ISABEL SIBANDA

Versus

THE ASSISTANT MASTER N.O.
C.J. MBEREWERE (MAGISTRATE)

And

ESTATE LATE ALFRED ZACHARIA SAMUEL MUCHINAPAYA (represented by Nyasha Emmanuel Muchinapaya)

And

NYASHA EMMANUEL MUCHINAPAYA

And

GOKWE TOWN COUNCIL

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 8 JUNE 2020 &11MARCH 2021

Opposed Application

B.A Chifamba, for the applicant
No appearance for the1st and 4th respondents
A. Sibanda, for the 2nd and 3rd respondents

MABHIKWA J: The applicant filed an application for condonation for late filing of an application for review in terms of Order 3 Rule 359 of the High Court Rules, 1971. She sought the relief that it be ordered that;

> "1. The application for condonation of the late noting of an application for review be and is hereby granted.
>
> 2. The applicant be and is hereby granted leave to file the application for review of the proceedings in DRGK 92/10 within ten (10) days of this order.
>
> 3. The 2nd to 3rd respondents are to pay the costs of this application on a higher scale."

Brief history

The brief history of this matter makes sad reading. In my view it is also a matter that has unnecessarily dragged and caused not only the court but the litigants themselves so much expense, wasted time and anxiety. All this would have been avoided if at the very beginning

everyone had acted without rushing but rationally. Unfortunately, the matter went down a sloppy fall replete with irregularities and in explicable actions in some cases.

What appears on record is that on 16 October 1965 in Salisbury, the now late Alfred Zacharia Samuel Muchinapaya married Shumirai Muchinapaya (nee Chimuka) in terms of the Marriages Act then (Chapter 37). Twenty-two (22) years later on 29 May 1987 the late Alfred Zacharia Samuel Muchanapaya married the applicant, Isabel Muchinapaya (Nee Sibanda) in Bulawayo in terms of the African Marriages Act, then (Chapter 238).

In 2006 and during his lifetime, the now late Zacharia Alfred Smauel Muchinapaya wrote an affidavit to the Gokwe Town Council, instructing the Council to transfer a stand acquired in 1995, number 3634 Sesame 1, Gokwe into the names of the applicant. The Council obliged and the change of ownership was done.

In September 2010 (4 years later), Alfred Zacharia Samuel Muchinapaya died. Let me hasten to mention at this stage that as can be seen from the above, stand number 3634 Sesame 1, Gokwe was not registered in his names when the late Muchinapaya died. *Prima facie*, it was not estate property. No one knows under what circumstances or for what reasons the house ownership was changed by Muchinapaya himself, but it was some years before his death. Annexure 'A' which is a letter by a Mr Mandeya, a Town Secretary for the Gokwe Town Council shows that Muchinapaya instructed Council to change ownership well before his death.

On 14 November 2010, four (4) relatives, who actually included Shumirayi Muchinapaya and the applicant (Isabel Muchanapaya) appeared before a magistrate in Gweru in his capacity as Additional Assistant Master. The relatives appointed the 3rd respondent (Nyasha Emmanuel Muchinapaya) heir to the estate of Zacharia Samuel Muchinapaya. In that "Declaration by Relatives", Shumirayi was declared widow 1, whilst Esabel was declared widow 2. The 3rd respondent is in fact Shumirayi's son.

Surprisingly, when he took up the administration of the estate and its execution, 3rd respondent began treating the applicant as a complete stranger. He even states in his opposing affidavit, paragraph 9, ad para 9, that;

> "The marriage between my late father and my mother did not have provision for a first and 2nd wife. It was a monogamous marriage. Thus the attempt to refer to the first and second wife does not hold water. It was simply found by the court a quo to be a worthless argument by the applicant and her lawyer."

Thereafter, it appears that the matter was driven by emotions leading to a series of irregularities. In my view *Mr Mashanyare* for the applicant articulated the irregularities well. They are grave and too many to ignore. Unfortunately, the Additional Assistant Master allowed himself to be overwhelmed by the emotions of the heir. For instance, the Assistant Master declared that it was the applicant's duty to produce proof that the house belonged to her and that it was her who constructed it and not the late Muchinapaya. In fact what should have happened is just the opposite. Where property is not in the name of the deceased at the time of his death, if the executor or a beneficiary believes that the property in fact is estate property, then it is the duty of the executor to sue and prove that fact. Applicant could not have been expected to sue and prove ownership of property registered in her name, moreso long before

the deceased's death. See HOLMES JA in *Ockland Nominees Ltd* vs *Collivia Mining Investments Co. Ltd* 1976 (1) SA 441 @ 452 where MATHONSI J (as he then was) quoted him with approval in *Zavaza & Anor* vs *Tondore & Ors* HH-740-15 that;

> "If the law did not jealously guard and protect the right of ownership and the correlative right of the ownership to his or her property then ownership would be meaningless and the jungle law would prevail to the destruction of legality and good order".

And in *Nyandoro & Anor* vs *Nyandoro* HH-89-15 it was held that;

> "… the position in our law is that property that is solely in the husband's name belongs to him."

