ANDREW MAZUWANI MUDENDA

VERSUS

SABRINA MUDENDA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 1 SEPTEMBER 2008 AND 23 OCTOBER 2008

Mr. B. Ndove for the applicant
Mr. T. Masiye-Moyo for the respondent

Judgment

Wrong legal advice

CHEDA J: This is an urgent application seeking the reversal of the removal of applicant as ordered by this court on the 19th August 2008 pending the finalization of divorce pending.

The parties have been married for the past 19 years. During the subsistence of the marriage they accumulated substantial movable and immovable property and were for all intents and purposes living well.

However, of late their marriage has been bumpy. Respondent filed for divorce which matter is still pending. Respondent also filed an urgent application for the removal of applicant from the matrimonial home under case number HC 1637/08 which application I granted on the 19th August 2008.

In reaction to the said order respondent who is now applicant in this matter filed the present application. The relief sought is couched in the following terms:-

"FINAL ORDER SOUGHT

1. The order of this Honourable Court granted on the 19th August 2008 under case No. HC 1637/08 be and is hereby set aside.
2. Applicant be and is hereby directed to file his Notice of Opposition in Case No. HC 1637/08 within five (5) days of the setting aside of the Order referred to in Paragraph 1 hereof.
3. Respondent to pay costs of this application on an attorney and client scale.

INTERIM ORDER GRANTED

Pending finalization of this matter, Applicant be and is hereby granted the following Provisional relief;

1. The execution of the order of this Honourable Court under case No. HC 1637/08 be and is hereby suspended.
2. In the event that at the time that this Interim Order is granted, the Order of this Honourable Court under case No. 1637/08 would have been executed, such execution be and is hereby reversed.
3. The Deputy sheriff Bulawayo, be and is hereby directed and ordered to ensure that the terms of this interim Order are complied with."

The order which applicant now seeks to upset was obtained by default. The background is that respondent made an urgent application for the removal of the now applicant from the matrimonial home. As the relief was *per se* final, her legal practitioners served the application on applicant's erstwhile legal practitioners who were representing him in the divorce action.

Upon receipt of the application, his legal practitioners adopted a wrong procedure which procedure was ignored by respondent's legal practitioners and as a result of that he was evicted from the matrimonial home. Aggrieved by his erstwhile legal practitioners' adoption of a wrong legal procedure, he engaged his current legal practitioners who filed this urgent application which seeks to restore him to the matrimonial home on the basis that his legal practitioners had not properly represented him. In simple terms that he was ill advised.

The question then, is, should applicant be allowed to upset a properly obtained order for the reason that his legal practitioners did not advice or properly represent him?

It is every citizen's constitutional right to a legal representative of his choice. Applicant though his legal practitioners failed to take appropriate action after he had been served with respondent's application. This failure, it has been submitted by his current legal practitioners, was due to ill advise by his erstwhile legal practitioners.

Generally, our courts are reluctant to visit a litigant with the sins of his legal practitioners. However, there is a limit beyond which the courts will not go, see *Bishi v*

Secretary for Education HH 162/89. In that matter the court held that the courts should be careful in creating a dangerous precedent if it easily succumbed to such a temptation.

In *Gore v Oman* HB 82/89 MUCHECHETERE J (as he then was) stated:

> "….there is a limit beyond which a litigant cannot escape the results of his legal practitioners' lack of diligence or the insufficiency of his explanation for his default. To hold otherwise might have disastrous effects upon the observance of the rules of this court. Considerations ad misericordiam should not be allowed to be an invitation to laxity. The legal practitioner is the representative the litigant has chosen and there is little reason why, in regard to a condonation of the failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship no matter what the circumstances of the failures are."

The same ruling was made in *Kona v Nyika* HB 101/90, see also *Highline Motors Spares* (1933) *(Pvt) Ltd and Others v Zimbabwe Corp. (Pvt) Ltd* 2002 (1) ZLR 514 (S). In *Viking Woodwork P/L v Blue Bells Enterprises P/L* 1998(2) ZLR 249 at 252H-253C SANDURA JA stated:

> "Although the fault was most probably that of the appellant's legal practitioners, the appellant cannot escape the consequences of the lack of diligence on the part of its lawyers. As STEYN CJ said in the Saloojee case supra at 141B-E:
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> > "I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court, was due to negligence on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

In my view our courts should be slow in sympathizing with litigants who fail to comply with rules of this court due to dilatoriness or lack of diligence on the part of their legal representatives.

In the present case, applicant's legal practitioner exhibited lack of deligence on his part and his action resulted in this matter being improperly handled.

Applicant has not submitted a convincing reason for his failure which can remove his non-observance of the court rules from the ordinary. Applicant made his choice of a legal representative and he must stand by his choice. Respondent can not be unnecessarily prejudiced by the inept handling of this matter

For that reason this application is dismissed with costs.

Marondedze, Mukuku, Ndove and partners, applicant's legal practitioners
Messrs Hwalima, Moyo and Associates, respondent's legal practitioners