



## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 334/17

In the matter between:

**JUSTICE NXUMALO**

**APPLICANT**

and

**ALLEN MANGO**

**1<sup>ST</sup> RESPONDENT**

**FELIX VILAKATI N.O.**

**2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF DEEDS**

**3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

Neutral Citation : Justice Nxumalo vs Allen Mango and 3 Others (334/17)  
[2017] SZHC 190 (19 SEPTEMBER 2017)

Coram : MABUZA – PJ

Heard : 2 JUNE 2017

Delivered : 19 SEPTEMBER 2017

## **SUMMARY**

**Civil Procedure – Applicant seeks an order setting aside a sale in execution of immovable property on the grounds that same did not comply with the Rules of Court – Application granted with costs.**

**Civil Procedure – Applicant further seeks an interdict against the registration of transfer to buyer – Interdict granted.**

## **JUDGMENT**

### **MABUZA -PJ**

[1] The Applicant herein seeks an order in the following terms:

- (a) Setting aside the Sale in Execution conducted on the 28<sup>th</sup> October 2016 of the immovable property described as Lot No. 476, situate in Nhlangano Township Extension No. 3, Shiselweni District, measuring 1350 square metres, and held under Crown Grant No. 25/1986.
- (b) Interdicting the 3<sup>rd</sup> Respondent from registering the transfer of the immovable property described in paragraph 3 above from Applicant in favour of the purported buyer of the immovable property described in paragraph (g) above.
- (c) Costs.

- [2] On the 10<sup>th</sup> March 2017 by consent of the parties this Court granted an order granting prayer b. to operate with immediate and interim effect pending finalization of this matter.
- [3] The Applicant is an adult Swazi male of Extension 3, Nhlangano Township in the Shiselweni District.
- [4] The 1<sup>st</sup> Respondent is Allen Mango, an adult Swazi male of Manzini in the District of Manzini, the Plaintiff and Judgment Creditor in the application under High Court Case No 873/2004.
- [5] The 2<sup>nd</sup> Respondent is Felix Vilakati, an adult Swazi male deputy Sheriff of this Honourable Court for the District of Shiselweni who carried out the attachment of the property described as Lot No. 476, situate in the Nhlangano Township, Extension No. 3, Shiselweni District.
- [6] The 3<sup>rd</sup> Respondent is the Registrar of Deeds situate at Treasury Building, Mbabane in the Hhohho District, cited herein as the Registry for all Deeds executed within the Kingdom of Swaziland.

[7] The 4<sup>th</sup> Respondent is the Attorney General situated at 4<sup>th</sup> Floor, Ministry of Justice Building, Mhlambanyatsi Road, Mbabane in the Hhohho District cited herein as the legal representative of the 3<sup>rd</sup> Respondent.

[8] The 5<sup>th</sup> Respondent is Nkosingiphile Lukhele the alleged buyer of the immovable property in question.

[9] The Applicant is the Registered owner of a certain immovable property described as:

Certain	:	Lot No. 476 situate in the Nhlangano Township, Extension No. 3 Shiselweni District, Swaziland.
Measuring	:	1 350 square metres
Held	:	Under Crown Grant No. 25/1986, dated 10 <sup>th</sup> July 1981 and registered on the 30 <sup>th</sup> April 1986.

A copy of the Title Deed proving ownership of the immovable property in question was annexed and marked "J1".

## **The facts**

- [10] During the latter part of 2003, the parties entered into an oral agreement in terms of which the 1<sup>st</sup> Respondent agreed to assist the Applicant sell a property known as McSeveny's homestead in Nhlangano. They agreed to share the commission equally with one another.
- [11] The 1<sup>st</sup> Respondent fulfilled his obligations and found a buyer for the property which was eventually sold to the said buyer for the purchase price of E3,300,000.00 (Three million three hundred thousand Emalangeni). The commission payable on the sale was an agreed sum of E100,000.00 (One hundred thousand Emalangeni) which had been paid by the purchaser to the Applicant.
- [12] Despite having received the commission from the purchaser, the Applicant failed to pay over to the 1<sup>st</sup> Respondent his share of the same in the sum of E50,000.00 (Fifty thousand Emalangeni).
- [13] During March 2004, the 1<sup>st</sup> Respondent instituted action against the Applicant by way of a Combine Summons for payment to him of the sum of

E50,000.00 (Fifty thousand Emalangeni) being in respect of commission fees due to him.

