

BEAUTY DUBE

Versus

MATHEW JOSEPH MADZUKUTURE

And

PROVINCIAL MAGISTRATE N.O.

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 2 JUNE 2010

M Munjanja for applicant

First respondent in person

No appearance for 2nd respondent

Opposed Court Application for review

Ex Tempore

KAMOCHA J: The applicant in this matter was seeking for an order in the following terms.

“It is ordered that:

- (a) applicant’s late filing of this review application be condoned;
- (b) on review, the judgment of the provincial magistrate under case CC 383/94 (local courts) is quashed and rescinded and in its place, an order be made referring the case to be heard *de novo* before a different provincial magistrate;

Alternatively to (b) above

- (c) the court proceedings of the provincial magistrate court (local courts) under case CC 383/94 declared a nullity and the matter be referred to be heard *de novo* before a different magistrate; and
- (d) first and second respondents pay costs of this application, only if they oppose his (*sic*) application.”

This judgment relates to an application for condonation for the late filing of an application for review. The delay is extraordinary inordinate in that it is a delay of some 12 years.

Her reason for not filing the application timeously was that she had only allegedly found out about the court order for the first time in September 2006. It was her story that she had waited from 1994 on the understanding that case number CC 383/904 had been postponed *sine die* until the last child of their former marriage attained the age of 18 years. Thereafter the matter relating to the division of their matrimonial property would be adjudicated upon. She, however, had to bring up the matter earlier because their last child was no longer being looked after by the first respondent. The minor child was, instead, being looked after by his sister who is another child of the parties.

Her explanation is simply untenable and unacceptable. She was represented by a very senior legal practitioner and so was the respondent. She wants the court to accept her suggestion that when the matter went to community court the two legal practitioners went into the presiding officer's office they emerged from there telling her that the matter had been postponed *sine die* but the respondent was ordered to pay her \$10 000 as a small interim payment to her pending the final resolution of the issue relating to the share of the matrimonial house and other property – which was going to be done after the last child had turned 18 years. The sum of \$10 000 was a lot of money in 1994 which cannot be described as a small amount paid as a stop gap measure for her to put in her pocket so that she could start a small home-grown business. Her legal representative had no reason to mislead his own client. It is for the above reasons that I find her explanation untenable and unacceptable.

What then are her prospects of success on the merit? The parties' marriage was dissolved on 28 August 1992. At divorce she was awarded the following property:- a kitchen table and 4 chairs, stereo, double bed and mattress and half share kitchen utensils. The defendant was ordered to buy her a two plate electrical stove. The court made an award for her maintenance in the sum of \$100 per month which was effective from June that year.

The defendant was awarded the custody of all the five children with plaintiff having reasonable access. The reason for awarding the custody of the children to the defendant was because the plaintiff used to suffer bouts of mental challenges time and again.

Two years later the applicant went back to court claiming "half share from sale of house, property and custody". As can be seen from her claim she was, in addition, to the claim of a half share of the proceeds from the sale of the matrimonial home, claiming again a share in the

other property and custody of the children. Matters which had already been adjudicated upon by the court at divorce.

In its judgment on the claim for half share from the sale of the house the court recorded the following:

“Defendant to pay plaintiff \$10 000. Terms of payment to be arranged between their legal practitioners respectively. No order as to costs.”

It is clear from the above that applicant got her share of the value of the house. She admits receiving the money but contended that she got the impression that the money was just to cushion her so that she could have some money in her pocket to start a business. Why would the respondent have given her such a large sum of money if that was not her half share of the house. Ten thousand dollars in 1994 was indeed a large sum of money. Respondent would not gratuitously part with such kind of money to assist a woman he had just divorced. The applicant's assertion is difficult to understand.

More difficult to follow is the suggestion that the two legal practitioners told the parties that the matter had been postponed sine die until the last child turned 18 years. In the light of the foregoing I hold a view that the prospect of success on the merits are non-existent.

In the result her application for condonation of the late filing of the application for review is devoid of any merit and is accordingly dismissed with costs.

Munjanja & Associates, applicant's legal practitioners