

NORAH NCUBE

Versus

ALBERT GUMBO

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 9 FEBRUARY 2010

Applicant in person
M Nzarayapenga for the 1st respondent

Opposed Court Application

KAMOCHA J: I dismissed this application after hearing submissions from the contendants and indicated that my full reasons would follow in due course. These are they. The applicant in this matter was seeking an order in the following terms:-

It is ordered that:-

- (1) Applicant's appeal in case number HCA 43/04 be and is hereby reinstated.
- (2) Costs of suit as against 1st respondent only if he opposes."

The order that the applicant sought to appeal against was in fact an order by consent granted by the Magistrates' (Customary Law) Court on 26 April 2004 and reads:-

"It is ordered by consent:-

- (1) That the immovable property be shared as per the attached annexure "A" and
- (2) That house number 3299 Cowdray Park, Bulawayo to be sold at market value and proceeds shared equally between the two parties."

A month later on 26 May 2006 the applicant had appeal papers drafted which were filed at the beginning of June 2004. Her complaint was that the court *a quo* had erred at law in holding that the respondent was entitled to half share of the proceeds of the sale of the said property on the ground of an unregistered customary law union. In the alternative the order by

consent was assailed on the allegation that the trial court had erred on a point of law and fact in holding that the respondent was entitled to a half share in the immovable property on the ground of tacit universal partnership or unjust enrichment because that was not the cause of action brought before him and in any event he did not have the jurisdiction to deal with the matter based on either of the said causes of action.

A year later on 15 April 2005 the applicant withdrew her appeal. She, however, blames her erstwhile lawyer Mr *Mazibisa* for the withdrawal of the appeal which she alleges she always had wanted to prosecute. She alleged that Mr *Mazibisa* had no mandate from her to do that.

It was her assertion that the appeal had merit. She alleged that it was all her money which was used to purchase the house in 1997 when she worked as a domestic worker. She was financially assisted by her employers to pay for the house. The house was registered in her name. No affidavit from her employers was filed to support her story.

The respondent only came into her life in 1999 long after she had secured the house. She serviced the mortgage single handedly. The best that the respondent did was to go and deposit the money she gave him with Zimbabwe Building Society. She complained bitterly that the respondent who came into the picture long after the property had been purchased should be unjustly enriched by an award of 50% of the proceeds. He only lived with her for 4 years and some months. At the end of it he got 50%. She concluded that he had been unjustly enriched grossly.

It is observed that Mr *Mazibisa* who is being accused of withdrawing the notice of appeal without the mandate of the applicant did not file an affidavit explaining on whose instructions he did that.

Respondent alleges applicant accepted she was customarily married to him and he had even paid lobola to her parents in 1996. The parties met in 1993 when she was working and staying at 14 Blank Close, Emerald Hill, Harare. They had been customarily married from 1993 to 2004. She later moved to Bulawayo with her employers who settled at number 17 Westmount, Burnside, Bulawayo in 1994.

The lobola was paid to her parents at Phelela Village in Tsholotsho in 1996.

He claims to have paid \$7 000,00 to Zimbabwe Building Society as deposit for the house. He also paid \$400,00 to connect electricity - \$100 to the City Health Department. He used his payslip and had to write a letter explaining that he was going to be responsible for the payment of the loan.

The respondent explained that he had to produce his payslip because the Zimbabwe Building Society wanted to know how the mortgage was going to be serviced. He alleged that it became necessary that he had to write a letter explaining that he would be responsible for the payment of moneys to service the mortgage bond although the property was registered in the name of the applicant.

The respondent cannot be said to have been unjustly enriched in the light of the sums of money that he paid. The applicant does not say how much she paid towards the purchase of the property. She alleged that she was financially assisted by her employers without mentioning any figure. She did not produce evidence from her employers confirming her story.

The applicant sought to appeal against a judgment granted by the consent of both parties. The parties approached the judicial officer and requested the court to record what they had agreed on. They had agreed to share the proceeds from the sale of the immovable property 50% each. Such a judgment is unappealable. See *Calvera & Ors v Mudzimunoera* 1994 (2) ZLR 371

The applicant has had a change of mind. She wants the consent judgment set aside. She accused the presiding magistrate of not giving her a chance to state her case. It is difficult to understand what she means by that when the parties approached the court with a draft order which they wanted the court to record into an order of court.

Similarly it is difficult to understand how her legal practitioner would have withdrawn her notice of appeal without her mandate. If he did not agree with her he would have just renounced agency instead of withdrawing her appeal without her authority.

Quite clearly her change of mind was an afterthought actuated by greed. Her application to this court is devoid of any merit and must fail.

The applicant seeks to appeal against a judgment which she requested the court to grant. She went on to accuse the presiding magistrate of having been biased against her as he allegedly denied her an opportunity to state her case. He allegedly silenced her and went on to say she was too talkative.

She did not end there but she went on to accuse her erstwhile legal practitioner of withdrawing the appeal without her mandate.

This court must express its displeasure at such kind of behavior by litigants. It must award punitive costs to discourage them from resorting to such conduct.

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In the result the order of this court is that the application be and is hereby dismissed with cost on an attorney and client scale.

Dube-Banda, Nzarayapenga & Partners 1st respondent's legal practitioners