ELIZABETH MAJONDO
versus
ERENIUS KUFAKUNESU MAKWANYA

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 21 March & 26 April 2017

Opposed Application – Rescission of judgment

I Mataka, for the applicant
J Dondo, for respondent

CHAREWA J: This is an application for rescission of a default judgment granted by this court on 31 March 2015.

The Facts

The facts of this matter are that, on 15 June 1995, this court made an order, in HC 4323/93, which, among other issues, ordered that matrimonial immovable property between the applicant and her then husband, John Efremu should be sold and the proceeds shared equally between the parties, in the event that either one of four conditions came to pass. In 2009, after the couple's youngest child was over 18 years of age, (which was the 4th of the conditions), the applicant's former husband sold the matrimonial property, which was registered in his sole name, but did not give the applicant her 50% share thereof.

The first time that the applicant knew or ought to have known that the property had been sold was when the respondent filed and served an application, in HC 894/10, seeking an order compelling transfer, against both the applicant and her former husband. The order was granted in default on 7 June 2010.

After he obtained the compelling order, the respondent then sought the eviction of the applicant by summons issued out of the Magistrates Court on 20 January 2011 in case number 294/11. The summons was served on the applicant personally in July 2011. She unsuccessfully contested the claim for her eviction in the Magistrates Court.

Thereafter, the applicant appealed against the Magistrates Court order for eviction which appeal was dismissed by this Court on 17 July 2012. A further appeal to the Supreme Court under SC 322/13 was withdrawn with costs *de bonis propriis* for failure to comply with the rules. A subsequent chamber application for reinstatement of appeal in SC 305/13 was struck off the roll on 3 October 2016.

By order of this court in HC 10618/11, the applicant's dereliction in seeking rescission of the order of 7 June 2010 was condoned on 21 March 2013. On 3 April 2013, and under HC 2612/13, the applicant sought rescission of the judgment compelling transfer granted on 7 June 2010.

Her application was opposed. She did nothing to prosecute it, resulting in the respondent setting it down, after due notice to her. In default of her appearance once more, her application was dismissed on 31 March 2015.

She then filed the present application on 5 October 2015 to set aside the order granted on 31 March 2015. (For reasons I cannot fathom, the current application, and the application dismissed on 31 March 2015 carry the same case number).

Be that as it may, there is therefore currently no application before the court seeking to set aside the judgment of 7 June 2010.

Further, the property has since been sold to an innocent third party who is not party to these proceedings.

The law

Rescission of judgment being an indulgence granted by the court, the issue to address therefore is: does the applicant have a good and sufficient cause to have the order made on 31 March 2015 rescinded. In that respect, she must satisfy a three legged test: that she has a reasonable explanation for her default; that she is *bona fide* in seeking rescission; and that she has a good and *bona fide* defence, on the merits, to the main matter, with some prospects of success. These three legs of the test must be considered individually and cumulatively.[1]

Because rescission of judgment is an indulgence granted by the court, it may not be granted were the default is wilful.[2]

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[1] See *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 400(S), *Barclays Bank of Zimbabwe Ltd* v *C International (Pvt) Ltd & Anor* S-16-86, *Stockil* v *Griffiths*1992 (1) ZLR 172 (S)
[2] See *Du Preez* v *Hughes NO* 1957 R&N 706 (SR).

The reasonableness of the applicant's explanation

The applicant lays the blame for her failure to prosecute her first application for rescission of judgment under HC 2612/13 squarely upon her legal practitioners, who, upon being properly served with the notice of set down, failed to inform her thereof, or to attend court themselves. By affidavit sworn to by Mr Blessing Nyamwanza, the legal practitioners in their turn laid the blame on their receptionist whom they claim was a relief receptionist who failed to inform the lawyers of the set down.

The respondent, quite rightly pointed out that the failure of the applicant's legal practitioners to act when required was her own failure. He therefore argued that she should be held liable for the legal practitioners' negligence. For this argument, the respondent stands on good legal principles as enunciated in this jurisdiction.[3]

However, it is my view that mistakes like these do happen in an office. Therefore, the extent to which a party should be excused from the failure of her legal practitioners must be determined by the circumstances of each case.

Wilful default has been defined as follows:

> "….when a defendant with full knowledge of the set down and of the risks attendant on his default, freely takes a decision to refrain from appearing…"[4]

Thus, the courts have sometimes excused failure to act where a functionary in the office of a party, or legal practitioner has caused a breakdown in communication.[5]

Looking at the current application, I would be inclined to condone the applicant's failure in that neither she nor her lawyers had full knowledge of set down and freely chose not to appear. I would be fortified in this indulgence by the fact that it is not disputed that the applicant was personally following up on her matter diligently, and that is why she learnt that default judgment had been granted, even before her legal practitioners were aware of the fact. And as soon as she discovered, on 25 September 2015, that her application had been dismissed in default of her attendance, she immediately caused this present application to be filed on 5 October 2015.

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[3] See *Winnie Simbi* v *Rugare Simbi* SC 164/04, *Beitbridge Rural District Council* v *Russell Construction Co (Pvt) Ltd* 1998 (2) ZLR 190(S) at190 and *S* v *McNab* 1986 (2) ZLR 280 (S) at 284A-E.
[4] *Neuman (Pvt) Ltd* v *Marks* 1960 (SA) 170 (SR) at 173 A-D per Murray CJ
[5] *Zimbabwe Banking Corporation* v *Masendeke* (supra)

Taken in isolation, I am therefore loth to find that applicant acted in wilful disdain of the rules in this particular instance.

