REPORTABLE ZLR (6)

Judgment No. 17/09
Civil Appeal No. 191/08

ELIZABETH MUTIZHE v (1) LOVENESS AXCILLIA GANDA (2) THE REGISTRAR OF DEEDS (3) FANNIE RONNIE MUTIZHE

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 11 & APRIL 2, 2009

J Samkange, for the applicant

G Gafu, for the first respondent

No appearance for the second and third respondents

Before MALABA DCJ: In Chambers in terms of r 31 of the Rules of the Supreme Court ("the Rules").

This is an application for an extension of time in which to note an appeal against the whole judgment of the High Court given on 27 February 2008.

The applicant and the third respondent were married to each other until the High Court granted him a decree of divorce on 22 February 2005 in case No. HC 8877/03. The High Court made an order with regard to the division of the assets of the spouses.

Of relevance to the determination of this application is the fact that the third respondent was awarded 80% of the market value of the matrimonial house situated at Stand No. 2711 Mahogany Circle, New Marlborough, Harare ("the property"). The applicant was awarded 20% of the market value of the matrimonial house.

The order further directed that:

"5. If the parties cannot agree on the value of the matrimonial home within ten (10) days of the date of this order, the property is to be evaluated within 30 days thereafter by a registered firm of Estate Agency agreed upon by the parties' legal practitioners or failing such agreement by an Estate Agent nominated by the Registrar of this Court.

6. The cost of evaluation are to be borne by both parties in equal shares.

7. The plaintiff shall pay to the defendant on or before the 1st of November 2005, 20% of the net value of the property.

8. Failing compliance with the provisions of clause 7 above, the matrimonial home shall be sold on the open market to the best advantage and the net proceeds therefrom to be shared between the parties as set out in the paragraph above."

On 16 June 2004 the applicant had obtained from the High Court an interdict prohibiting the second respondent from registering transfer of the property without her prior written consent.

On 11 August 2005 the first respondent entered into an agreement of sale with the third respondent in terms of which he sold and she purchased the property for $750 000 000.00. She paid the purchase price to the third respondent's conveyancers. At the time she entered into the agreement of sale, the first respondent was not aware of the

court order awarding the applicant 20% of the value of the property. When she subsequently got to know of the order she raised the question of its possible effects on the sale of the property. The third respondent assured her that the order would not affect transfer of the property into her name provided the applicant was paid the 20% share of the value of the property. Upon request by the third respondent, she authorized the release of $150 000 000.00 which was 20% of the purchase price into his bank account for payment to the applicant. The applicant confirmed in the founding affidavit that an amount of $149 000 000.00 was paid into her bank account.

After the payment of the purchase price by the first respondent, the applicant instituted an appeal against the order of the High Court. A perusal of the record in case No. HC 8877/03 shows that the appeal had been noted out of time. It appears that there was an application for an extension of time in which to note the appeal which was granted.

The notice of appeal, however, remained fatally defective for non-compliance with r 29(1)(d) of the Rules. Under the heading "Grounds of Appeal" it is stated as follows:

> "1. With new evidence before the court, the court *a quo's* apportionment of shares in the matrimonial house called House No. 2711 Mahogany Circle, New Marlborough, Harare is amendable.
>
> 2. Without all evidence the court *a quo* failed to award Stand 6839 Borrowdale."

By no stretch of imagination can it be said that what is stated constitutes grounds of appeal against the order given by the court *a quo* on 22 February 2005 in case No. HC 8877/03.

In light of the appeal which the applicant had purported to institute, the third respondent sought to cancel the agreement of sale. The first respondent rejected the cancellation and commenced action in case HC 1545/06 claiming an order against the third respondent of specific performance of his obligation to transfer the property into her name. She also claimed an order of upliftment of the caveat of 16 June 2004 and eviction of the applicant and all those claiming the right of occupation of the property through her.

The third respondent did not appear at the trial to oppose the claim. A default judgment was entered against him. That had the effect of confirming the third respondent's right to transfer of the property. The court *a quo* found that the first respondent had adduced sufficient evidence to establish her entitlement to an order of upliftment of the bar. It granted the order. The decision took into account the fact that the applicant had not adduced evidence in opposition of the granting of the order.

