REVESAI MUTAMBASERE
and
JOEL DZORANI
and
CHARLES KUNYANGARARA
and
NEVER JAKARASI
and
MAXIWELL MASVAVIKE
and
KEFFAS CHIGWIDA
and
KANISIMO MAPWANYA
versus
TAGMASS PROPERTIES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 25 January and 18 February 2022

Civil Appeal

F Munyamani, for the appellants
T T G Musarurwa, for respondent

MUCHAWA J: This is an appeal against the whole judgment of the court a quo in which an application for the condonation of late filing of an application for rescission of judgment was dismissed with costs.

The factual background to this matter is that a default judgment was granted against the applicants in 2005. That order was to the effect that the now appellants be evicted from Pumula Farm in Urungwe, Karoi. A warrant of ejectment and execution against property was then obtained in 2020 prompting the appellants to file the application for condonation of late filing of an application for rescission of judgment as they were way out of time in seeking a setting aside of the default order. The court a quo found that the delay was inordinate, there was no reasonable explanation for the delay, and there were no prospects of success on the merits and that there was need for finality to litigation. In the result the application was dismissed with costs.

On appeal before us the appellants have set out the following grounds of appeal:

1. The court a quo erred at law in its exercise of discretion when it concluded that appellants had not proffered any reasonable explanation for the delay in bringing

the application for rescission of default judgment when their explanation to the fact that they had been instructed to continue residing on the plots by the responsible Minister was reasonable.

2. The court a quo erred at law in its exercise of discretion when it concluded that the appellants had no prospects of success in the main matter when evidence had been placed before it to the fact that the farm in question being Lot 1 of Lot 1 of Pumula, had been compulsorily acquired by the Government of Zimbabwe hence it became State land and then offered to the appellants.
3. The court a *quo* grossly misdirected itself in its exercise of discretion when it dismissed an application for condonation of late filing of rescission of default judgment when the facts and evidence before it clearly warrants the court to grant the indulgence to the appellants.

At the hearing of the appeal Mr *Munyamani* abandoned ground of appeal 3 after Mr *Musarurwa* had raised the objection that the ground was imprecise. This was a proper concession as grounds of appeal must be clear and precise. We heard the parties on the remaining grounds and reserved our judgment. This is it.

Ground 1: Whether the appellants offered a reasonable explanation for the delay

Mr *Munyamani* submitted that the appellants had a reasonable explanation for the delay in bringing the application for rescission of judgment. The explanation proffered is that the appellants approached the relevant ministry which advised them to continue residing on the land in issue on the basis that they were holders of valid confirmation letters. The appellants blame their inaction on the fact that as lay persons they had no idea of the legal intricacies involved in getting the default order set aside so they took refuge in the Ministry advice. It was argued that since the respondent did not evict them from 2005 to 2020, they believed that the matter had been resolved by the Ministry.

Mr *Musarurwa* submitted that the court a quo did not err as it rightly observed that the explanation by the appellants for the delay was at variance pointing to some dishonesty. On the one hand they were saying they had only gotten to know of the eviction order against them in 2020 yet on the other, they were saying they knew about the order soon after it was granted from their counterparts but elected to engage in contemptuous politicking.

I can do no better than quote from the court a quo's reasoning:

> "The next point which has to be addressed is the explanation for the delay. The explanation has to answer to why after having had knowledge of the default judgment applicant still delayed applying in for rescission. In casu the applicants are offering different explanations at first they say they only got to know of the judgment when the messenger came to evict them in 2020. On the other hand they say they were informed of the judgment but they were advised to continue to stay on the farm by the Ministry of Lands and the District administers (sic) office. The evidence before the court proves that the applicants were aware of the court outcome when they defaulted court in 2005. However they chose to do nothing to vindicate their claim.

> If indeed they were facing transport fare challenges, in a space of a month they could have managed to raise the money to seek a reversal of the judgment clearly the applicants willfully chose not to pursue rescission of the default judgment. It is the courts (sic) view their explanation for the delay is not reasonable given the circumstances."

The respondent drew our attention to the role of the court in a matter such as this which involves the exercise of discretion, by reference to the case of *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S)

> "It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution----"

A look at the magistrates' reasoning above does not point to any error in the exercise of her assessment of the reasons given for the delay. She correctly picked out that there were two divergent explanations which indeed pointed to some dishonesty as to why the appellants had not acted timeously. She even considered that bus fare may very well have been a hindrance but concluded that it could not have taken the appellants up to 15 years to mobilize bus fare. To have then concluded that in the circumstances the appellants willfully elected not to pursue rescission of judgment, cannot be an error by any stretch of imagination.

The fact that the respondent did not immediately enforce the order does not detract from the fact that an order for eviction remained extant against the appellants, a fact they knew from 2005.

