AMINA MUKUYA
versus
JESSE KAMWANZA

HIGHT COURT OF ZIMBABWE
MUZENDA J
HARARE, 13 September 2018

Opposed Application for condonation

Advocate F Chinwavadzimba, for the applicant
Ms *K Mukanhairi*, for the respondent

MUZENDA J: This is an application for condonation of late filing of an application for rescission of default judgment where the applicant is seeking the following order:

"IT IS HEREBY ORDERED THAT:

1. Leave be and is hereby granted to the applicant to make an application for rescission of default judgment granted against her in Case No. HC 3004/14.
2. The applicant is directed to file such application for rescission of default judgment within seven days of issuing of this order,
3. The costs of this application be borne by the respondent if opposed."

Background

The applicant, Amina Mukuya was customarily married to Austin Mukuya, who died on 15 November 2012 leaving 4 children. Sometime in 1981 the deceased acquired a lease within an option to purchase stand C63 Chegutu Township from Chegutu Municipality. The rental status granted to the deceased was upgraded to home ownership status in 1988. The papers from Chegutu Municipality show that one Imulani Mukuya acquired ownership of the stand in 1993, the record reflects cancellation of 2254/88 and registration of 3169/93 which reflects the names of Imulani

Mukuya. Sometime in 2014 Imulani Mukuya sold C63 Chegutu8 Township to the respondent. The respondent made an application for the eviction of the applicant and obtained default judgment against the applicant on 25 February 2015 under case No. HC3004/14 where CHIGUMBA J made the following order:

"IT IS ORDER THAT:

(a) Respondent be and is hereby ordered to vacate house number C63 Chegutu within seven (7) days from the date of this order, failing which the Sheriff of the High Court be and is hereby ordered to evict the respondent.

(b) Respondent to pay costs of suit."

Applicant became aware of the default judgment in October 2015 when she was served with a writ of execution by the Sheriff. She was evicted and locked out of the house. The Mayor of Chegutu, Mr L Gwanzura went to the subject house, C63, in the company of municipal police and unlocked the doors for the applicant. According to the applicant she believed that the Mayor was right in his actions and she never thought to have the order for eviction rescinded. She never concerned herself with the default judgment and accordingly she did not seek to rescind it. She however states that she was not in wilful default because she never got the summons. She further averred that she had the opportunity to peruse the record under case No. HC 3004/14 and she noted that the notice of intention to bar was served at No 6123 Glen Norah B, Harare. The return of service showed that it was served by affixing at the outer principal gate in a letter box on 23 August 2014.

She states that she is eager to prosecute her case and had it not been for the fact that she is a lay person who was misguided she would have made the application at an earlier stage. After the Mayor broke into the house and let her in the respondent instituted proceedings for contempt of court and when she was served with those papers, she consulted a lawyer. She opposed the contempt proceedings. When the matter was set down she did not attend court, her lawyer did attend and consented to the order though she had not instructed the lawyer to do that. She instituted proceedings to set aside the consent order for contempt proceedings. It then occurred to her that in order to sustain her position she needed to have the judgment granted in her default rescinded. In her papers she accepted responsibility for the delay but she attributes the delay to the intervention by the Chegutu Mayor. If she had been given proper guidance she would have made the application for rescission of default judgment timeously and ensured that the matter was prosecuted without

any further delay. She regrets the inconvenience caused. To the applicant she strongly believes that she has given a reasonable explanation. The courts should not be constrained by the delay, but should be more eager to do justice. Imulani Mukuya who claimed to have rights to the property has at law no rights accruing to him.

On the aspect of prospects, she contends that she has prospects of success. She argues that the agreement of sale between respondent and Imulani Mukuya was illegal and fraudulent. At the time the parties entered the agreement availed with Imulani Mukuya's name was disowned by Chegutu Municipality hence to the applicant it follows that Imulani Mukuya had no right, title and interest to sell the property.

She alluded to an affidavit of the Director of Housing Melania Mandeya who stated that there is no "auditable" paper trail to show that the property was ceded to Imulani Mukuya. She prays that she be given an opportunity to be heard and that default judgment granted against her be set aside. She stands to lose the house that she had lived in and owned as matrimonial property.

The application for condonation is vehemently opposed by the respondent. The respondent bought the property from Imulani Mukuya who had been the owner of the property since 1993. The respondent denies that the seller, Imulani acquired the house after the death of the previous lease holder applicant's late husband. The respondent insists that applicant was served with the order (for default judgment) and the applicant ignored the eviction proceedings. She queries why the applicant did not get an affidavit from Mr L Gwanzura, the Chegutu Mayor to support her averments about getting an advice from the Mayor. The respondent also argues that she is an old lady of 77 years and of ill health and suffers from high blood pressure. She purchased the property from the legal owner.

