REPORTABLE (46)

EARNEST RAMBAYI TAURAYI
v
(1) RICHCLOVER (PRIVATE) LTD (2) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
HARARE: 28 AUGUST 2024 & 29 MAY 2025

R.H Goba & *T.LGandazha,* for the applicant

D. Tivadar, for the first respondent

No appearance for the second respondent

IN CHAMBERS

CHIWESHE JA:

This is an opposed chamber application for condonation of noncompliance with the rules and for an extension of time within which to file and serve an appeal in terms of r 43(1) of the Supreme Court rules, 2018. The applicant intends to appeal against the whole judgment of the High Court (the Court *a quo*) sitting at Harare, handed down on 28 June 2024, wherein the court *a quo* dismissed his application for *rei vindicatio* with respect to a certain piece of land described as Stand Number 993 Salisbury Township measuring 892 square meters, situated in the district of Salisbury (the property). The court *a quo* proceeded instead to confirm the first respondent's title in the property.

Aggrieved by the decision of the court *a quo*, the applicant noted an appeal to this Court under SC627/24. The appeal was however noted out of time hence the present application for condonation and extension of time within which to file and serve the appeal.

THE FACTS

The dispute between the applicant and the first respondent revolves around the acquisition and ownership of the said property. The background facts to this matter are succinctly captured by the court *a quo*. They are as follows. Until 1996 the applicant was the registered owner of this property, situated in the Harare central business district. He then sold the property to an entity called ENPA (Private) limited. Thereafter the applicant sought to resile from the agreement of sale. ENPA approached the court *a quo* armed with an application for specific performance of the agreement of sale. CHATIKOBO J granted the application under judgment HH5/98. He issued an order directing applicant to sign all documents needed to pass transfer to ENPA, failing which the sheriff was directed to so sign such documents. The property was duly transferred to the purchaser and registered under deed of transfer DT 10698/99 in favour of Oztanir Investments (Pvt) Ltd (Oztanir). In August 2015, Oztanir sold the property to a company called Rich Clover (Pvt) Ltd, the first respondent in the present application. The first respondent obtained title under deed of transfer number DT 276/16.

In 2016, eighteen years after the initial sale per *CHATIKOBO J's* judgment, the applicant approached the court *a quo* with an application for the cancellation of Oztanir's title to the property. He cited a number of respondents including the first respondent herein. The applicant failed to timeously prosecute that application. As a result, the first respondent filed an application for the dismissal of applicant's application for want of prosecution. That application was granted by *TSANGA J* on 22 June 2017. The applicant's application for cancellation of Oztanir's title thus stood dismissed. However, on 3 July 2019, the applicant obtained an order by *MUSHORE J* in the following terms:

1. "Default judgment be and is hereby entered against the respondents.
2. The third respondent cancels Deed of Transfer number DT 10698/99 held over a certain piece of land situated in the District of Salisbury called stand 993

Salisbury Township, measuring 892 square meters in favour of the first and second respondents.

3. The third respondent revives Deed of Transfer Number 2874/91 held over a certain piece of land situate in the District of Salisbury, called Stand Number 993, Salisbury Township measuring 892 square meters in favour of the applicant.
4. Costs of suit on ordinary scale".

The first respondent challenged the authenticity of the above order which sought to reverse the order granted by TSANGA J. The court *a quo* also noted some discrepancies on that order by MUSHORE J, noting that the applicant's application to cancel Oztanir's title originally cited nine respondents. In the order by MUSHORE J, only five respondents were cited, while the first respondent herein, who held title to the property, had not been cited at all. It also noted that the same application had been dismissed by TSANGA J in 2017 for want of prosecution. However, the record of proceedings leading to the order by MUSHORE J did not have any application for the reinstatement of the applicant's application that had been dismissed by TSANGA J for want of prosecution nor did it have any order rescinding TSANGA J*'s* judgement. The court *a quo* noted that counsel for the applicant had urged it to assume that such reinstatement had been applied for and granted!! The court *a quo* rejected that suggestion, more so because the applicant had not pleaded that fact nor had he tendered proof of the existence of such application and such order.

None the less, armed with the order by MUSHORE J, the applicant approached the Registrar of Deeds to effect cancellation of Oztanir's title deed held under deed of transfer DT 10698/99, which cancellation was duly effected. The applicant also sought the cancellation of the first respondent's title deed held under deed of transfer number DT 276/16. Initially the Registrar agreed to do so but later changed his mind indicating that the first respondent's title deed had not been included for cancellation in MUSHORE J's order. In fact, the first respondent had not even been cited as a party in those proceedings.

