

MARGARET MARANGE
versus
TAFIRENYIKA KAPENDE
and
PAUL MWONZORA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 27 January 2015 and 11 February 2015

Opposed Application

Ms C. Kanengoni, for the applicant
T G Mkundidza, for the 1st respondent
D Tandiri, for the 2nd respondent

MATHONSI J: This is one matter in which a litigant simply cannot accept an outcome preferring to blindly fight all the way even when it is apparent that she is headed nowhere as she is treading on moving sand and can only suffer grief for all her efforts in trying to reverse the outcome of the process of winding up her late daughter's estate, an estate which was wound up in accordance with the law no matter the perceived unfairness of the result. Perhaps the moment our people accepted that the institution of marriage brings with it certain rights and corresponding obligations to both the wife and the husband, the better for all of us.

The applicant is the mother of the late Rebecca Marange who died on 20 February 1998 but not before she had acquired in her own name, stand 5594 Dangamvura Township of stand 5625 Dangamvura Township, Mutare in June 1984 and got married to the first respondent, Tafirenyika Kapende in 1989. The marriage was blessed with two children before Rebecca died on 20 February 1998 and was survived by the first respondent and the two children.

The applicant has approached this court seeking condonation for the late noting of an appeal against a decision of the magistrates court sitting at Mutare on 22 August 2009. The

application comes aboard a founding affidavit deposed to by the applicant which makes for interesting reading. After the usual salutations, the applicant states:-

- “3. Sometimes in August 2008, an order was granted by the magistrates court ordering the eviction of people whom I had placed to reside at No 1380 Area 3 Dangamvura Mutare. The judgment was not available to me immediately. Even though the judgment was handed down on 22 August 2008, I only became aware of it on the 27th March 2009. It has always been my intention to appeal against the decision of the magistrates court. I filed an appeal albeit out of time under Case No CIV “A” 135/09. My appeal was struck off roll because I did not formally apply for condonation. I now seek to regularise matter by formally applying for condonation.
4. I was not availed with the judgment on time. It has always been my desire to appeal. As will more fully appear on the attached notice of appeal, I have good prospects of success on appeal.
5. My late daughter was employed by CABS. I was employed as a domestic servant and naturally my daughter had a more appealing job and source of income. I applied to Council (City of Mutare) to be allocated a house. I did not qualify for a bigger house because of my status. I convinced my daughter to have the house registered in her name. She agreed and the house was allocated to her. I then paid the house using my daughter’s name. This explains why the house was registered in my late daughter’s name. This was in June 1984. In 1989 my daughter began staying with the 1st respondent as son in law. He came for formalities to be introduced as a future son-in-law but fell short of paying lobola. They were blessed with two children. At the time that they began staying together the house had long been acquired. They never stayed in the house. My daughter passed away on 20 February 1998. She was still staying (with) the 1st respondent but not at the house in question. I had always been regarded as their (sic) of the house even by my late daughter.
6. A dispute arose between myself and the first respondent over the house. It spilled into courts and at one time the first respondent indicated that he was going to ensure that the house was for the minor children of the late Rebecca. It seemed a viable option rather than for him to inherit it. He had come into my daughter’s life when the house was already there. The first respondent has since pretended to dispose of the house to second respondent. This is a flagrant disregard of the promise he gave the court. He also disposed of it, without the consent of the Master. His actions were fraudulent. The first respondent has also argued that he inherited the house in his own right. This is fallacious. The law does not allow this. It was never the intention of the law for a spouse to inherit what he found at the time of entering a marriage already in the possession or ownership of the other spouse.
7. It is clear that I have good prospects of success on appeal. The decision of the magistrate is more than likely to be reversed. I respectfully apply for condonation of the late of (sic) noting of appeal. I also undertake to pay all the costs associated with the appeal. I have since written the undertaking to the Clerk of Court.

8. I accordingly pray for an order in terms of the draft.”

A mixture of a palpable misunderstanding of the law of inheritance and outright dishonesty as well as a determination to undermine the institution of marriage. What the applicant has done is to put before the court a Spanish *omlete* which does not begin to shed light on the real issues to be considered in an application for condonation. The founding affidavit is legendary by its failure to explain why the applicant did not file her appeal on time, why she took exactly five years to bring this application, if we are to accept for a moment that she only became aware of the judgment of the magistrates court in March 2009.

I am aware that the issue of inheritance may be outside the scope of the present inquiry, which is limited to considerations of the delay in appealing and the merits of such application, regard being had to the fact that what is sought to be appealed against is an order for the eviction of the applicant and those claiming through her as opposed to the respective rights of the parties to inherit Rebecca’s estate. It is not easy to ignore that applicant lays claim to a property acquired in 1984 which she did not bother to have transferred to her name until Rebecca died 14 years later. At the time it was purchased she was a mere domestic worker while Rebecca was a bank employee who would ordinarily easily afford to purchase a house. She did purchase the house and had it registered in her name and not that of the applicant.

