that it has not yet been transferred into his name.

In addressing this issue, one should inquire into the nature of rights which are conferred through cession versus the nature of rights conferred to a purchaser before ownership is transferred through the registration of title. This will determine whether or not the principles applied in the *Muwandi* judgment apply to this case.

Ownership of immovable property is proved by producing a deed of transfer. On the other hand, in the *Muwandi* case, rights acquired through cession of rights in immovable

property were proved through registration of a cession at a local authority. In that case the cedent had done all he was expected to do to transfer to the cessionary his rights in the property which belonged to a third party.

In the *Muwandi* judgment this court dealt with cession of rights at the offices of a local authority, which does not confer real rights. The first respondent holds personal rights against the sellers but will on transfer get real rights over the property in dispute. He therefore stands to lose rights superior to those of a cessionary.

It is apparent that the rights of a cessionary are inferior to the personal rights of the first respondent, a purchaser of immovable property who is awaiting the transfer of real rights in the property. This means the rights of the first respondent who has done all he is expected to do to get transfer and has established the existence of special circumstances should also be protected.

The similarities between the *Muwandi* case and this case are that in both cases the registration of the cession and of title had not been effected due to circumstances beyond the purchaser's or cessionary's control, after they had with the co-operation of the sellers done everything they were expected to do to effect registration. They both deal with circumstances where the seller had willingly co-operated with the purchaser to effect registration but registration was not effected through no fault on the part of the seller and the purchaser. The question which was answered in *Muwandi* and must be answered in this case is do these facts constitute special circumstances which enable the court to protect the purchaser's unregistered rights in the property against execution by the seller's judgment creditor.

I must state that a deed of transfer or registration of cession is not conclusive proof of ownership or the rights of a cessionary. See the cases of *Young v Van Rensburg* 1991 (2) ZLR 149 (S) at 156 D-G and *Kassim v Kassim* 1989 (3) ZLR 234 (H) at 237 B-D. It simply raises a presumption in favour of the holder of the title deed or the rights of a cessionary until the claimant proves on a balance of probabilities that he innocently bought the property or cessionary rights from the owner of the property or cedent. See the case of *Cunning v Cunning* 1984 (4) SA 585 (T). In any event, the registration of transfer in the Deeds Registry or registration of cession at the offices of a local authority or Deeds Registry does not always reflect the true state of affairs. A title deed or registered cession is therefore *prima facie* proof of ownership or cessionary rights which can be successfully challenged. When the validity of title or registered cession is challenged, it is the duty of the court to determine its validity in order to make a ruling which is just and equitable. The fact that it can be challenged is vital for the disposal of this appeal.

Once it is accepted that a title deed or registered cession is not conclusive proof of ownership or cessionary rights, it follows that the appellant merely has a *prima facie* right to execute against the attached property registered in the names of the judgment debtor, Nompiliso Maphosa, and her husband, Tarisai Matsveru. The *prima facie* right is open to rebuttal. This may therefore be a basis for setting aside the sale in execution if the first respondent proves the existence of special circumstances.

Special circumstances exist where a purchaser has failed to have the property registered in his name, when he and the seller have demonstrated a clear intention to effect transfer and when there was no legal impediment to such transfer or the impediment does not justify the refusal to grant protection to the purchaser.

The first respondent purchased and paid the full purchase price for the property in August 2010. It is common cause that the first respondent acted promptly to secure registration of title by paying the transfer fees and obtaining tax and rates clearance certificates. It is further common cause that the first respondent, in terms of the contract of sale was entitled to take vacant possession 3 months after the date of payment of the purchase price, that is, from November 2010. When the appellant served summons against Nompiliso Maposa, the first respondent was already residing at the property in question, where service of the summons was effected.

The transfer could not be registered because Lizhibowa Real Estate (Pvt) Ltd, a creditor of one of the sellers, had registered a caveat on the title deeds of the property. The caveat was registered after the first respondent was already in possession of the property and a day before the first respondent's transfer papers were filed in the Deeds Registry. The first respondent had done all that a purchaser is required to do to get transfer.

KOTZÉ J in the case of *Van Niekerk v Fortuin* 1913 CPD 457 at 458-459, commenting on the effect of the existence of special circumstances against execution of purchased property by the seller's judgment creditor, said:

“It seems to me that the plaintiff being a judgment creditor, and the property being still registered in the name of the defendant, prima facie the plaintiff has the right to ask that the property shall be seized in execution, **unless the party interested can show that there are special circumstances why such an order should not be granted ...**” (emphasis added)

Special circumstances justify the setting aside of an attachment in execution on account of a claim by a purchaser who bought the property subject to execution when the property was free from any right of preference.

Failure to protect the first respondent, who had without colluding with the seller purchased the property in good faith when the property was free from any right of preference would be unjust. It would allow the judgment debtor to pay his debt through the sale in execution of property he had already sold and had received payment for. It would enable the judgment debtor to benefit twice from the same property. It exposes the first respondent to double loss. He will lose the purchase price and the property, and be left with the remedy of damages against a seller whose property will have been executed against by other creditors. He will most likely not be able to recover anything from the seller. Such hardships should not be allowed against the first respondent who is an innocent purchaser.

Mr *Hashiti* for the appellant submitted that the application of the notions of “equity”, “justice” and “fairness” should be sparingly relied on by the courts. He did not however take the argument further by arguing that the circumstances of this case do not call for the use of the notions of “equity”, “justice” and “fairness”. This omission does not help the appellant’s case. It must be noted that notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. See the cases of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9F-G and *Jajbhay v Cassim* 1939 AD 537 at 544. In my view, simple justice in the circumstances of this case demands the setting aside of the appellant’s writ of execution and upholding the decision of the court *a quo*.

The first respondent has clearly demonstrated that the judgment debtor's title to the property merely remained on paper, as she had relinquished all her rights in the property to the first respondent, long before the judgment the appellant seeks to enforce had been granted. The judgment was awarded to the appellant after summons had been served on the first respondent instead of the judgment debtor. The first respondent advised the appellant that he had purchased the property and that the seller no longer stayed on that property, as he was in possession of the property. In spite of being given this information, the appellant applied for and was granted default judgment on the basis of service on the first respondent, well aware that service had not been effected on the judgment debtor. I am satisfied that there are special circumstances in this case, which justify the court *a quo*'s decision.

The appeal has no merit and should be dismissed with costs.

It is ordered that:

The appeal be and is hereby dismissed with costs.

PATEL JA

I agree

MAVANGIRA JA

I agree

Kantor & Immerman, appellant's legal practitioners

Mabuye, Zvarevashe, 1st respondent's legal practitioners