On the aspect of prospects of success, the respondent submitted that the person who sold the property to her was the legal owner holding the recent title; if the cession was not properly processed, the applicant's husband should have raised the query during his life time rather than wait for 23 years to raise the issue. To her, the agreement is therefore valid and binding. The order which applicant seeks to be rescinded is dated 25 February 2015 and the pending application for rescission of judgment has been lying idle for 3 years 3 months after the order had been granted. To the respondent the delay is inordinate, the respondent alleges that the applicant did not care to commend on this inordinate delay. She states that she deserves finality in litigation.

In the matter of Forestry Commission v *Moyo* 1997 (1) ZLR 254, it was held that the following are some of the factors that the court will consider in deciding whether to grant condonation or not:

‘(a) the explanation for the delay

(b) that there are reasonable prospects of success on the merits

(c) that there is no possible prejudice to the other party should the application be granted.

In this application for condonation the applicant has had knowledge of the judgment against her in October 2015. This application was brought before the court in May 2018, more than two years later. On the date of hearing the applicant’s counsel admitted openly that the applicant was the cause of the delay, the delay was obviously admittedly inordinate. The explanation about the Chegutu Mayor and lack of education on legal issues is partially not satisfactory in that the applicant admits that there was a case which she had filed an appearance to defend and was ejected by the Sheriff but then decides to relax completely doing nothing to upset that judgment. The behaviour of the applicant explicitly justifies an inference that she might have ignored the notice of intention to bar but deliberately sat on her laurels by failing to file her plea. The applicant sought legal advice before entering appearance and also on opposing contempt proceedings surely she cannot say she was ignorant of the law in the circumstances. I agree with the submission by the respondent’s legal practitioner that the law protects and favours the vigilant (MCNALLY JA, in *Ndebele* v *Ncube* 1992 ZLR 288 and also *Harnsha* v *Cabs* HH 974/15) the law helps the vigilant and not the sluggard. It is the view of this court that a delay of two years is inordinate and no reasonable explanation has been forwarded by the applicant. (See *Mutopo* v *Midlands State University and 2 Ors* HH 200/14).

In the matter of Director of Civil Aviation v *Hall* 1990 (2) ZLR 354 (SC) at 357 GUBBAY CJ (as he then was) observed that the prospects of success is generally the most important though not decisive factor. The applicant’s legal practitioner Ms *Chinwavadzimba,* was asked to address the court on this very important factor and she struggled to explain the prospects of success on the applicant’s part. The applicant’s own heads of arguments shows in para 2.3, p 79 of the record that according to Municipal records of Chegutu Municipality Imulani Mukuya acquired ownership of the home in 1993 for the same property. The record reflects cancellation of 2254/88 and in favour

3169/93" thus it is clear that the applicant acknowledges that cession over the property occurred in 1993 and at the time Imulani sold the property to the respondent, Imulani had all the rights to cede the rights from him to the respondent. The applicant intends to apply to this court for the rescission of a default judgment of CHIGUMBA J, which is for ejectment that matter does not resolve the issue of ownership of C63 Chegutu Township. In any case the applicant did not obtain from Imulani Mukuya an affidavit to confirm that he fraudulently sold the property to the respondent. The applicant's counsel, in reply to the respondents' counsel submissions seemed to argue that if the application for condonation is granted the applicant will call Imulani to court to give evidence, yet there is no explanation from the applicant why such critical evidence is absent from the court papers now. The applicant does not in her papers fully explain the position of the respondents as an innocent purchaser who has fully paid for the full purchase price. She must surely be allowed to enjoy the fruits of her payment than to come between the feud of the applicant and her son. In the matter cited by the applicant of *Musemburi and Anor* v *Tshuma* 2013 (1) ZLR 526 (S) the court ruled that:

> "In a case where there is no reasonable explanation for an in ordinate delay, then there should be good prospects of success. In *deKuszaba Dabrowski et uxor* v *Steel NO* 1966 RLR 60 A at 64 BEADLE CJ remarked as follows:
>
> > "the more unsatisfactory the explanation for the delay so much greater must be the prospects of success of the appeal be before delay will be condoned and the converse must of course be equally true, the more satisfactorily are the explanations for the delay the more easily will the court be inclined to condone the delay provided it thinks there is some prospects of the appeal succeeding."

The applicant failed to explain the inordinate delay and did not prove on a balance of probabilities the prospects of success on the application for rescission of judgment. In *Willies Principle of South African Law* 8 ed p 25, the learned author writes:

> "The registration of title in one's name constitutes the registration of a real right in a thing which entitles the holder to vindicate his right that is to enforce his right in a thing for his own benefit in the thing as against the world that is against all persons whatsoever."

The applicant did not adduce any evidence to show that she had better reason than Imulani Mukuya or those of the respondent. The applicant also blames he lawyers but there is nothing to prove that she was a complaint against any of the lawyers. In any case she is the one who chose those legal practitioners. There are no prospects of success on her application.

Disposition

The application for condonation is dismissed with costs.

Mashingaidze & Mashanyore, applicant's legal practitioners
Mukanhari-Makodza Attorneys, respondent's legal practitioners