If Rebecca died in 1998 leaving behind two children, assuming she was not married as the applicant has sought to imply, it is those children who should inherit her estate and not her mother. This is the same mother who tells us that she had struck a deal with the first respondent to have the house inherited by Rebecca’s children. If it was hers, the applicant would certainly not have acceded to inheritance of the house by her grandchildren. The more likely explanation is that indeed the house belonged to Rebecca and all that the applicant is unhappy with is having it inherited by her husband.

Coming back to the issue at hand, the first respondent inherited the house from his late wife in terms of the law and the estate was wound up with the house being transferred to him. He sold it to the second respondent who took transfer and now holds title by Deed of Transfer No 985/10. The applicant does not care about all that and wants to be given an opportunity, even at this late stage, to challenge her eviction from the house to enable her to bring up her claim of ownership of the house.

Significantly, when the applicant purported to note an appeal against the decision of the magistrates court on 16 April 2009, she was aware that such appeal was out of time. This is because she said so in her preamble to the notice of appeal which reads:-

“Be pleased to take notice that the appellant hereby notes and files her appeal against the decision of the Magistrates Court which was handed down at Mutare Magistrates Court on 22nd August 2008 but was only availed to the appellant on 27th March 2009. Take further notice that the appellant shall apply for condonation of late noting of the appeal.” (The underlining is mine).

We know of course that the applicant did not apply for condonation electing instead to only appear before the Appeal Court on 4 June 2013 to move the appeal, an appeal which did not exist considering that it had been filed out of time. The appeal was consequently struck off the roll. The effect of that order in terms of practice direction 3/2013 is:-

- “3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place.
4. In accordance with the decision in *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S) and *S v Ncube* 1990 (2) ZLR 303 (S); if a court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the court.
5. Where a matter has been struck off the roll for failure by a party to abide by the Rules of the Court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned.

Provided that a Judge may, on application and for good cause shown, reinstate the matter, on such terms as he deems fit.”

It is important to note that the order of the Appeal Court was issued on 4 June 2013 in open court with the applicant firmly represented by counsel. It was not until 11 March 2014, more than nine months after the appeal was struck off that the applicant filed this application for condonation, an application which does not explain her failure to act from 22 August 2008 when the judgment sought to be appealed against was made, right up to the time the appeal was thrown out on 4 June 2013. It is an application which is deafeningly silent on why the applicant was unable to act for nine months after the appeal was struck off. In fact the appeal was considered abandoned at the expiration of 30 days from 4 June 2013 because the applicant did nothing about it.

An application for condonation must be made as soon as a party requiring it realises that he has not complied with the rules. If such party does not do so, he should give an acceptable explanation not only for the delay in making the application for the rescission of judgment but also for the delay in seeking condonation. *Viking Wood Work (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) 251 C-D.

In an application of this nature the court has regard to certain broad factors in deciding whether to condone or not. These are:-

- (a) that the delay was not inordinate, having regard to the circumstances of the case;
- (b) that there is a reasonable explanation for the delay;
- (c) that there are prospects of success should the application be granted; and
- (d) the possibility of prejudice on the other party should the application be granted.

See *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (S) 357 D – G; *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) 260 C-H; *Ncube v CBZ Bank Ltd & Ors* HB 99/11; *Munonyara v CBZ Bank Ltd & Ors* HH 91/15.

In this case the applicant has failed to satisfy even a single requirement for condonation. She has not explained the inordinate delay in seeking condonation. She has not shown any prospects of success if the application were to be granted and has not said anything about the interests of a third party that purchased the house and took transfer. The closest she has come to referring to that is when she stated in her founding affidavit that the first respondent “pretended to dispose of the house to the second respondent.” She did not elaborate.

I am satisfied that the application is without merit whatsoever. It should not have been made at all except that the applicant appears to take the court for granted, that the court would indulge whatever the circumstances. In fact Ms *Kanengoni* for the applicant was reduced to appealing to the court’s sympathy asking that it be charitable enough to allow the application even when it has no merit because the applicant is an elderly woman. Unfortunately this is a court of law and not equity. As Aristotle put it:-

“The umpire has regard to equity and the judge the law.”

Both Mr *Mkundizha* and Mr *Tandiri* for the respondents asked for punitive cost with Mr *Tandiri* going a step further to ask that the costs be borne by the applicant’s legal practitioner *de bonis propriis*. While I agree that the applicant has been remiss in a very big

way and that she should face the consequences of that, I am not prepared to extend the admonition to her legal practitioner.

In the result, the application is hereby dismissed with costs on the legal practitioner and client scale.

Gonese and Ndlovu, applicant's legal practitioners
Tandiri Law Chambers, respondent's legal practitioners