

REPORTABLE (58)

EX TEMPORE

(1) KUNDAI MAKUZVA (2) YEUKAI CHEU (Nee MAKUZVA)

v

(1) VIOLA MACHERA (Nee MAKUZVA) (2) NENGOMASHA FAMILY TRUST (3) WILSON TATENDA MANASE N.O (In his capacity as executor of the estate late Muchandibaya Makuzva) (4) MASTER OF THE HIGH COURT (5) REGISTRAR OF DEEDS (6) VIRIMAI MAKUZVA

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, CHITAKUNYE JA & MWAYERA JA
HARARE: 17 MAY 2024**

T.L. Mapuranga, for the appellants

G.R.J. Sithole with *F. Zuva*, for the first respondent

B. Diza, for the second respondent

Ms *F. Chinwawadzimba* with *E. Mubaiwa*, for the third respondent

MWAYERA JA: This is the unanimous decision of this Court. This is an appeal against the whole judgment of the High Court handed down on 2 November 2022, in which the court *a quo* struck the appellant's and the sixth respondent's application off the roll. The application was for the nullification of two transfers of an immovable property in the estate of the late Muchandibaya Makuzva. The transfer of the property was firstly to Viola Machera nee Makuzva and subsequently to the second respondent, 'The Nengomasha Family Trust'.

In the court *a quo* preliminary points were raised. Firstly, that the applicants had no *locus standi* to bring the proceedings. Secondly, that their claim was prescribed. The court *a quo* upheld the preliminary objections and struck the matter off the roll. Aggrieved by the judgment, the appellants filed this appeal. At the commencement of the hearing, counsel for the first, second and third respondents raised preliminary objections.

Mr *Diza* for the second respondent argued that, the fact that the sixth respondent who deposed to the founding affidavit *a quo* was not an appellant, invalidated the appellants' appeal. Upon engagement with the court on the propriety of the appellants' adoption, in clear terms, of the founding affidavit as deposed to by the sixth respondent, counsel properly abandoned the preliminary point. He also raised issue with the competence of the relief of remittal, sought in the absence of an appeal by the sixth respondent.

Mr *Mubaiwa* for the third respondent raised 3 preliminary points. Firstly, that the notice of appeal was invalidated by the indication that the appeal was against the whole judgment of the court *a quo*, when the notice attacked only one part. He further submitted that the appellants could not impugn the part of the judgment relating to the sixth respondent. He argued also that the relief sought was incompetent because the merits of the matter had already been determined in another matter. Counsel further raised the point that the appeal was also invalidated by the non-compliance with the requirements in terms of r 11 of the Supreme Court Rules 2018, (the Rules), to file proof of service of the notice of appeal on all respondents. Such non-compliance was said to be in regard to the sixth respondent only.

Mr *Sithole*, for the first respondent, weighed in on the submissions that the failure to file proof of service on the sixth respondent rendered the appeal fatally defective.

Mr *Mapuranga* for both appellants contended that the appeal was properly before the court, as the appellants seek the setting aside of the whole judgment of the court *a quo* and remittal for determination of the matter on the merits. He further submitted that the relief sought is a competent relief, as the matter was not determined on the merits. He argued that the appellants are not precluded from appealing a judgment that affects them, even in the absence of the sixth respondent. Counsel conceded that proof of service on the sixth respondent had not been filed. He however sought condonation from the bar on the premises that this was due to inadvertence on the part of the instructing lawyers. Before the rising of the court, counsel advised that he had since arranged, while the court was still in session, for the uploading of proof of service on the sixth respondent onto the IECMS platform and that this had been done while the court was in session.

In the court's view, the filing of proof of service is provided for in peremptory language and has to be done within reasonable time. Non-compliance would therefore render the matter to be improperly before the court. In any event, and more importantly, rule 11B (4) of the Rules stipulates that the lodging of such filed process with the Registra shall be done not more than forty-eight hours after such service. The belated oral application for condonation by Mr *Mapuranga* premised on alleged inadvertence on the part of the instructing practitioners, does not warrant the indulgence sought. The filing done whilst the court was in session, does not avert the consequences of non-compliance. More so even if the court was to be inclined to condone such late filing of the proof of service, the appellants faced the insurmountable challenge of their failure

to effect proper service on the sixth respondent. This is so because the indication on the belatedly filed proof of service shows that the sixth respondent is out of the court's jurisdiction. This fact brings into question the appropriateness of the service effected on a post at the farm and also on the social media WhatsApp platform.

In our view the determination of the preliminary point is dispositive of the matter as we cannot relate to a matter that is improperly before us.

In the circumstances, it becomes unnecessary to determine the other preliminary points raised by the respondents.

In the result the court orders as follows:-

“The matter be and is hereby struck off the roll with no order as to costs.”

MAVANGIRA JA : I agree

CHITAKUNYE JA : I agree

Zinyengere Rupara Legal Practitioners, appellants' legal practitioner

Bruce Tokwe Commercial Law Chambers, 1st respondent's legal practitioner

Mhishi Nkomo Legal Practitioners, 2nd respondent`s legal practitioner

Manase & Manase Legal Practitioners, 3rd respondent`s legal practitioner