

SHERIFF OF ZIMBABWE
versus
CHIDO MOYO
and
FIRST CAPITAL BANK

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 22 July 2024 & 19 February 2025

Interpleader Application

M. Nyathi, for the applicant
R. Chingwe Gangata, for the claimant
B. Mahuni, for Judgment Creditor

TAKUVA J:

Pursuant to the notice of attachment of immovable property under HCH 184/23 with the reference of the Sheriff SSH 25/23 and upon being advised of the notice and its contents, claimant informed The Sheriff of her interest and rights over the shares in the immovable property through an affidavit.

CLAIMANT CASE

It was contented that the property under attachment does not belong to either of the two judgment debtors. The 50% share in the piece of land described as stand 232 Athlone Township of Green Grove C which is under attachment forms part of property that was subject to divorce proceedings in HC 3244/94 wherein it was declared by way of a court order that the 50% which belonged to EDWIN MOYO, the judgment debtor, would belong to CHIDO MOYO and her sister CHEDU MOYO and that by operation of the law it would rest in them upon attaining the age of 18 years. The Claimants' rights to this property were to be governed in terms of the Consent Paper accepted by the Court. Paragraph 9(c) thereof shows that the judgment debtor lost all his rights, title and interest in the immovable property and also that the judgment debtor was not allowed to do anything to encumber, sell or lease the property without written consent of Claimant's mother.

At the time when the decree of divorce was pronounced the first claimant was a minor. Also it was contended that the property is not executable as it forms part of her security and maintenance. The property can not be sold or used to settle a debt of someone whose rights were lost the moment divorce proceedings were concluded.

JUDGMENT CREDITOR'S CASE

It was submitted that the Claimant's claim lacks merit by virtue of the operation of law relating to disposal of immovable property subject to a decree of divorce and superannuation. The joint owner had not filed a supporting affidavit asserting ownership. Claimant's claim becomes incompetent as shares are indivisible. Also there is a high possibility of conclusion in that the Claimant and judgment debtor are related. Claimant and her sister were supposed to immediately take transfer of the second judgment debtor's 50% share in the immovable property after the decree of divorce in 1998. The Consent Paper does not state that the property would only be transferred upon attaining legal age of majority.

Twenty – five years have lapsed since the decree of divorce but Claimant and her sister have not taken transfer of the 50% share, the property remain registered in the name of the Judgment Debtor. Therefor it is executable. The parties were clearly content with letting the second Judgment Debtor retain ownership of the property. Claimant failed to enforce the court order for many years. No explanation for that failure has been given. Failure to take transfer means the judgment debtor remains the owner of the said property. The Claimants' rights remain personal rights only converted to a real right upon registration. Personal rights are not enforceable against the whole world and 3rd parties like the Judgment Creditor. Claimant's rights lapsed.

It was further contended that the judgment which Claimant seeks to rely on has long since superannuated three (3) years thereafter. It's too old to be used unless Claimant applies for it to be revived. In the final analysis, the judgment creditor prayed for the dismissal of the Claimant's claim with costs on a legal practitioner and client scale.

Analysis

In *Van NEKERK v FORTUIN* at p458 – 459 of his judgment, KOTZE J 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.”

The issue is whether or not there are special circumstances why the property under judicial attachment must be declared not executable. In my view, the following facts help in arriving at a proper conclusion:

1. Claimant's claim is that the rights and interest being put under execution are hers and her sister by virtue of pronouncement of the court in divorce proceedings under case No. HC 3244/94.
2. The substance of that order is indisputable because it is a court order that clearly defines the property in issue. The remaining half of the rights and interest over the property as contained in the Consent Paper belongs to the former wife of one of the judgment debtors.
3. Despite the fact that so far the Claimant's claim is straightforward, the judgment creditor relies on technical facts to insist that the property is executable.

In my view there are special circumstances why the property under judicial attachment must be declared not executable. In *BRUCE NO v JOSIAH PARKES & SONS LTD* 1971 (1) RLR 154 it was stated that, "*In my view, in proceedings of this nature, the Claimant must set out the facts and allegations which constitute proof of ownership.*" In *casu*, it is not in dispute that Claimant was awarded rights through a court order over the piece of land being the subject matter. Her rights were created by the court. Claimant acted promptly to protect her rights and interest. It is conceded that transfer has not been effected for reasons outlined in Claimant's Opposing Affidavit.

Further, the property awarded is an entitlement and her only piece of property that reminds her about her family. The order in HC 3244/94 is extant despite having had superannuated. The fact that it is old does not neutralize or make it non-existent. It can be revived and its pronouncements are enforceable. The balance of convenience favours the Claimant in that despite her rights being personal rights, the extent and breath of these rights should be weighed against the circumstances underlying it. The value to be recovered from the sale of the 50% shares or however way is not proportionate to the sentimental value to be lost by Claimant and every member of the family should the property be lost.

Also I find that the allegation of collusion is misplaced in that collusion should not just be loosely taken because there is a relationship between Claimant and Judgment Debtor. Can it be

said judgement debtor divorced in anticipation of this scenario? Can Claimant's failure to cause transfer be interpreted to mean she anticipated this or that the order was somehow cooked up in order to evade anything? The approach I take is not to be swayed into stereotype and preconceived notions which are baseless – See *Sheriff of the High Court v Munyaradzi Majoni & Ors* HH 689/15.

In view of the above, I find that Claimant is entitled to a relief favorable to her. Also the technicalities raised by the Judgment Creditor do not in my view bar or prevent Claimant from causing transfer of title into her name. It is inevitable and Claimant is precisely doing that. Clearly, Claimant has rights flowing from the court order in HC 3244/94.

In the circumstances, it is ordered that;

1. The Claimant's claim to the immovable property known as the undivided 50% share of certain piece of land situate in the District of Salisbury called Stand 232 Athlone Township 2 of Green Grove C measuring 3886m² which was placed under attachment in execution of the order in HCHC 184/23 be and is hereby granted;
2. The above mentioned property attached in terms of the Notice of Attachment of immovable property dated 6 October 2023 issued by the applicant be and is hereby declared not executable.
3. The Judgment Creditor is to pay the Claimant's and the Applicant's costs.

TAKUVA J:

Kantor & Immerman, applicant's legal practitioners
Madzima & Company Law Chambers, claimant's legal practitioners
Scanlen & Holderness, judgment creditor's legal practitioners