

REPORTABLE (48)

WONDER DUBE
v
KEITH MATSEKA

SUPREME COURT OF ZIMBABWE
HARARE: 19 SEPTEMBER 2022 & 29 MAY 2023

K. Gama, for the applicant

E. Nyakunika, for the respondent

CHAMBER APPLICATION

BHUNU JA:

[1] This is an opposed chamber application for reinstatement of an appeal under case number SC 166/22. The application is brought consequent to the applicant's failure to file his heads of argument within the prescribed time limits.

THE LAW

[2] The legal requirements for the application to succeed are well known. In *Apostolic Faith Mission & Two Ors v Murefu* SC 28 – 03 the court held that the applicant must satisfy the court that:

- (a) He has a reasonable explanation for the delay.
- (b) He has reasonable prospects of success on appeal.

[3] A Judge sitting in chambers is duty bound to interrogate the application and be satisfied that one or other of the essential requirements stipulated by law have been met before the

application can succeed. I now proceed to determine whether the two requirements for the application to succeed have been met.

WHETHER THE APPLICANT HAS A REASONABLE EXPLANATION FOR THE DELAY.

[4] The Registrar's letter calling for the appellant's heads of argument was served on the applicant on 26 July 2022. The applicant was obliged to file his heads of argument within 15 days from the date of the letter calling upon him to file heads of argument. He failed to file his heads of argument within the prescribed time limit.

[5] His undisputed explanation for the delay is that the letter was sent to the personal IECMS account of his erstwhile legal practitioner Mr. *Gama*'s personal IECMS account who was no longer representing the applicant on appeal. The letter ought to have been sent to the law firms' IECMS account. Upon learning of the error he filed the application for condonation and reinstatement of the appeal on 25 August 2022.

[6] The period of delay is not inordinate and the explanation for the delay is satisfactory and beyond reproach. This finding disposes of the first requirement in the applicant's favour which brings me to the second part of the enquiry.

WHETHER THE APPLICANT HAS REASONABLE PROSPECTS OF SUCCESS ON APPEAL.

- [7] In disposing of the above issue it is necessary to give a brief resume of the facts so as to gain an insight into the applicant's prospects of success on appeal.
- [8] The brief facts as outlined in the court *a quo*'s judgment are by and large common cause. The respondent issued summons in the Magistrates Court for the eviction of the applicant and all those claiming occupation through him from Stand Number 1, Village 5, Central Estates, Mvuma. The respondent's case was that he had been allocated the stand in 2000 and was later granted an offer letter on 20 February 2004. He claimed that the applicant unlawfully occupied part of his stand in 2002.
- [9] The applicant opposed the claim on the basis that he was not occupying any portion of Stand Number 1, but was actually occupying Stand Number 2 of which he is the owner. The respondent could not therefore, evict him from his own stand.
- [10] Upon consideration of the evidence before him, the Magistrate made a factual finding that stand number 1 was allocated to the respondent whereas stand number 2 was allocated to the applicant. The applicant had however encroached onto the respondent's land thereby triggering the dispute. On the basis of such finding he granted the respondent's claim and ordered the applicant's eviction from the disputed piece of land adjudged to be part of stand number 1.
- [11] The Magistrate's judgment was premised on a map adduced in evidence and an inspection *in loco* the court carried out. Upon consideration of the totality of the evidence before him, the Magistrate concluded that the applicant was occupying Stand Number 1, not Stand Number 2 that was allocated to him. He found that the applicant was occupying

a piece of land that is between water ways when stand Number 2 is beyond the second water way. The court observed that the District Administrator who had testified in favour of the applicant was not a credible witness.

[12] Aggrieved, the applicant appealed to the High Court (the court *a quo*) without success. On appeal he challenged the authenticity of the map produced by the respondent in evidence. He contended that the provisions of the Land Survey Act [*Chapter 20:12*] should have been followed. He stated that the undisputed facts are that the land in question was surveyed and beacons installed, the beacons should therefore have been located to resolve the dispute. He argued that the beacons had to be located by a land surveyor.

