

ANDREW MALOYA
versus
RUBBIE CHITUNGO
and
KNOWLEDGE MUMANYI
(In his capacity as Executor of the Estate Late Anderson Maloya)
and
BLESSING MAZARURA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 31 January & 4 March 2020

Opposed Application – Condonation

Applicant, in person
S Chatsanga, for the 2nd respondent
Ms M N Ngwenya, for the 3rd respondent

CHAREWA J: This is an opposed chamber application for condonation of late noting of review of the Master's decision in the administration of the estate of Late Anderson Maloya.

The facts

It is common cause that the applicant is one of the sons of Late Anderson Maloya and that he was in prison at the time of the deceased's death and during the administration of the deceased's estate. It is also common cause that at the time of his death, the late Anderson Maloya was the owner of certain immovable property being House Number 2569 Takawira Avenue, Dzivaresekwa 2, Harare and that before his death, the deceased had purported to donate the property into the joint ownership of his two sons Amos Rombwa and Jethro Rombwa on 24 May 2007.

It is also common cause that deceased was married to first respondent in terms of the Marriages Act Chapter 5:11 and that she is the one who registered the Estate and that an independent executor was appointed as a result of disagreement by the family on the appointment of one of them as executor. The house was sold in terms of s120 of the Administration of Estates Act Chapter 6:04 and the proceeds were to be shared among the family members. A dispute with regard the sale and distribution account was resolved by

beneficiaries agreeing to refund the purchase price, failing which it was agreed that the Master would give the executor a directive to proceed. The family failed to refund the purchase price and the administration of the estate proceeded. Applicant's share is presumably held in the Guardian Fund. The final distribution account has not yet been confirmed.

The applicant was released from prison on 17 October 2017 but only filed this application on 11 April 2019. He has not filed with this application, his draft application for review.

Parties' submissions

The applicant submits that the delay in filing his application for review was because he was in prison and was not in contact with his family. He tendered confirmation of his incarceration and release from prison across the bar through his "heads of argument". He only became aware that he no longer had a home when, upon coming out of prison he found no family members at the family home. He explained the delay from his time of release to the time of filing this application by blaming second respondent for "all the complications of this case" in failing to call for claims before he "secretly" disposed of the property. Applicant therefore submits that if second respondent had called for claims he would have timeously raised his claim that the property had been donated.

On the merits, he submits that his application for review has good prospects of success because the decision of the Master on 11 July 2014 was not only wrong but was passed "secretly", thus depriving him and his siblings of ownership, use and enjoyment of their home. Besides, he argues that the property was not part of the deceased estate, it having belonged to his mother and father. To this end, he attached a certificate of occupation listing his mother as one of the occupants. He thus argues that his father gave away the property before he married first respondent and therefore that the property should not have been part of the deceased estate.

In addition, he submits that the Master was biased and guilty of underhand dealings and gross irregularities in that he did not take into account that deceased had given away the property to applicant's brothers and retained no claim to ownership. Besides deceased procured the property in 1979 and only married first respondent out of community of property in 2007. Therefore fourth respondent was wrong in authorising the sale at first respondent's request.

Applicant submits that whether or not he has *locus standi* to bring this application given the purported donation to his brothers, is for the court to decide. However, he argues that since

the house was given to his brothers to preserve it as “The Maloya-Rombwa-Family Home”, this gives him the right to institute these proceedings as he is an interested party.

Further he submits that bias and corruption on the part of second respondent is predicated on the fact that the valuation report he commissioned was done on 26 June 2014, before he was given Letters of Administration. This is therefore an irregularity for which review is merited.

Further, it is his assertion that, despite being legally represented and having filed three other applications under such representation in addition to having participated in the administration of the estate, his siblings did not seek review of the decision of the Master or the executor on the grounds of bias or gross irregularity because they were ignorant. Finally, he submits that third respondent stands to suffer no prejudice should the sale to him be reversed, despite the passage of time since he obtained ownership and the fact that he has made improvements to the property.

And in answer to the question why he had not attached his draft application for review, applicant stated he wanted condonation first before attending to drafting and filing his application for review.

