REPORTABLE (33)

ROSEMARY BASTIN
v
KUFA JOHN MADZIMA (IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE LATE MARIMO MASAWI MADZIMA)

SUPREME COURT OF ZIMBABWE
MAKARAU JA, MAKONI JA & MATHONSI JA
HARARE: JANUARY 17, 2020 & MARCH 5, 2020

Ms J. Wood, for the appellant
H. H. Mukonoweshuro, for the respondent

MATHONSI JA: This is an appeal against the whole judgment of the High Court handed down on 20 February 2019 which granted summary judgment in favour of the respondent for the eviction of the appellant, and all those claiming occupation through her, from stand no 3437 Highfield Township, Harare ("the property") after dismissing the appellant's application for condonation of the late filing of heads of arguments in opposition to the summary judgment application.

The facts of the matter are these. The respondent's father, Marimo Masawi Madzima, died at Marondera in 1985. He was the registered owner of the property. Following his death, the respondent was appointed heir to, as well as executor of, the estate. In 2001 the

respondent engaged the law firm of Karuwa and Associates with instructions to dispose of the property. In due course, and entirely without the authority and consent of the respondent, that law firm sold the property to the appellant. The appellant took transfer of the property and held title by Deed of Transfer No. 1948/2007.

The respondent was aggrieved. He instituted an action in the court *a quo* against the appellant and others under case number HC 2120/07, *interalia,* for the cancellation of the sale and the return of the property to its rightful owner. Although the action was contested, the respondent was successful. By judgment delivered on 23 May 2012, being HH 221/12, the court *a quo* found that the transfer to the appellant had been fraudulent and that the owner of the property was entitled to vindicate his title against any other person in possession of the property. The order which was issued included an award of costs on the legal practitioner and client scale against the law practice of Karuwa and Associates.

As the appellant remained in occupation of the property notwithstanding the judgment of the court *a quo* referred to above, which was only appealed against by Karuwa and Associates in respect of the award of costs, the respondent instituted action proceedings for eviction under case number HC 1025/18. The action was opposed by the appellant whose only discernible defence was that the judgment of the court *a quo* in terms of which her claim was dismissed had been taken on appeal to this Court under case number SC 211/18. As it turned out, that was an appeal lodged by Karuwa and Associates against only a part of the judgment "that granted costs" against the law firm and nothing else.

The respondent was understandably unimpressed and believing that the appellant did not have a *bona fide* defence and that appearance to defend had been entered for dilatory purposes only, made an application for summary judgment. Although the appellant still opposed to the application, maintaining that no relief could be afforded the respondent by summary judgment, her legal practitioners failed to file heads of argument within the time allowed by the rules of court. She was therefore automatically barred in terms of r 238 (2b) of the High Court Rules, 1971.

The appellant did not file a formal application for the upliftment of the bar. Instead, counsel for the appellant still proceeded to file heads of argument out of time in which she sought to lead evidence from the bar on the reasons for failure to timeously file the heads of argument. At the hearing before the court *a quo,* an application for condonation of the late filing of the heads of argument was then made on behalf of the appellant from the bar. The application was dismissed and the court *a quo* proceeded to determine the summary judgment application on the merits unopposed. It granted the application.

The appellant was not happy with that turn of events. She has noted an appeal on the following grounds.

1. The court *a quo* erred in dismissing the application for condonation thereby unprocedurally hearing the matter unopposed.
2. The court *a quo* misdirected itself in finding that the appellant did not satisfy the requirements for condonation.

3. The court *a quo* erred in finding that the appellant did not have a *bona fide* defence to the application for vindication.
4. The court *a quo* erred in finding that the respondent had made a case for summary judgment.

While the appellant has listed four appeal grounds, they are clearly repetitive. Only two issues have to be determined in this appeal. They are:

a. **Whether the court *a quo* erred in dismissing the appellant's application for condonation and the upliftment of the bar;** and
b. **Whether the court *a quo* erred in granting summary judgment.**

At the hearing of the appeal, Ms *Wood* who appeared for the appellant initially appeared to make an application, in terms of r 40 of the Supreme Court Rules, 2018, to lead further evidence on appeal. She submitted that the appellant had effected improvements on the property during the period of almost 13 years that she has been in occupation. In that regard she has an improvements *lien* over the property and cannot be evicted therefrom without compensation for those improvements.

It was further submitted that the appellant filed an action in the court *a quo* in November 2019 for compensation. She therefore desired to lead further evidence on appeal relating to the suit now pending in the court *a quo* which should be determined before the appeal is determined.

Mr *Mukonoweshuro* for the respondent opposed the application to lead evidence on appeal. He submitted that the claim for compensation is a separate action pending before a court of competent jurisdiction. It had nothing to do with the present appeal which is only concerned with the rights of the parties as determined by the judgment of the court *a quo* delivered in 2012.

