Judgment No. SC 14/05
Civil Appeal No. 69/03

MADELINE GAMANYA v (1) R J CHIMBARI (2) VINCENT TENDAYI (3) HELEN GAMANYA (4) SHERIFF FOR ZIMBABWE (5) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, FEBRUARY 7, 2005

V Muza, for the appellant

D Kanokanga, for the second respondent

No appearance for the first, third, fourth and fifth respondents

ZIYAMBI JA: The appellant is the widow of the late Zebediah Mapfumo Gamanya ('Mapfumo') who died on 4 January, 1997. Prior to his death and on 17 September 1990, the third respondent, ('Helen') who is the ex-wife of Mapfumo, was awarded one third of the value of Lot 105 Marlborough Township ('the property') by virtue of a divorce order in Case No: HC 5061/88. Mapfumo died before the one third portion was paid to Helen. Accordingly, at the time of his death, only two thirds of the property formed part of the deceased estate for distribution to Mapfumo's beneficiaries.

On 9 January, 2001, Helen caused a writ of execution to be issued against the deceased estate. The property was attached and subsequently sold to the second

respondent at a public auction held in Harare on 29 June, 2001 for a purchase price of 2.2 million dollars. The public auction sale was conducted by the Sheriff for Zimbabwe, who is the fourth respondent in this matter. The second respondent was declared the purchaser on 17 July 2001. Thereafter, an objection was made by the executor of the deceased estate on the grounds that he had secured a buyer for the property who was willing to pay $3 200 000.00 for it. On 13 December 2001 the Sheriff having heard the matter and, having received no proof from the executor of a better offer for the property, dismissed the objection and confirmed the sale. Instructions were given to the conveyancers to pass transfer upon receipt of the purchase price. The purchase price was paid by the second respondent, upon request, on 27 March 2002.

On 23 August 2002 the appellant, aggrieved by the Sheriff's decision aforesaid, filed an application in the High Court purportedly in terms of Rule 359 (8) of the rules of the High Court seeking an order setting aside the sale on the ground that by reason of the delay of 9 months in payment of the purchase price she had suffered financial prejudice as property prices had risen considerably during the 9 months following the sale of the property. The appellant blamed the late payment on the second respondent as purchaser of the property.

The second respondent in his opposing affidavit alleged that the delay in processing the sale was due to objections made by or on behalf of the appellant. He alleged that he had paid the purchase price within a short time after it had been requested by the conveyancers. He denied that he was responsible for the delay.

Helen averred that the delay in payment of the purchase price was caused by the appellant. She claimed that the appellant had obstructed many efforts in the past to sell the property; that she had waited close to 12 years for her share; that she could no longer accept the dilatory tactics being employed by the appellant and that she is now a pensioner with no income and desperately in need of her share of the proceeds of the sale of the property. It was common cause that the appellant is still residing at the property rent free.

The learned judge in the court *a quo* found the application to be devoid of merit and dismissed it, hence the present appeal.

Rule 359 (8) provides as follows:

> "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".

The sale was confirmed by the Sheriff on 13 December 2001. The parties were notified of that decision on 23 December 2001. This application ought to have been filed in January 2002. Instead, it was filed on 23 August 2002, eight months after the appellant was notified of the Sheriff's decision. No condonation was applied for or granted. On this ground alone the application ought to have been dismissed.

Further, there is merit in the submission by the respondents that blame for the delay was attributable to the appellant and not to the second respondent. The

executor represented the interests of the estate of which the appellant is a beneficiary. The objection by the executor delayed the matter to December 2001. The second respondent performed his part of the agreement by making payment when requested. The ground of complaint relied on by the appellant has, therefore, not been established.

Accordingly no good ground has been advanced as to why the sale should be set aside.

Sales in execution by the Sheriff are not easily set aside by the courts. Once a sale is confirmed, it is no longer a conditional sale and the court is normally very reluctant to set it aside, for the reason that reliability and efficacy of sales in execution must be upheld. If that were not so, the public would have no confidence in such sales in execution. See *Lalla v Bhura* 1973(2) RLR 280 (G), *Morfopoulos v Zimbabwe Banking Corporation Limited & Ors* 1996 (1) ZLR 626 (H), & *Munyoro v Founders Building Society & Ors* 1999 (1) ZLR 344 (H).

The appellant did not push for an early transfer of the property or an early release of the amount that was due to her. In fact she did nothing, but was content to remain in the house, rent free, for as long as she possibly could, it being in her interests to do so.

It is not surprising then, that at the hearing of the appeal Mr *Muza* found himself unable to make any meaningful submissions on behalf of the appellant. The

stance taken by Counsel for the appellant was proper in the circumstances. The appeal is devoid of merit.

It was for the above reasons that at the end of the hearing we dismissed the appeal with costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Gutu & Chikowero, appellant's legal practitioners

Kanokanga & Partners, second respondent's legal practitioners