Aggrieved by the stance taken by the registrar in refusing to cancel first respondent`s title to the property, the applicant approached the court *a quo* for relief. It filed under HCH 6324/23 an application for *rei vindicatio* seeking the eviction of the first respondent from the property. On its part, the first respondent filed under HCH 238/24 an application seeking a declaration to the effect that there being no court order cancelling its title to the property, there was no basis upon which its title could be cancelled. It also sought cancellation of the applicant`s revived title deed and the revival of its cancelled deed of transfer.

The two applications were consolidated and heard together. They were both determined in one composite judgment. After hearing arguments, the court *a quo* dismissed the applicant`s application for *rei vindicatio* and granted first respondent`s application for a declaratory order and revival of its title deed. The applicant was ordered to pay costs on the legal practitioner and client scale.

Aggrieved by that decision, the applicant noted an appeal to this court. He did so out of time and now seeks the indulgence of condonation.

THE LAW

In order to succeed in an application of this nature certain requirements must be met by the applicant. In *Mzite* v *Damafalls Investments (Pvt) Ltd* SC 21/18 BHUNU JA stated a follows:

> "The requirements for the application of this nature to succeed are well known as outlined in the case of *Kombayi* v *Berkou*t 1988 (1) ZLR 53(S). These are:
>
> 1. The extent of the delay.
> 2. The reasonableness of the explanation for the delay.
> 3. The prospects of success on appeal."

POINT *IN LIMINE*

The first respondent raised a point *in limine* to the effect that the applicant should not be heard until such time as he would have paid the costs in HC 6324/23. However, this point was not pursued in argument and must be deemed to have been abandoned.

THE EXTENT OF THE DELAY AND THE REASONABLENESS OF THE EXPLANATION THEREFOR

The applicant's explanation for the delay amounts to a strange dilemma on the part of its legal practitioners who left matters unattended until the very last day of the *dies induciae* and, even on that day, were undecided as to whether to pay the required fees through the bank or directly at the office of the Registrar of this Court. In the result, they did neither and found themselves out of time. Whilst this explanation for the delay is untidy, the delay itself is not inordinate and, for that reason, condonation may be extended to the applicant.

PROSPECTS OF SUCCESS ON APPEAL

The applicant has no reasonable prospects of success in the intended appeal. That is so because the applicant's case is predicated upon the order by MUSHORE J. It is not in dispute that the first respondent was not party to the proceedings leading to that order. It is also not in dispute that the said order only cancelled Oztanir's title to the property but not the first respondent's title. Despite that fact, the applicant persuaded the Registrar of Deeds to cancel the first respondent's title deed on the grounds that the first respondent's title having been obtained from Oztanir and Oztanir's title having been cancelled by order of court, the first respondent's title could no longer be sustained. The applicant reasoned that only his title was valid to the exclusion of others, it having been revived by the order given by MUSHORE J. It

was for that reason that it approached the court *a quo* by way of *rei vindicatio* to recover its property from the first respondent.

The court *a quo* dismissed that application for the reason that, *inter alia*, the Registrar of Deeds had no power to cancel title in the absence of a court order. It set aside that cancellation and reinstated the first respondent's title deed. The decision of the court *a quo* in that regard cannot be faulted. Section 8(1) of the Deeds Registration Act [*Chapter 20:05*] provides, in clear and unambiguous language, as follows:

> "**8. Registered deeds not to be cancelled <u>except</u> upon order of court**.
>
> (1) Save as is otherwise provided in this Act, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled except upon an order of court." (Own underlining)

In casu it is not in dispute that the order of MUSHORE J did not include, for cancellation, the first respondent's title deed. That being the case, the registrar's actions, in purporting to cancel such deed, contrary to the above provisions of the Deeds Registries Act, were null and void. The court *a quo's* decision in that regard cannot be faulted.

In addition, the applicant was unable to provide proof that TSANGA J's judgment, dismissing his application for want of prosecution had been set aside or, conversely, that its application had been reinstated. In the absence of such proof it must be held that TSANGA J's judgment is extant and that the applicant's application stands dismissed for want of prosecution. Until TSANGA J's order is set aside and the applicant's application reinstated, MUSHORE J's judgment must be vacated, leaving the applicant with no leg to stand on.

DISPOSITION

For the reasons given above it is my view that the intended appeal has no prospects of success. The present application cannot therefore succeed. Costs will follow the cause.

Accordingly, it is ordered as follows:

"The application be and is hereby dismissed with costs."

C. Mpame & Associates Legal Practitioners, applicant's legal practitioners

Whatman & Stewart Legal Practitioners, 1st respondent's legal practitioners