On his part, second respondent submits that his opposition to the application is predicated on the unexplained delay between the time that applicant was released from prison and the time he filed this application: a period of some eighteen months. Further, and on the merits, he submits that he did nothing wrong. He was entitled to sell the property in terms of the letter of authority from the Master dated 11 July 2014 (Annex I at page 25 of the record). In any case, he further submits, first respondent, being the surviving spouse, having consented to the sale, he was within his rights as executor to proceed in terms of s5(1)(b) of the Deceased Estates Succession Act Chapter 6:02. And if applicant is aggrieved by the distribution account, he is at liberty to seek recourse in terms of s 52(8) of the Administration of Estates Act Chapter 6:01. Besides the application is primarily predicated on an alleged donation to applicant’s siblings and thus applicant has no capacity to sue on a donation not made to him. In any event the alleged “donees” never lodged a claim against the estate to predicated on the donation.

In the premises, applicant’s degree of non-compliance is inexcusable, particularly since he offers no good or satisfactory, acceptable and reasonable explanation thereof. In any event, he has no good prospects of success to warrant the potential prejudice to other parties and the consequent unnecessary delay in the administration of justice.

For his part, third respondent submits that in addition to his heads of argument and second respondent's submissions, which he adopts, the application does not meet the minimum requirements prescribed by law for the success of an application of this nature, the applicant is not being candid with the court. The letter dated 28 November 2014 was written on behalf of all the siblings, including applicant, raising the presumption that he was well aware of his complaint from thence and, through his brothers could have sought review then. Further, third respondent submits, applicant does not substantiate why there will be no prejudice to third respondent if condonation is granted, nor does he give any justification for his belief that he has good prospects of success. Therefore no reasonable basis for interfering with third respondents rights has been given.

In response applicant gave evidence from the bar that the delay of eighteen months was because he was looking for a lawyer.

The Law

It is trite that the success of an application of this nature is predicated on the following:

1. The degree of non-compliance must not be inordinate
2. A good, satisfactory, acceptable and reasonable explanation for the delay must be proffered by an applicant.
3. There must be good prospects of success on the merits
4. The case must be sufficiently important to justify condonation
5. The possibility of prejudice on the other party if the application is granted must be outweighed by the possibility of prejudice on the applicant if the application is not granted
6. The granting of condonation must not unnecessarily delay the administration of justice.¹

Therefore, whenever an applicant realises that he has not complied with any rule of the court, he should apply for condonation without delay.² Where the claim on the merits relates to the rights of an innocent third party, who was unaware of any disputes and having made due diligence checks with the Master and had been assured that everything was done above board, he is entitled to complete and undisturbed ownership.³

¹ Bishi v Independent African Church SC58/07

² See James v Kutsiga & Ors ZWSC 97/2007. See also Ready Wholesalers (Pvt) Ltd t/a Power Sales v Innocent Katsande SC7/03

³ See Mwayi Paidia Family Trust v Madorobwe & Ors ZWSC 22/24

At the end of it all, the power to grant condonation is purely discretionary. However, the court must exercise such discretion when the principles of justice and fair play are considered in circumstances where the reasons for the delay have been explained satisfactorily.⁴

Finally, it is trite that in an application such as this, the intended application for review must be attached in order for the court to be in a position to assess the prospects of its success.

Analysis

The applicant fails at the very first hurdle. He has not attached his draft application for review, nor has he indicated in his draft order the relief he seeks subsequent subsequent to the condonation sought.

In addition, he does not explain at all what he was doing for eighteen months after his release from jail and why he therefore failed to file this application. Despite paragraph 8 of second respondent's opposing affidavit filed on 2 May 2019 drawing this failing to applicant's attention, applicant filed no answering affidavit addressing this issue. As pointed out by third respondent, applicant and his siblings did complain against the conduct of the executor by letter dated 28 November 2014 at page 40 of the record, meaning that though he was in jail, he was aware of what was going on. Yet they did not see fit then to seek review of the decision of the Master to authorise the sale. No explanation for such failure has been advanced.

However, it is clear from the Master's report, at page 54 of the record, that the estate was illiquid, none of the beneficiaries were willing or able to pay statutory expenses or for advertising of the estate, leaving the executor with no option but to seek the Master's authority to sell the property, which authority was granted in accordance with s120 of the Administration of Estates Act.

As for prospects of success on review, applicant appears to have none in my view. The complaint encapsulated in the letters of 7 October and 28 November 2014 are on three levels: the first being that the executor was only dealing with the surviving spouse. However, the letter of 28 November 2014 itself suggests that this was a result of the beneficiaries failing to turn up rather than any misconduct of the executor as the last sentence on paragraph 3 reads:

We never had any meeting done with the executor as most parties concerned never turned up as required".

