

LOVEMORE ZVAVATONGA

Versus

MERJURIE ZVAVATONGA (nee MOYO)

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 16 FEBRUARY AND 21 SEPTEMBER 2023

Opposed Application

F. Murewa, for the applicant
Respondent in person

TAKUVA J: This is an application for dismissal for want of prosecution made in terms of Order 32 Rule 236 (3) (b) of the High Court Rules 1971. The rule states, where a respondent has filed a notice of opposition and an opposing affidavit and the applicant has neither filed an answering affidavit nor set the matter down for hearing, the respondent on notice to the applicant may make a chamber application for want of prosecution and the Judge may order the matter be dismissed with costs or make such terms as he thinks fit.

BACKGROUND

Applicant married the respondent on the 23rd of April 1997 in terms of the Marriages Act (Chapter 5:11). On 29th September 2016, the applicant filed for divorce as the marriage had irretrievably broken down and there were no reasonable prospects of restoration of a normal marital relationship between the two. A decree of divorce and ancillary relief under case No. 2460/16. The order was granted in default.

In terms of the divorce order the applicant was awarded the matrimonial immovable property being house No. 4053 Mkoba 10, Gweru as his sole and exclusive property. Respondent was awarded household furniture. Aggrieved, respondent filed a court application for the rescission of the default judgment under HC 135/19. Applicant sought ejection of the

respondent and all those claiming occupation through her from the aforementioned property. The respondent entered appearance to defend and the applicant filed an application for Summary Judgment in the Magistrates Court under case No. 2247/18.

The application was opposed on the basis that the respondent had a plausible defence to the claim for eviction.

This court was advised by counsel for the applicant through a letter dated 13 April 2023 that the application for rescission brought under Case No. HC 135/19 A which applicant sought to dismiss under HC 135/19 B was on 20th January 2023 dismissed by this Court.

Accordingly, this application has been overtaken by events in that the applicant has already obtained the relief he is seeking in this application. The respondent on the other hand based her opposition on the application for rescission which is no more.

In any event, the respondent's failure to set down the matter over a period in excess of 3 years is inexcusable. The failure caused prejudice to the applicant. There must be finality to litigation. See *Ndebele v Ncube* 1992 (1) ZLR 288 (S). A delay of 3 years is in my view inordinate. The explanation for the delay is unreasonable in that respondent should at least made a follow-up on the lawyer or with court officials. See *Guard Force Investments (Pvt) Ltd v Sibongile Ndlovu & Ors* SC 24-16 where the court stated that;

“It is quite clear from the record that there was a lot of inaction by the appellant when action should have been taken. For instance, when the application for dismissal for want of prosecution of the application for rescission of the default judgment was filed, the appellant did not seek to have the application for rescission of the default judgment dealt with expeditiously. There is no rule of law which barred the appellant from proceeding with its application for rescission of the default judgment despite the making of the application for dismissal for want of prosecution. The fact that the appellant sat around and did not attend to the setting down of the application for rescission of the default judgment is a factor that weighs heavily against the appellant. If anything, the chamber application ought to have triggered the appellant to attend to the finalisation of the application for rescission of the default judgment. The only way the appellant could have shown that it was serious about the application for rescission was to proceed to have the matter set down after it was served with the chamber application for dismissal for want of prosecution.”

In the result it is ordered that:-

1. The application for dismissal of case No. HC 135/19 for want of prosecution be and is hereby granted.

2. There shall be no order as to costs.

Gundu Dube & Pamacheche c/o Dube-Tachiona & Tsvangirayi, applicant's legal practitioners

Hlabano Law Chambers c/o Tanaka Law Chambers, respondent's legal practitioners