

CLERA PENYAI
versus
DEREK PENYAI
and
REGISTRAR OF DEEDS, HARARE N.O

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 6 October and 22 October 2015

Urgent Chamber Application

N Kajevhu, for the applicant
F Malinga, for the respondent

MWAYERA J: The applicant approached the court on urgent basis seeking to interdict the respondent from disposing of stand 3355 Warren Park Township held under Deed of Transfer 4517/85 on the basis that the property in question is *res litigiosa*. The property in question is subject to a matrimonial summons HC 6813/15 which is pending before these courts. At the hearing Mr *Malinga* for the applicant conceded the matter was urgent for if not heard on urgent basis the applicant would suffer irreparable harm.

The respondent however, raised a point in *limine* that the order sought is of a final nature and as such cannot be granted since the prayer in the interim relief is the same as in the final order. It is clear that the point in *limine* has no merit given the order sought is competent;

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. 1st respondent be and is hereby interdicted from in any way, whensoever and howsoever directly or indirectly selling and transferring title in Stand 3355 Warren park Township, until Case No. HC 6813/15 has been finalised by this court.
2. 2nd respondent be and s hereby interdicted from signing all such documents of transfer as may be necessary to transfer:
Certain piece of land in District of Salisbury
Called 3355 warren park Township
Held under Deed of transfer 4517/85 dated 19th day of August, 1985;

without the written consent of the applicant until Case No. HC 6813/15 has been finalised by this honourable court.

3. The 1st respondent to pay costs of this application on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

That pending determination of this matter, the applicant is granted the following relief:

1. This order shall operate as an interim interdict until the order is confirmed, interdicting:
 - (i) 1st respondent from selling and transferring title in Stand 3355 Warren park Township, and
 - (ii) 2nd respondent from signing all such documents of transfer as may be necessary to transfer;
Certain piece of land situate in the District of Salisbury
Called 3355 Warren Park Township
Held under deed of Transfer 4517/85 dated 19th day of August, 1985; without the applicant's written consent."

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In an event the interdict requirements are clearly met by the fact that the applicant has an interest in the property as founded in her pleadings in the litigation pending.

It is important to note that what the applicant is seeking is an interlocutory or temporal interdict pending the finalisation of the matrimonial matter in which the property Stand 3355 Warren Park Township also falls for determination. The requirements of an interim interdict are fairly settled as pronounced in *Stelego v Stelego* 1914 AD 201 at 227; *Airfield Investments (Pvt) Ltd v Minister of Lands and Ors* 2004 ZLR at 511.

The requirements can aptly be summed up as:

- a. that there is a *prima facie* right even though open doubt
- b. that an injury has actually been committed or is reasonably apprehended
- c. the absence of a similar or adequate protection by any other ordinary remedy
- d. the balance of convenience favours the granting of the interim relief.

See also *Flamelily Investments (Pvt) Ltd and Another v Zimbabwe Salvage (Pvt) Ltd and Another* 1980 ZLR 378.

In *casu* the property which the applicant seeks on interim interdict is subject to pending matrimonial case HC 6813/15. It is potentially a matrimonial asset which falls for distribution, division and or apportionment. The relief sought by the applicant in HC 6813/15 includes a decree of divorce and an order of appointment of immovable property acquired during the subsistence of the marriage. The property is accordingly *res litigiosa*. The applicant clearly has a *prima facie* right to the property. It has not been disputed that potential buyers are approaching the house in question for viewing purposes. This clearly means the

applicant's fear and apprehension is reasonable. The applicant will suffer irreparable harm if the respondent goes ahead to dispose the property which is pending litigation. There is need for a prohibitory interdict. Given both the applicant and respondents' founding affidavits there is no prejudice which will be occasioned to the respondent by grant of the order as prayed for. The requirements of an interim interdict as set out are clearly met.

On merit, clearly the respondent just argued that the order should not be granted as he has no intention to sell the house because some of his children stay at the house in question. No cogent reasons have been given why potential buyers are visiting the house in question. The applicant's fear is reasonable and hence the application to court. The order sought given the consideration of equity and fairness is to maintain the status *quo* pending litigation in the main matrimonial matter. The balance of convenience given the prevailing law under the Matrimonial Causes Act [*Chapter 5:13*] and the Constitution of Zimbabwe on sharing and distribution of property at divorce in the circumstances tilts in favour of granting the order. The opposition is unwarranted and ought to be dismissed.

Accordingly it is ordered that the application be and is hereby granted as prayed for. In the result it is ordered that pending determination of case HC 6813/15

- (i) The first respondent is interdicted from selling Stand 3355 Warren Park Township
- (ii) The second respondent is interdicted from signing all such documents of transfer as may be necessary to transfer certain piece of land in the District of Salisbury called 3355 Warren Park Township held under Deed of Transfer 4517/85 dated 19th of August 1985 without a valid court order

Muzondo & Chinhema, applicant's legal practitioners
Muronda Malinga Legal Practice, 1st respondent's legal practitioners