⁴ Kodzwa v Secretary for Health & Another 1999 (1) ZLR 313

The second complaint, contained in the letter of 7 October 2014 is to the effect that the sale was improper as the house was co-owned with deceased's first wife, and in any event was donated to Amos and Jethro Ruombwa. However, no proof of ownership by the first wife is in evidence. A certificate of occupation, which does not confer ownership rights, was tendered in support of this contention. As for the alleged donation, all that were tendered are affidavits, which at best, support an intention to donate. The proper processes for effecting a donation are not in evidence, which perhaps explains why the City of Harare did not alter the ownership records in its keeping.

The third complaint was that despite disputes, the executor went ahead and sold the house with the consent of one beneficiary. S5(1)(b) of the Deceased Estates Succession provides as follows:

“5 Agreement on alternative division or direction to sell property devolving in undivided shares

(1) Where as a result of a distribution in intestacy any property devolves upon any heirs in undivided shares—

(a) the heirs may agree upon an alternative division of the property, and such agreement shall be binding on the executor;

(b) any one or more or all of them may direct in writing that he wishes or they wish, as the case may be, the property to be sold and the proceeds divided amongst the heirs, and such direction shall be binding on the executor and all the heirs. (my emphasis)

(2)

The executor therefore dealt with the estate in accordance with the law. He did not have to obtain the consent of every beneficiary. Clearly this provision was put in to ensure finality in the administration of estates in situations where consensus among beneficiaries could not be obtained.

The final ground of complaint was that the monies to beneficiaries had not been distributed. This presupposes that the beneficiaries agreed that the property should be disposed and that each should receive their share. Consequently, if there is a dispute regarding the distribution of the estate, the beneficiaries have recourse to s52 (8) of the Administration of Estates Act.

Surprisingly, the applicant wants the second respondent, whom he accuses of bias and interest in the estate, to be re-appointed to continue with the administration of the estate. Nor has any factual basis for the Master's alleged bias, interest or gross irregularity been laid. In

particular, the fact that applicant did not see fit to accompany this application with his draft application for review suggests to me that he is merely trying his luck and is not convinced that his intended application for review is meritorious. It seems to me that his complaints suggest that he is aggrieved by the executor not calling for claims and “secretly” disposing of the property, all of which is not supported by the facts, rather than any bias or gross irregularities by the Master. Certainly, the allegation that the Master appointed the executor secretly is unfounded in that the letter by applicant’s siblings dated 28 November 2014 in fact lauds the Master’s decision given the squabbles among the family members. It seems to me that this application can only be termed spurious.

Generally, the basis for seeking the review of the Master’s decision relies heavily on the grounds that the house ought not to have been sold as it was donated to applicant’s siblings. However, the fact of the matter is that such donation was never effected in that no transfer of rights or interests in the property ever devolved upon his siblings. The property remained in the deceased’s name until his death and was rightfully considered an estate asset. The affidavits of donation produced can only therefore prove personal claims by applicant’s siblings, which claims they did not pursue. In any event, even if the donation had been fully and effectually effected, the rights to the property would have devolved upon Amos Ruombwa and Jethro Ruombwa. Applicant’s *locus standi* to seek condonation on their behalf is thus predicated on shaky ground. I find therefore that applicant does not have good prospects of success on review.

Besides, the imputation of ignorance on his siblings is misleading. They had legal representation in filing their complaints, per the letter of 7 October 2014, given by hand of Lawman Chimuriwo, Attorneys at Law, and they managed, with such legal assistance, to pursue litigation in HC 683/15, HC 2533/15 and HC 6598/15.

Finally, applicant does not dispute that third respondent is an innocent third party, who took transfer in good faith, having done his due diligence and was assured everything was above board, as it indeed was. Neither does he dispute that the Master gave his siblings all the audience they requested and tried to resolve the matter to their satisfaction including mediating an agreement that third defendant could relinquish his rights to the property back to applicant’s family in exchange for a refund of the purchase price and attendant costs. This, the estate beneficiaries failed to do. Nor is applicant offering to do so now. In the circumstances, it seems to me therefore that the interests of justice and fair play are tilted in favour of the third respondent, that this application should be dismissed.

Disposition

Consequently, the application for condonation of late filing of an application for review of the Master's decision is hereby dismissed with costs.

Applicant, in person

Messrs Chatsanga & Partners, 2nd respondent's legal practitioners

Messrs Matsika Legal Practitioners, 3rd respondent's legal practitioners