REMIGIO SIYAKURIMA
SELESTINA SIYAKURIMA
versus
MAJORY KUNAKA
and
SUSAN MACHI
and
DREWARD FRASER INTERNATIONAL
and
KAMA CONSTRUCTION (PVT) LTD
and
THE SHERIFF OF HIGH COURT N.O.
and
THE CITY OF HARARE

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 15 October 2024

Opposed Application

K Mawodza for the 1st and the 2nd Applicants
K C SIYEBA for the 1st respondent
No appearance for the 2nd to 6th respondents

TAKUVA J: This is an application for condonation of lake filing of a Notice of opposition and opposing affidavit. Applicants also applied for the upliftment of the bar currently operating against them. At the hearing counsel for the first respondent did not oppose the application for upliftment of the bar and it was accordingly lifted. However the application for condonation was opposed.

Background Facts

On 21 May 2021, the first respondent filed an application for a declaration in this court. This application was served on applicant's legal practitioners on the same day. The legal practitioners failed to reach the applicants due to network problems. Applicants who were not aware of this development did not make any personal efforts to communicate with their legal practitioners as they believed there was no urgency to do so since there were no outstanding matters

after the first respondent had withdrawn a matter she had filed against applicants under HC 6404/20.

The first applicant eventually talked to his legal practitioner on 30 June 2021. He was made aware of the application on that day and he instructed the legal practitioner to oppose the application. Unfortunately the *dies induciae* lapsed, hence this application.

Applicants' Case

The two contended that the application should not have been served on their legal practitioners but on themselves personally since this was a fresh application. The argument is that the legal practitioners did not have instructions to receive the application on applicant's behalf. When the legal practitioners received the application they made efforts to contact applicants to no avail. Applicant's legal practitioners then wrote a letter to the first respondent legal practitioners informing them that they (applicants' legal practitioners) did not have instructions to receive the application on applicants' behalf. First respondent legal practitioners were also advised to serve applicants with the application personally.

Nothing happened until on 30 June 2021 when first applicant dicided to make a routine call to his lawyers following up on the order for wasted costs tendered by the first respondent under HC 64 04/20. That is when applicants became aware of the case in HC 2455/21. They instructed their lawyers to immediately oppose the matter. It is Applicants' submission that the explanation they tendered is both reasonable and justifiable. Therefore the 30 days delay cannot be said to be inordinate. On the merits, applicants submitted that they have real prospects of success in the main matter in that they have a good defence. Their argument is that they are innocent purchasers and the balance of equities weighs heavily in their favour in that they made improvements on the property and effected possession.

The improvements consist a seven bedroomed house and three toilets. Also applicants have been in possession of the property for seven years. Both applicants deny committing fraud or any other crime in the process of acquiring the property.

As regards the like hood of prejudice on the first respondent, applicants argued that there is none and he even failed to highlight such prejudice in his opposing papers. It was contended that the balance of convenience favours the granting of this application. The interest of justice *in casu*,

in applicants' view can only be achieved if this dispute is finally determined on the merits. Finally applicants prayed that the application be granted.

First Respondent's Case

The application is opposed on numerous grounds. Firstly it was submitted that the policy of the law is that there should be finality in litigation. Secondly it was argued that the applicants have no *bona fide* defence to the first respondent's application. Thirdly, first respondent submitted that evidence that applicants were personally served with the application after their erstwhile legal practitioners returned it. The applicants' delay was thus inordinate. As regards reasonableness of the explanation for the delay, first respondent argued that a lie can not constitute a reasonable explanation. Applicants invented a lie and swore under oath that they were not served with the application. The court was urged not to come to the aid of the applicants because they were not candid with the court.

Reliance was placed on the following case;

(a) *ZIMSLATE QUARTIZE (PVT)*LTD ORS v *CENTRAL AFRICA BUILDING SOCIETY SC34/17 (b) H.J VORSTER (PVT) LTD v SAVE VALLEY CONSERUANCY* SC 20/14.

The first respondent contended that applicants have no good prospects of success should the application be granted in that they have abandoned their defence in the opposing affidavit filed out of time and adopted a new defence in this application. The defences between the defences is that in the earlier, applicants denied the existence of a double sale while in the latter they admit that they purchased the property through a double sale from the fourth respondent. What this means is that the applicants have not addressed their defence in the opposing affidavit. Their defence as respondents' in the main matter stands or falls on their opposing affidavits. For these reasons, first respondent concluded that the applicants have no propects of success and the application must be dismissed with cost on a punitive scale.

