

STANLEY MUDAWARIMA
versus
C.H.P.W. (PVT) LTD
and
BARCLAYS BANK OF ZIMBABWE P/L
and
DAVID CHITENGU
and
MESSENGER OF COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANONGWA JJ
HARARE, 19 January 2016 and 30 March 2016

Civil Appeal

Ms W Nyakudanga, for the applicant
B Mahuni, for the 1st respondents
D Chitengu, for the 2nd & 3rd respondents

MWAYERA J: The appellant approached the court *a quo* with an application for condonation of late filing of an application for objection to a public sale in terms of order 26 r 15 (15 c) of the magistrates court (civil) rules.

The court *a quo* dismissed the unopposed application with no order as to costs. Aggrieved by the magistrate's decision the appellant approached this court on appeal. The appellant raised six grounds of appeal as discerned from the record as follows:

1. No due weight was placed on the fact that the application by the appellant was not opposed by any of the respondents in this matter. None of the five respondents filed any notice of opposition or opposing affidavits notwithstanding the fact that all the respondents were served with the application.

2. No due weight was placed on the fact that not only did the respondents fail to file any opposing documents, none of the respondents appeared in court to attend the hearing. All the respondents were in willful default. This clearly shows that the application for condonation was not opposed and none of the respondents were anxious to oppose the application. The honourable magistrate erred by dismissing the application which was not opposed and were on the face of it. The respondents had not opposed the application.
3. The learned magistrate misdirected himself by dismissing the application regard being had to the fact that the delay in filing the court application in terms of the magistrates court (civil) rules s 15 (15 c) was not inordinate and was for a short time. No prejudice was occasioned by the delay to any of the respondents. The court should have condoned the application.
4. There was a potential conflict of interest in that the magistrate who heard the matter in court was the same magistrate who confirmed the sale. The said magistrate should have recused himself from handling the matter in the interest of transparency and for justice to be seen to be done.
5. The balance of convenience favoured the granting of the application for condonation. There was no prejudice in the administration of justice in granting the application.
6. No due weight was placed on the fact that the appellant had already filed an application under case 2608/15 in terms of the magistrate's court (civil) rules order 26 r 15 (15 c) which application had not been opposed by any of the respondents. This clearly shows the appellant was serious in prosecuting his case.

I must mention that the grounds of appeal were to a great extent tainted with evidence and unnecessarily repetitive. For example ground one and two point to the same aspect of attacking the court *a quo*'s decision on basis of placing weight on the fact that the application for condonation was not opposed.

Another example is ground number five which is not a ground of appeal but mere submission of evidence in support of the appellant's version of the appeal. The magistrates' court (civil) rules are clear on how grounds of appeal should be couched. Order 31 (4) (b) "A Notice of Appeal or of cross appeal shall state the grounds of appeal, specifying the findings of fact or

ruling appealed against.” The grounds of appeal have to be concise and clear and not clouded as some of the grounds highlighted above.

The brief background of the matter is as follows.

The second respondent obtained a judgment in the sum of USD \$8 759-23 against the appellant in the magistrate court on 25 September 2013. The second respondent lodged its warrant of execution and the sale was concluded by private treaty on 7 January 2015. The house was sold for US\$19 000-00 which was the highest bid. On 19 January 2015, the sale was confirmed. On 20 January 2015 the appellant wrote a letter objecting the confirmation of the sale. It turned out this was not procedurally proper since objections in terms of the rules ought to be by way of application. Further, the appellant was already out of time as the sale had already been confirmed. Alive to being out of time, the applicant in objecting to confirmation of sale then filed an application for condonation for late noting of objection to confirmation of the sale. The application was not opposed by the respondent despite the respondents having been served. Further the respondents did not attend the hearing. The court *a quo* dismissed the application with no order as to costs. Aggrieved by the decision of the court *a quo* the appellant filed the present appeal.

What falls for determination is whether or not the appellant’s application for condonation for late filing of the application for objection to confirmation of sale should have been dismissed. The court *a quo* in its judgment among other reasons dismissed the application on the basis that the applicant (now appellant) despite knowledge of the sale did not attend and that there are no prospects of success in the main application for objection since the going price of \$19 000-00 was by private treaty and higher than the auction price of \$10 000-00.

