BEAULAH NDUNA
versus
VIRGINIA TAWENGWA
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 19 September & 25 October 2017

Opposed Application for Condonation

Ms *G Dzutiro,* for the applicant
R Dembure, for the 1st respondent
No appearance, for 2nd respondent

CHAREWA J: This is an application for condonation of late noting of appeal and extension of time within which to note an appeal.

Background

The dispute between the parties is in respect of rights and interests in the property in the estate of Late Tito Tawengwa called no.2 Dennys Close, Helensvale, Borrowdale. The property was registered into the deceased's name on 3 July 1987 under DT4591/87.

Since it was never disputed that the property was acquired before applicant's marriage to deceased, during the subsistence of previous relationships out of which children were born, and the applicant did not contribute to its acquisition, the sole issue the second respondent had to determine therefore was whether the applicant ever resided at the property at the time of the deceased's death for it to be termed matrimonial property.

On the evidence adduced before the second respondent made the factual finding that applicant did not reside at the property at the time of the deceased's death. Consequently she arrived at a conclusion of law that, on the principle enunciated in *Alex Chimhowa* v *Joyce Chimhowa & 3 Ors* HH 183-12, 6 Dennys Close was not matrimonial property and therefore that applicant was not entitled to any rights therein.

The second respondent thus made a definitive determination of the rights and interests in the estate on 4 March 2016, when she handed down a rendering in DR1238/06 in which she decided that the applicant could not be declared the sole beneficiary of the property. She therefore awarded the property to the deceased's children.

The applicant was aggrieved by that decision, contending that she is the surviving spouse entitled to be appointed the sole beneficiary in the estate. She therefore filed an application for the review of the Master's decision in HC 4469/16 on 29 April 2016. The application was dismissed on two preliminary points raised by the respondent, firstly, that the application fell afoul of Order 33 R257 and secondly, that the grounds for review were premised on points of law rather than gross procedural irregularities.

As a result, by the time HC 4469/16 was finalised, the applicant was out of time within which to file an appeal. Consequently, she filed this application on 19 October 2016, seeking condonation of late noting of appeal and an extension of time within to note her appeal against the Master's decision.

The first respondent opposes the application.

Facts

The applicant and the deceased got customarily married on 28 December 1996. The record shows that the estate property had already been acquired before the applicant's marriage and she admitted that she made no contribution towards its acquisition.

The deceased died in 2005 and the applicant, as the surviving spouse, was appointed executrix dative in 2006.

The record also shows that at the time of applicant's marriage, the deceased was in a customary relationship with one Morlene and already had several children from previous relationships, the eldest of whom is the first respondent.

On 13 February 2007, the applicant wrote to one Passmore Tavengwa, who was in occupation of the property, that, in her capacity as executrix, she wanted him to vacate the property so that she could carry out renovations. On 26 November 2007, Passmore Tavengwa having been unlawfully evicted, obtained a provisional spoliation order against the applicant in HC 6418/07. Subsequently, and in HC2580/10, the applicant obtained a consent order for the eviction of Passsmore Tavengwa.

Submissions

The applicant avers that because she is the surviving spouse, the estate property is matrimonial property of which she is entitled to be appointed the sole beneficiary. The matter is thus important and calls for a definitive pronouncement by the court. Further, she believes that the criticisms she levels against the Assistant Master point towards prospects of success on appeal and the procedural mistakes she made in the misinterpretation of the law and rules, which caused the delay, are reasonable explanations entitling her to be excused from her failure to abide by the rules. In any event, she avers that respondents will not be prejudiced by the delays emanating from her failure to adhere to the rules or in awaiting the final disposition of the matter on appeal. She did not address the issue of the convenience of the court and the requirement for finality to litigation.

