

DISTRIBUTABLE (61)

Judgment No. SC 51/06

Civil Application No. 98/06

NICHOLAS MUGADZA

v

(1) EZEKIEL DHITIMA (2) SHERIFF OF
ZIMBABWE (3) CITY OF HARARE (4)
ZIMBABWE BUILDING
SOCIETY

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 11, 2006

K Gama, for the applicant

H Zhou, for the first respondent

No appearance for the second, third and fourth respondents

Before: CHEDA JA, in Chambers in terms of r 34 of the Supreme Court Rules.

The applicant was the registered owner of an immovable property known as Stand Number 8393 of Budiriro Township, Harare.

Although no details of the background are given, what is common cause is that the applicant had obtained a mortgage bond from Zimbabwe Building Society (the fourth respondent). He defaulted in payments. The fourth respondent repossessed the property and eventually had it sold by auction.

The applicant applied to the High Court to have the sale set aside and was granted an order to stop the transfer of the property to the purchaser.

The order was conditional in that it gave him sixty days within which to pay the arrears. This order did not cancel the sale that had taken place.

According to the first respondent, the applicant still failed to comply with that order to pay within sixty days.

The first respondent obtained an order from the High Court on 30 July 2003 to have the property ceded to him.

The applicant's subsequent application to the High Court to set aside the sale was dismissed. This is the order against which he noted an appeal.

After noting the appeal, the applicant failed to comply with the Rules of the High Court as he did not pay, or make any undertaking to pay, for the preparation of the record.

The Registrar of the High Court, by a letter dated 16 March 2006, advised his legal practitioners that the appeal was deemed to have lapsed. He has now applied for the reinstatement of the appeal.

In considering such an application the Court has to take into account, amongst other factors, the reasons for failure to comply with the Rules and the prospects of success if the application is granted.

The applicant's explanation is not satisfactory. He says he was at his home in Gokwe where communication with his legal practitioners is difficult, and he only contacted them after a relative advised him that the legal practitioners wanted to speak to him.

He did not narrate in detail in his founding affidavit what happened, but when his brief explanation was challenged he filed a replying affidavit, in which he said he advised his legal practitioners even before his application was dismissed that if he lost the case he would appeal.

The applicant was in court on the day the application was dismissed. He does not say what he did then, but excuses himself and his legal practitioners by saying they could not undertake to pay for the record as he had not yet given them instructions, yet they were able to file the appeal within the time limit.

His legal practitioners would have known that once they noted an appeal there was need for the record to be prepared. They have not given any explanation for their failure to comply with this requirement. The excuse that the applicant seeks to put forward for his legal practitioners is unacceptable. It cannot be said that the applicant wanted them to appeal when he was not going to pay for the record.

I find the explanation to be unsatisfactory.

On the other hand, even assuming that this could be the fault of his legal practitioners, the applicant has not shown that there are prospects of success in the appeal if the application is granted.

In his founding affidavit, the applicant clearly stated that he did not wish to deal with the merits save to refer to the notice of appeal.

As a result, a lot of background information as to what transpired was not given. It was only at the hearing of the application that his legal practitioners disclosed that there had been several court cases on the same matter, but reference to them could not assist an applicant who is reluctant to make his case clear on the founding affidavit.

The High Court found that what the applicant sought to do was to reverse the transfer, but had no valid challenge to the sale as there was no irregularity shown.

The applicant argued that when he tried to make payment for the arrears the Building Society turned him away as they had been paid by the purchaser of the house. The purchaser also refused to surrender the house to him. They were entitled to do so as he was only trying to reverse a process which was by then complete.

I therefore see no prospects of success on appeal even if this application is granted.

Accordingly, this application is dismissed with costs.

Madzivanzira & Partners, applicant's legal practitioners

Bvekwa Legal Practitioners, respondent's legal practitioners