Judgment No. HB 27/14
Case No. HC 512/11
X REF HC 3041/09

PROMISE DANISA

Versus

UMKHONTO WENGUQUKO CO-OPERATIVE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO,22 NOVEMBER, 2013 & 13 FEBRUARY 2014

G. Nyathi for the applicant
R. Ndlovu for the respondent

Opposed Application

MUTEMA J: The applicant is the widow of the late Manson Moyo who died on 7 July, 1997. Manson Moyo was once the chairperson of the respondent. By virtue of that position he was entitled to reside in house number 171 Maphisa Growth Point in Kezi together with applicant wife who also was a member of respondent. Following Manson's death applicant resisted moving out of the house in question prompting respondent to issue summons for eviction against her under cover of case number HC 2130/10.

Apparently, though the papers before me do not ventilate when, how and why, the house in question had already been registered in the name of either applicant or her late husband for under case number HC 3041/09 in which respondent was the plaintiff while applicant was the 1st defendant, Estate Late Manson Moyo the 2nd defendant and the Additional Assistant Master was the 3rd defendant, the respondent had obtained an order granted in its favour by KAMOCHA J on 18 March, 2010 in the following terms:

"It is ordered that:-

1. Immovable property known as stand number 171 Maphisa, Kezi be and is hereby declared to be held in trust by 1st defendant for and on behalf of plaintiff's members.
2. The 1st defendant be and is hereby ordered to take all reasonable steps to transfer ownership of stand number 171 Maphisa, Kezi to plaintiff's nominee within fourteen (14) days of this order failure of which the Deputy Sheriff be and is hereby ordered and empowered to act on 1st defendant's stead and sign all necessary documents to transfer ownership to plaintiff's nominee.
3. 1st defendant be and is hereby ordered to pay costs of suit on the ordinary scale."

The applicant failed to enter appearance to defend the suit in HC 2130/10 resulting in a default judgment being obtained against her on 16 December, 2010. According to the applicant the summons was served upon her on 21 October, 2010. She took the summons to the Bulawayo Legal Projects Centre where she left the documents with one Mr Gasela who she

thought then to be a legal practitioner yet is a paralegal who made her believe that the suit would be defended. She was surprised on 11 February, 2011 when the Deputy Sheriff came to the house and evicted her therefrom. On 23 February, 2011 she then filed this application for condonation of late filing of the rescission of the default judgment in HC 2130/10. The application is thoroughly opposed.

Although the letter dated 1 June, 2010 written by responded to applicant directing her to vacate and surrender the house in contention pursuant to KAMOCHA J's order of 18 March, 2010 in HC 3041/09 and expelling her from the co-operative society is not signed, which is the ground upon which applicant sought to impugn it, she did not deny receiving it or getting acquainted with its contents. This means that it was brought to her knowledge that the judgment in HC 3041/09 was in existence. That judgment was also given in default. She has done absolutely nothing about it. It still stands and it is getting now to four years from the date of its issuance. Even if applicant were to successfully have the judgment in HC 2130/10 rescinded, she will still have the judgment in HC 3041/09 to contend with. There are therefore no prospects of success in having HC 2130/10 rescinded before HC 3041/09 has been rescinded.

It is incomprehensible why applicant in her papers says nothing about what she has done or intends to do with the judgment in HC 3041/09.

Now back to the matter at hand, Rule 63 (1) of the High Court Rules, 1971 provides that a party against whom a judgment has been given in default may make a court application not later than one month after he has had knowledge of the judgment for the judgment to be set aside. *In casu* applicant says she had knowledge of the default judgment on 11 February, 2011 when she got evicted and this application, according to the court's date stamp, was filed on 23 February, 2011.

In the event, she had no reason to file this application for condonation, she should just have proceeded to file an application for the rescission of the default judgment straightaway. Unless of course she is lying that she became aware of the default judgment on 11 February, 2011. I am constrained to think that she is lying, otherwise why would one embark upon a tortuous and more onerous legal itinerary when a shorter and less onerous one exists.

Assuming that applicant was entitled to apply for condonation first she would still fail to scale the hurdles enunciated in *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (SC). These hurdles are to give an acceptable explanation not only for the delay in making the application for rescission but also for the delay in seeking condonation. In the event of flagrant breaches of the rules, the indulgence of condonation may be refused no matter what the merits of the application are and this applies even where the blame lies solely with the party's legal practitioner.

In casu applicant realized that she was in breach of the rules on 11 February, 2011 but only filed her application for condonation on 23 February, 2011 – some 12 days later. This period cannot be said to be as soon as possible? She does not give an explanation, let alone an acceptable one why she delayed in filing this application by 12 days. That should be the end of the enquiry.

Even a look at her explanation for the delay in applying for rescission leaves a lot to be desired. Applicant and her erstwhile legal practitioners were negligent. She cannot be heard – lay personship aside – to aver that she simply dumped the summons at her legal practitioner's offices from October, 2010 and did not bother to make a follow-up up until she learnt of the default judgment 4 months down the line. She did not even bother in this application to file an affidavit by the so-called Gasela or anyone from the Legal Projects Centre corroborating her averment.

She was content to allege in the penultimate paragraph of her founding affidavit that the house is hers, having inherited it from her late husband as per annexures "B", "C" and "D". Nothing can be further from the truth. Annexure "B" is simply her late husband's death certificate, annexure "C" is a letter of administration by the additional assistant master appointing applicant executrix dative of the estate of her late husband while annexure "D" is a letter dated 24 April, 2007 written by some administration clerk in the Ministry of Local Government, Public Works and Housing at Maphisa saying

> "TO WHOM IT MAY CONCERN
>
> REF: House No. 171 Maphisa
>
> This note serves to introduce Promise Danisa I.D. no. 21-026919 W 21 as the true owner of the referred property.
>
> The house was constructed by the above Ministry and sold to Danisa under the national housing fund."

Surely these documents are anything but proof of ownership! They cannot withstand the force and effect of KAMOCHA J's order of 18 March, 2010 in HC 3041/09. There is not even a shred of evidence save for a bald allegation that the house belonged to applicant's late husband. She therefore could not have inherited what did not belong to her husband. The house has since been transferred into respondent's names following KAMOCHA J'S order alluded to above. In the event there are not prospects of success in any application for rescission of judgment that applicant can file – whether of HC 3041/09 or HC 2130/10.

In the event the application is without merit and is accordingly dismissed with costs.

Sansole & Senda, applicant's legal practitioners
Messrs R. Ndlovu & Company, respondent's legal practitioners