DEPUTY SHERIFF - HARARE

versus

ELIMON NDOMUPEI MARINGE

and

NATIONAL RAILWAYS OF ZIMBABWE

CONTRIBUTORY PENSION FUND

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 27 July 2012.

**Opposed Application**

No appearance for applicant

*P. Mavhondo,* for claimant

*T. Pasirai,* for judgment creditor

MUTEMA J: This is one of those cases in which the maxim the law does not assist the sluggard can be aptly invoked. The claimant purchased a four roomed house in Kuwadzana in November, 2009 from one Langton Mwarazi for $10 000-00 which was fully paid. For various reasons which do mot legally excuse the delay, the property did not find transfer into the claimant’s name. In November, 2011 that property was attached by the deputy sheriff (applicant) to satisfy a judgment which the judgment creditor had obtained against Langton Mwarazi. This prompted the claimant to institute these interpleader proceedings claiming ownership of the subject of attachment.

However, the claimant’s woes continued unabated, this time occasioned by his legal practitioners who forgot to realize that claimant was not the applicant. The court application was served upon the claimant’s legal practitioners who had instituted the interpleader. In terms of Rule 232, the claimant as well as the judgment creditor are each required to file opposing papers if they were contesting the court application. The judgment creditor did file opposing papers but the claimant chose not to oppose despite the court application clearly stating, “If you intend to oppose this application you will have to file a Notice of Opposition in form No. 29A, together with one or more opposing affidavits, with the Registrar of the High Court at Harare within ten (10) days after the date on which this notice was served upon you ……”

In terms of Rule 233 (3) the claimant is barred. The judgment creditor regularized its papers namely the notice of opposition, the opposing affidavit as well as the Heads of Argument. The applicant’s Heads of Argument were filed and served on the other parties on 10 January, 2012 while the judgment creditor’s were filed on 19 January, 2012 and served on the same date. For reasons alien to adjectival law, on 23 January, 2012 the claimant filed what he termed an answering affidavit which he proceeded to serve on the other parties on the next day. As if the claimant had not flouted the rules enough, on 10 February, 2012 he filed Heads of Argument and served them on the applicant on the same day and upon the judgment creditor on 14 February, 2012.

At the hearing Mr *Pasirai* took the point *in limine* to the extent that they relate to the claimant correctly in my view, in these few words:

1. Claimant is barred and has no right of audience for not filing notice of opposition and opposing affidavit in breach of Rule 232. For this proposition he relied on *Deputy Sheriff Harare* v *Brownweel Marketing and National Railways of Zimbabwe Contributory Pension Fund* HH 243/12.
2. Over and above the above, the purported answering affidavit filed by claimant is invalid as well as the Heads of Argument. There was nothing claimant was answering to and the two documents were filed after the automatic bar. In any event, even assuming that there was no bar in place, claimant would still have been barred for filing Heads of Argument out of time in breach of Rule 238 (2a).

Regarding the claimant’s failure to file notice of apposition and opposing affidavit Mr Mavhondo submitted that claimant did file notice of opposition clearly outlining his claim and parties proceeded on the basis that the papers filed by the claimant constituted notice of opposition.

The Rules 232 and 233 (3) and the *Brownweel* case cited *supra* are clearly apposite to this case considering the pedestrian approach adopted by the claimant in the handling of this matter. I find it idle and amounting to digging in the ashes for claimant to allege that he did file his notice of opposition because the parties proceeded on the basis that papers filed by him *viz* his affidavit initiating the interpleader constituted notice of opposition. Nothing can be further from the rules of this court.

In the alternative, Mr Mavhondo submitted that this was a proper case for the court to condone claimant’s non-compliance with the rules since the document filed by claimant amounts to substantial compliance. I find this akin to taking a long shot in the dark to see if one could hit anything. Clearly there was not a hint of substantial compliance with Rule 232 at all and it is not in the interests of justice in terms of Rule 4C to warrant any condonation of such errant flouting of the rules. For this conclusion I derive solace from SMITH J’s *bemoaning that there was now more honour in the breach of the rules than their observance in Mlambo* v *City of Harare* 2001 (2) ZLR 545 at 547 H.

Regarding issue of the Heads of Argument being filed out of time, Mr Mavhondo argued that in terms of Rule 238 (2a) proviso (ii), the claimant’s Heads were filed in time. In the alternative, he submitted that a delay of only 5 days was not unreasonable so the court could condone it taking into account the importance of the case.

Rule 238 (2a) provides that:

“Heads of Argument referred to in subr (2) shall be filed by the respondent’s legal practitioner not more than ten days after the heads of argument of the applicant or excipient, as the case may be, were delivered to the respondent in terms of subr (1);

“Provided that-

1. no period during which the court is on vacation shall be counted as part of the ten day period;
2. the respondent’s heads of argument shall be filed at least five days before the hearing.”

From experience in the opposed motion court it appears that there are still quite a number of legal practitioners – both experienced and green – who still fail to grasp the correct interpretation of the above quoted rule with the concomitant consequence of heads being filed out of time without an accompanying or preceding application for condonation. The correct interpretation of the rule was laid bare by MAKARAU J (as she then was) in *Vera* v *Imperial Asset Management Company* 2006 (1) ZLR 436 (H) at 437 F – G and it bears repetition for clarity: “The operative part of the rule is not to be found in the proviso. It is in the main provision and is to the effect that the respondent is to file his or her heads of argument within 10 days of being served with the applicant’s heads. That is the immutable rule. However, in the event that the respondent has been served with the applicant’s heads close to the set down date, he or she shall not have the benefit of the full 10 day period within which to file and serve heads stipulated in the main provision but shall have to do so five clear days before the set down date. This is the import of the proviso to the main provision of the rule.”

