

RAPHEAL DERA JARAVAZA

versus

PERPETUA MAKOMBE

HIGH COURT OF ZIMBABWE
ZISENGWE J
Masvingo, 30 March, 26 May and 8 July, 2020

Opposed Application

E.C Muranda, for the applicant
S Moffat, for the respondent

ZISENGWE J: The applicant seeks condonation for filing his application for rescission of judgment out of time. The application has its roots in case No. HC 57/17 wherein respondent (then plaintiff) sought an order for the sharing of property acquired by the parties during the subsistence of their unregistered customary law union.

A perusal of case No. 57/17 reveals that the parties entered into the said union in 1974. It would endure for a period in excess of four decades before hitting turbulent times. This development sadly led to the parties separating. Pursuant to that the respondent approached this court for the aforementioned claim for the sharing (i.e. distribution) of the assets acquired during the currency of the union.

The applicant (then defendant) duly entered appearance to defend and in his plea raised a number of issues, chief among them his objection to the use of general law to the dispute. He believes the dispute should be resolved on the basis of customary law. Secondly, he objects to the actual award of the assets to the parties.

After the filing of the applicant's plea, the remaining pre-trial procedures progressed in fits and starts culminating in a Pre-Trial Conference (PTC) being held on 28 February, 2018.

The matter was then set down for trial. However on three separate occasions during the period stretching from June 2018 to June 2019 the trial failed to take off on account of the absence of either the applicant or his counsel or both. On each of those occasions, the matter would be postponed (with the concurrence of the respondent) on the strength of the explanation proffered (and accepted) for such absence.

However, on 2 July 2019, applicant (who was yet again not in attendance) was not as fortunate as respondent successfully applied for default judgment to be entered against him.

It is common cause that subsequent to that, the applicant failed to apply for rescission of that default judgment within the one month's period stipulated in Rule 63 of the High Court Rules, 1971. It is against the backdrop of the foregoing that the applicant seeks to be condoned for the late filing of his application for rescission of judgment. He avers in the main that his failure to appear at the trial in the main matter was occasioned by an unfortunate breakdown in communication between him and his erstwhile legal practitioner *Mr Mafa* of the law firm Mutendi, Mudisi and Shumba Legal Practitioners. This breakdown in communication was in turn the result of the fact that his mobile phone happened to be unreachable at the material time. He claims that he only became aware of the default judgment on 16 August 2019.

He further avers that the subsequent delay in the aftermath of becoming aware of the default judgment was as a consequence of relieving his erstwhile lawyers of his mandate coupled with his attempt to secure a replacement for him.

It is pertinent to note that the applicant at all relevant times was represented by counsel appointed for him by the High Court pursuant to his application to defend the matter *informa pauperis*.

On the merits, applicant claims that the distribution of assets granted in the default judgment with result in grave injustice to him if allowed to stand.

The main operative parts of the default judgment reads;

1. The defendant's plea be and is hereby struck off

2. The property known as Stand No. N 470 B, Dangamvura Township, Mutare registered in the defendant's name is hereby awarded to the defendant as his sole and exclusive property.
3. The property known as Stand No. 23916 Zimuto, Masvingo which is registered in the defendant's name, be and is hereby awarded to the plaintiff as her sole and exclusive property.

The default judgment also makes reference to other pieces of movable property, (mainly furniture and household appliances) however, it is the award of the two sets of immovable property above that is highly contentious.

The applicants avers that the immovable property awarded to him (the Dangamvura property) was disposed by him on 2015, long before the institution of the claim of sharing of property. He therefore contends that that property was no longer available for distribution. The corollary being that the award to the respondent of the only remaining immovable property (the Masvingo property) will gravely prejudice him as he is entitled to the same.

This application was opposed by the respondent who principally argues that the record (in case number HC 57/17) is replete with instances of applicant's dilatoriness. She maintains that the applicant has failed to treat court and court processes with the earnestness and seriousness they deserve as evidenced by his past lackadaisical approach and attitude which smack of disdain. By way of example she refers to the fact that applicant opted to file an application for a protection order against her in the Magistrates Court (at roughly the same time he was served with the court order of the default judgment) instead of promptly attending to the application for rescission.