The applicant had defended the claim on the ground that the order of 22 February 2005 gave her a real right in the property. The court held that her right was to have 20% of the proceeds of the sale of the house. It held that the right was enforceable against the third respondent and could not operate to defeat the transfer of the property to the first respondent in terms of the agreement of sale.

The judgment was given on 27 February 2008. The Registrar had given notice to the parties through the roll of the court relating to unopposed matters for that day that the judgment was to be handed down. Whilst the legal representative of the first respondent attended court to note the handing down of the judgment neither the applicant nor her legal practitioner attended. No appeal was instituted against the judgment within fifteen (15) days as is required by r 30(a) of the Rules.

The applicant averred in the founding affidavit that she had knowledge of the judgment for the first time on 22 August 2008 when a copy of it was served on her by the Deputy Sheriff. On 26 August she filed a notice of appeal with the Registrar. The document contained all the formalities required by r 29 to be stated in a notice of appeal. Strict compliance with the mandatory requirements of the provision of r 29 suggests that the applicant had read the relevant Rules before noting the appeal.

The notice of appeal was, however, fatally defective because it was filed six months after the date the judgment appealed against was given. Rule 30(a) had not been complied with. No application for condonation of failure to institute the appeal within fifteen (15) days of the date the judgment was given and extension of time in which to appeal was made in terms of r 31 of the Rules.

The explanation given by the applicant for non-compliance with the Rules was that she was a self-actor. She said she did not know that she was required to make an

application for condonation of non-compliance with r 30(a) and extension of time in which to appeal. She said she did not know that the notice of appeal was defective.

On 13 November 2008 the first respondent's legal practitioners wrote to the Registrar drawing her attention to the defective notice of appeal. The letter was copied to the applicant. Notwithstanding the fact that the letter made it clear that the effect of the defective notice was that there was no appeal against the judgment, the applicant did not act to regularize the situation.

On 25 November 2008 the Registrar wrote to the first respondent's legal practitioners accepting the contention that there was no appeal against the judgment of the High Court given on 27 February 2008. The letter was copied to the applicant. She did not act immediately to secure compliance with the rules of court. It was sixteen (16) days later that the applicant made an application for extension of time in which to appeal.

The explanation for failure to act after having been made aware of the defective notice of appeal and consequences thereof was again that the applicant was a self-actor. She pleaded ignorance of the requirements of r 31.

The factors a court has to consider in the determination of an application for condonation and extension of time in which to appeal have been stated in numerous decisions of this Court and the High Court. In *Maheya v Independent African Church* S-58-07 it is stated at p 5 of the cyclostyled judgment that:

> "In considering application for condonation of non-compliance with its rules the court has a discretion which it has to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance; the explanation therefor; the prospects of success on appeal; the importance of the case; the respondent's interests in the finality of the judgment; the convenience to the Court and avoidance of unnecessary delays in the administration of justice."

See *De Kuszab Dabrowski Uxor v Steel N.O.* 1966 RLR 60(A) at 162B-E; *Bishi v Secretary for Education* 1989(2) ZLR 240(H) at 242D-243C; *Director of Civil Aviation v Hall* 1990(2) ZLR 354(S).

The period of time marking the delay by the applicant in taking steps to note a valid appeal is nine months. The right to appeal is now dependent on the exercise of the court's discretion. The application was made on 8 December 2008. The inordinate delay may be divided into three parts. The first part extended from 27 February to 26 August 2008. The second extended from 27 August to 25 November. The last part extended from 26 November to 7 December 2008.

The applicant gave different explanations for her inaction during each of the three periods of delay. In relation to the first period of delay, she said that she had no knowledge that the judgment had been given on 27 February. In respect of her inaction in the second part of the period of delay, she said as a self-actor she was not aware of the requirements of r 30(a). She said she was also not aware of the provisions of r 31 providing a remedy to a party who would have failed to exercise the right to appeal

against a judgment of the High Court timeously. She had no explanation for her inaction during the last part of the period of delay.

Is the explanation of the delay reasonable? Apart from saying she did not know that the judgment had been delivered on 27 February 2008 the applicant did not say why steps were not taken by her or her legal practitioners which would have enabled her to acquire that knowledge. The court *a quo* had reserved judgment at the end of hearing of evidence in the trial of the action. The applicant and her legal practitioners were under the duty to make regular inquiries with the Registrar as to when the judgment would be given. To provide a reasonable explanation for compliance with rules of court it is generally necessary to say why the applicant or his legal representative failed to act in a manner a diligent litigant or his legal practitioner would reasonably have been expected to act.

