EDITH MARUME
versus
JOSEPHINE MURWIRA

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 20 July & 25 August 2022

Opposed Matter-Rescission

C Sakupwanya, for the applicant
C Chakawa, for the respondent

MAXWELL J: On 25 July 2018 default judgment was granted in a matter between respondent and one Emely Charambira. Emely Charambira subsequently passed on 21 December 2018. Applicant approached the court seeking condonation for late filing of an application for rescission of the default judgment on the basis that she was appointed *executrix dative* to the Estate of the late Emely Charumbira (the deceased). Condonation was granted on 16 March 2022. The present application was filed on 24 March 2022.

In her Founding Affidavit applicant gives the background of the matter as follows. On 12 April 1999 house number 8609 Mbare, Harare was donated to her parents by her late grandparents. The cession was confirmed by the City of Harare on 15 July 2007. Applicant's father passed on in 2007 and her mother was appointed *executrix dative* to his estate. The house was subsequently registered in applicant's mother's name as the surviving spouse. Applicant stated that respondent has been legally at war with her mother ever since her father passed away, seeking that the house be declared a family house. She further stated that numerous court processes were instituted by the respondent against her mother in an attempt to dispossess her of the house. All were successfully defended. The matter in which default judgment was granted was instituted on 6 November 2017. Her mother had entered appearance to defend the action on 13 November 2017.

In response respondent stated that the property in dispute was ceded to her late brother in 1996 in trust for the purpose of securing a loan. The property was always regarded as a family home from which all of the children should benefit. She disputed that the house was given as a donation. She stated that at her brother's demise his late wife surreptitiously registered his estate and proceeded to have the property registered in her sole name, and started

denying her and her siblings access to the house and their share of the rentals from which they used to benefit. She disputed that appearance to defend was entered. She states that if it was entered, it was not served on her therefore r 49 of the High Court Rules was not complied with. As such the default judgment was property obtained.

1. **Whether or not default judgment was properly obtained.**

The default order appears on p 10 of the record. It clearly indicates that Mr T G Manhombo appeared for the applicant and defendant was in default. Rule 59A of the High Court rules, 1971 states:-

> "1. If on the calling of any case the plaintiff or plaintiff in reconvention appears in court personally, or by his counsel, and the other party is in default, the court may, subject to rule 60, grant judgment or make such order as it considers the plaintiff or plaintiff in reconvention, as the case may be, is entitled to upon the summons, declaration or claim in reconvention as the case may be."

Rule 60 excludes actions where the claim is for damages. Since the defendant was in default on 27 July 2018 it was not an error for the court to grant the order in default. The founding affidavit does not state that the defendant or a representative appeared on that day. The argument is that an appearance to defend had been entered on 10 November 2017. That is disputed by the respondent. Page 30 of the record is a copy of notice of entry of appearance to defend stamped 13 November 2017. Rule 49 of the High Court Rules 1971 required written notice of the entry of appearance to defend to be served on the plaintiff or his/her legal practitioner within twenty-four hours. The founding affidavit is silent on whether or not service was effected in terms of the rules. It therefore follows that from the papers on record, it has not been established that the default judgment was granted in error.

Applicant approached the court on the wrong premises. She ought to have sought rescission on the basis that the judgement was given in default, under r 63 of the High Court Rules 1971, not on the basis that the judgement was granted in error.

2. **Whether or not the default was wilful.**

Rule 63(2) of the High Court Rules 1971 requires an applicant to establish that there is good and sufficient cause for the court to rescind a judgment granted in default. *Stockhill* v *Griffiths* 1992(1) ZLR 172 sets out the factors to be taken into account in determining whether an applicant has discharged the onus of proving good and sufficient cause. They include

- the reasonableness of the explanation for the default
- the *bona fides* of the application, and

- the *bona fides* of the defence on the merits of the case which carries some prospect of success

The factors are considered not only individually but in conjunction with one another and with the application as a whole.

Explanation for the default

Applicant is not in a position to explanation why there was a default on 25 July 2018. As submitted by Mr *Chakawa*, her explanation is mere speculation. Her heads of argument state that the deceased instructed legal practitioners to represent her in February 2018. It therefore follows that by the time the default order was granted, the deceased was legally represented. Applicant has a heavy onus in justifying the rescission of the judgment. Where neither an affidavit from the legal practitioners who were representing deceased at the material time nor an explanation for the non-availability of such an affidavit is given, the court cannot escape the conclusion that there was deliberate or negligent failure to comply with the rules. Applicant failed to discharge the onus on her and the conclusion that the default was wilful is unavoidable.

The *bona fides* of the defence on the merits

In her heads of Argument, applicant submitted that the property in dispute was donated 24 years ago. Respondent alleged that the house was ceded in trust and therefore could not have been legally inherited by the deceased. The documents on record speak to a cession which was confirmed by the City of Harare in 2007. It is trite that he who alleges must prove. See *Nyahondo* v *Hokonya* 1997(2) ZLR 457. Applicant failed to prove that there are prospects of success in her favour on the merits.

In para 24 of her heads of argument respondent stated.

> "It is important to note, further that the Applicant was a young child when the agreement of cession in trust was entered into between the father and grandparents. It is not possible that she has any recollection or remembrance of the incident. The assertions made by her thus far are all a matter of hearsay and based on tales which she was told. If given the chance, she would be unable to give a credible and plausible testimony in support of the arguments she has raised."

This submission by respondent was not controverted. There is no evidence that applicant has any other evidence to buttress her allegations. The prospects of her success on the merits have therefore not been established. Accordingly the application fails.

Respondent prayed for costs on the legal practitioner and client scale in her heads of argument. No justification was given for the court to order such punitive costs. Ordinary costs will meet the justice of the case.

I therefore make the following order. The application for rescission of judgment be and is hereby dismissed with costs.

Hungwe & Partners, applicants' legal practitioners
Tamuka Moyo Attorneys, respondents' legal practitioners