THE LAW AND ANALYSIS

The requirements for an application of this nature are pedestrian in our law. In *Mohdd* & *Ors* v *Lunga* (N.O) *ORS* HC 348/2013, it was held that;

> "The broad principles that guide the court in an application for condonation were set out in the case of *United Plant Hire (Pvt) Ltd* v *Hills* & *Ors* 1976 (1)SA 717(A) in the following words;

> "It is well settled that in considering applications for condonation, the court has discretion to be exercised judicially upon consideration of all the facts and that in the essence it is a question of fairness to both sides. In enquiry relevant considerations may include the degree of noncompliance with the Rules, the explanation therefore, the prospects of success on the merits, the importance of the case, the respondent's interest in finality of his judgment, the convenience of the court and avoidance of unnecessary delay in the administration of justice."

See also *Kodzwa* v *Secretary for health* & *Ors* 1999 (1) ZLR 313 (5) at 315 *B-E HERBSTEIN* & *WINSENIS* <u>*THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA*</u> 4TH *BY VAN WINSEN, CILLIERS AND LOOTS AT pp 897-898*

<u>*BESSIE MAHEYA V INDEPENDENT AFRICA CHURCH*</u> SC -58-07

In an application for condonation the following are the essential requirements;

(i) The extent of the delay and the explanation thereof

(ii) The prospects of success

(iii) Like hood of prejudice on the other party

<u>The extent of the delay and the explanation thereof.</u>

This requirement was well canvased in <u>Terera v Lock & 3 Ors</u> HH 93/2021 where the court stated that;

> "Where a litigant realizes that they have fallen foul of court rules, they ought to apply for condonation without delay. The litigant must give an acceptable explanation for the failure to comply with the particular rule and for delay in approaching court seeking condonation. One must satisfy the Court that the explanation is reasonable and deserves the court's empathy."

In the present matter the court application for a declaratory order filed by the first respondent under HC 2455/21 was served on the applicants legal practitioners on 21 May 2021. Unfortunately this was before the lawyers had received instructions from the applicants. Despite several attempts to communicate with Applicants, no contact was made.

Having encountered this hurdle, the applicants' legal practitioners wrote to the first respondent's legal practitioners and advised them to serve the application on the applicants personally. No response was forth coming from first respondent's legal practitioners.

Eventually, applicants' legal practitioners managed to contact the applicants but this was after the time period stipulated by the rules had already lapsed. Accordingly the (30) day delay cannot be termed inordinate. It is trite that a legal practitioner is mandated to act on a client's instructions and where there are no instructions, there is no mandate – see *Law Society Of Zimbabwe v Muramba tsvina* (HC48/23)

In the result, I find therefore that there is a reasonable and credible explanation for the delay to file the notice of opposition in the main matter.

PROSPECTS OF SUCCESS

The significance of possessing prospects of success in the matter was articulated in *Mahachi* v *Backlays Bank of Zimbabwe* SC 6/06 in the following words:

> "It is settled that where no acceptable explanation for noncompliance with the rules has been given by an applicant seeking condonation for the late noting of an appeal, one must at the very least show very good prospects of success if the indulgence is to be granted."

Similar sentiments were echoed in ESSOP v S (2014) ZASCA 114 where the court stated:

> "what the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore the applicant must convince this court on proper grounds that he has prospects on appeal and that these prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal."

In casu I find the first respondent's contention that applicants have no prospects of success in the main matter because they prevaricated as regards the nature of their defence to have no merit in that the dispute remains centered on the fact that the property is claimed by more than one person. How each claimant acquired rights is a question to be interrogated and answered in the main matter. On the facts at hand, the court will inevitably have to consider the issue of the balance of equities. See *Gusav v Moyo & Ors* 2000 (2) ZLR 588 (5). In light of these facts, I find that applicants possess real prospects of success in the main matter. Also although first respondent alleged that applicants were personally served with the application, no proof was placed before the court of such service.

LIKEHOOD OF PREJUDICE ON THE OTHER PARTY.

A court has a discretion to grant condonation when principles of justice and fair play demand it and when reasons for noncompliance with the rules have been proffered by the applicant to the satisfaction of the court. *Kodzwa* v *Secretary for Health & Anor 1999 (1) ZLR 313(SC).*

I agree with the applicants' submission that the interests of justice can only be achieved if this dispute is finally determined on the merits. On the facts of this matter, there is no likehood of prejudice on the first respondent. Applicants are the ones who have vacant possession and effected

improvements on the property. It is in the best interests of both parties that the dispute is resolved on the merits. The applicant have advanced good reason for noncompliance with the rules. Further they have also shown that the balance of convenience favours the granting of the indulgence.

In the result it is ordered that:

1. The court application for condonation of late filing of a Notice of Opposition and upliftment of bar be and is hereby granted
2. Applicants be and are hereby ordered to file their notice of opposition and opposing affidavits within ten days from the date of receipt of this order.

Mugiya Law Chambers, applicant's legal practitioners
Bherebende Law Chambers, first respondent's legal practitioners