

FORTUNATE MANYIMO
versus
SHERIFF, HIGH COURT OF ZIMBABWE N.O.
and
NORTON BROOKE ENTERPRISES (PVT) LTD
and
MUNETSI JANGWA
and
CBZ BANK LIMITED
and
REGISTRAR OF DEEDS N.O.
(for information purposes)

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 24 March & 01 June 2016

Opposed Matter- Review

T Mpofu, for applicant
J Sande, for the 2nd respondent
B Maruva, for the 4th respondent

TAGU J: The applicant is indebted to the second respondent Norton Brooke Enterprises (Private) Limited to the tune of US\$59 000.00. The second respondent then duly obtained a judgment against the applicant to the same tune of US\$59 000.00. The first respondent who is the Sheriff of the High Court of Zimbabwe executed for the benefit of the second respondent through a public auction the applicant's 7,2 hectare immovable property known as certain piece of land situate in the district of Hartley called Stand 14146 Norton Township measuring 7, 2736 hectares on 20 April 2015. The third respondent one Munetsi Jangwa was declared the highest bid at the auction with a bid value of US\$42 000.00. The auctioned property is endorsed with a mortgage bond of US\$480 000.00 in favour of the fourth respondent CBZ Bank Limited.

The applicant failed to submit his initial objection to the confirmation of the sale in time in terms of the Rules of this honourable court on 18 May 2015 because by then he did not have a valuation report to substantiate his objection. He attempted to file his objection on 20 May 2015 but it was too late because the sale had been confirmed by the first respondent on 18 May 2015.

After the lapse of the objection period, and at the first respondent's office, the applicant was advised to seek a review of the sale before this court. His main ground of objection being gross unreasonableness in the outcome of the entire process and the process itself in that according to the valuation report which he had sponsored in 2011 the auctioned property is valued at US\$480 000.00, yet it was auctioned for US\$42 000.00 in order to recover a debt of US\$59 000.00.

It is the applicant's contention that in light of the mortgage bond the second respondent will not be able to satisfy its debt if the sale is allowed to stand because the fourth respondent is the preferred creditor over the second respondent. Further, to allow the sale to stand would sink him into insolvency. In light of the above he wants the sale to be reviewed so that the confirmation of the sale by the first respondent by letter dated 18 May 2015 be set aside, and the first respondent be ordered to refund the third respondent the sum of US\$59 000.00 paid over to him within 7 days of the order.

The second and fourth respondents opposed the application for review and prayed for the dismissal of the application. In their opposing affidavits filed of record which is amplified in their heads of arguments the second and fourth respondents took some points *in limine* and prayed that the application be dismissed without delving into the merits. For the avoidance of doubt I reiterate their points *in limine* as follows-

POINTS IN LIMINE FOR THE SECOND RESPONDENT

“IN LIMINE

The application is not properly before this court as it is not in accordance with the rules of the court.

1. The Applicant seeks to challenge a sale in execution on the ground that the value it was sold is unreasonably low.
2. The Applicant did not request the setting aside of the sale within the 15 (fifteen) days of the auction in terms of r 359 of the High Court Rules.
3. There being no objection to the sale within the prescribed time, the Sheriff proceeded to confirm the sale.
4. The Applicant cannot therefore make an application for review since there is nothing to review. The Sheriff confirmed the sale in the absence of any objections from the Applicant and therefore there is nothing to be reviewed by this Honourable Court.
5. It is trite law that the grounds set out in the rules of this Honourable court cannot be used out in an application brought at common law to set aside a sale in execution.
6. Furthermore, the grounds for making an application for review for the setting aside of a sale in execution after confirmation of the sale, but before transfer, do not include the ground that the price was unreasonably low, which is the only reason tendered by the Applicant for review.
7. In the premises, the application ought to be dismissed on this point alone without delivery into the merits.....”

POINTS IN LIMINE FOR THE FOURTH RESPONDENT

“IN LIMINE

The application filed by the Applicant does not comply with order **40 Rules 359 (1) to Rule 359 (8) of the High court Rules** in that any request to set aside a sale is made to the 1st Respondent not to this court and the only time an order is made to this court to set aside any decision is after the 1st Respondent has made a decision on the request. There is no provision for a review in the rules in a case where the confirmation of the sale has not been challenged timeously.

In view of the above submission 4th Respondent prays for dismissal of Applicant’s claim with costs at an attorney and client scale.”

The applicant maintained, in response to the points *in limine* taken by the respondents that his application for review was within the provisions of the rules of this court. The applicant relied on section 26 of the High Court Act [*Chapter 7:06*] which provides that-

“Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe”

He further relied on section 4 (1)(a) of the Administrative Justice Act [*Chapter 10:28*] which provides that-

“Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section three may apply to the High Court for relief.”

