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Judgment No. SC 19/07
Civil Application No. 174/05

INNOCENT KADUNGURE v CHERYL CHANDI KADUNGURE

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 15, & JULY 2, 2007

H Nkomo, for the applicant

G C Chikumbirike, for the respondent

Before: ZIYAMBI JA: In Chambers, in terms of rs 5 and 31(7) of the Rules of the Supreme Court.

This application should, as I understand it, be correctly termed an application for an extension of time within which to note a cross appeal. However it is headed: "APPLICATION FOR CONDONATION OF LATE NOTING OF COUNTER APPEAL".

This Court has reiterated time and time again that it cannot condone the late noting of an appeal as the appeal so noted is a nullity. It does not exist. How can it be condoned? What an applicant must apply for is an extension of the time within which to note an appeal (or cross-appeal as the case may be) and for condonation of his failure to note an appeal (or cross appeal) in the time prescribed. See for example, *Passmore Matanhire v BP Shell Marketing Services (Private) Limited* SC 113/04.

To add to the confusion, the remedy sought according to the draft order attached to the application is:

> "1. The time within which the Applicant is entitled to note an appeal (my underlining) against the judgment of the High Court in HC4393/00 be and is hereby extended by seven days from the date of this order.
>
> 2. The applicant be and is hereby directed to file and serve his notice and grounds of counter-appeal within seven days of this order...".

What should have been sought is an extension of the time within which to file a cross appeal (not a counter- appeal) and not an appeal since an appeal has already been noted by the respondent against the judgment of the court *a quo*.

In addition, the papers have not been paginated and indexed as required by the Rules of this Court ("the Rules") and, because of the volume thereof, make difficult reading.

The above begins the sad litany of errors which have beset this application. The history of the matter is as follows. The judgment was delivered on 8 June 2005. On the same day, so the applicant avers, instructions were given to his then legal practitioner, to appeal against part of the judgment. The last day for filing a notice of appeal in terms of the Rules was 29 June 2005. Indeed, the respondent filed a notice of appeal against part of the judgment on 10 June 2005 and served a copy on the applicant's legal practitioners. One would think that this would have alerted the applicant's legal practitioner to the fact that he must file a cross- appeal. The Rules (rule 33(1)) provide that this must be done within ten days of entry of the appeal. Thus the cross-appeal should have been filed by 24 June 2005.

No cross-appeal was filed. Instead, a notice of appeal was filed by the legal practitioner which was out of time by one month and five days on 1 August 2005.

Rule 34 of the Rules of this Court require an appellant to pay for the costs of the record or give to the Registrar an undertaking that such costs will be paid. This was not done. Nearly one year later, on 3 July 2006, the Registrar wrote to the applicant's legal practitioners advising them that the "appeal" had lapsed. This provoked some reaction. With a greater degree of diligence than displayed formerly, the legal practitioner, on 24 July 2006, filed an application for reinstatement of the appeal albeit some three weeks after the notification by the Registrar. No explanation is given by the applicant as to why it took three weeks for that application to be filed.

In due course the matter came before me and, there being no appeal to be reinstated, the application was denied. The Registrar advised the applicant's legal practitioners of the result of the application on 2 October 2006. Immediately upon receipt of the letter and with amazing alacrity considering his history of inaction in this case, the legal practitioner, on 4 October 2006, wrote to advise the Registrar in the following terms:

> "Your letter of 2 October 2006 refers.
>
> You will note that the written judgment was not available on 8 June 2005 as can be seen from the appellant's Notice of Appeal filed of record in our court application as annexure A.
>
> We respectfully point out that the judgment was only made available on 20 July 2006 as appears from the date stamp from the High Court. The appeal was accordingly filed within the requisite time period, a fact which you, by implication, acknowledged.

We would be grateful if you could draw this to the attention of the Honourable Judge."

Thereafter there was a period of silence from 4 October 2006 to 28 March 2007 when the instant application was filed - a period of in excess of five months in respect of which the applicant gave no explanation in his affidavit.

There was no explanation as to how the applicant came to be represented by its present legal practitioners and when. In short, there was no explanation for the applicant's inaction for five months.

It is now more than two years since the respondent filed its notice of appeal and served it on the applicant. The delay is inordinate.

The only explanation proffered by the applicant for the default is that his legal practitioner was of the belief that the time for noting an appeal in this Court was fifteen days from the date on which he had sight of the written judgment. This belief is unfounded as the Rule clearly states that time begins to run from the date of the judgment.

Rule 30 of the Rules of the Supreme Court of Zimbabwe ('the Rules') provides as follows:

"30. Time for entry of an appeal

An appellant shall institute an appeal within the following times -

(a) if leave to appeal is not necessary, by serving notice of appeal within fifteen day of the date of the judgment appealed against."

The time is reckoned from the date of the judgment. How can anyone, let alone a legal practitioner, read into the words "date of judgment" the meaning "date one has sight of the judgment"? If the judgment or order is delivered orally then the date of judgment is clearly the date of such oral delivery. If the judgment is handed down in written form the 'date of judgment' is the date of such handing down. This is elementary knowledge which every legal practitioner should have at his finger-tips. Yet infringement of this Rule carries on unabated despite the fact that the attention of legal practitioners continues to be drawn to the provisions of thereof. As a result, many 'appeals' are being struck off the roll with costs which are most likely being borne by the appellants.