By parity of reasoning, property that is not in the husband's name at the time of his death but in the name of his wife or some other person cannot be said to belong to him. It cannot be an asset in his estate. The question therefore is whether the 2nd respondent should have insisted in writing the house number 3634 Sesame 1, Gokwe as an asset of the late Muchinapaya. Incidentally and surprisingly, he did not include in the inventory, the house given to his own mother (widow 1) by the late Muchinapaya, also before his death.

However, this is an application for condonation for the late filing for review. It is not to decide the merits of the administration of the said estate. The gravamen of this application is the inordinate delay in the filing of the application for the review and most importantly, the explanation given for the delay. The merits may only assist the court as one of the factors to consider in the exercise of its discretion whether or not to grant the condonation. I must re-iterate as other learned judges have done before that condonation will not be granted for the mere asking and the court should never be taken for granted in the observance of court rules and its time limits.

In *Chimpandah and Anor* vs *Muvami* 2007 (2) ZLR 326 H 328D-E.MAKARAU JP (as she then was) commented thus;

> "It is my further view that, when considering an application for condonation for the late observance of a rule of procedure before default judgment is given in the matter, the court should lean in favour of granting rather than refusing such an application. I am however not suggesting that prior to judgment, condonation should be granted for the mere asking. The applicant still has to satisfy the court that there is good cause to excuse the negligence and grant the indulgence."

In *K M Auctions (Pvt) Ltd* vs *Samuel & Ors* 2012 (1) ZLR 286 (S) condonaion was denied because the applicant's same lawyers kept on failing, more than once, to obey court rules. In October 2008 they appealed against a judgment granted by the High Court. The appeal was not pursued timeously. In October 2010, applicant filed an application for condonation and leave to file an appeal out of time. The reason was that in drafting the notice of appeal earlier, his legal practitioners did not specify if the appeal was against the whole or only part of the judgment of the High Court. He also averred that the prayer in the notice had been defective. The legal practitioner accepted that the defective notice of appeal was an oversight on his part. The application for condonation was granted.

The matter was set down for January 2012. Again he matter was struck off the roll on the hearing date for want of compliance with the Supreme Court Rules. In a further application for condonation, the same legal practitioner averred that the defects in the fresh notice of appeal had also been an oversight on his part. The court held that such had been a lack of diligence on the part of the applicant and his legal practitioner. The court "could not continue to be encumbered by applications for condonation caused by a legal practitioner's tardy performance of his work". In that case, the applicant was represented by a senior legal practitioner with considerable experience who was expected to be familiar with the rules of court.

I must say that *in casu*, the applicant ditched the legal practitioner who had failed to observe the court rules. In any event, it has not been alleged that the erstwhile legal practitioner was an experienced one. Generally, the courts are reluctant to visit the sins of a legal practitioner on his client especially in the face of a possibility of injustice being caused.

In *Forestry Commission* vs *Moyo* 1997 (1) ZLR 254 (S) per GUBBAY CJ (as he then was), the court set out the factors to be considered in an application for condonation as follows;

(a) That the delay involved was not inordinate having regard to the circumstances of the case;
(b) That there is a reasonable explanation for the delay;
(c) That the prospects of success should the application be granted, are good;
(d) The possible prejudice to the other party should the application not be granted.

The court only had to guard against the urge to redress an injustice to the extent of then *mero muto* granting condonation where no application for it has been made. It was held that an explanation is also essential before a court can exercise its judicial discretion to condone.

And in *FBC Bank Ltd* vs *Chiwanza* SC-31-17 GWAUNZA JA stated the following regarding visiting the sins of legal practitioners on litigants.

> "I found it quite tempting to follow the principle in MC Nab's case and would have done so but for the fact that I do not believe that it would be fair on the applicant to visit this particular "sin" of its legal practitioners on it. The matter concerned the interpretation of rules of issues naturally falling outside the applicant's sphere of knowledge or influence."

I agree with applicant's counsel that the sentiments expressed in *FBC Bank (supra)* apply with equal force *in casu*. I must say also that the more the possibility of injustice being caused if condoantion is not granted, the more the justification for the court to consider the reason for the delay, and further, the more the justification for the court to lean in favour of granting the application or condonation, where possible.

I have already said that the history of the matter makes sad reading. Apart from what has already been stated, a look at the said inventory will show that it comprises only of the house in issue – number 3634 Sesame 1, Gokwe as if the whole registration and administration of the estate of the late Alfred Zakaria Muchinapaya was simply meant to take away the house from the applicant. Without the house, there was no estate. It is common cause that the house

was not registered in the name of the late Muchinapaya at the time of his death. There is need to redress a clear injustice seemingly mischievously done. A host of other irregularities in the proceedings on DRGK 92/10 have also been shown. It is up to the Master's office thereafter to deal with them.

I will re-iterate that the essential question in review proceedings is not the correctness of the decision under review, but its validity. I am convinced that good cause has been shown for the relief sought.

Accordingly, I order as follows that;

1. The application for condonation of the late noting an application for review is hereby granted.
2. The applicant is hereby granted leave to file the application for review of the proceedings in DRGK 92/10 within ten (10) days of this order.
3. There be no cost of suit.

Mavhiringidze & Mashanyare c/o Dube, Mguni & Dube, applicant's legal practitioner
Mhaka Attorneys c/o Majoko and Majoko, 2nd and 3rd respondents' legal practitioners