WILFRED MUTEWEYE
and
SUSAN MUTEWEYE
versus
SHERIFF OF ZIMBABWE N.O
and
TALLSPRING INVESTMENTS (PVT) LTD
and
LINAH NDORI AGERE
and
REGISTRAR OF DEEDS
and
STILLFORD INVESTMENTS (PVT) LTD
and
MACBASE (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 May 2021 & 11 May 2022

Opposed application

Mrs. R Mabwe with Mrs. C Damiso, for applicant
T. L Mapuranga, for 2nd respondent
G Madzoka, for 5th & 6th respondents

MUREMBA J: This matter came in 2019 as an application by the applicants to compel transfer by the first respondent, the sheriff of an immovable property commonly described as Stand 157 Meyrick Park Township of Lot 109 of Meyrick Park, Mabelreign, Harare, less undivided 7.7% share no. 8 in Stand no. 8 in Stand 157 Meyrick Park, Mabelreign measuring 3997 square metres. The applicants had brought the property from the sheriff in a judicial sale in execution of judgment in case no. HC 10410/12 wherein the second respondent, Tallspring Investments (Private) Ltd was the judgment debtor.

After hearing the matter, I granted the application and ordered the sheriff to transfer the property to the applicants. The second respondent appealed and the appeal was allowed. The matter was remitted to this court for this court to hear evidence on whether the property was capable of transfer as at the date of the application by the applicants on 7 February 2019.

The background of the matter is as follows. The judgment debtor having failed to

pay his debt to the third respondent, the judgment creditor the immovable property in issue was attached by the sheriff in execution of judgment. The applicants were the highest bidder and there having been no objections to the sale, the sale was confirmed by the sheriff. The applicants were asked to pay the full purchase price which they did and this was in May 2017. They also paid the conveyancer's fees and stamp duty and awaited transfer of the property to them by the sheriff. To their surprise, they received a letter from the sheriff on 22 June 2018 advising them that he had cancelled the sale on the instructions of the third respondent, the judgment creditor. Apparently, the judgment debtor and the judgment creditor had settled their matter by entering into a deed of settlement without the knowledge of the applicants. Consequently, the property was not transferred to the applicants by the sheriff. This is what prompted the applicants to the file the application to compel transfer of the property to them by the sheriff on 7 February 2019. The other relief they wanted was a *declaratur* that the setting aside of the sale by the sheriff was null and void because after having confirmed the sale, the sheriff was now *functus officio*. At law he no longer had the power to reverse the confirmation of the sale he had made. In response to the application the sheriff did admit in his report that he had erred in cancelling the sale as he did so when he was now *functus officio*. He further indicated that he had later realised that he had erred in cancelling the sale and wrote a letter retracting the cancellation. He further stated that despite his retraction, he did not proceed to transfer the property to the applicants because he was under the belief that it was no longer possible for him to do so because the property had already been transferred into a third party's name. The sheriff did not explain the basis of his belief that the property had already been transferred into a third party's name. On the other hand, the second respondent, the judgment debtor opposed the application stating that the property had already been sold and transferred to third parties, but it was not forthcoming with information about who these third parties who had bought the property were. The second respondent argued that the applicants ought to have made a research of the identity of the buyers and joined them as parties to the proceedings. The sheriff and the judgment debtor were not forthcoming with information about the identity of the buyers in question even at the hearing of the matter. Since the applicants were not aware of these buyers, I granted their application.

Aggrieved by my decision, the judgment debtor took up the matter on appeal to the Supreme Court. On 18 May 2020, the appeal was allowed and the matter was remitted for this court to hear evidence on whether the property in issue was capable of transfer as at

the date of the application. The fifth and sixth respondents who had not been parties in the initial proceedings before me then applied to be joined to the proceedings after remittal. An order for their joinder was granted unopposed by a different judge on 28 October 2020. The order directed the applicants *in casu* to serve the fifth and sixth respondents with the application. In turn the fifth and sixth respondents were to respond to the application. The applicants were also entitled to respond thereto. So, what consequently happened is that the fifth and sixth respondents filed their notice of opposition to the applicants' application stating *inter alia* that the property in question was no longer capable of transfer because they had bought the property and that it was transferred to them on 11 June 2018. In response the applicants filed an answering affidavit averring that since the property was transferred to these respondents on 11 June 2018 before the sheriff had cancelled the sale on 22 June 2018, the sale and transfer of the property to them was a nullity. The applicants ended by making a prayer that the title deeds issued by the registrar of deeds in favour of these respondents be cancelled and set aside in terms of s 8 of the Deeds Registries Act [*Chapter 20:05*].

It appears that the joinder of the 5th and 6th respondents caused confusion to the applicants who, in their answering affidavit, ended up seeking a new relief for the fifth and sixth respondents' title deeds to be cancelled and set aside. It is incompetent and unprocedural for an applicant to seek relief for the very first time in an answering affidavit. This is because any relief sought has to be founded on the evidence set out in the founding affidavit. There has to be a cause of action in the founding papers. *In casu* the applicants did not lay the basis for seeking the setting aside of the fifth and sixth respondents' title deeds in their founding affidavit. Their founding affidavit does not make any reference to these respondents whatsoever. So, they cannot all of a sudden seek an order against these respondents on the basis of the averments these respondents made in their opposing affidavit. For their relief to be sustainable against these two respondents, the applicants needed to first amend their application before serving these respondents with it. They needed to establish a cause of action against these respondents first before seeking the relief of cancellation of their title deeds. So, the relief sought in the answering affidavit by the applicants against the fifth and sixth respondents is something that I cannot grant in the present proceedings.

