

PRISCA MBENGO
versus
ESTATE LATE ALICE NDORO
and
JOSEPHINE CHINAKA
and
CHARLES NDORO

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 3 March 2022

OPPOSED APPLICATION

M Mareanadzo, for the state
Ms E Ngorima, for the accused

MUZENDA J: This is a court application for condonation of late filing of appeal where applicant seeks the following:

“IT IS ORDERED THAT:

- a) The application for condonation of late filing of appeal be and is hereby granted.*
- b) The applicant be and is hereby ordered to file her appeal within ten (10) days from the date of this order.*
- c) Each party to bear its own costs.”*

The application is opposed by the respondents.

Background facts

Applicant was customarily married to Elia Svosverai Ndoro who died intestate in 2010, she was the third wife. Alice Ndoro was also married to Elia Ndoro and she was the second wife. Alice died in 2008 without leaving a will. When Alice Ndoro died Josephine Chinaka (“second respondent”) was appointed executrix dative over Alice Ndoro’s estate and Joseph Chinake (“third respondent”) is cited as beneficiary. In compiling the inventory of Alice Ndoro’s estate, a shop situated at Chinyauhvera was included as part of the estate of the late Alice Ndoro.

Applicant was not happy with that inclusion. She made an application at Mutare Magistrates court under case number DRMT1/17 seeking an order for the court declaring the

shop not forming part of the late Alice Ndoro's estate. On 5 June 2020 the trial magistrate dismissed the application with no order as to costs. The trial court in its judgment came to a conclusion that the lease agreement issued by the Chief Lands Officer in respect of the shop was in the name of Alice Ndoro, as such there was a high possibility that the late Alice Ndoro was the registered owner of the shop in dispute. Applicant intends to appeal against that ruling contending that the shop belonged to the Ndoro family and the lease agreement was not conclusive evidence of ownership. To the applicant the shop was owned by the late Elias Svosverai Ndoro and must benefit all family members and not the late Alice Ndoro's children only.

Applicant realised that the date for filing the appeal was belated. Although judgment was delivered on 5 June 2020, she only learnt about it in October 2020 and got a copy on 2 November 2020. No one took the initiative to advise her of the judgment, not the respondents, not the court. She feels that she has explained her delay and has high prospects of success on appeal.

Respondents on the other hand aver that since the applicant is the one who had made the application to court, and the trial court had indicated to parties to periodically check the judgment, the applicant was expected to do so. She did not. She delayed to note the appeal and in any case to the respondents the decision made by the trial court is beyond reproach. The prospects of success on appeal were nil and respondents pray for the dismissal of the application for condonation with costs.

Applicant's Submission

It was submitted on behalf of applicant that she had been waiting for the ruling since June 2019 when judgment was reserved. She continuously checked for the ruling and the situation was worsened by the Covid-19 pandemic. It was argued further that the delay was not inordinate and she has tendered a reasonable explanation for the delay. Counsel for applicant cited the matter of *Moyo v National Prosecuting Authority*¹. After having learnt of the ruling on 2 November 2020, she proceeded to file the application for condonation on 12 November 2020. To the applicant she has bright prospects of success on appeal.

¹ HMA 16/20

Respondent's Submission

The respondents in their heads submitted that applicant has failed to meet the requirements for condonation and cited the matter of *Forestry Commission v Moyo*² and *Kombayi v Berout*³. It was argued on behalf of the respondents that applicant was not vigilant and took four months to learn about a judgment. They added that applicant had no one to blame for the inordinate delay but herself. It was further argued that applicant is not candid and honest in her application for the delay⁴. On the prospects of success it was submitted that the decision of the trial magistrate was supported by facts and documents adduced in court. It ought not to be interfered with even on appeal. Respondents prayed for the dismissal of the application with costs.

Issues for determination

- 1. *Whether the applicant has managed to explain her delay?***
- 2. *Whether there are prospects of success on appeal?***

The Law

The principles guiding condonation are well trodden in my view and basically three of them among others feature prominently and these are:⁵

- (i) the length of the delay;
- (ii) the reasonableness of the explanation for the delay
- (iii) the prospects of success if leave to appeal is granted and the following are bonus additions.
- (iv) the importance of the case
- (v) the need for finality to litigation
- (vi) the convenience of the court.
- (vii) the prejudice to the respondent.

² 1997 (1) ZLR 254(S)

³ 1988 (1) ZLR 53 (SC)

⁴ *Friendship V Cargo Carriers Ltd* +1 SC 1/13

⁵ *De Kuszabas – Dabrowski and Another V Steel N. O* 1966 RLR

No single factor is decisive⁶, but are inter-related and must be weighed against the other, thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong.

Applying Law to the Facts

Applicant has all along been legally represented and even up to this date. The trial court promptly alerted both parties that it was going to reserve its judgment but parties had to constantly check for the judgment. Applicant only filed an application for condonation on 12 November five months after judgment was delivered on 5 June 2020. In her affidavit and submissions in court she shifts blame to third parties without exonerating herself. Her explanation falls short of adequacy and reasonableness and left a lot of issues unexplained. I am not satisfied with her explanation for a delay of 5 months, even if I could allow a grace period of a month, the period still remains four months which to me is patently inordinate given the circumstances of this matter. Applicant seems to have another insurmountable task on the prospects of success.

The court *a quo* dealt with the existence of the late Alice Ngoro. She looked at birth certificates as well as the lease agreement. Having looked at both records the court came to a conclusion that respondents had proved on a balance of probabilities that the controversial shop was publicly registered in the late Alice Ngoro's name and as such belongs to the Estate. Given the evidence placed before the trial court, I can hardly find any fault with her finding. I discern no misdirection at all and come to a conclusion that the prospects of success on appeal are remote.

On the question of costs, I see no legal basis for granting costs on legal practitioner client scale. In my view applicant genuinely believed her legal practitioners to pursue the application for condonation. Ordinary costs would be justified.

Accordingly the following order is returned:

- a) The application for condonation of late filing of appeal is dismissed.***
- b) Applicant to pay respondent's costs on party and party basis.***

⁶ United Plant Hire (Pty) v Hills and Ors 1976 (1) SA 717 (A) at g720 G

Chikamhi Mareanadzo, applicant's legal practitioners
Legal Aid Directorate, respondents' legal practitioners