In *Metro International* (*Pvt*) *Ltd v Old Mutual Property Investment Corporation* (*Pvt*) *Ltd* S-31-2008 the applicant company could not explain why its legal representative failed to take necessary steps to get knowledge of when the judgment it sought to appeal against had been given. At p 4 of the cyclostyled judgment it was stated that:

> "It is clear that the applicant's legal practitioners were under a duty, having taken instructions to represent it in the application at the High Court, to make regular inquiries at the Registry, confirmed by letters, as to whether the judgment had been given and if not, when it was to be handed down. A vigilant litigant interested in the speedy outcome of the application would have satisfied himself that the legal practitioners made regular inquiries for the judgment. Lack of knowledge of a judgment due to the failure to make necessary inquiries in

> circumstances where one is under a duty to do so cannot be an acceptable explanation for non-compliance with Rules of the Court. The applicant could not remain inactive until notification of the judgment was given by the Registrar."

In this case notification of the judgment given on 27 February 2008 was given to the parties by the Registrar in a Court Roll of cases to be dealt with on that day. The applicant and her legal practitioner did not avail themselves of the official source of the information on the delivery of the judgment. In my view, she cannot escape the consequences of failure to diligently pursue a judgment that befell the applicant in *Metro International's* case *supra*.

The explanation of failure to apply for an extension of time in which to appeal when the applicant got to know of the date the judgment was given is also unacceptable. The applicant could not have been ignorant of the requirements of r 30(a) when she drew up a notice of appeal which contained all the necessary formalities of a valid notice of appeal prescribed under r 29.

The letter of 13 and 25 November drew the applicant's attention to the fact that no appeal was pending before the Supreme Court because none had not been instituted within fifteen (15) days of the date the judgment was given. She was advised of the need to make an application for extension of time in which to appeal if she wished to have the situation regularized. To plead ignorance of the Rules in the circumstances on the ground that one is a self-actor is unlikely to persuade any reasonable Court to hold that the applicant was not culpable for the consequences of her own inaction.

There was no explanation for the failure to apply for extension of time in which to appeal for sixteen (16) days after the applicant received the letter of 25 November 2008. In the *Director of Civil Aviation* case *supra* at p 358B-C GUBBAY CJ cited with approval from *Bosman Transport Works Committee & Ors v Piet Bosman Transport (Pty) Ltd* 1980(4) SA 794(A) where at p 799D-E MULLER JA said:

> "Where there has been a flagrant breach of the Rules of this Court in more than one respect and where in addition there is no reasonable explanation for some periods of delay and indeed, in respect of other periods of delay, no explanation at all, the application should … not be granted whatever the prospects of success may be."

As I am unable in this case to go so far as to hold that the applicant was in flagrant breach of the Rules of this Court, I have considered the question whether there are good prospects of the appeal succeeding despite the finding that there is no reasonable explanation for the inordinate delay in making the application for extension of time in which to appeal.

The grounds of appeal were stated as being that:

"1. The court *a quo* erred at law and in fact in failing to uphold that the appellant's appeal in HC 8877/03 had an effect of suspending the whole judgment of the High Court in the divorce proceedings.

2. The court *a quo* erred in fact and at law by holding that the appellant had no real rights over the disputed property known as stand 2711 Marlborough Township of Stand 2575 Marlborough Township.

3. The court *a quo* misdirected itself by failing to regard the appellant's evidence that the interdict obtained by the appellant on 16 June 2004 had an effect of interdicting any transfer of the disputed property pending the determination of the appeal in case no. HC 8877/03.

4. The court *a quo* erred in fact and at law by failing to uphold that the cancellation of the agreement of sale by the third respondent was valid and lawful."

One looks at the founding affidavit for evidence of the facts stated as grounds of appeal. Considering these facts together with the reasons for the judgment appealed against and applying the relevant law, one can decide whether there are good prospects of success on appeal.

All that is stated in the founding affidavit on the grounds of appeal is this. The applicant said:

"20. I strongly believe that there are prospects of success on appeal. I say so because

20.1. As appears from the Notice of Appeal I insist that there was a valid and lawful cancellation of the agreement of sale.

