THE SHERIFF OF ZIMBABWE
versus
GARA FAMILY TRUST
and
MUNYARADZI GARA
and
CBZ BANK LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 23 March 2016 and 29 June 2016

Opposed application

H Muromba, for the applicant
N Mufure, for Claimants
N R Mutasa, for Judgment Creditor

MTSHIYA J: On 23 March 2016, in an interpleader application, I granted the following order:

> "IT IS ORDERED THAT:
>
> 1. The 1st claimant's claim to the property attached at number 44 Clyde Road, Eastlea, Harare placed under attachment in execution of judgment HC 4169/14 is hereby dismissed. The notice of seizure and attachment dated 29 August 2015 is hereby set aside and the property described therein is declared executable.
>
> 2. The 2nd claimant's claim to the property attached at Number 21 Simms Road, Mount Pleasant, Harare placed under attachment in execution of judgment HC 4169/14 is hereby dismissed. The notice of seizure and attachment dated 29 August 2015 issued by applicant is hereby set aside and the property described therein is declared executable.
>
> 3. The 1st and 2nd claimants shall pay the judgment creditor and applicant's costs on a legal practitioner and client scale".

There was an obvious error in the last sentences of para(s) 1 and 2 of the above order. The last sentence in each paragraph should be amended to read,

> "The notice of Seizure and Attachment dated 29 August 2015 issued by the applicant is hereby confirmed and the property described therein is declared executable."

Corrective steps were, in terms of r 449 (1) of the High Court Rules 1971, taken on 21 June 2016 and the amended operative order now reads as follows:

"IT IS ORDERED THAT:

1. The 1st claimant's claim to the property attached at number 44 Clyde Road, Eastlea, Harare placed under attachment in execution of judgment HC 4169/14 is hereby dismissed. The notice of seizure and attachment dated 29 August 2015 is hereby confirmed and the property described therein is declared executable.

2. The 2nd claimant's claim to the property attached at Number 21 Simms Road, Mount Pleasant, Harare placed under attachment in execution of judgment HC 4169/14 is hereby dismissed. The notice of seizure and attachment dated 29 August 2015 issued by applicant is hereby confirmed and the property described therein is declared executable.

3. The 1st and 2nd claimants shall pay the judgment creditor and applicant's costs on a legal practitioner and client scale".

It is the above order that I am required to give reasons for.

The above order was preceded by an order of this court, granted in favour of the Judgment Creditor on 17 July 2015, which order read as follows:

"IT IS ORDERED THAT:

1. The first, second, third and fourth defendant shall pay to the plaintiff, jointly and severally, the one paying, the others to be absolved:
   (i) The sum of US$98 271.51 together with interest thereon at the plaintiff's penalty rate from time to time, currently being at 35% per annum, calculated on the daily balance and compounded on a monthly basis, with effect from 31 March 2015 to the date of payment in full.

   (ii) Collection commission thereon calculated in accordance with By-Law 70 of the Law Society of Zimbabwe in full.

   (iii) Costs on the legal practitioner and client scale

   (iv) The first defendant's immovable property hypothecated under Mortgage Bond No. 6845/2010, being a certain piece of land situate in the District of Salisbury called Lot 10 of Stand 109 Prospect, measuring 1 939 square metres, held under Deed of Transfer No. 7836/1988 dated 25 October, 1988, to be specially executable."

Following the above order, on 29 August 2015, the applicant, on the basis of a writ of execution obtained from this court by the judgement creditor, attached property at the following premises:

a) No. 44 Clyde Road, Eastlea, Harare,

   and;

b) No. 21 Simms Road, Mount Pleasant, Harare

On 2 September 2015, Catherine Gara, who says she is one of the Trustees of the 1st Claimant, filed an affidavit on behalf of the 1st Claimant stating that the property attached at Number 44 Clyde Road, Eastlea, Harare, belongs to the 1st Claimant (the Trust). She averred:

> "6. Gara Family Trust, is the owner of all the property and all other households effected to be removed at Number 44 Clyde Road, Eastlea, Harare by the Sheriff of the High Court of Zimbabwe under case number HC 4169/14 on the 2nd of September 2015. See ANNEXURE "A" which is the Notice of Seizure and Attachment. All the said properly was donated through a Deed of Donation dated 22th January 2013. See Annexure "B".
>
> 7. Gara Family Trust has nothing to do with the matter that resulted in the attachment and thus seeks restoration to *status quo ante*."

Through an undated affidavit but filed of record, Munyaradzi Gara, also made the following claim to the property attached at Number 21 Simms Road, Mount Pleasant, Harare:

> "4. I am the owner of all the property and all other household effects at Number 21 Sims Road, Mount Pleasant, Harare attached by the Sheriff for Zimbabwe, under Case Number HC 4169/14 which judgment was handed down on the 17th day of July 2015 with the property due for removal, a copy of the Notice of Seizure and attachment is annexed hereto. SEE ANNEXURE 'A'. The Second Defendant in that matter is my mother and she is taking care of the property on my behalf as I am away on business in Dubai. See Title Deeds annexed here as ANNEXURE 'B'.
>
> 4. I have nothing to do with the matter that resulted in the attachment thus I seek restoration to *status quo ante*".