[13] He further challenged the jurisdiction of the presiding Magistrate to hear and determine the matter on the basis that the dispute ought to have been resolved by the Land Commission since it involved the extent of boundaries. He further challenged the Magistrates Court jurisdiction on the basis that the amount involved exceeded the Magistrates Court jurisdiction.

[14] In the court *a quo* he accordingly sought an order setting aside the judgment of the Magistrates Court and that the matter be referred for a fresh trial in the Magistrates Court. His quest in this respect found no favour with the court *a quo*.

[15] On the other hand counsel for the respondent countered that the applicant had failed to place before the court *a quo* evidence tending to show on a balance of probabilities that the right of occupation in issue exceeded \$2000.00 so as to oust the trial magistrate's

jurisdiction. He further submitted that both the trial Magistrate and the court *a quo* had the necessary jurisdiction to hear and determine the matter. It was contended on his behalf that both courts properly assessed the evidence before them and came up with the correct decision

[16] On the question of jurisdiction, the court *a quo* found that the issue of jurisdiction had never been raised before the trial Magistrate. It thus held that it was improper for the applicant to raise the issue of jurisdiction for the first time on appeal. The court however went on to hold that the Magistrates Court had jurisdiction to preside over the dispute as it was not being called upon to determine boundaries between the two pieces of land in dispute. It further found that the issue of the map was not relevant for the resolution of the dispute. Consequently the Land Survey Act was not relevant. The court *a quo* also found that the argument that the District Administrator was not aware of the inspection in *loco* was unmeritorious since the court does not need permission from anyone to carry out an inspection in *loco*.

[17] The applicant was dissatisfied by the decision of the court *a quo*. He noted an appeal to this Court. He however failed to file heads of argument timeously. As a result, the appeal was deemed abandoned and was accordingly dismissed. The applicant therefore turned to this Court in chambers for the reinstatement of the appeal.

ANALYSIS AND DETERMINATION.

[18] It is trite that the issue of jurisdiction remains alive between the parties at every stage of the proceedings. It may therefore be raised at any stage of the matter including at the

appeal stage though in appropriate cases a litigant may be held to have abandoned, acquiesced in or submitted to the court's jurisdiction. In any proceedings it is convenient that the issue of jurisdiction be raised right at the commencement of proceedings to avoid wasting time and money. It is pointless to proceed with a trial in which the court has no jurisdiction. In *Commercial Union Assurance Co. Ltd v Waymark N.O* 1995 (2) SA 73 (TR) at P 80 D – E, it was held that:

“An objection to the jurisdiction of the court should be taken *in limine*, a party who fails to object to the jurisdiction of the court before *litis contestation* may be assumed to have acquiesced to the court's jurisdiction”. It is however up to the appeal court to finally determine the issue of jurisdiction.

[19] Given the circumstances of this case, it is difficult to discern the basis on which the court *a quo* determined that the dispute did not concern the issue of boundaries considering that the cardinal issue for determination was whether or not the applicant had encroached onto the respondent's land. In that light, it is difficult to say off hand the question of using the relevant maps and pegs if any was irrelevant. The question as to whether the Land Survey Act [*Chapter 20:12*] is applicable to this case is a matter to be interrogated and determined by the appellate court.

[20] Initially I had misgivings about the veracity of the merits of the applicant's case. After a further scrutiny of the matter I am left with no doubt that there is an arguable case on appeal. On that score, I take the view that the applicant has an arguable case on appeal. The applicant's submission to the effect that he has reasonable prospects of success on appeal has merit. It is accordingly ordered that:

1. The application for reinstatement of an appeal and for extension of time to file heads of argument be and is hereby granted.
2. The appeal noted by applicant in Case Number SC 166/22 be and is hereby reinstated.

3. Applicant shall file heads of argument in Case Number SC 166/22 within ten days from the date of this order.
4. Each party shall bear his own costs.

Gama and Partners Legal Practitioners, applicant's legal practitioners.

Dondo and Partners Legal practitioners, respondent's legal practitioners.