20.2. I was also not satisfied by the court's ruling that the issue between me and the first respondent was whether or not I had a real right to the property.

20.3. For instance if the appeal court in case No. HC 8877/03 were to up my share from the 20% given by the court *a quo* to a higher percentage, this would affect the issues of enforceability of the judgment. This aspect is normally addressed by way of giving one party a time frame within which to pay out the other party of its share failing which that property can be sold and the proceeds are shared.

20.4. Assuming the transfers were to be done to the so called innocent buyer, and then the appeal court were to up my share, such court order would be difficult to enforce. The house in a case of this nature is a surety that one gets their share."

Nothing is said in the founding affidavit about the first ground of appeal. What was stated in the notice of appeal against the judgment of 22 February 2005 did not constitute grounds of appeal required under r 29(1)(d) of the Rules. There would be no valid appeal pending in the Supreme Court against the judgment in case HC 8877/03. In any case the appeal would not have been instituted against the whole judgment of the court *a quo*. There was no appeal against the order granting the decree of divorce. The court *a quo* could not have erred in failing to hold that the appeal suspended the whole judgment in case HC 8877/03 when in fact the appeal could not have had that effect.

It is clear from the founding affidavit that the applicant took issue with the fact that the court *a quo* perceived the question in dispute between her and the first respondent as having been whether she had real rights in the property. Contrary to the contention advanced in argument on her behalf by Mr *Samkange*, the applicant was not even claiming that the order of the court in case HC 8877/03 gave her real rights in the property. She did not challenge the fact that the right she was given was 20% of the share of the value of the house. Her view was that 20% of the value of the property was too low. These facts do not render any support to ground No. 2 of the defective notice of appeal.

The law is to the effect that the person in whose name immovable property is registered is *prima facie* its owner. The order of the court *a quo* did not alter the fact that as the third respondent was the person in whose name the house was registered, he was the sole holder of the real rights in it. It must be borne in mind that the

rights of spouses in the division, apportionment or distribution of assets upon dissolution of marriage, are depended upon discretionary remedies. In this case in the exercise of the broad discretion conferred on it, the court in case HC 8877/03 gave the applicant a right to 20% of the value of the property as opposed to 20% share of the real rights in the property. It was not a share in a joint ownership of the house. The third respondent could sell the property to a third party without the consent of the applicant provided he paid her 20% of the proceeds. That right did not give her power to *veto* the exercise by him of the right to dispose of all the real rights he alone held in the house as long as the sale met the conditions prescribed by the order. There is no basis in fact on which the allegation in ground No. 2 of the defective notice of appeal could be established.

On the third ground the interdict did not in fact have the effect the court *a quo* was accused of having disregarded. It preceded the judgment in HC 8877/03 and did not interdict transfer of the property pending determination of the appeal against that judgment. What the interdict prohibited was the registration of transfer of the property without prior written consent of the applicant. In other words the interdict would have given the applicant an absolute right to *veto* the transfer of the property even when the subsequent order gave her the right to 20% of value of the property with no power to *veto* the sale of the property to best advantage. So even if the applicant adduced evidence it would not prove that the interdict had the effect of prohibiting transfer of the property pending the determination of the appeal in case No. HC 8877/03. (The underlining is mine for emphasis)

Nothing of substance was said in the founding affidavit on ground No. 4. Cancellation of a contract is lawful when it is in accordance with the terms and conditions of the contract between the parties. It is also lawful where there has been a repudiation of the contract which is accepted by the innocent party as a breach relieving him from future performance of his obligations, otherwise the innocent party has a right to elect to accept or reject the unilateral act by the other party to try and bring a contract to an end. If he rejects the repudiation as a breach of contract the innocent party can hold the other party to his side of the bargain provided he discharges his own obligations under the contract.

The court *a quo* found that the third respondent had not shown that the cancellation was in terms of the agreement of sale. It accepted the evidence of the fact that the first respondent had elected to reject the cancellation of the contract by the third respondent as a breach. The first respondent was found to have held the third respondent to his side of the bargain. The applicant did not place before me facts on the basis of which a determination could be made to the effect that there were good prospects of ground No. 4 succeeding on appeal.

The application is accordingly dismissed with costs.

Byron Venturas & Partners, applicant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners