

NATSHO MASUKU
versus
THE ADDITIONAL MASTER
and
ALICE MASUKU
and
MAVIS LUNGA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 24 JULY AND 8 OCTOBER 2015

Opposed Matter

S. Mlaudzi for applicant
T Sibanda for respondents

MOYO J: This is an application for condonation of the late noting of an application for review.

The applicant wishes to note an application for the review of the decision of the Additional Master Bulawayo in the estate of the late Mbizo Masuku (who is applicant's biological father) which was registered as DRBY 665/05.

The facts of the matter are as follows:

The late Mbizo Masuku sired applicant with Mavis Lunga but the two were never married. Actually Lunga is applicant's mother's married surname as it is alleged that her maiden name is Mawoyo. The applicant lived with his father until he died. Applicant's aunt Alice Masuku who is the second respondent allegedly fraudulently registered the estate of the late Mbizo Masuku without applicant's knowledge. Applicant avers that he is illiterate and can neither read nor write. The fraudulent registration of the estate late Mbizo Masuku saw applicant's aunt, the second respondent being appointed the executrix dative of the deceased estate.

Again, applicant's mother according to documents filed at the additional master's office, swore to an affidavit that she was customarily married to the deceased and had been so married for 43 years. Applicant avers that this in fact is not true as the deceased was in fact single with

only one child, being the applicant. The final liquidation and distribution account states that the assets in the estate of the late Mbizo Masuku comprising of house number B5209 Old Pumula be awarded to Alice Masuku in terms of her customary marriage to the late. Applicant avers that in fact this is grossly irregular as Alice Masuku is the deceased's sister and not his wife.

Also, in the documents purportedly filed with the additional master, applicant disappeared 20 years ago, according to third respondent. Applicant states that in fact this is not true as he has always been available and when his father passed on he was present and did bury him. Applicant has delayed to launch an application for review and is badly out of time. He avers that he sought assistance from the Legal Resources Centre and was assured that all was in order and trusted so. The lawyers at the Legal Resources Centre actually negotiated with second respondent and came to some understanding which applicant did not accept as he considered it as being unfair. Apparently they had advised him to share the house with his aunt, the second respondent.

He then sought assistance from *Samp Mlaudzi and Partners* who also could not help much as he could not pay them. The second respondent had sought an eviction order against applicant which she then obtained and as at the time this application was launched, second respondent was in the process of evicting applicant.

In such cases, the approach of the court was aptly put in the case of *KM Auctions Pvt Ltd v Adanesh Samuel and Another* SC 15/12 where in the Supreme Court listed the considerations that the court should take into account in dealing with such an application. They were given as the following:

- 1) the degree of non-compliance
- 2) the explanation for it
- 3) the importance of the case
- 4) the prospects of success
- 5) the respondent's interest in the finality of the case
- 6) the convenience of the court and
- 7) the avoidance of unnecessary delays in the administration of justice

Condonation of non compliance with the rules of the court is not granted as a matter of right but it is an indulgence. The court in granting condonation for failure to adhere to the rules of the court exercises a discretion. The aforelisted considerations are therefore the ones that the court should take into account as a guide on how to best exercises its discretion in the interests of justice. An applicant who seeks condonation must also show that there is indeed a good cause warranting that the court exercises its discretion in his favour. Refer to the Supreme Court case of *Fuyana vs Moyo* SC 54/2006. In the case of *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at page 532 C- F the court stated thus:

“In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among facts usually relevant are, the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are compatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts.

Thus a slight delay and a good explanation may help compensate for prospects of success which are not strong. Or, the importance of the issue and strong prospects of success may tend to compensate for long delay. And the respondent’s interest in finality must not be overlooked.”

It is my considered view, that whilst the court should endeavour to promote the principle of finality to litigation, and whilst the court should consider the respondent’s interests in the finality of the matter, the court should not close its doors to litigants on the basis of such principles to an extent that the situation that obtains is that of a clearly unjust result. The court’s duty is to dispense justice in a fair manner and it is my view that in such an endeavour, the court should not ordinarily allow the technical aspects of a case to overshadow the meritorious aspects of same so much so that those who perpetrate fraudulent acts benefit from such actions.

I believe like in this case, where clearly a fraud was committed in the registration and administration of the estate of the late Mbizo Masuku, which fraud is so glaring resulting in the sister to the deceased being fraudulently named a wife and a surviving spouse cannot remain so on the basis that the applicant knocked on the court’s doors after a considerable amount of time had elapsed.

The delay by the applicant is indeed very long and his explanation is a porous one, he should have acted swiftly and sought to enforce his rights more effectively rather than to just take a back seat and wait for non-performing lawyers.

However, a collective evaluation of the principles I have alluded to herein persuades me to exercise my discretion in applicant's favour for the simple reason that the rationale in the *Melane* case (*supra*) shows that even where there is no reasonable explanation for the delay, the court can still exercise its discretion in favour of a late litigant if good cause is shown and if there are strong prospects of success in the matter. The fraud that was done in the registration of the deceased estate by the first and third respondents is glaring, and in their notice of opposition, these allegations, especially those of Alice Masuku being named a surviving spouse and therefore an heir, in the liquidation and distribution account, yet she is in fact a biological sister to the deceased, are not refuted at all meaning that they are true.

In fact in paragraph 13 of the opposing affidavit it is stated that second respondent was given stand B5209 Old Pumula as she was the only surviving daughter of the late Selina Masuku who is the deceased's mother. This is a gross irregularity in the administration of the estate.

It is for these reasons that I am satisfied that applicant has indeed shown a good cause for the granting of condonation in the interests of justice warranting that I exercise my discretion in his favour. On the other hand, I do not see the respondents suffering any prejudice or inconvenience as they are not expected anyway to find comfort in their fraudulent activities.

I accordingly grant the application in terms of the draft.

Samp Mladzi and Partners, applicant's legal practitioners
Majoko and Majoko, 3rd respondent's legal practitioners