Judgment No. SC 19/03
Civil Application No. 156/03

ELIAS MABEKA v HILDA MABEKA

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 24, 2003

Z M Kamusosa, for the applicant

Miss *M Gwaunza*, for the respondents

Before CHEDA JA, In Chambers, in terms of Rule 32 of the Supreme Court of Zimbabwe Rules.

The Applicant and the respondent were granted a divorce order in a judgment of the High Court dated 26 November, 2001.

He perused it and was not happy with the Court's finding.

On the 30th May, 2003 he instructed his legal practitioner to note an appeal. The legal practitioner advised him of the need to apply for condonation for the late noting of the appeal. This is the application now before me.

The application is opposed by the respondent. I said the parties could either come and argue in chambers or submit written heads of argument. They opted to submit written heads.

In his affidavit the applicant says after the trial of the divorce action judgment was reserved. His legal practitioner promised to inform him when judgment was to be delivered. He kept checking but was advised that it was not yet out. His legal practitioner then promised to write him a letter as soon as the judgment was out.

He says because he was unemployed he found that his daily expenses in Harare were becoming unbearable hence he opted to live at his rural homestead for a greater part of the time.

Between February and March 2003 he phoned the office of his legal practitioner and spoke to a lady called Dorothy and advised her to inform Mr Kamusasa of his new address in the event that he would write letters. Although he requested the lady to check in his file whether there was anything for his attention she advised that Kamusasa had gone to Bindura, she could not locate the file as she was new but promised to convey the message to Kamusasa. He said it was after his daughter had been served with a warrant of execution between 20 and 21 May 2003 that she notified him and he immediately went to see his legal practitioners on 27 May 2003. He was advised that a letter had recently been posted to him and was shown a copy. He was also told that several letters had been written to him about the judgment but he said he had not seen the letters.

On scrutinizing the copies he noticed that they had been sent to the wrong address which he had since closed at the end of 2002. He was not happy with the sharing of property on the judgment and maintenance. He requested more time to study the judgment and discuss details with Kamusasa. That was when he was

advised that if he wanted to appeal it would be out of time. He said since he is not employed, if the house was sold he would be reduced to destitution and haunted by the maintenance order which he will not be able to fulfil.

In *De Kusaba-Dabrowski & Uxor* v *Steel N.O.* 1966 RLR 60(A) the Appellate Division laid down broad principles which the court may take into account. Some of these are:

(1) The extent of the delay in failing to note the appeal;

(2) The reasonableness of the explanation for the delay;

(3) Whether the litigant himself is responsible for the delay;

(4) The prospect of success of an appeal, should the application be granted;

The possible prejudice to the respondent should the application be granted.

In *Kombayi* v *Berkhout* 1988(1) ZLR 53(3) the following were repeated:

(a) the extent of the delay;

(b) the reasonableness of the explanation for the delay;

(c) the prospects of success.

The above three principles were repeated in *Jensen* v *Acavolos*, 1993 (1) ZLR 216 (S).

In order to determine the matter on the basis of the above principles one has to look at the information given in the affidavits as well as the heads of argument and the judgment of the court *a quo*.

The applicant seeks to attribute the blame to his legal practitioners as he says in his founding affidavit that the honourable court should not visit upon him the mistakes of his legal practitioners or anyone in their employment.

In my view he, the applicant, is, to a large extent, to blame.

He says in his affidavit that he decided to go and reside at his rural homestead. When his wife tells us in her opposing affidavit that she often met him in Harare on several occasions since the trial, he makes a general denial, but goes on to say in his answering affidavit he resided at Mabvuku during the period in issue. Living at the rural homestead and residing at Mabvuku are not the same thing, He admits that he often visited his children who occupied the cottage as the main house is rented. He does not explain the fate of the letter addressed to him at No 20, Cleveland Road, Greendale on 21 May, 2003.

He does not explain how the writ was served on the above address but the letter addressed to the same address was not seen by him up to the 27 May if it takes only 2 days for mail to reach that address.

I do not believe that the applicant's usual known address was only Box 3, CH 198, Chisipite, Harare, because the legal practitioner would also have in his file the address for service of the summons which cannot be a post office box number.

Respondent said if the box number is closed the letters sent to it would be returned.

I am inclined to believe her. We are not told what action was taken to establish the fate of those letters and the judgment.

In his founding affidavit he said if the Greendale home is sold he will be homeless, yet he tells us also that he was residing in Mabvuku.

He also talks of residing in rural Hurungwe without indicating when this was.

Applicant says the Greendale house is rented but does not state where he is currently residing.

He does not even indicate when he closed the address that his legal practitioner posted letters to.

He says it was not necessary to attach proof of closure of a postal box which the respondent was well aware of, yet this is for the information of the court and not the respondent.

