DISTRIBUTABLE (7)

JULIUS TAWONA MAKONI
V
(1) PAULINE MUTSA MAKONI (2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
HARARE, 10 OCTOBER, 2016 & FEBRUARY 15, 2018

F. Girach, for the applicant
Mr *S. Mpofu,* for the first respondent.

IN CHAMBERS

Judgment No. 7/2018
Civil Application No. SC 409/2016

BHUNU JA: This is an application for condonation of late noting of appeal and extension of time within which to file the appeal in terms of r 31 of the Supreme Court Rules, 1964.

The parties were married but divorced in England. The court in England issued a decree *nisi* which the first respondent used to obtain an interdict in the local High Court. The interdict barred the applicant from dealing in the property known as No. 5 Reitfontein Close Highlands, Harare, which he claims to be his sole property.

Aggrieved by the court *a quo's* order, the appellant sought to appeal to this Court. He initially filed his notice of appeal on time but the application was struck off the roll with costs for want of compliance with r 29. The appeal was fatally defective in that it did not state the date on which the judgment appealed against was handed down, thereby prompting this application.

The taxed costs amounted to $7 545.25. (**Seven Thousand five hundred and forty-five dollars twenty –five cents).**

At the hearing Mr *Mpofu* counsel for the first respondent raised a point *in limine* objecting to the continuation of the proceedings before the applicant has settled the first respondent's wasted costs. He accordingly moved for the proceedings to be stayed pending payment of the outstanding wasted costs.

Mr *Girach* counsel for the applicant after taking brief instructions acknowledged that his client owed the first respondent the taxed costs. He however countered that his client is owed some untaxed costs by the first respondent. He then proposed that the first respondent's costs be set off against the applicant's untaxed costs. When it was pointed out to him that a liquidated amount cannot be set off against an illiquid amount he conceded the point but countered that the respondent should execute against applicant's property.

In further argument he submitted that justice must be dispensed quickly and fairly with due regard to the need to effect finality to ligation. It was his submission that the first respondent should effect execution for wasted costs awarded while the hearing proceeds to finality on the merits.

He pointed out that the court had the discretion whether or not to stay the proceedings pending payment of the first respondent's taxed costs. There is merit in that submission.

The applicant's attitude that the respondent should proceed with execution against his property evinces a mind set on piling wasted costs on the respondent. I come to that conclusion because he has advanced no reason why he cannot voluntarily sell his property to liquidate his liability to the respondent without incurring further costs for execution. That attitude gives credence to Mr *Mpofu's* submission that it is unfair for the applicant to continuously bring proceedings against the first respondent without paying respondent's wasted costs awarded by the court *a quo*.

Considering that money may be hard to come by I held back delivering judgment in this application to give the applicant time to pay the outstanding wasted costs. I am in agreement with Mr *Mpofu* that it would be manifestly unfair and unjust for the applicant to continue piling proceedings on the 1st respondent without first making good the wasted taxed costs he caused the respondent to incur. In my considered view this may be meant to wear down the respondent with costs.

It is now more than 15 months since the applicant was granted the opportunity to pay the respondent's wasted costs. If by now he has not paid the respondent's wasted costs,

proceeding with the hearing in the absence of payment will cause the respondent serious prejudice if not grave injustice.

In the event that to date the applicant has not paid the respondent's wasted costs, the application for stay of proceedings succeeds. I note in passing that the order will not adversely affect the respondent since the interdict granted by the court *a quo* operates against the applicant in favour of the respondent. Any prejudice which the applicant may suffer arising from the stay of these proceedings is self-inflicted.

It is accordingly ordered that:

1. The objection *in limine* be and is hereby sustained with costs.
2. This application for condonation of late noting of appeal and extension of time within which to appeal to this court be and is hereby stayed until the applicant has paid the first respondent's taxed costs in the court *a quo*.

Magwaliba & Kwirira, the applicant's legal practitioners

Munangati & Associates, incorporating *Goneso & Associates*, the 1st respondent's legal practitioners.