

IN THE HIGH COURT OF SWAZILAND

a/Matsvsbs

Simon Musa MaCsebula

applicant

v

Swaziland Building Society and others

respondents

Case No 66/96 B

Coram S.W. Sapire

For Applicant Mr. S. Mdladla

For Respondent Mr. J. Henwood

Judgment

(18/5/98)

This is an application in which the Applicant seeks an interdict restraining the Deputy Sheriff and the Swaziland Building Society from proceeding with the transfer of an immovable property belonging to the Applicant, pursuant to a sale of the property in execution of a judgment of this court. The interdict sought would operate pending the out come of an appeal that the Applicant has noted to the Court of Appeal against a judgment I gave dismissing an application in which the applicant sought to have the sale in execution set aside on the grounds of alleged irregularities in non compliance with the provisions of the Rules of Court. Governing sales in execution of immovable property.

The application has been brought and dealt with on an urgent basis as the documents required to have transfer registered in the deeds office have been drawn and could be lodged with the registrar in the Deeds office at any time. It appears to be agreed that should transfer to the purchaser take place, the transaction could not be reversed should the Court of Appeal uphold the appeal and hold that the sale was invalid.. This view shared by counsel appearing for the contending parties finds support in the decision of a South African court see.

GIBSON, NO v ISCOR HOUSING UTILITY CO, LTD AND OTHERS 1963 (3) SA 783 (T)

It must however be born in mind that decision turned on the wording of Act 32 of 1944, (the Magistrates Court Act (SA))sec. 70 which reads

a/Matsvsbs

'A sale in execution by the messenger 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.'

No corresponding legislative enactment affecting sales in execution of immovable property by the sheriff in Swaziland has been brought to my attention, nor have my own researches in this connection revealed any relevant provisions. In the absence of such provisions there seems to be no reason why a transfer effected pursuant to an invalid sale in execution should not be set aside even after registration.

In principle there seem no reason to me why in the absence of such legislation, a transfer of immovable property, pursuant to an invalid sale in execution should not be reversed together with the setting aside of the whole execution process. There are of course a number of factors, including the rights of the purchaser and his financing institution, which may make it extremely difficult if not impossible practically to unscramble the egg. In this case the Applicant could be left with an action for damages against the sheriff and the respondent to the applicant building society. The balance of convenience could lie with the applicant in favour of granting an interdict if this were the only aspect of the matter to be taken into consideration. But it is not.

The respondent has argued that the judgment on the application to set aside the sale is not a final judgment, and that the Applicant has no right of appeal, and for this reason an interdict pending appeal is not available. For the purposes of this application I will assume that this argument cannot be maintained, for although the relief claimed, namely an interdict pending the decision of an application to set aside the sale, was interlocutory in form, the decision on the basis that the sale was not shown to be invalid was in fact and in effect final.

I must have regard for inconvenience of the purchaser, who requires the property for residential purposes, as does the applicant, and has made financial arrangements to purchase the property. These financial arrangements may be jeopardised by delay in transfer being effected

The Building Society, first respondent in these proceedings, has a judgment which remains unsatisfied, while the Applicant, continues to occupy the property as he has done for over two years, without making payment whatsoever. The Applicant, seems, from what was argued from the bar, to be unaware that in fact interest on the judgment debt is mounting, with the effect that he will receive a much smaller payment if any in respect of the residue of the proceeds of the sale, after the Building Society's constantly increasing claim is met.

There is a further important consideration, The court has an interest in seeing that

3

a:Matsvsbs

execution of its judgments is not thwarted by technical ingenuity. The history of this matter is that the Building society has been trying over a long period to have execution on its judgment carried out. The property was first attached in terms of the judgment which declared it executable but that attachment was set aside because of a technical defect in the attachment processes. Execution had to be commenced de novo. Again the applicant came to court to have the conditions of sale varied. The conditions of sale related to the sale which he now sought to have set aside. In papers filed in that application, (which was withdrawn) he said that his only objection to the sale was that no reserve price had been set. He wished to have a reserve of E 80 000 set. The property was in fact sold for E191 000. That application was made when the applicant already had knowledge of what he claimed were irregularities entitling him to have the sale set aside.

The applicant has shown no substantial prospect of success on appeal. I have dealt with each of his contentions in the judgment delivered and do not consider that this is a case where there are substantial prospects of the applicant succeeding in his appeal.

For these reasons the application is dismissed with costs.

S.W. SAPIRE

ACTING CHIEF JUSTICE