HB 84-18
HCA 126-14
XREF HC KK 823/12

ROSINA NGIRAZI
versus
FUNGAI SAUROSI
and
KWEKWE CITY COUNCIL

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15 MARCH 2018 AND 22 MARCH 2018

Opposed application

S Siziba for the applicant
K Ngwenya for the respondent

MATHONSI J: This is essentially an application for condonation of the late noting of an appeal against the judgment of the magistrates court sitting at Kwekwe handed down on 9 January 2013 in terms of which it ordered the applicant, as the executrix of the estate of her husband, the late David Nyirenda, to transfer House number 544/3 Mbizo Kwekwe to the first respondent. The court made a finding that the said house had been sold by the deceased to the first respondent before he passed away on 27 June 2008.

The applicant, who had earlier on in 2009 been issued with a certificate of authority by the additional master to transfer the same house, surprisingly valued at $1000-00, to her own name, was understandably gutted. She purported to file an appeal but in the wrong court namely the magistrates court in Kwekwe on 21 February 2013. She says that when she tried to file the appeal in this court she was stopped dead in her tracks, the time within which to appeal having expired.

The applicant says as a lay person she was vexed by that sudden turn of events and sought assistance from "the Zimbabwe Human Rights Association who kept (her) documents for months" without acting on them. They later returned the documents to her without an explanation. At that stage she decided to report the matter to the police alleging forgery of her deceased husband's signature on the agreement of sale purportedly entered into between the deceased and the first respondent. She does not say what became of the police case. She

however places the blame for failure to act timeously on the Zimbabwe Human Rights Association completely oblivious of the fact that she was already out of time to launch an appeal when she tried to do so in February 2013 and does not even begin to proffer any explanation for that initial delay.

In addition, she does not take the court into confidence as to when exactly she consulted that organization, the name of the lawyer she dealt with and when she eventually got her documents back. Needless to say there has been no supporting affidavit from whoever was consulted at that organization confirming the delay. Whatever the case, this application for condonation was only filed on 29 December 2014 almost 2 years after the impugned judgment was handed down.

Regarding her prospects of success on appeal the applicant asserts that those are very bright because the agreement of sale relied upon by the first respondent "appear (s) to have been forged" and her late husband never sold the house. The fact that the applicant's papers are in shambles with affidavits and other documents being filed all over the place and willy nilly without any regard to rules of procedure and without filing the record of proceedings in the magistrates court which are being contested, may be attributable to the fact that initially the applicant was a self-actor. However there can be no justification whatsoever of the fact that the papers have been allowed to remain in that shambolic state throughout regard being had that the applicant's legal practitioners, who prosecuted the application, assumed agency on her behalf a long time before the matter was set down. Their notice of assumption of agency was filed on 3 March 2017 and they requested a set down of the matter on 20 February 2018.

There is also no justification whatsoever for their filing of heads of argument that do not address the issues to be determined. In fact a tangent is taken in the heads of argument which address the appeal proper without attempting to deal with the issue of the delay. Mr *Siziba* who appeared for the applicant instructed by Mhaka Attorneys conceded that indeed the heads of argument, which were not prepared by himself of course, were not helpful at all. Unfortunately Mr *Siziba* did not file his own heads of argument ahead of the set down.

In his opposing affidavit, the first respondent expressed reservations on the veracity of the applicant's story that she consulted lawyers who let her down because there is no confirmation from the said lawyers that such consultation ever took place. He stated that

although a report was made to the police by the applicant, it yielded nothing. No explanation for the delay has been proffered in the entire application which, in the first respondent's view, is an abuse of the process of the court.

Let me state from the onset that in motion proceedings an application stands or fails on its founding affidavit. If the founding affidavit does not make a case for the relief sought, it does not matter that the applicant files additional affidavits unprocedurally or attempts to make a case in the answering affidavit. The application will fail as no case would be made in the founding affidavit. See *Mobil Oil Zimbabwe (Pvt) Ltd* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) at 70. The founding affidavit does not explain why the applicant attempted to file an appeal in February 2013 well out of time, the judgment having been handed down on 9 January 2013.

Whenever a litigant realizes that he or she has not complied with a rule of court he or she should apply for condonation without delay. If the litigant does not do so, he or she should give an acceptable explanation, not only for the delay in the filing of the notice of appeal, but also the delay in seeking condonation. What calls for some acceptable explanation is not only the delay in noting the appeal but also the delay in seeking condonation. There are therefore two hurdles to overcome in an application of this nature. See *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) at 251 C-D; *Saloojee and Another NNO* v *Minister of Community Development* 1965 (2) SA 135 (A) at 138H.

As I have said the applicant has not given any explanation as to why she found herself out of time to note an appeal. In addition, even the explanation for the delay of well over a year in bringing this application for condonation is, to say the least, tenuous indeed, premised as it is on the unsubstantiated blame on an organization called Zimbabwe Human Rights Association whose existence is as obscure as the story itself. It is settled in this jurisdiction that where the explanation for the delay is unsatisfactory then the prospects of success of the appeal must be really great before the court can exercise its discretion to condone the non-compliance. As stated by BEADLE CJ in *Kuszaba-Dabrowski et uxor* v *Steel N. O* 1966 RLR 60 (AD) at 64;

> "----the more unsatisfactory the explanation for the delay, so much greater must be the prospects of success of the appeal be, before the delay will be condoned and the converse must of course be equally true, the more satisfactory are the explanations for the delay, the more easily will the court be inclined to condone the delay provided it thinks there is prospects of the appeal succeeding."

See also *Maheya* v *Independent African Church* 2007 (2) ZLR 319 (S) at 323 B-C; *Khumalo* v *Mandeya and Another* 2008 (2) ZLR 203 (S) at 208 B; *Musemburi and Another* v *Tshuma* 2013 (1) ZLR 526 (S).

In the present matter the application fails on both fronts. The explanations for the two delays, that is in noting the appeal and in bringing this application for condonation, the latter one being quite inordinate indeed, are extremely pathetic if not non-existent at all. On the prospects of success the application is also very poor. I say so because the applicant appears intent on appealing the decision of the court *a quo* merely on the basis of a suspicion. In her own words she seeks to challenge the sale agreement between her late husband and the applicant because it "appear (s) to have been forged." In my view, that is not enough. If the applicant was unable to establish the forgery, not only at the trial but also to the police where she reported it, surely she cannot establish it on appeal. This is so because it is trite that an appeal is determined on the four corners of the appeal record. If the evidence of forgery was not submitted to the court of first instance, it will still not be there on appeal. In fact Mr *Siziba* conceded that, without leading fresh evidence, the applicant cannot prove forgery.

The grant of condonation involves the exercise of judicial discretion, which the court is required to exercise judiciously of course. The court cannot condone a delay where it is apparent that there will be no success at all merely to baby sit a litigant's ego. That would be an injudicious exercise of discretion. I am therefore unable to grant condonation in this matter.

In the result, the application is hereby dismissed with costs.

Mhaka Attorneys, applicant's legal practitioners
Magodora and Partners c/o Mabhikwa and Partners, respondent's legal practitioners