

EVANS TIGERE
versus
FLORENCE TINARWO
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18 May & 30 June 2021

Opposed Application

T. Chara, for the applicant
S. Mushonga, for the 1st respondent

TAGU J: This is a court application for condonation of late filing of an application for rescission of default judgment. The relief sought being that the applicant's late filing of application for rescission of default judgment be and is hereby condoned, the applicant be granted leave to file his application for rescission of judgment within seven (7) days of this order and that there be no order as to costs.

This application is opposed by the first respondent.

The facts of the matter are that the first respondent instituted proceedings under case number HC 10722/16 against the applicant who was then the first defendant and the second respondent who was the second defendant in the main matter wherein she sought that she and the first respondent be declared joint owners to the property in question being Stand number 245 Northwood Township 2 of Sumben held under deed of transfer 8281/06. The applicant had opposed the action in the main matter and was fully aware and convinced even beyond reasonable doubt that he had a plausible and bona fide defence to the plaintiff's claim. He religiously attended trial sometime in June 2019 wherein the presiding judge requested that the plaintiff prove that the property was held under tacit universal partnership. The amended declaration was not served on the Applicant since his erstwhile legal practitioners had by then renounced agency and he was not accorded the opportunity to respond to that. When agency was renounced he was not informed and they furnished the court with a physical address in Harare being number 4 Brunswick Lane Mount Pleasant, Harare when in actual fact they were fully aware that he did not at any point and time

reside there because he is fully based in the United Kingdom. The plaintiff who was fully aware that he was in the United Kingdom at that point in time took advantage of that and snatched judgment from this Honourable Court. The Notice of set down was served by affixing it to the outer door which is evidence that no one was staying at the above given address at all.

The applicant only came to know about the order granted in default when he saw a picture of the first respondent and an unknown man standing in front of the High Court. The applicant promptly sent his young brother to make inquiries at the High Court and he was informed that a default judgment had been entered against the applicant under the main matter. The applicant timeously filed an application for rescission of the default judgment under case number HC 9916/19 as a self -actor. He later engaged a legal practitioner who upon perusing his founding affidavit advised him that it was defective as it was commissioned instead of being notarized since same was done out of Zimbabwe. He promptly advised his new Legal Practitioners to withdraw the application and file a fresh one. Due to that his application was no way out of time hence the present application for condonation of late filing of an application for rescission of judgment.

The applicant is of the view that he was not in willful default and that the application for rescission has high prospects of success and the balance of convenience favours that this court should grant the application for condonation.

The first respondent is opposing the application on the basis that the Applicant failed to attend the initial hearing on the pretext that he had failed to raise air fares. She said there are two awards of costs granted against the applicant which he has not paid and that she cannot be saddled with costs. As to the renunciation of agency by applicant's erstwhile legal practitioners she said that is an issue between applicant and his former Lawyers. She submitted that there are always people at 4 Brunswick Lane Mount Pleasant, Harare because applicant rented out this premises from time of its purchase to date. She denied snatching the judgment arguing that applicant should have been constantly checking on the progress of the proceedings. She said service was effected on address supplied by his legal practitioners. As to the prospects of success she said the application for rescission does not have such prospects because the applicant was not working at the time the property in question was purchased since he did not have a work permit.

This is an application for condonation for late filing of an application for rescission. The requirements for such an application have been stated times without number in several decided

cases. In *Maswaure v Nyamunda* 2001 (1) ZLR 405 (SC) the Supreme Court had occasion to deal with such an application for condonation and the court laid down the following requirements-

1. It is the duty of a litigant to inform his legal practitioners of his forwarding address.
2. It is the duty of a litigant who has a pending matter to frequently contact his legal practitioners on the progress of the matter.
3. Applicant must give a satisfactory explanation for the delay in complying with the court's rules.

In *Saloojee and Another N.O. v Minister of Community Development* 1965 (2) SA 135 (AD) the Appeal Court held that what calls for some explanation is not only the delay...but also the delay in seeking condonation. An applicant should whenever he realizes that he has not complied with the Rules apply for condonation without delay.

It is trite that the main factors that are considered in determining applications of this nature traditionally include the extent of the delay, the cause of the delay and the reasonableness of the explanation thereof, the importance of the issue to be raised on appeal and the interests of fairness and justice. The last two factors being of particular importance. See *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (SC). In *Kodzwa v Secretary of Health and Anor* 1999 (1) ZLR 313(SC) SANDURA JA stated that in assessing such an application, the Court should endeavor to reach a conclusion that will be interest of justice. This general standard of the "interest of justice" is aptly captured in South African Constitutional Court decision in *van Wyk v Unitas Hospital (Open Democratic Advice Centeras Amicus Curiae)* 2008 (2) SA 472 CC at 477A-B wherein it was stated,

"This court has told that the standard for considering an application for condonation is the interest of justice. Whether it is in the interest of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extend and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

In the present case a major reason behind the delay was that the applicant had timeously filed his application for rescission of judgment under case number HC 9916/19 as a self-actor and later engaged a legal practitioner to act on his behalf. Applicant was advised that the founding affidavit was defective as it was commissioned instead of being notarized since the same was

sworn out of Zimbabwe. As to the adverse impact on the first respondent, or the administration of justice there will be no prejudice, whereas denial thereof in fact may potentially lead to grave consequences for the applicant who would be prejudiced. On the interest and fairness of justice, the nature of our law and the role of the judiciary, have a bearing on whether the law is fair and just as between the sufferer of the breach and the causer of the same. In respect of prospects of success in the main matter, the applicant's chances are very high given the circumstances of this matter. Therefore the applicant's reasons for not timeously filing the application is excusable. The application will be granted.

IT IS ORDERED THAT

1. The Applicant's late filing of application for rescission of default judgment be and is hereby condoned.
2. The Applicant be and is hereby granted leave to file his application for rescission of judgment within seven (7) days of this order.
3. There be no order as to costs.

Chara & Associates, applicant's legal practitioners
Mushonga Mutsvairo & Associates, 1st respondent's legal practitioners