Upon this Court engaging counsel for the appellant further on the nature of her application to lead evidence on appeal, she changed gear and made an application for a postponement to enable the appellant to prepare a formal application to lead evidence on appeal. Counsel submitted that the application could not be made earlier because, firstly, she had not been involved in the preparation of the appeal, her instructing legal practitioner was. Secondly, the idea of leading evidence on appeal only occurred to her when she was preparing for the appeal hearing. It may have been an afterthought.

Clearly there was no merit in whatever application the appellant sought to make from the bar. An application to lead further evidence is governed by r 40 of this Court's rules which provides:

> "An application to lead further evidence on appeal shall be accompanied by that evidence in the form of an affidavit and also by an affidavit, or statement from counsel, showing why the evidence was not led at the trial, together with a copy of the judgment appealed from and a statement indicating in what manner it is alleged the evidence sought to be adduced affects the matter at issue."

The appellant's counsel could not make an oral application to adduce evidence on appeal from the bar. It was simply incompetent to do so as such an application was not in the form

and did not meet the standard set by the rules. Perhaps it was upon a realization of that fact that the application quickly morphed to one for a postponement to allow for the preparation and filing of a proper application.

A postponement is not there for the asking. The court has a discretion, which it exercises judiciously, to grant or refuse a postponement. Where the reason for a party's non-preparedness to proceed with the hearing has been fully explained and the non-preparedness to proceed is not due to tardiness and some delaying tactics, the court will be very reluctant to refuse a postponement.

It is settled however, that an application for a postponement must be made timeously and as soon as the circumstances justifying it become known. An application for a postponement being used as a tactical manoeuvre to gain an unfair advantage will not be granted for its lack of *bona fides*. The main consideration in determining whether to accede to an application for a postponement is whether prejudice will be suffered by the other party. See *Myburgh Transport v Botha* 1991 (3) SA 310 (NSC) at 315 C-D.

In this matter a postponement was sought in order to enable the appellant to create a case which was not placed before the court *a quo* whose judgment is on appeal. In response to the respondent's claim for eviction, the appellant filed a plea which, as I have said, only raised the defence that the judgment of HUNGWE J (as he then was) had been appealed to the Supreme Court.

The defence of an improvements *lien* was not raised. Indeed, even in case number HC 2120/07 which settled the rights of the parties, that defence was not raised. The appellant wants to raise it for the first time on appeal.

It occurs to me that r 40 of this Court's rule is not intended to be used for the purpose of building a new case altogether which was not before the court *a quo.* More importantly, the evidence which the appellant intended to lead is certainly not necessary for the determination of the present appeal. It is for that reason that, on the turn, this court dismissed the application for a postponement in order to make an application to adduce what was clearly extraneous evidence and proceeded to hear the matter on the merits.

On the merits of the appeal the appellant did not fare any better either. I shall first consider the issue whether the court *a quo* erred in dismissing the appellant's application for condonation. It is now settled that where a party has fallen foul of the provisions of the rules, they are generally required to purge their default by seeking condonation.

Where the party has not sought condonation for failure to comply with the rules, it must give an acceptable explanation not only for the delay, but also the delay in seeking condonation.

It means that what calls for some acceptable explanation is both the failure to abide by the rules and the failure to seek condonation. See *Viking Woodwork (Pvt) Ltd vs Blue Bells*

Enterprises (Pvt) Ltd 1998 (2) ZLR 249 (S) at 251 C-D, *Maheya vs Independent Africa Church* 2007 (2) ZLR 319 (S) at 323 B-C.

Consideration of an application for condonation involves the exercise of judicial discretion. Simply put, the court exercising a discretion is allowed the freedom or authority to make judgment or to act as it sees fit. In *Bonneyview Estates (Pvt) Ltd vs Zimbabwe Platinum Mines (Pvt) Ltd and Anor* SC 58/18 at p 3 of the cyclostyled judgment, this Court made the point:

> "Condonation is an indulgence granted when the court is satisfied that there is good and sufficient cause for condoning the non- compliance with the Rules and good and sufficient cause is established by considering cumulatively, the extent of the delay, the explanation for that delay, and the strength of the applicant's case on appeal, or the prospects of its success."

When calling upon the court *a quo* to exercise its discretion in favour of condoning the failure to file heads of argument on time, the appellant did not make a good case at all. In fact, submissions on behalf of the appellant advancing the cause for condonation were made as if condonation was a mere formality. No attempt whatsoever was made to satisfy the basic requirements for condonation.

In written heads of argument submitted in support of the oral application, counsel for the appellant admitted that the respondent's heads of argument in the court *a quo* were served on her on 17 September 2018 and yet the appellant's own heads of argument were filed on 29 January 2019.

It was also conceded that the appellant was served with the notice of set down of the application for summary judgement on 11 January 2019 meaning that it took the appellant, even after becoming aware of the set down date of 4 February 2019, eighteen days to file the belated heads of argument. What is more, although the appellant had about 24 days within which to make an application for condonation and the upliftment of the bar, even from the date of service of the notice of set down on 11 January 2019, she did not see the wisdom to do so. Instead she was content to prepare to make an oral application from the bar. This was extremely tardy and indeed irresponsible.