[14] The Applicant defended the action and caused a notice of intention to be filed dated 2<sup>nd</sup> April 2004. However, default judgment was obtained on the 11<sup>th</sup> July 2006 for the amount of E50,000.00 (Fifty thousand Emalangeni).

[15] Subsequent settlement negotiations took place culminating in the Applicant paying a total amount of E7,000.00 (Seven thousand Emalangeni) towards settlement of the debt; E5,000.00 (Five thousand Emalangeni) was paid on the 13<sup>th</sup> March 2007 and E2,000.00 on the 19<sup>th</sup> June 2007.

[16] The matter thereafter lay dormant without any activity until the 28<sup>th</sup> October 2016, when the Applicant received information that his home described in paragraph nine (9) supra was to be sold in execution at a public auction at the High Court in order to settle the aforesaid debt. The sale was advertised in the Swazi Observer dated 20<sup>th</sup> October 2016.

[17] The Applicant was not able to confirm that the sale had taken place. Hence the present application which is defended by the 1<sup>st</sup> Respondent.

[18] The issue of urgency has been overtaken by events and I shall not belabor it.

**The Applicant's case is that:**

[19] The purported auction sale violated the provisions of Rule 46 of the High Court Rules in that the Applicant was never served with any Writ of Execution as required by Rule 46 of the High Court Rules prior to the Auction Sale of the 28<sup>th</sup> October 2016; neither was a Notice of Attachment of the immovable property served upon the Applicant as the registered owner as required by Rule 46.

[20] The Writ of Execution against Applicant's immovable property was not served on the Registrar of Deeds (3<sup>rd</sup> Respondent) prior to the Auction Sale, which renders the Sale in Execution invalid.

[21] The Notice of Sale was advertised for lesser days than 14 days as required by Rule 46 (8), the advertisement was posted in the Swazi Observer on the 20<sup>th</sup> October 2016 for an Auction Sale to be conducted on the 28<sup>th</sup> October 2016.

- [22] The property was sold by private treaty. There were no bids in the sale of the 28<sup>th</sup> October 2016 and the property was sold to the 5<sup>th</sup> Respondent without inviting any member of the public to bid.
- [23] The sale took place in the Hhohho District whereas the immovable property is situate in the Shiselweni District contrary to Rule 46 (4) which requires that any sale in execution shall take place in the District in which the property is situate.
- [24] The Deputy Sheriff did not ascertain whether there were any bonds or other encumbrances registered against the immovable property; and no written Notice was given by him to Swazi Bank, the mortgagor of the immovable property neither was the Nhlanguano Town Council involved to ascertain if there were any arrear rates.
- [25] The Sheriff was not furnished with any copies of the Notice of Sale, the same was not affixed at the High Court Notice Board.
- [26] The sale was not published in the Government Gazette as required by Rule 46 (8) (c).



[27] The Notice of Sale was not signed by both the alleged purchaser (5<sup>th</sup> Respondent) or the Deputy Sheriff as proof that the sale did in fact take place and the property sold and bought thereat contrary to clause 5 of the Conditions of Sale attached by 1<sup>st</sup> Respondent.

[28] The Notices of Sale stipulated reserve prices contrary to Rule 46 (13) which provides that sales in execution of immovable property shall be without reserve.

[29] It is contended that it is on the basis of the above stated grounds that the Sale in Execution of the 28<sup>th</sup> October 2016 was irregular, invalid and liable to be set aside.

