

THE HIGH COURT OF SWAZILAND

MUZIPIET NKOSI Applicant

And

SWAZILAND BUILDING SOCIETY 1st Respondent

DEPUTY SHERIFF- H.R. LONG 2nd Respondent

REGISTRAR OF DEEDS 3rd Respondent

Civil Case No, 558/2004

Coram S.B. MAPHALALA – J

For the Applicant IN PERSON

For the 1st Respondent MR. J. HENWOOD

JUDGMENT

(06/08/2004)

2

1. The relief sought.

The Applicant has instituted motion proceedings for an order, inter alia, setting aside a sale in execution which took place on the 22nd November 1996, eight years after the event.

2. The preliminary issues.

The Applicant is representing himself in this matter after he has failed to secure the services of an attorney to act on his behalf. He was initially represented by the offices of P.R. Dunseith in the year 1997. The firm later withdrew as attorneys of record. As a result of this the Applicant could not obtain the services of any other attorney in Swaziland. He then proceeded a running battle with the Law Society of Swaziland and at some point reported his matter to the Attorney General. In the former he had laid a complaint against certain attorneys who were handling the issue of his house which is the subject matter of this case. The Disciplinary Committee of the Law Society found that there was no substance in his allegations and dismissed the matter. The office of the Attorney General advised him to report the matter to the police if he suspected that there was fraud in the manner in which his house was disposed of. He reported the matter to the police. However the police have not arrested the suspected fraudsters to date.

As a last ditch effort to save his house he launched the present application on the 26th March 2004, drawing the papers himself. When the matter appeared before me in view of the fact that he is obviously a layman in rather complicated civil matter I considered appointing amicus curae to assist the court. However after considering the matter further I came to the conclusion that it would not be proper for the court to appoint amicus curae in this case. Then arguments ensued.

3. The facts of the matter.

On the 24th May 1996, the 1st Respondent was granted a judgment by default by this court following the failure by the Applicant to service his mortgage loan with the 1st Respondent. The mortgage loan was in respect of the purchase of a house at Lot No.

89 situate in the Msunduza Township, Extension No. 3 in Mbabane. Pursuant of the said order the 1st Respondent through the 2nd Respondent prepared to sell the property in execution. The sale was set for the 26th May 1996 but could not take place. On the 16th August 1996 another sale was conducted. The property was sold to a third party who is not cited in these proceedings. The transfer of the property to the third party has been effected by the 3rd Respondent.

The Applicant's case is that the 2nd Respondent failed to follow the rules in one or more of the following ways: Firstly, that the 1st Respondent has not complied with Rule 46 (3) in that the person who was served the Notice of Attachment was a tenant who did not understand the contents of the document. Whereas the rule provides that "the mode of attachment of immovable property shall be by notice in writing prepared by the Deputy Sheriff and served upon the owner thereof, and upon the Registrar of Deeds or other officer charged with the registration of such immovable property, and if the property is in the occupation of some person other than the owner, also upon such occupier. Any such notice shall be served as provided in Rule 4 of these rules upon the owner and occupier and in any other case by registered letter, duly prepared and posted addressed to the person intended to be served. The Deputy Sheriff shall notify the Sheriff and the execution creditor of the attachment as soon as it has been effected". In this regard the Applicant also avers that no Notice of Attachment was sent to the 3rd Respondent.

The second irregularity is that the 2nd Respondent failed to serve the Applicant with a Notice of Attachment as required by Rule 46 (8) (c) of the High Court Rules. The rule requires that the 2nd Respondent was to publish a Notice of Sale once in the newspaper and in the Gazette not later than 14 days before the date appointed for the sale. In the present case the 2nd Respondent only published the said notice 10 (ten) days before the sale. This rule is pre-emptory and failure to comply with the said rule renders the sale irregular.

The third allegation is that the Respondents failed to comply with Rule 46 (a) in that the conditions of sale were not prepared 28 (twenty eight) days prior to the sale as required by the Rule.

The fourth complain made by the Applicant is that the 1st Respondent ought not to have sold his property as he was not in arrears. In paragraph 17 of his founding affidavit the Applicant attempts to show that he was not in arrears when the 1st Respondent obtained judgment against him. In paragraph 18 he avers that not only was he paying the 1st Respondent he was also paying the rates for the house up until July 1997.

The Applicant avers further that the 1st Respondent has not complied with the provisions of the Land Act, 37 of 1968 in that the two mortgagors were never informed of the action to be taken by the 1st Respondent, as there are three mortgagors over the said property. Section 54 (91) of the said Act reads as follows:

"If a mortgage bond or a material bond is passed by two or more mortgagors, no release from the bond;

- a) of any mortgager and his property, or of a portion of the property of any mortgager, may be released without the written consent of the other mortgager or mortgagers, or;
- b) of all the property of any mortgager may be registered unless such mortgager is also released".