As it also turns out, counsel for the appellant urged the court *a quo* to grant condonation while at the same time submitting that the court *a quo* was precluded from proceeding with the hearing of the summary judgement application by an appeal noted at the Supreme Court. The learned judge stated at p 3 of the cyclostyled judgment;

> "At the hearing, counsel for respondent proceeded to make submissions for condonation, advanced one main (reason) that being that applicant's claim for vindication of the property remained under (challenge) in the Supreme Court in matter number SC 211/18, and that the opposed motion proceeding couldn't be heard until the outcome of the appeal was forthcoming.
> Counsel for applicant opposed the respondent's application for condonation, arguing firstly that the appeal which had been filed by the respondent challenging HUNGWE J's determination, was a challenge on costs only and not the merits, and secondly that the appeal had since been determined by consent---- Accordingly I find there is no appeal pending in the Supreme Court which would have the effect of delaying the resolution of the present matter on this opposed roll. In the circumstances I dismissed the application for condonation for want of merit."

In dismissing the application for condonation as it did, the court *a quo* exercised discretion dealing with the matter as it deemed fit in the circumstances. It is not correct that no

reasons were given for that. An appeal court faced with an appeal against the exercise of judicial discretion does not have a fresh discretion as could be substituted for the one of the court below. As stated in the case of *Friendship v Cargo Carriers Limited* 2013 (1) ZLR 1 (S) at p5F:

> "It is settled that an appellate court will not interfere with the exercise of discretionary power by a lower court unless it is shown that the lower court committed such an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision: *Halwick Investments vs Nyamwanza 2009 (2) ZLR 400 (S), Sedco vs Chimhere* 2002 (1) ZLR 424 (S)*, ZFC Ltd vs Geza* 1998 (1) ZLR 137 (S)."

In this matter it has not been shown that the court *a quo* was guilty of any of the improprieties set out by the authorities in exercising its discretion by refusing to condone the failure to file heads of argument within ten days from 17 September 2018. In truth, there was nothing to condone at all as the appellant did not even begin to make a case for condonation. It is therefore my finding that there was no misdirection in refusing to condone the appellant's failure to file heads of argument on time.

I move on to consider whether the court *a quo* erred in granting summary judgment in favour of the respondent. The court *a quo* found that the appellant does not have a *bona fide* defence to the respondent's claim for vindication simply because the rights of the parties to the property had already been determined by that court previously. It found that the appeal against that judgment had been determined without upsetting the previous determination of the court *a quo.*

Counsel for the appellant maintained on appeal that the main reason for opposing the application for summary judgment was that it was made prematurely when there was still an

appeal to this Court by Karuwa and Associates. She acknowledged that the said appeal had long been finalised by consent at the time of hearing the application. However, she submitted that the consent order of this court settling the appeal should not have been produced before the court *a quo* because r 67 of the High Court Rules proscribes the adducing by the respondent of further evidence otherwise, than by the founding affidavit.

There is no merit in that submission. The court *a quo* was entitled to take judicial notice of the consent order settling the appeal in determining the matter. The existence of the consent order was a matter of public record which cannot be equated to adducing of further evidence within the meaning of r 67. In this case it was used to debunk what was regrettably a false defence relied upon by the appellant- that there was an appeal pending when there was none.

There can be no doubt that the appellant did not point to any *bona fide* defence to the respondent's claim or to any triable issue as would dissuade the court *a quo* to grant summary judgment. While summary judgement is an extra-ordinary remedy given that it deprives a litigant, desirous of defending an action, the opportunity to do so without regard to the *audi alteram partem* rule, it has always been granted by the courts to an applicant possessing an unassailable case. It is trite that such an applicant should not be delayed by resort to a trial, whose outcome is a foregone conclusion.

It is also trite that in order to defeat an application for summary judgment, a respondent must set out a *bona fide* defence with sufficient clarity and completeness to enable the court to decide whether the opposing affidavit discloses facts which, if proved at the trial, would entitle the

respondent to succeed. See *Kingston Ltd v L D Inesons (Pvt) Ltd* 2006 (1) ZLR 45 (S) at 458F-459A. The appellant 's brief opposing affidavit does not even begin to meet that threshold. The court *a quo* was certainly entitled to grant summary judgment. The appeal is entirely without merit.

In his heads of argument, Mr *Mukonoweshuro* for the respondent asked for costs *de bonis propriis* on the higher scale against the appellant's legal practitioners. At the hearing of the appeal he did not motivate costs of that nature. This C-ourt is unable to find any basis for awarding such costs although the court finds no reason why costs should not, as is the norm, follow the result.

In the result it is ordered that:

1. The appeal is hereby dismissed.
2. The appellant shall bear the costs

MAKARAU JA I agree

MAKONI JA I agree

Venturas and Samukange, appellants' legal practitioners
Messrs Mukonoweshuro & Partners, respondents' legal practitioners