Also, r 33 of the Rules clearly states that once an appeal has been noted the respondent may file a cross appeal.

Rule 33 provides:

> "(1) When an appeal has been instituted the respondent shall be entitled, within ten days of the entry of appeal in terms of r 29, to enter a cross-appeal."

Needless to say, the legal practitioner was also unaware of this Rule hence the noting of an appeal as opposed to a cross-appeal. Not only was the applicant's legal practitioner remiss in failing to file a cross-appeal within the time prescribed by the Rules, but when it was pointed out to him by the Registrar that his action in filing an appeal outside the fifteen days allowed was a nullity, he sought to argue with the Registrar the correctness of his actions without attaching any authority in support of his allegations. There is, of course, no such authority, but where a legal practitioner has been alerted in such a manner of the incompetence of his actions, I would expect the legal practitioner to back up with relevant authorities his argument to the contrary. Not so in this case. Instead,

there was a long silence of five months and then this application was filed with no explanation as to the reason for that delay. Accordingly, the explanation for the default is inadequate and in respect of the five months preceding the application, non-existent.

There can hardly be a worse example of disdain for the Rules of Court or incompetence and lack of diligence by a legal practitioner. It is deplorable that the Rules of Court are not studied or taken seriously by the legal practitioners who practise in those courts. It is part of a legal practitioner's legal duty to his client to ensure that he is well versed in the Rules of the court in which he appears on behalf of his client. Not to be conversant with the Rules constitutes, in my view, gross negligence on the part of a legal practitioner *vis-a-vis* his client.

But there is a further enquiry to be undertaken here and that is whether, in this case, the negligence of the legal practitioner ought to be visited on his client. The applicant does not deny knowledge of his appeal having lapsed, nor the fact that he deposed to an affidavit requesting that the appeal, which he believed to have been properly noted, be reinstated.

There is a certain degree of watchfulness which is expected of a client who has given instructions to his legal practitioner to act on his behalf. He is obliged to take an active part in ensuring that his case is being prosecuted with due diligence. There is a degree to which he cannot sit back and leave the matter in the hands of his legal practitioner. He must ensure that he is being kept informed of the progress of his case and change his legal practitioner if necessary in order to ensure that his case receives the

attention it deserves. He must exercise vigilance if he is not to suffer the consequences of his legal practitioner's incompetence and negligence.

The applicant, judging by his averments in his affidavit, was aware of the misdemeanors of his legal practitioner. He was aware of the lapsing of the appeal on or about 3 July 2006. He deposed to an affidavit on 24 July 2006 in an application in which he sought the reinstatement of the appeal. There is no explanation as to why it took as long as three weeks before the application for reinstatement was filed.

As was pointed out by Mr *Chikumbirike* for the respondent, letters from the office of the Registrar of the Supreme Court are not posted but placed in the pigeon-holes of the respective legal practitioners and collected therefrom by the legal practitioners. The applicant proffered no explanation for the gap of three weeks. When that application was refused, notification to the applicant was given on 2 October 2006. There followed the long and unexplained silence from 2 October 2006 to 26 March 2007 when this application was filed.

Certainly the applicant has displayed no desire to pursue his appeal or he would have taken some remedial action once he learned of the blunderings of his legal practitioner first with the lapsing of the appeal due to non-compliance with the Rules and then with the application for reinstatement of the non-existent appeal. In my view, no case has been made out for the exoneration of the applicant from the inaction, incompetence and lack of diligence of his legal practitioners.

Further, in a case of this nature, regard is usually had to the prospects of success on appeal as being one of the factors to be taken into account in determining whether to grant an application for extension of time within which to appeal.

The applicant has made no effort to present a case by which one could be persuaded that there are reasonable prospects of success on appeal. The main ground of appeal alleged in the draft notice of appeal attached to the application is that the learned Judge failed to properly take into account the relevant factors in s 7(4) of the Matrimonial Causes Act. The applicant takes issue with the grant by the learned Judge of a 30% share of the matrimonial home to the respondent on the grounds that the learned Judge did not "take into proper consideration" the fact that the respondent had acquired two immovable properties during separation, documentary evidence of which the court wrongly excluded. However, the learned Judge in her judgment said the evidence was not properly before the court and she could therefore not take it into consideration. It seems to me that, far from establishing that the apportionment was unjust, the applicant appears to have benefited from it, in that the applicant sold a "Borrowdale stand" in respect of which the court was of the view that the respondent should have been awarded a 30% share but the court declined to make that award on the grounds that:

> "The amount for which it was sold was not disclosed to the court. The court thus does not have sufficient evidence upon which an award may be made in respect to this property."

Where there is such an inordinate delay in complying with the Rules of court, as is the case with the instant matter, an applicant must show that the prospects of success are strong. In *casu,* the applicant has failed to satisfy me that there are reasonable, let alone strong, prospects of success on appeal.

In the result the application is dismissed with costs.

Mtetwa & Nyambirai, applicant's legal practitioners

Chikumbirike & Associates, respondent's legal practitioners