

MARY ANNASTASIA CADER
versus
THE ESTATE OF THE LATE PETER JOHN MARSH
and
WESENT INVESTMENTS (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 13 March 2017

Opposed matter

A Mufori, for the applicant
S Mohammed, for the 2nd respondent

MWAYERA J: On 13 March 2017, I dismissed an application for reinstatement of a court application for joinder which was dismissed under case HC 9454/16. The reasons for my disposition are availed herein.

The brief background to the application is as follows. The application for joinder under case number HC 5806/16 was filed on 9 June 2016; seeking to join in the second respondent to the proceedings under HC 10985/2004. The second respondent opposed the application on 22 June 2016. On 20 October 2016 the respondent successfully applied for dismissal of the application for joinder under case HC 5806/16 and got the order for dismissal under HC 9454/16. It is this dismissal which the applicant sought to be rescinded so as to reinstate the application for joinder.

The applicants argued that the delay in prosecution of the matter was occasioned by the fact that the applicant is an elderly woman who is based in Bulawayo. Further it was argued on behalf of the applicant that she was not in willful default as the lawyers wrote a letter to the respondents' legal practitioners on 14 July contents of which were to the effect that they had no further instructions from client after receiving the notice of opposition. It is against this background that the court should consider whether or not the application made is bona fide and whether or not the application for joinder should be reinstated.

“The rules of this court are framed for a purpose as has been pronounced in a number of cases. See *Jonesy Mandara v Tsitsi Chaseka* HH 42/08 wherein MAKARAU J (as she then was) stated at p 2 of the cyclostyled judgment “it is trite that pre-setting of rules of procedure is to date the widely acceptable manner of avoiding arbitrariness and ensuring fairness in airing of disputes by litigants.”

The applicant in this case did not seek to prosecute the application in the main matter that is application for joinder within the prescribed time. Further the applicant has not proffered a reasonable excuse for such failure. The address of service given is not in Bulawayo and even if it was, the applicant has to explain failure to file an answering affidavit for more than 3 months as having been occasioned by the fact that the applicant stays in Bulawayo. That is not a reasonable explanation for the default. The rules are clear on time frames. In terms of Order 32 r 236 (3) of the High Court Rules which states that “where the respondent has filed a Notice of Opposition and an opposing Affidavit and within one month thereafter, the applicant has neither filed Answering Affidavit nor set the matter down for hearing. The respondent on notice to the applicant may either:

- (a) set the matter down for hearing in terms of r 223 or
- (b) make a chamber application to dismiss the matter for want of prosecution.”

In the present case the respondent opted for an application the dismissal of the matter for want of prosecution and the order was granted. The sequence of events shows that the court application for joinder was filed on 9 June 2016. On 22 June 2016 notice of opposition and opposing affidavit was filed by the second respondent. On 16 September 2016 the second respondent filed the application for dismissal for want of prosecution. It was only after that application that the applicant filed an answering affidavit to the opposition to the joinder filed on 22 June. This is clearly more than 3 months after opposition. The applicant did not set the matter down or file the answering affidavit timeously. The respondent successfully sought dismissal of the application for want of prosecution. The question is, given the purpose of r 236 which is to ensure that matters brought to court are dealt with expeditiously does the applicant have a bona fide defence to the main matter so dismissed and does the applicant have a genuine explanation to show that he was not in wilful default when he did not prosecute the matter. See *Scontifin Ltd v Mtetwa* 2001 (1) ZLR 249.

In the present case the applicant did not show interest of having the matter expeditiously disposed for. The applicant refrained from setting the matter down for a 3½ months. The explanation tendered that the applicant resided in Bulawayo and that there was communication break down with lawyers' falls short of being satisfactory. Moreso, in light of the address of service in Harare and also the sudden interest after dismissal of the application. There is no satisfactory evidence substantiating why the applicant did not facilitate prosecution of the matter. The inactive stance of none prosecution of the matter is to the detriment of the second respondent who appears to be a *bona fide* purchaser of immovable property sold by the first respondent. Upon considering the requirements of rescission of judgment namely:

1. wilful default and
2. good and sufficient cause which emanates from the explanation of the default and the *bona fideness* of the defence. It appears there is no justification in finding in favour of the applicant.

In this case the requirements have not been satisfied. The applicant, conscious of the notice and affidavit of opposition as acknowledged by the lawyers who indicated they awaited further instructions, in the full knowledge and appreciation of the opposition the applicant deliberately refrained from actioning the matter in total disregard of the rules. The flimsy explanation of staying in Bulawayo does not exonerate the applicant from the willful default of not prosecuting the matter. That coupled with the merits of the case do not favour the rescission of the dismissal for want of prosecution. This is moreso when one considers the circumstances of the matter that the second respondent is just being dragged in and inconvenienced in a matter between the applicant and the first respondent.

It was for these reasons that on 13 March 2017, I dismissed the application for reinstatement of the application.