According to him the first respondent is an administrative official hence the High Court has jurisdiction over him and is at large to exercise its review jurisdiction over the actions of the first respondent. See *Attorney General v Makamba* 2004 (2) ZLR 63 (S) at 66 D-E, *Levy v Benator* 1987 (1) ZLR 120 (S) and *Ndlovu v Regional Magistrate, Eastern Division & Anor* 1989 (1) ZLR 264 (H).

The issue that lies for determination at this stage before dealing with the merits is whether or not the points *in limine* have been properly taken or not. Order 40 r 359 (1) to r359 (10) govern the procedure to be followed following sale, confirmation and or setting aside of sale in execution. Rule 359 of the High Court Rules are clear and they provide as follows-

“359. Confirmation or setting aside sale

- (1) Subject to this rule, any person who has an interest in a sale in terms of this Order may request the Sheriff to set it aside on ground that –
 - (a) the sale was improperly conducted, or
 - (b) the property was sold for an unreasonably low price;or on any other good ground.

- (2) A request in terms of subrule (1) shall be in writing and lodged with the Sheriff within fifteen days from the date on which the highest bidder was declared to be the purchaser in terms of rule 356 or the date of the sale in terms of rule 358, as the case may be:
Provided that the Sheriff may accept a request made after that fifteen-day period but before the sale is confirmed, if he is satisfied that there is good cause for the request being made late.
- (3).....
 (4).....
 (5).....
 (6) within ten days after a copy of a notice has been served on him in terms of subrule (5), the person making the request may lodge with the Sheriff a written reply and, if he does so, shall without delay serve a copy of his reply, together with any supporting documents, on the person opposing the request and on such other persons as the Sheriff may direct.
- (7), the Sheriff shall advise the parties when he will hear them and, after giving them or their legal representatives, if any, an opportunity to make their submissions, he shall either....
 (a) confirm the sale; or
 (b) cancel the sale and make such order as he considers appropriate in the circumstances; and shall without delay notify the parties in writing of his decision.
- (8) Any person who is aggrieved by the Sheriff's decision in terms of subrule (7) may, within one month after he was notified of it, apply to the Court by way of a court application to have the decision set aside.
- (9) In an application in terms of subrule (8), the Court may confirm, vary or set aside the Sheriff's decision or make such other order as the Court considers appropriate in the circumstances.
- (10) Where no request has been lodged with the Sheriff in terms of subrule (1) within fifteen days from date on which the highest bidder was declared to be the purchaser in terms of rule 356 or the date of the sale in terms of rule 358, as the case may be, he shall, subject to the *proviso* to subrule (2), confirm the sale." (the underlining is mine)

In casu the applicant failed to comply with the provisions of r 359 up until the time the Sheriff confirmed the sale. The first respondent, correctly, in my view, submitted that the applicant having failed to file the objection to the sale within the prescribed time, it follows that there is no decision of the Sheriff for this Honourable Court to review. The Sheriff simply followed procedure in confirming the sale after the requisite 15 (fifteen) day period in the absence of an objection. In the case of *Nyamwiwa v Zebra Mining Syndicate* HB 14/14 at page 3 of the cyclostyled judgment Makonese J stated as follows:

"In casu, the Applicants did not approach the 3rd Respondent in the first instance. The application before me cannot be continued as a review of the decision of the 3rd Respondent in terms of the High Court Rules. The applicants cannot therefore invite the court to exercise its powers of the review as this application is premised on the ground that the mining claims were sold for an unreasonably low price. The Applicants evidently adopted the wrong procedure."

The first respondent further correctly submitted that whilst the law allows for an interested party to approach the court to have the sale set aside, any party doing so after the sale has been confirmed can only do so on common law grounds. In the case of *Chiwanza v*

Matanda and Ors 2004 (4) ZLR 203; HH-170-04 at p 3 of the cyclostyled judgment Makarau J (as she then was) had this to say:-

“The approach to this court after a sale has been confirmed and in the absence of a prior approach to the Sheriff in terms of the rules is in my view to be based on the general grounds of review as provided for at common law. These would include such considerations as gross unreasonableness, bias and procedural irregularities but cannot include such grounds as an unreasonably low price or that the sale was not properly conducted.”

The fourth respondent also relied on the *Chiwanza* case *supra*, in arguing the fact that this application is not properly before this court.

Having read the papers filed of record and hearing counsels, I am of the view that the points *in limine* have been properly taken. The applicant failed to object, that is, to raise an objection with the first respondent challenging the sale in terms of the rules before confirmation of the sale. After the sale was confirmed the Sheriff was now out of the picture and this application could not be brought for review in terms of the rules.

In the circumstances I make the following orders-

It is ordered that-

1. The application be and it is hereby dismissed.
2. The applicant is to pay costs on a legal practitioner and client scale.

Atherstone & Cook, applicant's legal practitioners
Sande Atukwa, 1st respondent's legal practitioners
Mugwadi & Associates, 4th respondent's legal practitioners