The appellants blame their ignorance of the law for failure to act timeously. They however said that they had entered an appearance to defend upon receipt of the summons as self-actors. They therefore knew that there would be adverse consequences if they did not respond to the summons. They also say that they even sent representatives on the date of hearing which resulted in the default order for eviction against them. They therefore had sufficient appreciation of the adverse consequences that would arise from totally ignoring any court process or order.

The arising issues are akin to what was stated in *Songore V Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) where the applicant had given contradictory explanations as *in casu.* The court held that an acceptable reason must be given for the delay and that one who puts forward a reason which is an insult to the intelligence of the court may have difficulties. This is exactly the position the appellants put themselves in and the magistrate cannot be impugned for finding that their explanation was not reasonable or acceptable in the circumstances.

Ground 2: Whether the Appellants have prospects of success

Mr *Munyamani* submitted that the appellants managed to show that they had prospects of success in the main matter because the land in issue being Lot 1 of Lot 1 Pumula also known as Circle S Farm was compulsorily acquired by the Government of Zimbabwe during the land reform programme and was then offered to the appellants. In support of the compulsory acquisition the appellants referred to general notice 382 0f 2003 and subsequent confirmation in schedule 7 of the Constitution of Zimbabwe Amendment (No. 17) Act of 2005. It was averred that this was why the respondent had not enforced its order because the land in question was State land. Further reference was made to section 290 of the Constitution of Zimbabwe to bolster this argument.

Furthermore, Mr *Munyamani* submitted that the respondent had never objected to the compulsory acquisition and the land should be taken as having been compulsorily acquired therefore. The court's attention was directed to case HC 7328/20 wherein CHINAMORA J was said to have granted an order for late filing of an appeal in a case involving the same land, respondent and other similarly situated farmers. We were urged to allow the parties to interrogate the matter on the merits. In addition we were asked to interrogate why the respondent did not execute the order in its favour for 15 years, save that it knew it had no right to the land.

It was also pointed out that the appellants generally have grown attached to this land in which they have lived for over 15 years as it has been their source of livelihood as farmers and that they have been burying their dear departed on this land.

On the other hand, Mr *Musarurwa* basically supported the findings of the court a quo that the appellants had no prospects of success. It was submitted that the court a quo correctly found, on the basis of the evidence before it, that the land was private property held by the respondent in terms of a title deed and that there was no evidence of compulsory acquisition. It was argued too that the magistrate's finding that the basis of the appellants' claim to the land were mere letters which had not been issued by the acquiring authority. It was pointed out that in fact, the letters showed entitlement to occupy Circle Ace Farm and not Pumula Farm which is the respondent's land.

Except for the mere say so by the appellants, there is no evidence on record to back up the assertion that Circle Ace/S Farm is the same as Pumula Farm. Mr *Munyamani* attempted to refer the court to record p 184 where there is a map. That map relates to Mashonaland West Province Karoi North Circle "S" subdivisions. The appellants' confirmation letters refer to Circle Ace Farm. The other map we were referred to is on record p 67. The map is unclear and has no key. It was difficult to relate the two maps nor to see where either farm is located nor the relationship between them. Even counsel could not properly explain the maps. Rather the map on record p 186/188 serves to show that Pumula Farm, like other farms like Goodhope, Mukunga and Vuka Estates, are outside and

around the subdivided Circle 'S' Farm. In the circumstances the court a quo cannot be faulted for finding that the appellant's letters showed an entitlement to occupy Circle S Farm which is different from Pumula Farm.

Mr *Munyamani* conceded too that the General Notice 381 of 2003 which they sought to rely on was in fact, only a preliminary notice to compulsorily acquire the land held under the title of the respondent which land is described as Lot 1 of Lot 1 of Pumula and the remainder of Pumula. There was no proof that the land was then subsequently acquired and the respondent backed up its case by producing title deeds still reflecting it was the owner of the land, which title deeds had not been cancelled or endorsed. Against this, the appellants produced mere confirmation letters from the District Administrator's office and not offer letters from the relevant Ministry of Lands.

With such evidence before it, the court a *quo* cannot be impugned for finding that the respondent had established a clear right entitling it to evict the respondents. The appellants failed to show that they had prospects of success on appeal. I note too from the respondent's submissions that this matter is now moot as the respondents who were evicted on 19 November 2020 and in October 2021 were then subsequently offered their correct land which is not Pumula Farm by the relevant Ministry.

In the circumstances we find that as the delay was inordinate, there was no reasonable explanation for the over 15 years delay and no prospects of success in the main matter, the appeal should fail for lack of merit.

Accordingly the appeal is dismissed with costs.

WAMAMBO J AGREES ----------

T Pfigu Attorneys, appellants' legal practitioners
Chigwanda Legal Practitioners, respondent's legal practitioners