However, it turned out that the applicants had since filed an application to set aside the title deeds that were registered in favour of the 5th and 6th respondents. Submissions were made

to the effect that that application was filed in June 2020 under case number HC 3079/20. At the hearing of this remitted matter Mrs. *Mabwe* applied that the present matter be removed from the roll pending an application for it to be consolidated with the application in HC 3079/20 so that the two matters can be heard together. I am not inclined to grant the request because there was no explanation why the applicants had not made that application for consolidation by the time this matter was heard in May 2021 when the other matter had been filed in June 2020. Besides, Mr. *Madzoka* for the 5th and 6th respondents submitted that the applicants after filing their application against the 5th and 6th respondents in June 2020, they had not prosecuted that application. As a result, the 5th and 6th respondents had since filed an application for the dismissal of the application for want of prosecution and that application was pending. So, consolidation under the circumstances might pose a challenge.

I will thus proceed to determine the issue that was remitted. From the submissions made by counsels for the applicants; the second respondent, the judgment debtor and the 5th and 6th respondents, it is common cause that the property in issue was sold to the fifth and sixth respondents by the second respondent. Title was transferred to them on 11 June 2018. Thus, it is common cause that when the sale and transfer were done, the sheriff had already sold the same property in a judicial sale to the applicants and had confirmed the sale in May 2017. As at 11 June 2018, the sheriff had not yet cancelled the sale. He only received the instruction to cancel the sale from the judgment creditor, the third respondent on 14 June 2018. This was three days after the property had already been transferred to the fifth and sixth respondents. The sheriff cancelled the sale on 21 June 2018, albeit wrongly because he was now *functus officio*. Looking at the date the property was transferred to the fifth and sixth respondents, what is clear is that despite the fact that the property was under attachment by the sheriff and that he had sold it in execution of judgment, the judgment debtor sold the same property to the 5th and 6th respondents. This means that as at the date of the applicants filed their application on 7 February 2019, the property was no longer capable of transfer by the sheriff to the applicants. As was correctly submitted by Mr. *Madzoka* and Mr. *Mapuranga* the effect of transfer of title to the 5th and 6th respondents was to make the 5th and 6th respondents the holders of real rights over this property. It does not matter whether the transfer to the 5th and 6th respondents was done lawfully or not. The effect of registration of an immovable property is that it conveys real rights upon those in whose name the property is registered. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) @ 105H-106A; *Chapeyama v Chapeyama* 2000 (2) ZLR 175 (S) and *Ishemunyoro v*

Ishemunyoro SC 14/19.

Mrs. *Mabwe*, for the applicants submitted that the sale and transfer of the property by the second respondent to the fifth and sixth respondents was a nullity at law because the property in question had been attached by the sheriff. Besides, the sheriff had already sold it to the applicants and confirmed the sale. She submitted that although the property was still registered in the name of the second respondent, it had ceased to be his to deal with as he pleased or as he wished from the time it was attached in execution. From Mrs. *Mabwe's* submissions it is clear that she wanted the court to enquire into the legality or otherwise of the sale that was done by the second respondent to the 5th and 6th respondents when the property was under a judicial sale. It is my considered view that this is not an issue for my determination because the issue of the legality of the sale is not before me. It would have been an issue for my determination if the application to set aside the 5th and 6th respondents' title deeds was before me. If I determine this issue in the present case I will be overstepping my mandate by determining an issue that is not before me. This is an issue for determination in the other application in which the applicants have sued the 5th and 6th respondents for cancellation of their title deeds. This is the forum for Mrs. *Mabwe* to make her submissions. Mr. *Madzoka* and Mr. *Mapuranga* were correct in submitting that the present proceedings are not the proper forum for determining the legality or otherwise of the sale and transfer of the property by the second respondent to the 5th and 6th respondents.

In view of the foregoing, I still come to the same conclusion that I came to in my first judgment that the sheriff was wrong in cancelling the sale when he was now *functus officio*. Thus, I will issue a *declaratur* that the sheriff's action of cancelling the sale of the property to the applicants was illegal. I, however, can no longer order him to transfer the property to the applicants because the judgment debtor, the second respondent no longer has title to the property. So, the sheriff has nothing to transfer from the judgment debtor's estate to the applicants. That can only happen after title which is now registered with the 5th and 6th respondents has been cancelled. In terms of s 8 of the Deeds Registries Act [*Chapter* 20:05], title which is now vested in the 5th and 6th respondents can only be set aside in terms of an order of the court and at the time that I heard this matter there was no such order.

With regards to the issue of costs, I will order the sheriff to pay the applicants' costs since he acted unlawfully by cancelling the sale when he had no such powers.

In the result, it be and is hereby ordered that:-

1. The action of the first respondent, the Sheriff in cancelling the sale of property known as Stand 157 Meyrick Park Township of Lot 109 of Meyrick Park Mabelreign, Harare less undivided 7.7 % share no.8 in Stand 157 Meyrick Park Mabelreign measuring 3997 square metres is declared illegal.
2. The first respondent shall pay the applicants' costs.

Mushangwe & Co., applicants' legal practitioners
Mupanga Bhatasara Attorneys, second respondent's legal practitioners
Scanlen and Holderness, fifth & sixth respondents' legal practitioners