4. The Respondents defence

The answering affidavit of the Managing Director, Joseph Vusumuzi Ndlangamandla with annexures is filed in opposition thereto. A number of objections in limine have been raised therein. These are the subject-matter of this judgment.

These points were neatly paraphrased in Mr. Henwood's Heads of Argument and with due apologies I shall reproduce them here, for the sake of convenience. They run as follows:

"1. The common law principal relating to sales sub-hasta is that a sale in execution conducted by the Deputy Sheriff shall not, in the case of movable property after delivery thereof, or in the case of immovable property after registration of transfer be liable to be impeached as against a purchaser in good faith and without notice of any defect. 2. Non-joinder.

5

The Applicant has not cited the purchaser of the property Nompumelelo Malicia Dlamini (born Mavuso) who is an interested party in the present proceedings and who should be cited in terms of the provisions of Rule 6.

3, The academic nature of the application.

The relief which the Applicant seeks is academic in the circumstances of the present case as the Applicant has not sought a rescission of the judgment which was obtained against him by the 1st Respondent nor has he set out how the debt which was due to the 1st Respondent at the date judgment was granted, would be satisfied together with all interest and costs, in the event that the Applicant is successful in obtaining the relief which he seeks,

4. Dispute of fact.

The Applicant has sought to approach this court by way of motion when it is clear that a material dispute of fact would exist in the matter".

I shall proceed to determine these questions ad seriatum. However, before doing so I wish to point out en passant that the Applicant was faced with insurmountable difficulties when arguing this matter and he ended up appealing to the emotions of the court. However, as much as there might be an injustice suffered by the Applicant in the manner in which his property was sold the role of the court is to dispense justice between man and man within the confines of the law. Teary-eyed sentiments have no place in a courtroom.

I proceed thus:

i) Impeachment of sale in execution.

The guiding principle at common law relating to sales sub-hasta is that a sale in execution conducted by the Deputy Sheriff shall not, in the case of movable property after delivery thereof, or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith without notice of any defect, (see Messenger of the Magistrate's Court Durban vs Pillay 1952 (3) S.A. 678 at 683 and Conrandi vs Jones 1917 OPD 112).

6

In casu, the property which forms the subject matter of this application was sold in execution on the 22nd November 1996, to one Nompumelelo Malicia Dlamini. Registration of the property into the name of the purchaser was effected on the 20th March 1997. A copy of the Title Deed marked "AA" is evidence of this fact.

On the basis of the above-cited legal authorities the Applicant cannot succeed in impeaching the sale after transfer of the property has been effected almost eight (8) years after the event. It would appear to me in this regard that the only available route for the Applicant is to proceed by way of an action for damages against any of the Respondents.

ii) Non-joinder.

If a third party has, or may have, a direct and substantial interest in any Order the court might make in proceedings or if such Order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his rights to be joined (see *Amalgamated Engineering Union vs Minister of labour* 1749 (3) S.A. 637 (A)). In the present case the Applicant has not joined an interested party in the proceedings namely Nompumelelo Malicia Dlamini who was the purchaser of the property at the sale in execution. Furthermore, the 2nd Respondent has long passed away and the Applicant should have either sued the executor in his estate alternatively the Sheriff of the High Court but it is abundantly clear from the fact that the 2nd Respondent at this stage cannot be sued.

Therefore on the basis of the above reasons the point of law in limine in this regard succeeds.

iii) The academic nature of the application.

The reasons I have advanced under the first head above viz impeachment of the sale in execution also applied under this head. The Applicant's application is academic, whilst he seeks to impeach the sale in execution on one hand, he does not seek to

7

rescind the judgment, which was granted by this court in terms of which the property was sold.

Again under this head the objection in limine is good in law and ought to be sustained. iv) Dispute of fact.

There is a glaring dispute of fact in the present case. There is a dispute of fact between the Applicant's version and the 1st Respondent's version of how the sale took place and as such, the matter cannot be determined by way of application, (see *Room Hire Co. (Pty) Limited vs Jeppe Street Mansions (Pty) Limited* 1949 (3) S.A. 1155).

Therefore on the basis of the above legal authority the application ought to be dismissed as the dispute of facts are so glaring that they cannot be cured on affidavits.

v) Conclusion.

It is clear from what I have said in respect of the various heads that I have addressed that the present application cannot in law be sustained.

It would appear to me that the Applicant should have instituted action proceedings for damages which he may have suffered as a result of the sale of his property by the 1st Respondent.

vi) Order.

In the result, the application is dismissed with costs.

S.B MAPHALALA

JUDGE