

DISTRIBUTABLE (63)

Judgment No S.C. 75\2002

Civil Application No 422\96

NICHOLAS HATIDANI v (1) DAVISON SHONHIWA (2)
HONEY AND BLANCKENBERG (3) THE MESSENGER OF
COURT (4) THE REGISTRAR OF DEEDS N.O.

SUPREME COURT OF ZIMBABWE
HARARE JULY 22, 2002

O.C. Gutu, for the applicant

J.S. Mandizhe, for the respondent

Before: CHIDYAUSIKU CJ, in Chambers, in terms of Rule 31 of the Supreme Court Rules

This is a Chamber application in which the applicant is seeking leave to note an appeal out of time. The application is being made in terms of Rule 31 of the Supreme Court Rules, although strict compliance with that rule has not been observed. I will overlook that non-compliance as it does not go to the root of the matter.

The facts of this case are briefly as follows: George Seirlis and Associates obtained judgment in the amount of \$5 876.00 against the applicant in the magistrates' court. Following the judgment a warrant of execution was issued and

movable property found at No 160 Westwood was attached. The applicant's wife challenged that attachment of the movable goods on the basis that they belonged to her and not the applicant. The movables were released and the immovable property, the family home, No 160 Westwood, was attached. The applicant paid part of the debt, about \$2 000.00 leaving a balance of about \$3 000.00. The house on Stand No 160 Westwood was thereafter sold to the first respondent at an auction in execution by the Messenger of Court on 23 June 1995. The house was sold by auction to the highest bidder in terms of the Magistrates' Court Act and Rules. The first respondent purchased the house for \$186 000.00. On 11 July 1995 the applicant launched a court application in the High Court seeking to set aside the sale by auction of the house. The matter was opposed. The court application was dismissed by BARTLETT J in a judgment handed down on 25 January 1996. No appeal was noted against that judgment within the fourteen days prescribed by the Rules.

On 26 June 1996 the applicant filed with this Court a Chamber application for condonation for the late noting of an appeal against the judgment of BARTLETT J. This was opposed. Upon receipt of the Chamber application the Registrar directed the applicant to comply with the requirement of the rules of this Court before the matter could be placed before a judge. Instead of complying with the directive the applicant, on 19 December 2001, filed a notice of withdrawal of the application and tendered costs.

The applicant now seeks to revive the Chamber application for condonation on the basis that the notice of withdrawal did not comply with the rules, and, therefore, was of no force or effect. It is also apparent from the opposing

affidavit of the first respondent that he has since sold the immovable property to a third party, a Mr and Mrs Murombe. No attempt has been made to join those interested parties in these proceedings.

This application for condonation for the late noting of the appeal cannot be granted for a number of reasons. This property was auctioned in 1995. Not only has some six years elapsed since the property was auctioned but the property is now registered in the name of an innocent third party. It now belongs to an innocent third party.

Although this application was filed with this Court on 26 July 1996 it was only served on the respondents' legal practitioners on 16 October 2001, some four years later. No explanation was offered for this delay. The application was withdrawn albeit without complying with the rules and now the applicant wishes that the application be adjudicated. No plausible explanation for this conduct which, in my view, evinces a complete disdain of the rules of this Court, has been forthcoming. The explanation proffered is that there was a misunderstanding between the applicant and his legal practitioners. This explanation is a totally inadequate explanation for the inordinate delay in this case.

Apart from this the appeal has no prospects of success. According to the notice of appeal two grounds of appeal are being advanced. The notice of appeal provides as follows:-

"The Learned Judge in the court *a quo* misdirected himself by failing to set aside the sale in execution of Stand No 160 Westwood Drive,

Westwood, Kambuzuma, Harare, in spite of the fact that the appellant had clearly established that the sale ought not to have taken place in the first place and also the fact that the amount of money owing at the point in time that the sale in execution was conducted was so small as not to warrant the disposal of the appellant's immovable property by public auction.

The court *a quo* erred by not giving enough weight to the fact that the sum of \$2000.00 had been paid on the 14th June, 1995 to the offices of Mr Chingore, only a few days before the date of the sale in execution.

Although the Learned Judge in the court *a quo* stated that the appellant was largely the author of his own misfortunes, not enough weight was given to the appellant's desperate efforts to liquidate the small amount of money owing and thus save his property from being auctioned."

Dealing with the first ground of appeal, there was a court judgment which, it is common cause, had not been, at the time of the sale in execution, satisfied. In the light of this it is difficult to see how it can be said that the sale in execution should not have taken place. The fact that the amount of the debt was small is no ground for rendering a sale in execution invalid.

While I certainly sympathise with the applicant that a matrimonial home was sold in execution for a small debt, it is apparent from the record that it was the applicant's wife who prevented the sale of movable assets to satisfy that small debt. To that extent the learned judge in the court *a quo* was correct in his observation that the applicant was the author of his misfortune. It is also apparent on the record that the applicant also participated in the bidding for his house at the auction but delayed in doing anything to set aside the sale in execution.

This was a sale in execution in pursuance of a judgment of the magistrates' court. The High Court rules do not apply to such a sale, consequently the court *a quo* was correct in refusing to set aside the sale in execution on the ground

that the sale in execution did not comply with the High Court rules.

In the result this Chamber application cannot succeed. It is dismissed with costs.

Gutu & Chikowero, applicant's legal practitioners

Mandizha & Company, respondent's legal practitioners