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Judgment No. SC. 38/05

Civil Application No. 65/05

FREDDY TAVINGEYI v
(1) OTILIA MHAKA (2) CITY OF KWEKWE

SUPREME COURT OF ZIMBABWE
HARARE, SEPTEMBER 5 & 13, 2005

Before: CHEDA JA, In Chambers, in terms of Rule 5 of Part II as read with Rule 31
of the Supreme Court Rules

This is an application for leave to file a notice of appeal out of time in
terms of Rule 31 of the Supreme Court Rules.

The applicant's name is given as Freddy Tavingeyi, but the founding
affidavit was sworn to by one Pauline Tavingeyi ("Pauline"), who states she was
authorised by the attached Special Power of Attorney to depose to the affidavit. She
says the applicant obtained a provisional order in case No. HC 1024/02 restraining the
first respondent from ceding the rights, title and interest in stand No. 7935/4
Extension of Mbizo, Kwekwe. She does not state to whom the rights were being
ceded to.

The application was subsequently dismissed on 19 August 2004.
Pauline states that the applicant was never informed of this dismissal, and if he had

been notified he would have noted an appeal. She goes on to state that the applicant only became aware of the judgment some time in November 2004 after she, the deponent, received a notice to vacate the premises in late October 2004 from one Zodwa Furusa, who claimed to have bought the property from one Elias Tarisai, who is now deceased.

According to Pauline, the applicant got to know about the judgment in November 2004. He only came and granted her a Special Power of Attorney in order to note an appeal on 28 February 2005.

There is neither an affidavit nor an explanation from the applicant regarding these averments.

Even assuming that the applicant was not aware of the judgment from 19 August 2004 to November 2004, there is no explanation for the delay from November 2004 to 28 February 2005, when the applicant gave Pauline a Special Power of Attorney to note an appeal.

Pauline states that the applicant has been out of Zimbabwe since September 2003, and only managed to get permission to come to Zimbabwe towards the end of February 2005.

This cannot be true as the photocopies of the passport pages referred to as proof of the applicant's absence from the country indicate that there were several

departures from and arrivals in Zimbabwe by the person using the passport whose photocopied pages were attached to the papers. The passport bears date-stamps of September, October, November and December 2004.

The applicant has also failed to comply with the Rules of this Court.

Rule 15(2) requires that:

“The record shall be paged continuously throughout ...”.

The index on the papers refers to pages that are not marked on the papers and one has to count the pages in order to find the different pages.

Rule 31(1) of the Rules of this Court states as follows:

“An application that leave to appeal be granted or for an extension of time in which to appeal shall be by notice of motion signed by the applicant or his legal representative and shall be accompanied by a copy of the judgment against which it is sought to appeal.”

No such judgment was attached to this application.

In *De Kuzaba-Dabrowski and Uxor v Steel N.O.* 1966 RLR 60 (A) it was stated as follows:

“While each case must depend on its own merits, there are certain broad principles which the court may take into account. Some of these are –

- (i) The extent of the delay in failing to note the appeal;
- (ii) The reasonableness of the explanation for the delay;

- (iii) Whether the litigant himself is responsible for the delay;
- (iv) The prospects of success of an appeal, should the application be granted; and
- (v) The possible prejudice to the respondent, should the application be granted.”

In this case, I find that the applicant has not given any explanation at all for the delay after he was made aware of the judgment. He is clearly responsible for the long delay. The prospects of success cannot be assessed, as he has not bothered to provide the judgment appealed against as required by Rule 31(1). The attached cession documents are not helpful, as the cession from the Kwekwe City Municipality does not state to whom the cession was made.

I am not satisfied that the applicant has made out a proper case for me to grant him condonation for the late noting of the appeal.

The application is dismissed with costs.

Legal Aid Directorate, applicant's legal practitioners