It is settled that in applications for condonation the court has to consider the following facts:

1. The length or extent of delay.
2. The cause of delay and the explanation proffered for the delay.
3. The importance of the issue to be raised on appeal.
4. Whether there are prospects of success.
5. Potential prejudice to the other party and the interests of justice and fairness. See *Manikwa v Sino Zimbabwe Cement* LC/MD/13/08 and also *Kumbirayi v Berhaut* 1998

(1) ZLR 93, *Ellis and Whales v Macey Shoes Limited* 1993 (2) ZLR 17 AND *Bashiv v Secretary for Education* 1989 (2) ZLR 240 (H).

In considering applications for condonation for non-compliance with its rules the court, has a discretion which it has to exercise judiciously. The learned author Herbastein and Van Winsen echoed the same sentiments in their book, *The Civil practice of the Supreme Court of South Africa* 4th edition p 897-898.

The court in considering applications for condonation usually weigh the degree of non-compliance, the explanation for non-compliance, the importance of the case, the prospects of success, the respondent's interests in the finality of the matter, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. See *Maheya v Independent African Church* S 59/07.

In the circumstances of the case before the court *a quo* the appellant wrote a letter of objection instead of filling an application. The letter of objection Annexure 'A' pp 43 - 44 of the record was within time but unprocedural thereby leaving it open that there was no valid objection. The application was subsequently filed out of time and had of necessity to be preceded by an application for condonation. The delay was for about 8 days and the property that fell for execution is a residence and thus colouring the matter with importance as the property is not only of value but also a shelter. In the case of *Kodzwa v Secretary for Health and Another* 1999 (1) ZLR 313 (SC) it was held that the court has a discretion to grant condonation when the principle of justice and fair play demand it and when reasons for non-compliance with the rules have been proffered by the applicant to the satisfaction of the court.

In *casu* the appellant did not raise objection timeously and procedurally Order 27 r 7 15 (d) is apposite and it reads:

“if no objection is made to court within 7 days from the date a provincial magistrate declares the highest bidder to be the purchaser in terms of subrule (15a) from the date of sale by private treaty in terms of subrule 15 (b), as the case may be the provincial magistrate shall confirm the sale.”

The first objection raised by the appellant though unprocedural because he lodged a letter instead of filing an application would have been within the time limit. The delay in filing the application was for about 8 days and that in my view cannot be viewed as inordinate.

The applicant tendered an explanation that he raised objection by way of letter and upon being advised of the need to make an application proceeded to lodge an application stating interests in prosecuting the objection. The prosecution of the application for objection to the sale required condonation hence the application lodged with the court *a quo*. The application was not opposed but the magistrate dismissed it. Given that the subject matter is a residence and that the appellant filed objection within a period which even though out of time, cannot be termed inordinate delay and that the respondent did not oppose the application there was no basis for dismissing the application more so, when one considers that no prejudice will be occasioned on the respondent if the application for condonation is granted. The condonation would entail arguing the matter on merit and fully ventilating the matter to attain the interest of the administration of justice. Also given the unclear manner in which the property was sold by private treaty it being a residential premise that is shelter there are chances of success.

The sentiments by the appellant that the property was improperly sold and that it was sold for unreasonably low price in the face of no opposition from the respondent boost the chances of success on the party of the applicant. The failure to oppose despite knowledge of the application by the respondent can be viewed as acquiescence to the relief sought by the appellant. In an event the appellant's delay in objecting is not inordinate. When that is viewed in conjunction with the totality of the circumstances of this matter it tilts more in favour of granting of the application. I am alive to the policy requirements that there should be finality to litigation, however, such need to finalise litigation should not be at the expense of administration of justice. In the face of the minimal delay in filing objection to sale of a residence and the explanation tendered, the balance of convenience tilts in favour of granting of the unopposed application for condonation.

In the result, it is ordered that:

1. The appeal be and is hereby upheld.
2. The decision of the court *a quo* is set aside and substituted as follows
 - (a) The application for condonation be and is hereby granted.
 - (b) The appellant be and is hereby granted leave to file the application in terms of the Magistrates Court (Civil) Rules Order 26 r 15 (c) within 10 days of this order.
3. That each party is to bear its costs.

MUNANGATI-MANONGWA J: agrees.....

T.K. Hove & Partners, applicant's legal practitioners
Mtewa & Nyambirai, 1st respondent's legal practitioners
Scanlen & Holderness, 2nd & 3rd respondent's legal practitioners