

TENDAYI MUNDAWARARA
versus
EMELDA MUNDAWARARA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 21 November 2013 and 19 June 2014

Opposed Matter

B. Mtetwa, for the applicant
N. M Phiri, for the respondent

CHITAKUNYE J: On the date of the hearing a *point in limine* to the effect that respondent was barred for not filing heads of arguments in time was raised by applicant's Counsel after which I granted the application and indicated that my written reasons will follow. These are the reasons.

The applicant and the respondent are former husband and wife. They were granted a decree of divorce by this court on 26 January 2012 in case number HH 51/2012. The Court order provided for, *inter alia*, a division of assets of the spouses.

Clause 3 in that regard provided that:-

- “3. The immovable property registered in the plaintiff's name known as Stand 51 Greystone Park Township 2 of Lot A of Borrowdale Estate, also known as No.15 Alveston Avenue, Borrowdale, Harare is hereby distributed by awarding 60% share to the plaintiff and 40% share to the defendant.
 - 3.1. The property shall be valued by a registered estate agent nominated by both parties within 30 days of this order.
 - 3.2. In the event that the parties fail to agree on an estate agent, the Registrar shall appoint an estate agent from his list to conduct an evaluation of the property upon request by either party.
 - 3.3. The estate agent shall submit his or her report to the parties within 15 days of his or her appointment.

- 3.4. The cost of evaluation shall be shared between the parties with the plaintiff paying 60% and the defendant 40%.
- 3.5. The plaintiff is hereby granted the right to buy out the defendant's 40% share within 90 days of the date of evaluation of the property.
- 3.6. In the event that the plaintiff fails to buy out the defendant in terms of paragraph 3.5 above, the property shall be sold at the best advantage by the deputy sheriff and the net proceeds shared between the parties with the plaintiff awarded 60% share and the defendant 40% share as per para (3) above.....”

The applicant appealed against one of the aspects of the judgement. The appeal was later withdrawn.

In the meantime the parties engaged in some arrangement pertaining to the enforcement of the judgement.

On 27 May 2013 the applicant launched this application seeking an order to the effect that he has fully complied with the provisions of para 3.5 of Case No HH51/2012 and so respondent should vacate Stand 51 Greystone Park Township 2 of lot A of Borrowdale Estate also known as No. 15 Alveston Avenue, Borrowdale, Harare.

The respondent opposed the application.

The applicant then filed his heads of argument on 18 July 2013. The heads of arguments were served on the respondent's legal practitioners on the same date. In terms of r 238(2a) of the High Court Rules, the respondent's heads of arguments were supposed to be filed within 10 days from 18 July 2013. The respondent purported to file his heads of argument on 19 September 2013.

On the date of hearing, applicant's counsel raised a *point in limine* arising from the late filing of the respondent's heads of arguments. The respondent's counsel had no plausible explanation for the obvious delay and failure to apply for the upliftment of the bar before the issue had been raised by applicant's counsel.

It was then that respondent's legal practitioner sought to apply for a postponement of the hearing to enable the respondent to file an application for condonation. That application was opposed. After hearing both counsel, I dismissed the application for postponement.

I was of the view that whenever a party seeks a postponement a party must advance reasonable grounds for the application. *In casu*, the respondent's counsel seemed oblivious

of the fact that his heads of argument were filed out of time. When that fact was brought to his attention he attempted to say the heads were not filed out of time in view of the vacation. However, a careful analysis of the matter shows that the applicant's heads having been served on the respondent on 18 July 2013, the respondent ought to have filed his heads of arguments by 2 August 2013 which was within the same term. Instead the respondent's heads were only filed on 19 September 2013. This was weeks after the third term had opened.

The impression created is that the respondent's legal practitioner for a reason best known to himself had deliberately not applied his mind to the timelines for filing heads of arguments and just thought that anytime would do. The rules are very clear on this. In that regard r 238(2) states that:-

“where an application,... has been set down for hearing in terms of sub rule(2) of rule 223 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, in accordance with sub rule (2a), heads of argument clearly outlining the submissions relied upon by him.....”

Subrule (2a) referred to therein states that: -

“heads of argument referred to in sub rule (2) shall be filed by the respondent's legal practitioner not more than ten days after heads of argument of the applicant.... , were delivered to the respondent in terms of sub rule(1).....”

Where the heads of argument are not filed in time the respondent is barred. To this effect sub rule (2b) of the same rule states that:-

“where heads of argument that are required to be filed in terms of subrule(2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll.”

Where a party is barred the normal route to take is to apply for the upliftment of the bar. In such an application a party must advance reasonable explanation for failure to abide by the rules. The explanation must be *bona fide*.

In casu, the respondent' legal practitioner had no such explanation and instead opted to apply for a postponement.

As already alluded to above respondent's counsel seemed not alive to the breach hence could not advance any good reasons for the failure to comply with the rules yet the failure to comply was so blatant. Applicant's heads of argument were served on respondent's legal practitioners on 18 July 2013 and respondent purported to file his heads of argument on 19 September 2013. Those heads of argument ought to have been filed at the latest by 2 August 2013 which was still during the second term of the High Court Calender.

Having failed to do so within the ten days, it took respondent about two weeks after the opening of the third term to file his heads of argument. Even then respondent's legal practitioner came ill prepared to address the issue of late filing of the heads of argument.

In the circumstances I dismissed the application for postponement and I proceeded to consider the matter and grant the applicant's application as respondent was barred.

Accordingly I granted an order that:-

1. The applicant has fully complied with the provisions of para 3.5 of Case No. HC 51/2012.
2. The respondent vacate the premises known as Stand 51 Greystone park Township 2 of Lot A of Borrowdale Estate also known as No. 15 Alveston Avenue, Borrowdale, Harare within seven days of the granting of this order.
3. In the event that the respondent does not vacate the said premises as provided for in para 2 of this order that she be responsible for all owner's charges in respect of the property set out in para 2 here above until she vacates the said premises.
4. That the respondent services the mortgage loan with CABS for as long as she remains on the premises.
5. That this order remains effective notwithstanding the noting of any appeal.
6. That the respondent pays the costs of this application on an attorney and client scale.

Mtewa & Nyambirai, Applicant's Legal Practitioners
Mvingi & Mugadza, Respondent's Legal Practitioners.