Judgment No. HB 33/06
Case No. HC 2417/03
XREF HC 1021/01
XREF HC 2183/01

ANDREW BOYKIE MOYO

versus

KELETIYA MOYO (NEE MTHETHWA)

and

ADDITIONAL ASSISTANT MASTER

and

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 JULY 2005 27 APRIL 2006

Ms A Masawi, for the applicant
SS Mazibisa, for the 1st respondent
No appearance for the 2nd and 3rd Respondent

Ndou J: This is an application for condonation of late application for review and review of the proceedings and decisions of the Second Respondent in the matter of the deceased estate of Peter Mqothuli Moyo (DRBY 1021/01) determined at Bulawayo, in or about the month of October 2001. The brief facts are the following:

The applicant is the eldest surviving son of the late Peter Mqothuli Moyo, who died intestate on 7 July 1990. The first Respondent who is applicant's stepmother was the customary law wife of the deceased. The Applicant did not register the said estate, and was not in attendance at the edict meeting. At the edict meeting the second respondent made a decision to appoint the first respondent as heir to the estate. The

edict meeting was attended by the applicant's younger sister, Belina Moyo, his half brother Velaphi Moyo and his cousin's son Misheck Moyo.

The assets of the estate included immovable property known as house Number R15 Mzilikazi, Bulawayo and fourteen (14) head of cattle. In March 2001, the applicant purported to sell the house Number R15 Mzilikazi to one Nicholas Muchena. It is common cause that at the time the applicant had not been appointed executor or heir to estate by Second Respondent. He did not have authority of the Second Respondent to dispose off the assets of the deceased estate. He was a self-styled executor/heir. Nicholas Muchena paid him a deposit. From his affidavit, the applicant states that he became aware of determination of the second respondent in August 2001. This application for condonation of the late filing of review of the determination of the second respondent was filed on 6 November 2003 (that is over two years after the eight-week period within which it should have been filed). The proceedings in this case would be terminated during the month of October 2001. (the exact day not clear) Order 33 Rule 259 of the High Court of Zimbabwe Rules, 1971, requires an application for review to be instituted within eight weeks of the termination of the proceedings in which the irregularity or illegality combined of is alleged to have occurred or at least when the applicant became aware of the decision. The *proviso* to Rule 259 allows the court to extend the time for good cause shown. In casu, there is strictly speaking no application for condonation for late filing of the application for review in the proper form. I agree with *Mr Mazibisa*, for the first respondent that the applicant ought to

have made the application for condonation in the prescribed form of application in the Rules, which is by notice of motion, together with an affidavit explaining why the application for review

was not filed in time – *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) at 260 G E, *Matsambire v Gweru City Council SC* 183-95, Mpofu and Another v Parks and Wildlife *Management* authority and others HB 36-04 and *Ndlovu v Ndlovu* and others HB 97-05.

A substantive application for condonation is required for non-compliance with Rule 259. In casu, the applicant came up with his own hybrid application which is a combination of both the application for condonation for non-compliance with Rule 259 and the application for review without delineation as to where each starts and ends. This is not desirable. However, in this case I will exercise my discretion and consider the application for condonation first. If I decide not to extend the time in terms of the *proviso* to Rule 259, supra' then the matter comes to an end. I will make my decision on the basis of the papers filed in the hybrid application. The standard factors to be considered in deciding whether or not to condone the late filing of an application for review are: the degree of non-compliance, the explanation for it; and the applicants prospects of success- *Bishi v Secretary for Education* 1989 (2) ZLR 240 (H); *Mushaishi v Lifeline Syndicate* and Another 1990 (1) ZLR 284 (H*); Vrystaat Estate (Pvt) Ltd* v *President, Admin Court* and others 1991(1) ZLR 323 (S), *Mambo v NRZ* and Another HH 41-03 and *Simba v Saybrook* (1978) (Pvt) Ltd HH 57-03.

I will consider these factors in turn.

Degree of non-compliance: There appears to a dispute of fact on this issue. The applicant, in his answering affidavit, says he became aware of the decision of the 2nd Respondent in October 2003, but the 1st Respondent's evidence on affidavit is that the applicant was aware a far back as 2001. I can determine this factual dispute by adopting a robust and common sense approach. *Lalla v Spafford* N O and others 1973

(2) RLR 241 (G) and *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (SC)

Nicholas Muchena filed spoliation proceedings against the 1st Respondent and two others under case number HC 2183/01. In the Founding Affidavit Nicholas Muchena said in paragraph 12:-

> "I need to explain that I had been properly installed in the house by Andrew Moyo, (Applicant in casu) who was in control of the house, but the Respondents declared that Andrew Moyo had no right either to let the house to anybody or dispose of it in any manner, as it belongs to the First Respondent."
> (Also First Respondent in *casu*)

The applicant supported the application in HC 2183/01 and said in a paragraph of his affidavit

> "…. invaded the Muchena family on the evening of Monday, 16 July, 2001, and evicted them without my consent or a court order, alleging that the house belongs to my stepmother, and I have no right either to sell or lease it."

He signed this affidavit on 20 July 2001. He says he filed an affidavit with 2nd Respondent on 3 September, 2001. (No affidavit was annexed although an unsigned document was attached).

Although he sold the house in 2001, the applicant had not yet

registered the estate from 1990 (that is a period in excess of ten (10) years). It was only registered on 30 July 2001 by the 1st Respondent. An edict meeting was held as alluded to above. All this information was accessed by applicant before he filed his 3 September 2001 "affidavit". He intimated that he intended to contest all the appointments. He did not formally challenge the appointment of the first Respondent as executor until 2003. The 2nd Respondent, gave a certificate of authority to the 1st Respondent to distribute the

assets. In my view, the applicant on a balance of probability became aware of the decision of the 2nd Respondent far much earlier than he is prepared to accept now.

Explanation for non-compliance

He seems to give the impression that he failed to comply on account of poor health. The fact that he had time to assist Nicholas Muchena to obtain a spoliation order, points in the direction of him having adequate opportunity to apply for review – *Songore v Olivine Industries* (Pvt) Ltd 1988 (2) ZLR 210 (S).

Prospects of success on the merits

It is common cause that the deceased died before the promulgation of the current Section 3 of Deceased Estates Succession Act (Chapter 6:02). It is true that if this Act applies the applicant has no case at all as the 1st Respondent, as a surviving spouse is the intestate heir of the estate in casu, pursuant to the provisions of Section 3. The applicant was, therefore, never entitled to an automatic and absolute inheritance of the property in dispute.

It is common cause that this estate was registered well after the promulgation of Act. The issue is whether the determining date of that of the death of the deceased or that of the registration of the estate. In other words, does the Act operate retrospectively from the wording of its provisions? I hold that it is not the date of registration of the deceased estate but the date of death of deceased that matters –*Magaya v Magaya* 1999 (1) ZLR 100(S).

From the above findings I hold that this is a case of a flagrant breach of the rules and there is no acceptable explanation for it, and, the indulgence of condonation should

be refused, whatever the merits of the case. *Kodzwa* v Secretary for Health and Another 1999 (1) ZLR 313 (S) at 313 D and *Khumalo v Mafurirano* HB11-04.

Accordingly, the application is dismissed with costs on a legal practitioner and client scale.

Masawi and Associates, applicant's legal practitioners
Cheda and Partners, 1st Respondent's legal practitioners