It is hoped that in future more practitioners shall acquaint themselves with the correct interpretation of this rule.

Mr Mavhondo’s interpretation of the rule was accordingly erroneous. The alterative submission of invoking Rule 4C has no justification in law and in fact and is rejected outright.

Normally in cases where a litigant has been barred for flouting rules of court, the matter is treated as unopposed and the court has a discretion in terms of Rule 238 (2b) to deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll.

In the instant case I propose to dispose of the matter on the merits due to its straight forwardness without any qualms of unnecessarily fettering the discretion of a future court that may be seized with an application for rescission of the default judgment which the judgment creditor is entitled to at this juncture.

In *Moyo* v *Fraser NO & Anor* 2006 (1) ZLR 257 (S), the seller of immovable property sold the property to the appellant. The purchase price was paid in full by way of instalments. The seller became insolvent before performing transfer of the property to the appellant. The first respondent, the liquidator and trustee, then sold property belonging to insolvent estate, including the property in question, to various purchasers. The property in question was sold to a third party. The appellant then sought an order compelling the trustee to transfer the land to him.

It was held that a purchaser of land on instalments who has not registered the agreement of sale in term of s 64 of the Deeds Registries Act [*Cap 20:05*] cannot interdict the trustee of an insolvent estate from selling such land to a third party.

It is pertinent to note that the s 64 referred to above puts attachment by the deputy sheriff in the same category with the alienation by a trustee of an insolvent estate.

On the same principle, the sale of land even on a cash basis, which has not been transferred to the buyer does not and cannot prevent the deputy sheriff form attaching that land to satisfy a judgment debt obtained against the seller of the land in whose name the land is still registered.

In the *Moyo* case *supra* the Supreme Court based its *ratio* on the case of *Harris* v *Buissinne’s Trustee* (1850) 2 Menzies 105 where the plaintiff had entered into a contract of sale with *Buissinne* in terms of which he bought the latter’s house for £1 050, £400 of which it was stipulated should be paid immediately in cash, and the balance of £650 the plaintiff agreed to pass a mortgage bond in favour of the directors of a Savings Bank. On the same date, the plaintiff paid *Buissinne* the £400 he took possession of the house.  *Buisinne* was unable to give the plaintiff transfer of the house so that he might perform his obligation to execute a mortgage in favour of the Savings Bank. The plaintiff took out summons against *Buissinne* who surrendered his estate as insolvent and it was placed under sequestration. In an action in which the plaintiff prayed for an order condemning *Buissinne* to give him a legal transfer, the trustee of the insolvent estate pleaded that he was not liable to give transfer to plaintiff.

Giving judgment for the trustee of the insolvent estate the court said at pp107-108:

“By the law of Holland, the *dominium* or *jus in re* of immovable property can only be conveyed by transfer made *coram lege loci* and this species of transfer is essential to divest the seller of and invest the buyer with the *dominium* or *jus in re* of immovable property as actual tradition is to convey the *dominium* of movables and that the delivery of the actual possession of immovable property has no force or legal effect whatever in transferring its *dominium*.

Consequently, the agreement of sale between *Harris* and *Buissinne* and the delivery of the possession of the house by *Bussinne* to *Harris*, gave *Harris* nothing more than a *jus ad rem* and a personal claim against *Buissine* to convey the *jus in re* to him by transfer *coram lege loci*. And, therefore, on the day on which *Buissinne’s* estate was placed under sequestration the *dominium* of the house in question was still vested in *Buissinne* and then formed part of his estate and that by the order placing his estate under sequestration this house became instantly and wholly vested in the Master and ultimately in the trustee for behoof (benefit) of the creditors of *Buissinne*.

On these grounds, it followed that *Harris* had only a personal claim against *Buissinne’s* estate for the damage which he has sustained by the non-fulfilment of his undertaking to perfect the sale by making legal transfer of the house to Harris and for restitution of that part of the price which he has paid, and in respect of this personal claim, he has no preference on the house in question, or any other part of the estate, and is only entitled to be ranked concurrently with the other personal creditors of *Buissinne*.”

Applying the law as postulated above, to the facts of the present matter, the claimant has no *dominium* or *jus in re* of the house in question since there was no transfer of it into his name which act would have conveyed real rights in the immovable property to him. In legal parlance, the house under judicial attachment still belongs to Langton Mwarazi – the judgment creditor’s debtor – and the deputy sheriff cannot legally be precluded from attaching, let alone selling in execution the house in question.

The reasons for the delay in transferring *dominium* or *jus in re* of the house intoclaimant’sname are mere moral arguments which cannot find reception in any legal crevices pertaining to the conveyance of real rights in our law. The claimant only enjoys a personal right against Langton Mwarazi for not performing timeous transfer, if he occasioned it, and for the purchase price that he has paid for the house.

In the result, it is ordered that:

Claimant’s claim be and is hereby dismissed with costs.

*Musimwa and Associates,* applicant’s legal practitioners

*Maganga and Company, Claimant’s* legal practitioners

*Gill Godlonton & Gerrans*, judgment creditor’s legal practitioners