The *bona fides* of the application for rescission

However, taken holistically, I believe the applicant faces the more difficult challenge of proving the *bona fides* of both this current application and her first application for rescission of judgment in filed on 3 April 2013.

This is more so when regard is had to the fact that the main order which is complained of was made on 7 June 2010. Despite the applicant being part to that matter, she defaulted in appearing before the court, a default which she also blames on her legal practitioners.

Further, even though her failure to apply for rescission of the 2010 order timeously was condoned by this court in HC 10618/11, she went on again to fail to capitalize on the court's indulgence, by pursuing her application for rescission until dismissal was sought, in default, by the respondent, on 31 March 2015.

In addition, the heads of argument filed on the applicant's behalf in support of the current application, are to say the least, most unhelpful to her cause as they are quite perfunctory and mostly devoted to an application for rescission in terms of r 449, yet this application is made in terms of r 63. In any event, no attempt is made, either in her pleadings or in her heads, to explain why, since 2010, the applicant has not diligently sought finality to this matter, thus impinging on the principle of finality to litigation.[6]

It seems to me that there ought to be a limit to which the court may continue to grant indulgencies and allow a party to drag a matter through the courts interminably, by always laying the blame on her legal practitioners, who are, after all her agents.

This is particularly so, since, the present application is only intended to rescind the order dismissing her first application for rescission of judgment. Should I find in her favour in the current application, she will then have to pursue her first application to rescind the order of 7 June 2010, seven years after the event.

This state of affairs, taken holistically, does not seem to me to indicate any *bona fides* on the part of the applicant in making this application, but that she seeks to frustrate the respondent from the enjoyment of property which he has bought, in circumstance where I am not convinced that such sale was illegal, or contrary to any court order.

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[6] See *Grace Chikuni Chinyepe* v *Nicholas Mapfumo Tsikira SC 187/94,*

Prospects of success on the merits

This obviously brings me to the issue of her prospects of success on the merits, to set aside the order of 7 June 2010, or even to have the sale to the respondent declared illegal.

The order of 1995, on which applicant premises her applications states, on the relevant part, as follows:

> "4. That the property, 44 Mubanga Street, Mabvuku be sold and proceeds be divided equally between the Plaintiff and Defendant provided that such a sale shall be executed only:-
> (a) When defendant dies or remarries or
> (b) When the defendant finds alternative comparable accommodation, or
> (c) When the plaintiff finds her and the minor children alternative comparable accommodation, or
> (d) When the youngest minor child (Rodgers) becomes 18 years old."

There is no dispute that when the property was sold to the respondent, the youngest child was over 18 years old. Therefore the sale was perfectly in accordance with the order of 1995.

There was nothing in that order saying that the applicant was to be consulted in the management of the sale, nor has applicant cited any authority to her assertion that the sale ought to have been with her knowledge and consent. In any event, the order of 1995, did not, in my view, give her any right to the property, but only to the proceeds of the sale thereof.

The applicant claims that the implication of the order was that she should participate in the sale, but sight must not be lost that the property was registered in the sole name of the applicant's former husband. It was not possible for any agreement of sale to include the applicant. And if her knowledge and consent was a pre-requisite, then it ought to have been a term of the order.

Consequently, it is my opinion that, even when the respondent made his application to compel transfer, it was not necessary for him to include applicant on the papers as she had no rights to transfer to him. I want to assume that he did that out of an abundance of caution to ensure the applicant was aware that he had bought the property, and at some stage would require her to vacate in his favour.

It seems to me therefore that the obligation to share the purchase price equally with the applicant rested solely on her erstwhile husband, the order so mandating being between the two of them and not enforceable against the whole world.

In the absence of a *caveat* against the property predicated on the order, there was no way any innocent third party would or ought to have known that this was matrimonial property which sale proceeds had to be shared with the applicant.

The applicant did not, in her pleadings, make any serious allegation that the respondent was aware of the court order of 1995 or its terms, or the personal circumstances between her and her husband. Her legal practitioner attempted to do so in oral submissions at the hearing, but in the absence of any proof to that effect in her application, I am not inclined to give any weight to those averments. In any event, the respondent denied them.

I note that the applicant appealed to this court, unsuccessfully, against her eviction from the premises pursuant to an order of the Magistrates Court in 294/11, based on the same grounds she raises herein: that the sale to the respondent was improper as she had not been consulted. As already stated in the summary of the facts, this matter went as far as the Supreme Court, and for one reason or another, was unsuccessful.

It seems to me therefore, that the applicant's prospects of success to have the sale set aside are next to nil. The applicant ought, in my view, firstly, to have safeguarded her interest in the property by registering a *caveat* against its title, or as soon as she learnt of the sale in 2010, ought to have sued her former husband for her share of the proceeds of the sale before he squandered it all.

I therefore find that the applicant has no prospects of success on the merits of this case. Cumulatively therefore, the applicant has not established good and sufficient cause for rescission of the order in HC 2612/13 of 31 March 2015.

I believe, it is time, for this court to put a stamp of finality to this matter by dismissing this application and giving the respondent some respite from the incessant litigation in this case.

In the result, there was no impediment against the respondent disposing of the property to an innocent third party, whose rights should not be disturbed.

In the premises, I make the following order:

1. The application for rescission is dismissed.
2. The applicant to pay the respondent's costs of suit.

Chambati Mataka & Makonese, applicant's legal practitioners
Dondo & Partners, respondent's legal practitioners