I want to believe that failure to put a date on the affidavit was merely an error.

Except for the applicant, all parties only filed their heads of argument on 21 March 2016 (i.e. 2 days before the hearing). However, the applicant as a neutral party to the proceedings, did not oppose the late filing of Heads of Argument. I therefore condoned the late filing of heads of argument and proceeded to hear the matter.

In its opposing affidavit, the Judgment Creditor did not raise any preliminary issues. However, in the Heads of Argument, it then questioned the legal standing of the 1st Claimant and its capability to acquire rights. I did not regard that as an important issue because I believe that a trust can indeed acquire rights and own property. The affidavit herein was sworn to by one of the Trustees-on behalf of the Trust. (i.e the 1st Claimant herein)

I am grateful to both claimants who, in both their submissions, alert me to existing case authority in the following manner:

> "4. In the case of *Bruce, N.O* v *Josiah Parkes* 1972 (1) SA 68 it was highlighted that,

> In interpleader proceedings under Order 22, Rule 5 (R), the claimant must set out such facts and allegations which constitute proof of ownership so that the question whether or not to refer the matter to trial would arise only in the event of there being a conflict of fact which cannot be decided without hearing oral evidence.
>
> In this instance the Second Claimant has provided as proof a Title Deed which shows that the property in question belongs to the Second Claimant". (my own emphasis)

The same authority is relied on in respect of the First Claimant.

Indeed, in terms of the principles pronounced in the above case, proof of ownership is crucial in interpleader proceedings. The court, on the basis of clear proof, must be satisfied that the property or goods belong to the Claimant(s). These are generally the guiding principles in this jurisdiction.

I am aware that it is only the second claimant who has requested for reasons for my order of 23 March 2016. However, it is necessary to give reasons for the dismissal of both claims (i.e. first and second Claimants' claims).

With respect to the 1st Claimant's claim, I am in agreement with the Judgment Creditor that no proof of ownership has been placed before the court. The record shows that, on 2 November 2010, one of the purported founders of the Trust, namely Alfred Muchenje Gara, (also cited as the fourth defendant in this court's order of 17 July 2015), signed a guarantee on behalf of the first defendant in HC 4169/15. The guarantee was in favour of the Judgment Creditor. The Trust was founded after that guarantee (i.e. on 22 January 2013). The purported donation of the attached property is captured in clause 3 of the Deed of Trust which provides as follows:

> " (i) All immovable and movable property at and in the residency or home(s) and/or possession of the Founders from and prior to the date of appending signatures on this Deed of Trust going forward.
>
> (ii) Any other assets that may be donated to the Trust from time to time".

The guarantee signed on 2 November 2010 does not allow for the diminishing of the property available for use in the liquidation of the debt. That guarantee is still in place and the first defendant in HC 4169/15 has not cleared its debt. The guarantors cannot therefore, without the consent of the Judgment Creditor, allow their assets to disappear. The property could only be donated with the consent of the Judgement Creditor. To that end, I am inclined to agree with the Judgement Creditor that the Trust was a scam.

As for the second Claimant's claim, whilst there is proof of ownership of the immovable property, there is no single proof to show that the attached goods belonged to the second claimant.

It is also important to note that this interpleader application is a result of the attempt to execute this court's judgment of 17 July 2015. It has nothing to do with the Provisional Order of 2 November 2011. It is clear that the judgement being executed was made well after the Provisional Order. It does not therefore matter whether or not the Provisional Order has lapsed or has been discharged. We have, *in casu,* a stand-alone judgement which is still extant.

Furthermore, I am unable to ignore the fact that under the urgent application for stay, HC 8152/15, the question of the claims herein never arose. In para 29 of the urgent application the applicants therein claimed ownership of the property as follows:

> "29. We therefore stand to suffer irreparable harm in the event that <u>our property</u> is executed as we have no recourse. In the event that this application is granted, the bank on the other hand will not suffer any prejudice as it has got the Tile Deeds belonging to the First Applicant as Security worth four times the current claim. Even if interest is to keep accruing on the fair outstanding amount, the bank will still recover upon conclusion of the matter.
>
> 30. We are therefore seeking relief on an urgent basis from a practical view as well". (my own underlining)

The property referred to is the same property that is now being claimed by first and second Claimants herein. There was never any mention of the Trust in HC 8152/15.

The above lies, made under oath, were never explained. In my view, it is clear that both Claimants' claims are not valid.

In view of the foregoing I dismissed the claims in terms of my order appearing at p 1 herein.

The above are my reasons for dismissing the Claimants' claims.

Kantor & Immerman, applicant's legal practitioners
Antonio & Dzvetero, Claimant's legal practitioners
Costa & Madzonga, Judgment Creditor's legal practitioners