

SANDRA NOKHUTHULA CHAKARA
and
MAKANYARA MIRIAM DAMBUDZO
and
SHANTEL OLIVIA DAMBUDZO
and
BHEKIMUZI RONEY CHAKARA
versus
JENNIFER M NDORO
and
ESTATE LATE NEVER CHAKARA
and
MASTER OF THE HIGH COURT

HIGH COURT HARARE
KATIYO J
HARARE, 18 November 2021 & 12 May 2022

Opposed Application –Dismissal for Want of Prosecution

Mr T.A Chiyengerere, for the applicants
Mr P. Mujau, for the respondents

KATIYO J: The applicant approached this court seeking the following order:-

IT IS ORDERED THAT

1. The first Respondents Application for Rescission of Default Judgement of HC 530/20 filed under Case No HC 3851/2020 be and is hereby dismissed for want of prosecution.
2. That the Respondent should pay the Applicants wasted costs in case HC 3851/2020 and the costs of this application at attorney-client scale.

Brief Facts

The Applicants made an application for default judgement which was granted under HC 530/2020. The Respondent then made an application for rescission of default judgement under Case No HC 3852/2020. The applicants filed their notice of opposition and the Respondent failed to set-down the matter within stipulated time citing that she had gone to

Karoi to attend to her sister who was ill during that time. Applicants then filed an application for dismissal for want of prosecution under HC 3132/2021.

Dismissal for want of prosecution

When dealing with matters of this nature the court has to look at the prospects of success of the main matter. In the matter of *African Star Diamonds v Judy Nyamuchacha & Ors* HH 313/17 MAKONI J held that “...prospects of success are an essential element in matters where one is considering indulgence to a defaulting party. The consideration that pertains to applications for rescission of default judgement should apply in this matter. What is the point of dismissing an application in terms of rule 236 when it is clear that the main matter is doomed to fail. Thus the default judgement that was granted was”. In this instance the main matter under case no HC 3851/2020 has high prospects of success due to the fact that the applicants default judgment prejudices the Respondent usufruct rights that were granted through the will of her deceased’s husband. This is also through the same will in which Applicants are claiming ownership of the property in question. According to *P.J Buedenhost, Juanita M Piennar and Hanri Mostert, Silberberg and Shoeman’s The Law of Property* 5th edition page 339 “an usufruct is defined as a real right in terms of which the owner of a thing and often referred to as a grantor confers on the usufructuary the right to use and enjoy the thing to which the usufruct relates”. The applicants have no right to sell or dispose of a usufruct property unless the Respondent remarries or dies. Although the applicants are the legal owners of the property whilst the usufruct is in effect they have no right or authority regarding how the property is used or enjoyed .In the case of *Zvinavashe v Zvinavashe* HH 437/19 CHIRAWU – MUGOMBA J it was held that;

- a) “a usufruct is a limited right
- b) The usufructuary has the use and enjoyment of the property whilst the remainder has the bare dominium
- c) The usufruct has the right to use and enjoy the property
- d) The usufructuary is a bona fide possessor and is entitled to fruits but the corpus must be handed over at the termination of the usufruct
- e) The remainder person has a right to demand inventory at any time
- f) The remainder person can demand security”

The above characteristics of a usufruct clearly explain why the Applicants have no right to sell the property as long as the usufruct is in place. More so the Applicants are basing their

claim on the Will by their deceased father therefore they should respect the freedom of the testator.

The granting of a dismissal for want of prosecution is done to the discretion of the court. An order of want for prosecution is a final order although parties can be allowed to reapply but granting this order will not bring justice to the Respondent and she will be homeless. Also the order being sought by the applicants can be granted where there is clear indication that the Respondent has no intention to pursue her rights. The Respondent has not shown any intention not to pursue her rights therefore a justiciable approach should be given to her and also she should comply and fix the area where she is in default.

Freedom of testator

A will is a legal document in which a person specifies how his /her estate can be distributed in the event of death. In Zimbabwe it is governed by the Wills Act [*Chapter 6:06*]. In the *Chigwada v Chigwada & 2 Ors* SC 188 of 2020 the court held that Section 5 of the Wills Act 5 does not forbid a testator from disinheriting his spouse the testator must distribute his estate according to how it deems necessary. Thus the Act gives the testator freedom of testation. Therefore in this instance the wishes of the testator should be fulfilled and if the beneficiaries of the estate wish to sell the estate they can only do so after the usufruct is no longer in place.

Costs

It is common cause that the Respondent failed to prosecute her claim in compliance with the then rules of the High Court. Thus the Respondent has failed to work timeously and litigation should always come to an end timeously never drag for a long. The fact that the Respondent failed to file papers on time means that she is liable for the costs incurred by the Applicants during that time. After perusing the papers filed by the both parties court comes to the following conclusion.

IT IS ORDERED THAT

1. The Application for dismissal for want of prosecution is hereby dismissed.
2. The Respondent to set down the matter within 10 days from date when judgement was handed down.
3. The Respondent to pay costs at an ordinary scale.

D.V Sapare Attorneys, applicant's legal practitioners
Nyakudanga Law Chambers, respondent's legal practitioners