The applicable law

In the case of *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) GUBBAY CJ synthesized the factors to be considered in an application for condonation generally, thus:

- (a) *That the delay involved was not inordinate having regard to the circumstances of this case.*
- (b) *That there is a reasonable explanation for the delay*
- (c) *That the prospects of success should the application be granted are good; and*
- (d) *The possible prejudice to the other party should the application be granted*

See also *Leonard Dzvairo v Kango Products* SC 35/2019; *Marick Trading (Pvt) Ltd. v Old Mutual Life Assurance Co. (Pvt) Ltd & Anor* HH 667/15.

The length of delay

There is rebuttable presumption in Rule 63(3) that the applicant has knowledge of the judgement within two days after the date of the default judgment. In this case, that the court order was served on the applicant on 14 August, 2019 is hardly in dispute. This much is confirmed by the return of service filed of record. This tallies with the applicant's own position that he only became aware of the default judgment on the said date. There is nothing on record to suggest that he became aware of it earlier than that. He has therefore managed to rebut the presumption referred to above.

Subsequent to the receipt of the court order, the current application was filed with the Registrar on 26 November, 2019 (some three and half months later). It is therefore that period between 14 August, 2019 and 26 November, 2019 that falls for consideration in the determination of whether or not the delay was inordinate.

In this regard in light of the nature of the dispute and what is at stake and more particularly in view of the reasons advanced for the delay which I will highlight below, I am of the view that the delay was not inordinate.

The reason for the delay

The applicant's explanation for the delay is essentially that being thoroughly dissatisfied with the services rendered by his erstwhile legal practitioner which culminated in default judgment being granted against him, he terminated the latter's mandate and then frantically sought to find his replacement. Unfortunately, so he says, time flew by resulting in the unfortunate delay.

Applicant's explanation is indeed borne out by the various correspondences filed in case number HC 57/17. These letters include the following:-

- (i) Letter by the applicant dated 9 October, 2019 directed to the Registrar of the High Court (the Registrar) and received by the Registrar on 28 October, 2019. In that letter applicant bitterly complains about the services he received at the hands of his then legal practitioner and wherein reference is made to his need to make an application for rescission of judgment

- (ii) Letter dated 29 October, 2019 by Mutendi, Mudisi and Shumba Legal Practitioners directed to the Registrar essentially indicating that they had no objection to a new legal practitioner being appointed for the applicant in their stead.
- (iii) Letter dated 4 November 2019 being the response by the Registrar to the applicant acknowledging receipt of his letter of complaint and advising him to seek legal counsel on how to proceed in view of the default judgment entered against him and further advising him that should he need to defend the matter *informa pauperis*, he should make the relevant application.
- (iv) Duly completed application form dated 11 November, 2019 by applicant for leave to defend/institute proceedings *informa pauperis*.
- (v) Letter dated 13 November, 2019 by Registrar appointing Messrs Mavhiringidze and Mashanyare Legal Practitioners to represent the applicant *informa pauperis*.
- (vi) This application being lodged on 26 November, 2019

It is therefore clear that the applicant did not sit on his laurels in the wake of having knowledge of the default judgment being granted against him. His explanation for the delay is not only reasonable but evidently truthful.

Prospects of success

As stated earlier, the applicant's main gripe with the default judgment is the question of the award of the Dangamvura property to him (and respondent getting the Masvingo property) yet according to him, the Dangamvura property should not feature in the distribution equation at all as he disposed of the same before the institution of the claim in HC 57/17.

To that end he attached a copy of the agreement of sale of the Dangamvura property entered into with one McFitzgerald Nyashanu Mutanga dated 17 November, 2015.

I am satisfied, therefore, that on a *prima facie* basis the applicant has managed to establish that he has a reasonably arguable case on the merits in the main matter. His intended application for rescission enjoys reasonable prospects of success so does his possibility of the court revisiting its initial award of the immovable assets should applicant successfully convince the court of the fate of the Dangamvura property.

Prejudice to the other party

Finally, save for the inevitable inconvenience (and expense) of having to troop back to court, there will be no serious prejudice to the respondent should this application be granted.

Accordingly, the application for condonation succeeds and the following order is hereby made:-

1. The application for condonation be and is hereby granted.
2. The applicant is hereby ordered to file his application for rescission of default judgment under case No. HC 57/17 within 10 (ten) working days of the granting of this order.
3. There be no order as to costs.

Mavhiringidze and Mashanyare, applicant's legal practitioners
Legal Resources Foundation – Masvingo, respondent's legal practitioners