The first respondent asserts that the applicant never lived at the property for it to be classified as matrimonial properly, particularly since the property was acquired before deceased had a relationship with applicant. Moreover, the applicant had her own house, 63 Huggins Close, Emerald Hill, where she lived. Thus her prospects of success are next to none. Further, her application falls short of meeting the rest of the requirements for applications of this nature in that applicant never explained, in her founding affidavit, either her delay in erroneously applying for review or in filing the present application. Further Applicant's explanation for the misinterpretation s 68J of the Administration of Estates Act and r 257 is incompetent as such mistake was by her legal practitioner who ought to have filed an affidavit therefor. And in any event, a lack of diligence by legal practitioner is never an acceptable explanation for non-compliance with the law and rules. In addition the first respondent submits that she and her siblings are being prejudiced by the lack of finality to litigation as the Master's determination has not been carried out since 2006 even though it remains extant. Nor is the case so important that it cries out for resolution in view of the fact that precedent has already been established setting out principles upon which a surviving spouse may be declared the sole beneficiary to property acquired before that spouse's marriage. Therefore the intended appeal is a frivolous inconvenience to the court.

The law

The law with respect to applications of this nature is trite.[1] The parties' heads of argument show that they are alive to the requirements that to succeed, a party must satisfy the court that

[1] See *KM Auctions (Pvt) Ltd v Adenash Samuel & Anor* SC15/12 @3

1. The degree of non-compliance is excusable or understandable
2. The explanation for such non-compliance is acceptable
3. The case is so important and critical that the non-compliance may be overlooked
4. There are reasonable prospects of success on appeal
5. The respondent's interest in the finalisation of the case is not unduly prejudiced
6. The court is not unnecessarily inconvenienced; and
7. The administration of justice is not unnecessarily delayed.

It is further trite that these factors are not exhaustive and in addition are interrelated such that the satisfaction of one does not necessarily counteract or cancel the other. Thus even if the prospects of success on appeal are excellent, where the degree of non-compliance is inexcusable, the court may decline condonation. The grant of condonation being entirely in the discretion of the court, these factors merely guide the court to exercise its discretion in a manner that balances the interests of the applicant, the respondent, the court and the administration of justice.

Analysis

The degree of non-compliance and explanation therefor

The decision sought to be appealed against was rendered on 4 March 2016. The applicant filed her application for condonation of late noting of appeal and extension of time within which to appeal on 19 October 2016 more than seven months later. She explains this by stating that prior to this she had erroneously followed the wrong procedure by filing an application for review on 29 April 2016.

The application for review was also out of time. In her founding affidavit in the current application, applicant proffers no explanation whatsoever why her application for review was out of time.

On 19 May 2016, she received first respondent's notice of opposition to the application for review informing her that she had followed the wrong procedure. During the hearing applicant's legal practitioner conceded that it was unreasonable to ignore the pointer in the notice of opposition that showed that her interpretation of s 68J of the Administration of Estates Act and r 257 was erroneous. Despite that, she proceeded to drag the first respondent through the entire process until the dismissal of her application for review on 11 October 2016, precisely on the grounds that had been pointed out to her in May 2016.

Upon dismissal of her application for review, the applicant waited a further 8 days before filing the present application on 19 October 2016. She advances no explanation whatsoever for this delay despite the clear jurisprudential position in our jurisdiction that an application for condonation of late noting of appeal must be filed immediately and if there is a delay, a reasonable and cogent explanation must be given.[2]

I grant that, the failure to properly interpret the law and the rules, as well as the failure to adhere to the time limits are matters within the purview of the applicant's legal practitioner rather than the applicant herself. However, I note that these failings have been met with stony silence from such legal practitioner. Yet it is trite that where a legal practitioner is to blame for any failure to abide by the rules or has misinterpreted the law, such legal practitioner must file a supporting affidavit as it is incompetent for the applicant to depose to matters which are not within her personal knowledge.[3]

I cannot but agree with the first respondent that the lack of diligence by the legal practitioner resulting in the applicant's non-compliance with the law and the rules cannot be an adequate or reasonable explanation for such non-compliance.[4] This is more so since the courts have already established jurisprudence that, beyond a certain point, a litigant will not escape the consequences of the failure of the legal practitioner to adhere to the rules.[5]

I am therefore in complete agreement with 1st respondent that, as in this case,

> "Where there has been a flagrant breach of the Rules of this Court in more than one respect, and where in addition, there is no explanation for some periods of delay and indeed, in respect of other periods of delay, no explanation at all, the application should not be granted whatever the prospects of success may be."[6]

Consequently I am not inclined to accept that the degree of non-compliance was excusable or that the explanation therefore is reasonable and acceptable.