**The 1<sup>st</sup> Respondents case is that:**

[30] Judgment by default was obtained on the 11<sup>th</sup> July 2006. A Writ of Execution against Applicant's movables was issued in August 2006 as more fully appears in Annexure "AM1" (writ of execution). No realisable movables of Applicant were found since he was not employed.

[31] On or about the 3<sup>rd</sup> November 2006 a Writ of Execution against Applicant's immovable property was issued, there being no movables. The Writ of Execution was served upon Applicant and upon the Registrar of Deeds and the latter affixed his date stamp on the 7<sup>th</sup> November 2006 as evidenced by Annexure "AM2".

[32] Having attached the immovable property in November 2006, the same was advertised in June 2007 to be sold by public auction on the 27<sup>th</sup> July 2007. A Notice of Sale signed by the Registrar (which was affixed on the Notice Board at the High Court and Shiselweni Magistrates Court) was annexed hereto (Annexure "AM3").

[33] It was only upon seeing the Notice of Sale in the newspapers in 2007, that the Applicant sprang into action and instructed attorneys to negotiate a settlement of the judgment debt. The Applicant undertook to liquidate the debt in full in monthly instalments of E5,000.00 (Five thousand Emalangeneni).

[34] The transfer did not proceed notwithstanding that the auction had already been conducted as the 1<sup>st</sup> Respondent's attorneys agreed to let the Applicant

settle in instalments. However, Applicant did not honour that agreement and failed to make any payment. The E7,000.00 which Applicant claims to have paid he has not attached any proof thereof because he never paid it.

[35] The 1<sup>st</sup> Respondent denies that he novated the default judgment. The property was duly attached in 2007. There was no need to re-attach the property since it was never released from the first attachment.

[36] The 1<sup>st</sup> Respondent does not know of any mortgage bond on the property since Applicant has not furnished any in his papers. However, such bond would be illegal since one cannot bond the property after it has been attached.

### **The Court**

[37] Even though the 1<sup>st</sup> Respondent denies any knowledge of the mortgage bond the Applicant has furnished proof of its existence and that it was registered on the 14<sup>th</sup> March 1989 and not after the alleged attachment of 2007. I agree with the Applicant that it is the duty of the Deputy Sheriff in terms of the Rules of this Court to ascertain the existence of any bonds over any property

to be sold in execution and then to notify the mortgagee of the attachment. This was not done during 2007 nor during October 2016.

[38] I further agree with the Applicant's arguments as set out above and conclude that, the statutory procedures were not followed in conducting the auction sale herein thus making the sale null and void and I so hold. In the case of **Bernard Msweli Kunene and Another v Bridges Munro and Others** Civil Appeal case no. 32/2015 it was stated as follows:

“In my view, if a purported sale in execution by the Deputy Sheriff of the Supreme

Court is null and void for lack of compliance with the statutory formalities, it confers no title upon those who purport to purchase the property and the owner may recover his property by means of a *rei vindicatio* unless possibly he is stopped from doing so.”

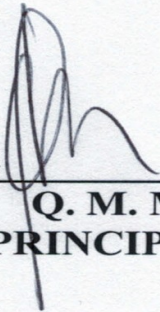
[39] The Applicant has in my view made out a case for the relief sought and I accordingly make the following order:

- (a) The sale in Execution conducted on the 28<sup>th</sup> October 2016 of the immovable property described as Lot No. 476, situate in Nhlngano Township Extension No. 3, Shiselweni District measuring 1350 square metres and held by the Applicant under Crown Grant No. 251/1986 is hereby set aside.

(b) The 3<sup>rd</sup> Respondent is hereby interdicted from registering the Transfer of the immovable property described in 39 (a) supra to the 5<sup>th</sup> Respondent Nkosingiphile Lukhele.

(c) The Applicant is hereby awarded costs of suit herein on the ordinary scale.

MBABANE Crim. Case



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**Q. M. MABUZA**  
**PRINCIPAL JUDGE**

For the Applicant : Miss Matsebula

For the Respondent : Mr. T. Mavuso