Since this is in the replying affidavit, the applicant should have provided proof since what he said had been challenged. As applicant the onus is on him to prove issues in support of his application, not for the respondent.

I now turn to deal with the three main principles and their application to this case.

THE EXTENT OF THE DELAY

The Applicant's legal practitioner was served with the judgment on 28 January, 2003.

The founding affidavit was filed without being dated.

The application for condonation was only filed on 4 June. This is a delay of five months. The Rules require a period of 15 days. Five months is therefore a very long time and would certainly require a satisfactory reasonable explanation.

THE REASONABLENESS OF THE EXPLANATION PROFFERED FOR THE DELAY

Appellant's explanation is most unsatisfactory and therefore unreasonable.

He contradicts himself about going to reside at his rural homestead, then says he was residing at Mabvuku at the relevant time. He has clearly avoided proving that he had closed his postal box preferring instead that respondent should prove that he is not telling the truth.

It is not enough for him and his legal practitioner to tell the court that the message about the change of address is available without filing it. They are well aware that applicant's case depends on their placing before the court all the necessary information in support of the application.

If they appreciated the need to file copies of letters, there is no reasonable explanation for not filing the message note about a change of address which is so important, or the proof that the post box number was closed.

He does not say when the postal box was closed or why he did not give his legal practitioner the new address when they arranged that the legal practitioner should write when judgment becomes available.

THE PROSPECT OF SUCCESS

The applicant attacks the judgment on the basis that the court *a quo* placed too much weight on the respondent's evidence of direct and indirect contribution

towards the acquisition of the matrimonial property which was uncorroborated, and erred by not making a finding on credibility.

The judgment shows that the court made a clear finding against the applicant, on page 3, that defendant was not being truthful with this court, that he does not dispute that plaintiff did assist in the construction of the Greendale house and cottage, Page 7, that he first says her contribution was not as much as she makes out, he does not dispute that she assisted in the business ventures in Dommboshawa, he does not dispute the purchase of the two motor-vehicles, Page 7, that it is not disputed that she contributed immensely in the acquisition of the immovable properties and the building of the businesses, Page 8. The court also found that her contribution was extensive and that on the evidence before it applicant's contribution was greater than hers.

These are findings based on the evidence led. All Applicant could say was that he did not agree that her contribution was as much as she made it out. There is no problem with that because the court concedes that his contribution was greater. The court however, still determined that she should get 45% of the value of the properties. This was a discretionary decision.

I see no fault with this conclusion and I do not believe the appeal can succeed on that basis.

The fact that he sold his previous property to acquire the stand at Greendale is not disputed. But it is the contribution by the respondent which the court

found to be extensive. Applicant did not dispute the various contributions she made but simply contended that it was not at the level she made out. In the absence of any challenge to the various things she did as her contribution the evidence indicates a definitely extensive level of contribution as the court found.

The court exercised its discretion as to the proportions she awarded, and there is nothing to suggest that she exercised it improperly.

The applicant's position that he is not employed and cannot afford to pay her anything strengthens the need to sell the house as he is not in a position to pay her off. That cannot be a basis for depriving her of her share.

On the maintenance order the applicant revealed that he was making large payments of $16 500 per term for the benefit of another child and maintaining the house and its expense for this child. The court correctly found that the applicant was not being truthful as he could not afford to pay $16 500 per term and rental for $2 500 per month if his income was only $7 500 per month. In any case he contradicts himself in saying he maintains the Greendale house and then says it is rented out.

He said he was left with $70 000 of the package he got from his former employment. The court was correct in concluding that he could afford to pay $7 000 per month for maintenance. He is also able to work and has not said why he is not working.

He has not disputed that he does piece work or contracts as a builder.

In conclusion I find that while it may appear that the applicant did not delay after the judgment was brought to his attention on the 27 May 2003, the allegation that he had not been aware of it up to that date is either untrue, or if it was true, he was at fault in not making proper arrangements with his legal practitioner about communication with him. When they arranged that the legal practitioner write to the applicant, he should have advised that his address had changed.

Even if that alone would not be enough ground for refusing the application, the application would still fail on the merits. His evidence was found to be untrue, The respondent's evidence on her level of contribution in the acquisition of the Greendale house was accepted by the court. Applicant was untruthful about his income. It was found that he can afford the maintenance claimed. He says he has no money to pay off the respondent, a point which shows that the property needs to be sold to that respondent can get her share.

I am satisfied that the appeal will only result in some inconvenience to the respondent and a further delay in getting her share.

Respondent asked for punitive costs to be awarded against the applicant.

I am not satisfied that I should make such an order on a case like this.

The application for leave to note an appeal out of time is dismissed with costs.

Nduna & Partners, applicant's legal practitioners

Wintertons, respondent's legal practitioners