CHIPO MUWANI
Versus
OBERT MUGUMWA
And
LOVEMORE CHIKONYORA
And
THE CITY OF HARARE

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 4 October 2022 & 15 February 2023

Opposed application

L.T. Muringani for applicant
T. Masenda for respondent

CHILIMBE J

BACKGROUND

[1] After hearing argument in this application for condonation by a barred party, I dismissed the prayer and gave reasons *ex tempore*. I now furnish written reasons at the request of applicant.

[2] At the heart of this matter is stand 3462,9th Crescent, Dzivaresekwa 2 Harare ("stand 3462"). Applicant contends that she purchased stand 3462 in the year 2000. First respondent claims to have acquired rights and interest in the same property as far back as 1986. Legal contests for the rights title and interest in the stand commenced in this court in the year 2001.The following are some of the orders that have been issued by this court with respect to various suits associated with stand 3462; -

1. HC 9067/01 per CHIWESHE J (as he then was) on 28/07/01
2. HC 8462/01 per KUDYA J (as he then was) on 09/07/08
3. HC 6575/16 per ZHOU J on 13/02/20
4. HC 3327/21 per CHINAMORA J on 21/07/21
5. HC 3327/21 per CHINAMORA J on 28/07/21
6. HC 4574/16 per TAGU J on 25/03/21

[3] The obvious fact emerging from the history of this matter is that the dispute simply needs to be put to rest. There must be finality to litigation[1].MAKARAU JP (as she then was) observed as follows in *Eugene Kondani Chimpondah and Another v Gerald Pasipamire Muvami HH 81-07 that; -*

> "To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute."

THE APPLICATION FOR CONDONATION

[4] The applicant seeks in the main, an order for the condonation of late filing of an application for to rescind the judgment granted against her in HC 8642/01 on 9 July 2008.Attached to this present application was the (unissued) application for rescission of judgment which present applicant proposed to issue once her bar was uplifted. That draft application was filed under rule 29 of the High Court Rules SI 202/21.like the present one, the draft application was backed by a 5-paragraph founding affidavit whose essence was that the judgment in HC 8642/2008 was erroneously sought and granted.

[5] The application was opposed by first respondent whilst second and third respondents expressed no interest. Applicant stated in paragraph 7 of her founding affidavit, that she had taken no steps to have the judgment against her set aside because it had superannuated. She also stated in the same affidavit that she became aware, however, that the same judgment had since been revived by the court on 7 March 2022. Two days later, applicant deposed to the founding affidavit and later instituted, on 24 March 2022, the present proceedings.

[6] The High Court Rules provide by rule 29 (2) as follows; -

> (2) Any party desiring any relief under this rule may make a court application on notice to all parties whose interests may be affected by any variation sought, within one month after becoming aware of the existence of the order or judgment. [Underlined for emphasis]

There was no explanation as regards why applicant did not simply proceed to file her "draft" application as soon as she became aware of the revived judgment. Which renders this

[1] *Ndebele v Ncube 1992 (1) ZLR 288 (S); Terera v Lock & 3 Ors SC 93-21; Lunat v Patel SC*

application ill conceived. The applicant came to court when no bar operated against her and on that basis alone, the application should have fallen.

THE LAW ON APPLICATIONS FOR CONDONATION

[7] The considerations which should guide a court faced with a prayer for condonation by an applicant in breach of the rules are well -established. CHATUKUTA JA restated these principles in *Lunat v Patel* SC 47-22 at page 5 as follows; -

> "THE LAW
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> The requirements for an application of this nature are well established. They are:
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> 1. The extent of the delay;
> 2. The reasonableness of the explanation for the delay;
> 3. The prospects of success on appeal;
> 4. Respondent's interest in the finality of the judgment in his/her/its favour;
> 5. Convenience of the court; and
> 6. Avoidance of unnecessary delay in the administration of justice.
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> See *Kombayi v Berkhout 1988 (1) ZLR 53 (S) 57G-58A*; Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa 4th ed at p 898. The requirements were rehashed by ZIYAMBI JA in *Zimslate Quartzite (Pvt) Ltd & Ors v Central African Building Society SC 34/17* where she held at p 7 that:
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> "An applicant, who has infringed the rules of the court before which he appears, must apply for condonation and in that application explain the reasons for the infraction. He must take the court into his confidence and give an honest account of his default in order to enable the court to arrive at a decision as to whether to grant the indulgence sought. **An applicant who takes the attitude that indulgences, including that of condonation, are there for the asking does himself a disservice as he takes the risk of having his application dismissed**." (own emphasis)".
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> Further, this court per DUBE J (as she then was) in *David Chiweza & Anor v Munyaradzi Paul Mangwana & 4 Ors HH 186-17,* was sounded the following reminder [see page 4]; -
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> "The court is required to consider the requirements for an application for condonation cumulatively and weigh them against each other. The application for condonation is not decided on one exclusive factor."

THE PRESENT APPLICATION

[8] The applicant`s founding affidavit as stated, was a brief two-page-eight-paragraph summary. Given the longevity of the dispute, one would have expected the applicant to set out in greater detail, facts addressing the six-point survey noted by the Supreme Court in *Lunat v Patel*. The applicant was involved in long-running legal duels with first respondent over the property. The explanation why (a) a judgment was obtained against her in default and (b) no steps were taken during the last 14 years to reverse it, was rather unclear.

[9] The period involved is grossly inordinate. These prospects of success are were not articulated with clarity. Applicant claims that the court,14 years ago, entered a judgment in error in that the court issued an order without a *declaratur*, citing "non-existent" persons as well as the person of Lovemore Chikonyora and not his office as executor of a deceased estate. In fact, applicant importantly argues that the order is brutum fulmen because it is inexecutable. Why a party in the circumstances of the applicant, would take steps to set aside a legally ineffectual order becomes puzzling. Even if the judgment order cited non-existent persons, its nature suggests that it could still be operable or enforceable through severability. In any event, it appears that the Sheriff is ready to execute on it.

[10] This matter is afflicted with undesirable longevity. The parties are fighting over a residential dwelling. As matters stand, the original seller was second respondent`s father who passed away in 1994.First respondent claims to have purchased the property in 1985.This means that for a period running into 34 years, he the matter of his rights, title and interest in stand 3462 remains outstanding.

[11] It is in the interest of justice and affected parties that there be finality to litigation. The courts cannot continue to entertain the same parties over the same dispute as note in *Kondani Chimpondah and Another v Gerald Pasipamire Muvami (supra).*

DISPOSITION

I find no merit in the application for condonation and will thus order as follow; -

Application for condonation of late noting of an application for rescission of judgment be and hereby dismissed with costs.

L.T. Muringani Legal Practice-applicant`s legal practitioners
R. Murambasvina Law Chambers-first respondent`s legal practitioners.

CHILIMBE J_____15/02/23