

DISTRIBUTABLE (41)

Judgment No. SC 49/06
Civil Application No. 130/05

PATRICIA NELIA USAYI

v

(1) WILFRED CHINEMBIRI (2) JOYCE CHINEMBIRI

SUPREME COURT OF ZIMBABWE
HARARE, OCTOBER 11 & 23, 2006

S Guuro, for the applicant

S N Moyo, for the respondent

Before: GWAUNZA JA, in Chambers in terms of r 34(5) of the Supreme Court Rules

The applicant seeks an order for the reinstatement of an appeal deemed to have lapsed, and for condonation of the late filing of her heads of argument.

It is trite that in order to succeed in an application of this nature, the applicant must, essentially, tender a reasonable explanation for the default in question and, further, show that his or her prospects for success on appeal are good.

I am satisfied, on the evidence placed before me, that the applicant has tendered a reasonable explanation for not having filed her heads of argument. I have accepted that the applicant, on 3 May 2005, noted an appeal against an eviction order granted against her and in favour of the respondents, by the High Court. The notice

of appeal was filed on her behalf by Messrs M V Chizodza-Chineunye, who had been her legal practitioners in this protracted dispute since 2000. On 1 June 2006 Messrs M V Chizodza-Chineunye were served with a letter from the registrar of this Court, inviting them to file the applicant's heads of argument in this matter, within 15 days. The legal practitioners did not file the heads of argument in question within the period given, nor did they inform the applicant of the receipt of the letter from the registrar. Instead, the legal practitioners filed a notice of renunciation of agency, after the fifteen day period had elapsed. The appeal was subsequently dismissed.

The applicant thereafter engaged another firm of legal practitioners to file and represent her in this application. I am satisfied, given this background, that this is not a case where the sins of the legal practitioner should be visited on his or her client. The applicant was not to know that the legal practitioner to whom she had entrusted her case would let her down in the manner she did.

While, however, the applicant may have passed the test concerning the reasonableness of her explanation for the default in question, I am not persuaded the same can be said of the other test, that is, proving that her prospects of success on appeal are good.

It is not in dispute that the applicant sought, through an interdict, to stop her husband of 39 years from selling their matrimonial home pending the outcome of the divorce action that she had instituted in the High Court. Nor is it in dispute that the said husband in what the court *a quo* referred to as a "flagrant and contemptuous breach of a court order" i.e., the interdict, nevertheless proceeded to

sell the house to the respondents *in casu*. The latter later went on to take transfer of the property. The proceeds from the sale of the house, as the court *a quo* found, were all applied towards payment of the husband's debts. The applicant therefore did not receive any share of such proceeds.

The High Court, fully cognisant of the fact that the house in question, which the applicant was occupying, had been disposed of, and moreover, that no application had been filed by the applicant to challenge its sale and transfer to the respondents, ordered the applicant's husband to pay her an amount equal to 50% of the sale price of the matrimonial home, less the estate agent's commission. The applicant's husband was aggrieved by this decision and appealed to this Court in case number SC 11/03. The appeal was dismissed.

Effectively, this left the applicant with the relief granted by the High Court, that is, 50% of the proceeds from the sale by her former husband of the matrimonial home in question.

Within this context, the respondents successfully petitioned the High Court for an order evicting her from the house. The High Court was satisfied that the respondents were the rightful owners of the property in question, and that, contrary to the applicant's assertions, they were innocent purchasers thereof.

I find the court *a quo*'s decision that the respondents were the rightful, duly registered owners of the property in question, to be unassailable. While the applicant's situation does invite sympathy – she was the victim of an unscrupulous

husband who on the papers, may have been aided and abetted in his contemptuous actions by his legal practitioners – there is no denying that the respondents' entitlement to the property is legally sound.

The applicant, who is an unsophisticated elderly woman, was quite likely not given correct advice by the various lawyers who represented her in this dispute. This is evidenced by the fact that she neither challenged the sale and transfer of the property to the respondents, nor did she register a caveat against the title deeds of the property after she had obtained an order interdicting her husband from disposing of it. These actions would have ensured that her interest in the property was not only protected, but eventually translated into the relief that she now wishes to seek on appeal. It is pertinent to note that the applicant, at this late stage and without having protected her interest as mentioned, is seeking an order that the property in question be sold at current rates and that, thereafter, she be given 50% of the proceeds thereof.

Apart from demonstrating that the applicant has misinterpreted the judgment of the High Court in the divorce action, the relief that she now seeks is no longer legally available to her since the title to the property has irrevocably passed to the respondents.

Mrs *Moyo*, for the respondents, argues correctly that the applicant has the right to take legal action against her former husband to recover the share of the proceeds from the sale of the matrimonial home that the High Court granted her as part of her divorce settlement. There is also merit in the submission made for the

respondents, that their application in the court *a quo*, for the applicant's eviction from the house, did not in any way interfere with the applicant's right to the share of the proceeds that she was awarded by the High Court.

I am compelled to note, however, that, while in theory the applicant can proceed against her husband in the manner indicated, it is evident that, in reality, she has effectively been denied any benefit arising from the sale of her matrimonial home. It is a matter of regret that her former husband, who sold the property in violation of a court order, was allowed to get away with such contemptuous behaviour. This is clearly a case in which the law was manipulated in order to deny justice to the appellant, an outcome that moved the learned trial judge, KAMOCHA J, to comment correctly that the applicant had fallen victim to the machinations of a dishonest husband and a dishonest lawyer. While both this Court and the High Court have roundly condemned the actions of her former husband, it is evident that no amount of censure will bring to the applicant the relief that she so desperately needs.

The applicant's prospects of success on appeal being, as I do hereby find, non-existent, this application cannot succeed. I however do not consider an award of costs against the applicant to be justified under the circumstances of this case.

It is in the result ordered as follows -

The application be and is hereby dismissed.

Mawere & Sibanda, applicant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners