

**AUGUSTINE BAYAYI**

**Versus**

**DOROTHY MZIMA**

**And**

**DENVER CHIWAKIRA**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO, 2 FEBRUARY 2007

Applicant in person  
*Ms A Masawi* for the respondents

Opposed Application

**KAMOCHA J:** After hearing from the applicant and *Ms Masawi* representing the respondents I gave an *ex tempore* judgment and dismissed the application with costs. I indicated that my written reasons would follow in due course. These are they.

The applicant and first respondent were married to each other and had been so married for 10 years but the marriage failed. The first respondent instituted divorce proceedings.

After a pre-trial conference meeting the matter was ready for trial. However, on more than three occasions the matter failed to take off due to the fault of the applicant and his legal practitioner.

The matter was finally set down for the 6<sup>th</sup> day of October 2005. On that day the applicant wanted to play the same game. This time the legal practitioner sought for another postponement on the basis that the applicant was suffering from stress and was depressed. He had made this application in chambers but the learned judge directed that such application be made in open court. Arguments were presented to

the court which refused to accede to another postponement and ordered that the matter be heard at the end of the roll. At the end of the roll applicant was called out but he did not

Judgment No. HB 39/07

Case No. HC 250/06

X Ref HC 3320/01

come forward. His lawyer went out of the court room to look for him and came back to advise the court that his client had left 20 to 30 minutes ago.

According to the information made available to the court, the applicant through his legal practitioner had indicated to the respondent's legal practitioner the day before of hearing that he would be seeking a postponement at the hearing but was told that the application for postponement would be strongly opposed. The applicant obtained a letter from a Railmed Medical Officer known as Dr Maramba on 5 October 2005 which was the day before the matter was to be heard. The letter was filed of record and reads:-

To who it may concern

Ref: Augustine Bayayi, A, Male

This above mentioned is under stress and has depression because of this social and economic problems has been demoted at work. I have given him time to rest at least a week under medication and I need to review him in about a wk's time.

Thank you for understanding.

Maramba Dr.  
Railmed Medical Officer  
05/10/05

Since the applicant decided to go away without being excused the court proceeded to hear the matter and indicated that the applicant would be taken as being in default. His lawyer asked to be excused and he was.

The first respondent gave *viva voce* evidence and referred the court to documents in the bundle of documents filed of record in order to substantiate her

claims. The court then granted the first respondent the order she sought and awarded her house number 21 Kirkland Road, Greenhill, Bulawayo.

Six days later the respondents issued summons for the eviction of the applicant from the said house. The summons was served on the applicant on 26 October 2005 and he entered

Judgment No. HB 39/07

Case No. HC 250/06

X Ref HC 3320/01

appearance to defend on 1 November 2005 and also requested for further particulars which were supplied the same day.

On 9 November 2005 the respondents applied for summary judgment which was granted on 1 December 2005.

On 3 November 2005 the applicant filed an appeal against the judgment which was granted when he disappeared without being excused. On 9 June 2006 he filed an application for the rescission of the same judgment. On 19 June he filed an application for condonation of the late filing of the application for rescission.

The applicant has since withdrawn his appeal to the Supreme Court. The application for rescission was filed without seeking condonation first. The applicant had then turned into a self-actor.

For the sake of bringing the matter to finality the court condoned his late filing of the application for rescission.

Turning to the explanation given for failure to wait until his turn came, the applicant said he was stressed and depressed and had taken drugs which made him feel acute drowsiness. He went further to allege that he had soiled himself because of diarrhoea. As a result there was smell of human waste since his legs were dripping with mess. He alleged that he, therefore, could not wait. He wrote a note which he gave to his stepson Denver Chiwakira to go and give to his lawyer so that he could

attend to him urgently. Denver went into the courtroom and never returned. Applicant decided to call a taxi which drove him home.

If applicant had been interested in attending the court hearing he would have asked the taxi driver to drive him back to court after cleaning himself up.

Denver averred in his affidavit that he was sitting next to the applicant on the bench outside the courtroom. He said the applicant was complaining about the proceedings taking

Judgment No. HB 39/07

Case No. HC 250/06

X Ref HC 3320/01

too long. He said he never smelt any bad air from the applicant. Applicant never asked for toilets at the High Court. Neither did he complain of being drowsy. The doctor's letter does not mention that he also suffered from diarrhoea. His only complaint was that the proceedings were taking too long. He then decided to go away without being excused. He was clearly in wilful default.

Has the applicant a *bona fide* defence? After he had chosen to absent himself from the hearing the court proceeded with the trial. It heard oral testimony from the first respondent and decided the matter on its merits. The right course for the applicant to adopt in the circumstances was an appeal since an application for rescission was inappropriate and must fail.

In the result I dismissed the application for rescission with costs.

*Masawi & Associates*, respondents' legal practitioners