TESSY ZVEMISHA
versus
EUNICE ZVEMISHA
and
MASTER OF HIGH COURT N.O
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE,
MUCHAWA J
HARARE, 15 February and 18 February 2022

Opposed Matter

H Gwanyanya, applicant's legal practitioner
P Madondo, respondent's legal practitioner

MUCHAWA J: This is an application for rescission of a judgment which was obtained in favour of the first respondent against the applicant on 11 February 2020 under case number HC 8648/19. The brief background to this matter is that the applicant and first respondent were both married to the late Kennedy Zvemisha at the time of his death on 30 September 1995. Both of them had registered customary law marriages. His estate was administered under DR 3175-95 as a testate estate upon the production of a will. Such will bequeathed the only matrimonial home (Stand 2957 Dangamvura Township, Mutare) of the applicant in which she was living before and after the death of the husband, to the first respondent who had been living in Chiredzi. The will gave the applicant a *usufructuary* right to the house until her youngest child attained the age of 18 years. Upon the child turning 18, the first respondent who had by then transferred the house into her name sold it and sought to evict the applicant from the house.

In order to protect her rights, the applicant had then filed a court application for a declaratory order, in which it was sought that the document registered as the will of the late Kennedy Zvemisha executed on 1 April 1993, be declared invalid and that it be declared he had died intestate. It was also prayed that the distribution and registration of Stand 2957 Dangamvura

Township of Dangamvura, Mutare under deed of transfer DT 8277/99 in favour of the first respondent be declared invalid and of no legal force. Additionally is was prayed that the second respondent be ordered to reopen the estate of the late Kennedy Zvemisha and appoint a neutral executor to distribute the estate intestate.

It appears that the first respondent then filed a chamber application for dismissal of the application for a declaratory order for want of prosecution, which application was granted by the Honourable Justice MANZUNZU on 11 February 2020. That is the order which the applicant wants rescinded in the matter currently before me.

At the hearing of the matter, the applicant took a point in *limine,* that the first respondent is barred for failure to timeously file her heads of argument as they were filed some six months after the prescribed time. Initially Mr *Gwanyanya* referred to the High Court Rules of 2021 but revised this by reference to the High Court Rules, 1971.

Mr *Madondo* objected to the reference to the High Court Rules, 2021, prompting Mr *Gwanyanya* to then refer to the 1971 Rules which are more or less similarly worded. He then sweepingly said that the *dies induciae* was interfered with by Covid 19 without specifying the specific periods and practice direction which would account for the full six months delay. It was also argued that the first respondent could not be barred anyway as the application for rescission itself was filed out of time in clear violation of Rule 63 (1) of the 1971, High Court Rules.

Whether the first respondent is barred and effect thereof

The record shows that the applicant issued out its heads of argument in this matter on the 14th of September 2020 and served same on first respondent' legal practitioners who had filed the notice of opposition on her behalf. In terms of rule 238 (2a), the respondent has to file its own heads of argument within ten days of receipt of applicant's heads of argument. See below;

> "(2a) Heads of Argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not
> more than ten days after heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent in terms of subrule (1)"

The first respondent's heads of argument were only filed on 19 March 2021, which is some six months later. This is clearly outside the ten days prescribed. Subsection (2b) provides for the effect of failure to file heads of argument as prescribed as follows;

> "(2b) 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."

In the case of *Vera* v *Imperial Asset Management Company* HH 50/60, Honourable MAKARAU J, as she then was aptly commented on the effect of a bar as follows;

> "In terms of rule (2b), where heads of argument that are required to be filed in terms of rule (2) are not filed within the specified period, 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 on the unopposed roll. The rule is in my view peremptory and the court has no discretion to exercise whether to bar the respondent or not. The bar falls into place automatically and by operation of the rules of procedure. It is not an order of the court that bars the respondent."

I believe the same effect falls squarely on the first respondent. She is barred. Mr *Madondo* could only be heard therefore on the removal of the bar and not on anything else. See *GMB v Muchero* 2008 (1) ZLR 216 (S). He could not therefore sneak in the first respondent's point in *limine* that the application for rescission was filed out of time.

I am persuaded to follow the approach taken in the case of *Vera* v *Imperial Asset Management (supra)* which was as follows;

> "It is my further view that as the bar against a respondent in such circumstances is automatic and brings about a technical default, a review of the merits of either case at this stage of the proceedings, though provided for in the rules, will unnecessarily fetter the discretion of a future court that may be seized with an application to rescind the default judgment that the applicant is entitled to at this stage. In view of the above, I have used the discretion vested in me by rule 4(c) in the interests of justice and instead of directing that the matter be set down on the unopposed roll for the granting of a default judgment, I will save the incurring of further costs and delays in the matter and grant a default judgment in favour of the applicant."

The equivalent of rule 4 (c) of the 1971 Rules is rule 7 of the 2021 Rules. I am proceeding to use the discretion vested in me by rule 7 of the 2021 Rules, in the interests of justice, by saving the incurring of further costs, to grant a default order instead of referring the matter to the unopposed roll. I therefore make the following order:

1. The application for rescission of judgment succeeds with costs.
2. The judgment granted in matter HC 8648/19 on 11 February 2020 be and is hereby set aside.
3. The matter under case number HC 8824/18 shall proceed in terms of the rules of this court.

Musara Legal Practice, applicant's legal practitioners
Khuphe & Chijara Law Chambers, first respondent's legal practitioners