Is the case so important that I may overlook the degree of non-compliance and the unreasonableness of its explanation?

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[2] See *Steven Kutiwa v Zimpost* SC85/05
[3] See *Bubye Minerals (Pvt) Ltd & Anor v Rani International Limited* 2007 (1) ZLR 22 (S) @25G-H. See also *Nguruve v Secretary of the Commission of Inquiry* 1988 (1) ZLR 244 (SC) @248
[4] *Auctions (Pvt) Ltd v Adenash Samuel & Anor @4(supra)*
[5] *Machaya & Muyambi* SC4-05
[6] See *PE Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794(A) @799D-E. See also *At the Ready Wholesalers (Pvt) Ltd t/a Power Sales v Innocent Katsande & 5 Ors* SC7/13

The principles applicable to a case such as this have already been clearly and adequately enunciated[7]; and these may be summarised thus:

1. Where property in a deceased estate was acquired prior to the subsequent marriage of the deceased, it must be proved that the surviving spouse was living at the property at the time of the deceased's death in order for the property to be declared matrimonial property to enable her to benefit.
2. Where the property is declared matrimonial property, but was acquired during the subsistence of previous relationships which begot issue, the surviving spouse cannot be declared the sole beneficiary to the exclusion of the deceased's children.

It was on the premise of the first principle that the second respondent made the factual finding that the applicant was not living on the premises at the time of the deceased's death and therefore that the property could not be declared matrimonial property.

An appellate court will not lightly interfere with factual findings made by a judicial/quasi-judicial officer who has the advantage of hearing witnesses, assessing their credibility and weighing their testimony together with any other evidentiary proof adduced.

On this basis alone I do not see that that this case is so important as to override the inconvenience to the court created by the applicant's failure to comply with the rules.

Prospects of success on appeal

While it is not the function of this court to decide on the validity of the notice of appeal, note must be made that in weighing the prospects of success, the court must perforce observe whether *prima facie*, the notice and grounds of appeal meet the necessary requirements in order to decide whether or not to grant condonation of late noting of appeal. *In casu*, the appeal is supposedly against the decision of the assistant master, yet the Notice of Appeal does not cite the Master as a respondent. It seems to me therefore that the notice of appeal is defective as it does not appear to meet the requirements of the Supreme Court Rules.[8]

Further, I do not see that the applicant has any prospects of success in her claim to be accorded sole beneficiary status for property acquired years before her marriage to the deceased in circumstances where factual findings were made that she did not contribute to or live at the property. The import of the *Chimhowa* case (*supra*) was to say that a surviving spouse should

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[7] *Alex Chimhowa v Joyce Chimhowa & 3 Others (supra)*
[8] See *Chamboko v Dorowa Minerals* SC 109-2011. See also *r7(a) Supreme Court [Miscellaneous Appeals and References] Rules 1975,*

not benefit from property which was acquired before her marriage and to which she made no contribution, to the prejudice of the deceased's children.

The current case is similar to the *Chimhowa* case in that both surviving spouses were married long after the property was acquired and made no contributions thereto. The only difference with this case is that in the *Chimhowa* case, the surviving spouse was living at the property, which was thus matrimonial property. However she was only granted a life usufruct as she made no contribution thereto. In the current case, the applicant was not even living at the premises and was therefore not entitled to a life usufruct, let alone sole beneficiary status.

Further, it seems that applicant is misguided as to the law enunciated in the *Chimhowa* case: that children only benefit when their mothers contributed to the acquisition of the property or were married to the deceased. The beneficiary status of children is not tied to the contribution of the other parent or the parents marital status: they benefit merely by being the deceased's children.

Further applicant seems to think that merely being a surviving spouse entitles her to sole beneficiary status. That is clearly an erroneous interpretation of the law as enunciated in *Chimhowa* (*supra*). It is clear from the plethora of cases between the parties that applicant only sought to move into the house in 2007 when she tried to unlawfully dispossess Passmore Tavengwa firstly by claiming she wanted to carry out renovations and secondly when she forcibly moved into the house without a court order. Paragraph 12 of applicant's founding affidavit that she and the deceased briefly moved out of the property to carry out renovations and left Passmore Tavengwa as caretaker is clearly intended to mislead the court as it is in contradiction to her own letter of 13 February 2007.

The law is clear. The surviving spouse is only entitled to ownership of the house she lived in at the time of the deceased's death.[9] In view of the fact that appellate courts are loath to interfere with findings of fact made by lower courts, it is highly unlikely that the Master's finding that the applicant did not live at the property will be upset. Even if that happened, at best applicant would, on the principles in the *Chimhowa* case, only obtain a life usufruct. However, in view of the fact that she does not want a life usufruct but sole ownership of the property, she has no reasonable prospects of success on appeal.

Prejudice to 1st respondent and the interests of justice

[9] See s68F(2)(d)(i) of the Administration of Estates Act

The decision of the Master was rendered on 4 March 2016 and has still not been implemented. Further this is an estate which was registered in 2006. Certainly, a delay of more than ten years in finalising the estate is not in the interests of speedy administration of justice. In addition, any delay in implementation of justice prejudices one or other party. *In casu*, the deceased's children have not been able to enjoy what their father worked for and provided as his children's inheritance. Further, the first respondent continues to incur unnecessary legal costs through incessant and unnecessary litigation, some of which, such as the present case, arise out of wanton disregard of the law and rules as well as lack of diligence.

I subscribe to the comments by GOWORA AJA (as she then was) that it is not in the interests of justice to deal with one matter on many occasions and thus clog the court roll, more so where this is occasioned by a party's laxity or lack of diligence on the part of legal practitioners as in this case.[10] There should be finality to litigation. Therefore, delays such as this, which arise from calls for courts to be charitable in condoning incompetence or lack of diligence by parties and/or their legal practitioners should be seriously discouraged, particularly where a matter raises no pressing cry for justice as in this case.[11]

Costs

I can find no fault with the first respondent's submissions that this application lacks merit and is a serious abuse of court process. The applicant and her legal practitioner seek to be rewarded for failing to comply with the rules and stubbornly persisting with procedurally incorrect processes. The first respondent has in fact kindly termed it lack of diligence, I would call it sheer incompetence: the notice of appeal is defective, no explanations have been advanced for failing to adhere to time limits, affidavits have been sworn by persons with no personal knowledge of what they are averring to, the legal practitioner has not bothered to explain why he failed to interpret the law correctly, and when this was pointed out, why he failed to rectify his mistake.

In addition the application for condonation and the intended appeal are frivolous and vexatious as, the appeal in particular exhibits a lack of appreciation of the law and established principles governing the right to benefit in deceased estates and patently has no prospects of success. I will venture to go further and state that this appears to be a case premised on sheer greed, where a litigant seeks to reap where she did not sow. I believe it is fair and just in the

[10] KM Auctions (supra) @ 5-6
[11] See Ndebele v Ncube 1992 (1) ZLR 288 (S)

circumstances that the first respondent should be safeguarded from further unnecessary legal costs with an order for costs on the higher scale.[12]

Disposition

In the premises I find the application to be without merit and order as follows:

1. The application for condonation of late noting of appeal and extension of time within which to appeal be and is hereby dismissed.
2. The applicant be and is hereby ordered to pay the first respondent's costs on the scale of legal practitioner and client.

Mutumbwa Mugabe & Partners, applicant's legal practitioners
Mabulala & Dembure, 1st respondent's legal practitioners

[12] Passmore Matanhire v BP & Shell Marketing Services (Pvt) Ltd SC 113/14