

Judgment No. SC 109/02
Civil Application Nos. 130/01 & 346/02

A. BEN SEMWAYO SITHOLE v A M JARVIS (NEE
HARTLEY)

B. BEN SEMWAYO SITHOLE v (1) THOMAS
KUMWENDA (2) LILIAN KUMWENDA

SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 21 & DECEMBER 10, 2002

M Madzivanzira, for the applicant

D S Mehta, for the respondent in application no. 130/01

V Madanhi, for the respondents in application no. 346/02

Before: CHEDA JA, in Chambers.

The applicant seeks an order for the re-instatement of his appeal with costs of suit and the costs of appeal in the first matter, and an extension of time within which to note an appeal in the second matter.

When the matters were first placed before me in Chambers, I pointed out that the applicant should comply with Rule 31 of the Supreme Court Rules (“the Rules”) as there was no judgment filed. It was also noted that in the second case there was no certificate of service filed.

The applications are opposed by the respondents and the parties argued the matters before me in Chambers.

In his founding affidavit the applicant says he noted an appeal to this Court on 16 May 2001. Messrs Cogan, Welsh & Guest were then acting for him. There was some misunderstanding with the legal practitioners and he instructed them to renounce agency. He immediately instructed Messrs Chikumbirike & Associates to act on his behalf. Some procedural irregularities occurred and the appeal lapsed. He said he is not to blame for that and the failure to comply with the Rules was not wilful on his part. He said the appeal was filed with the High Court on 3 September 2001 by Messrs Chikumbirike & Associates when he had instructed them in May 2001 and paid a deposit on 4 June 2001 with post-dated cheques for their fees. They did not file their assumption of agency at the time and, according to the records, only did so on 5 June 2002, which was a year later. He concedes this was the reason why Messrs Zamchiya Costa and the High Court directed correspondence to him.

The applicant says he remained ignorant about the fact that his appeal had lapsed until he consulted his legal practitioners on 4 October 2002. This is not true.

On the merits, all he says is that he stands a good chance of succeeding as the matter at the High Court was dismissed mainly on the issue whether or not the lease agreement had expired. He says there was numerous correspondence which

was tendered before the court to show that the lease agreement, which awarded him the option to buy, was renewed on several occasions.

The other parties opposed the matter on the basis that the applicant was advised about the defective notice of appeal and told what to do by the registrar of the High Court. He did not do anything to correct the defect. At some stage the registrar's office gave him up to 21 August 2001 to act, failing which the appeal would be regarded as having lapsed. The applicant did not comply with the Rules and the advice given.

The applicant accepts that he received correspondence from both Messrs Zamchiya Costa and the registrar of the High Court, but he does not state what action he took to rectify the matter. He has not given any proper reason for his failure to comply with the Rules.

The applicant blames Messrs Chikumbirike & Associates but has not obtained any explanation from them. Even if he instructed them properly, there is nothing to show that he made a follow-up with them when the other parties and the High Court kept writing to him personally, telling him what the position was regarding his case.

If the applicant had attended to the matter as advised by the High Court he could have been assisted to comply with the Rules, but he does not seem to have done anything to comply.

On the merits, the applicant says he has a good chance of success. However, from the record, the correspondence shows that the owner of the property in question advised him she was putting the property on the market for sale. He did not indicate his interest or exercise the option which he seeks to rely on. Instead, the respondents went through the sale process and even had the property transferred, after being assured that he had not taken any action regarding his defective appeal and as such there was no appeal.

Transfer took place in July 2002. Steps have been taken to evict him and an order has been granted for his eviction. The applicant had been told in no uncertain terms that he had failed to comply with Rule 34(5) and that no further action would be taken on the appeal.

There is nothing from the applicant to suggest that he ever took any action regarding purchasing the property, despite the fact that it was offered to him for \$1.7 million. He says he intended to exercise the option to buy it for a sum of \$25 000.00. This price had been set for the period of lease from 1 July 1981 to 30 June 1983, which period had since elapsed.

I am satisfied that the applicant failed to act reasonably on his case even when he was advised by the registrar's office about the state of his appeal.

I am satisfied also that even on the merits he has no chance of success for the reasons I have stated above.

Both applications are therefore dismissed with costs.

Madzivanzira & Partners, applicant's legal practitioners

Costa & Madzonga, respondent's legal practitioners in application no. 130/01

Madanhi & Associates, respondents' legal practitioners in application no. 346/02