CONRAD NYAKABAWO
versus
BRIGHTON NYAKURUSOWA

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 2 & 31 July 2019

Opposed Application – Condonation of Late Noting of Appeal

M A Dururu, for the applicant
Mr B Mufadza, for the respondents

CHAREWA J: This is an application for condonation of late noting of appeal against the order of the court a quo dismissing applicant's special plea of prescription.

Background

On 15 October 2018, the magistrate's court sitting at Harare dismissed the applicant's special plea of prescription against respondent's claim for eviction and ordered that applicant's two other preliminary points with regard to *locus standi* and lien be referred to trial. On 8 November 2018, applicant sought leave, by way of chamber application, to appeal against the magistrate's decision. The application was opposed. Applicant subsequently withdrew his application for leave to appeal, on the assumption that it was erroneous. However, by then, he was out of time with his appeal. He therefore filed this application for condonation.

Parties' submissions

The applicant submitted that a delay of five weeks was not inordinate, and his explanation that such delay was caused by the procedural mistake of his legal practitioners in wrongly seeking leave to appeal therefore was reasonable. He submitted that he had bright prospects of success on appeal as the court a quo misdirected itself by failing to consider the provisions of s 19 of the Prescription Act and the fact that unsuccessful court processes do not interrupt prescription. Finally, although he does not advance the basis for his belief, he is of the view that the application will not prejudice the interests of justice, nor will respondent be prejudiced if the appeal fails.

In response, respondent submits that the applicant does not enjoy the right of appeal without seeking leave, as the decision of the magistrate was interlocutory. This because the magistrate dismissed the special plea of prescription and referred the matter to evidence. In any event, since the failure to appeal on time was occasioned by applicant's legal practitioner's lack of diligence, applicant is liable for such dereliction. In any case, no prejudice will be suffered by the applicant if this application is dismissed since the matter was referred to trial. Besides, the applicant does not have any prospects of success on appeal as the reasoning of the magistrate cannot be faulted, especially since applicant sought to tender evidence on prescription before the magistrate from the bar. However, and on the contrary, respondent stands to suffer prejudice by continued deprivation of access to his property

The law

It is trite that an applicant seeking condonation must satisfy the court that the delay to abide by the rules was not inordinate, there is a reasonable explanation thereof, there are prospects of success in the main matter and there will be no prejudice to the administration of justice or to the other party, and if there is prejudice to the other party, it can be compensated for by an order for costs.[1] In exercising its discretion whether or not to grant condonation, the court must take a holistic approach.[2]

Analysis

In casu, the applicant suffers the initial challenge that the appeal being essentially against an interlocutory order, he in fact does require leave to appeal. The decision of the magistrate on prescription was interlocutory in that the special plea was dismissed, thus requiring that the matter should proceed on the merits, in which case the applicant was still at liberty to adduce evidence on prescription. Therefore an application for condonation of late noting of appeal in the absence of leave to appeal is doomed to suffer a stillbirth in these circumstances.

While a delay of five weeks may not be deemed inordinate by the mere reckoning of time, inordinate delay is not judged solely on that basis. The circumstances of each particular case are always pertinent. A delay of one day may be inordinate, while a delay of twelve months may not be inordinate, subject to the surrounding circumstances of the case. In this case, in

[1] See *Chimpondah & Another v Muvami* 2007 (2) ZLR 326
[2] See *Georgias & Another v Standard Chartered Bank Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (SC). See also *Dengetenge Holdings (Pvt) Ltd v Southern Sphere Mining and Development Company Limited and Others* (2013) 2 All SA 251 (SCA)

view of the fact that this is a matter which origins date back to 2016, and to date, respondent has still not received justice by way of a speedy and effective resolution of the matter, five weeks is indeed an inordinate delay, prejudicing the interests of justice, and further causing prejudice to respondent as applicant continues to enjoy possession and occupation of the disputed property to respondent's detriment.

Besides the explanation for the delay, that applicant's legal practitioners followed incorrect procedure, requires that the effects of such wrong decision be visited upon the applicant. The courts have from time immemorial stated that the law does not help the sluggard. The litigant is only rarely indemnified against the negligence or errors of his legal practitioners, who are after all, the litigant's chosen agent. In this instance, such negligence is compounded by the fact that even today, the applicant is still following the wrong procedure as stated above.[3]

In any event, there is absolutely no prejudice, in my view, to the interests of justice if this application is dismissed, as, as already stated above, whether or not the court a quo misperceived the law regarding prescription, that issue can still be proved by evidence at trial as the magistrate's decision did not dispose the matter on the merits. The applicant is thus not without remedy.

Its decision being interlocutory, the court a quo remains seized with the matter. Higher courts are loath to jump into the fray against interlocutory decisions since an appeal can still be filed after the conclusive judgment on the matter is rendered. While special pleas which dispose of a matter are appealable, it is an undisputed fact that the particular special plea in this matter did not dispose of the matter.

In any case I am not convinced that the court a quo was wrong in its interpretation of the law regarding prescription and therefore that the applicant has prospects of success on appeal. The judgment in HC 8727/2012 determined the rights of the respondent to the property. In that regard it laid the basis upon which anyone asserting a contrary claim, such as the applicant, could be evicted upon failure to pay the rent ordered by the court.

Finally, the proposed appeal does not provide for security for costs, nor does it make any undertaking to bear the costs of preparation of the record as required by the rules.

Consequently I cannot find that this application is merited. On the contrary, it appears to be an exercise aimed at delaying the resolution of the matter.

---

[3] See *Beitbridge Rural District Council v Russell Construction Company* 1998 (2) ZLR 190 (S) @192

This is, to say the least, an ill-conceived application which amounts to frivolous and vexatious litigation intended to vex the respondent. It was absolutely unnecessary to cause respondent to be dragged to court and incur legal costs in this matter. I therefore must agree with respondent that such abuse of court process should be visited with an order for higher costs at the very least.

Disposition

Consequently, it be and is hereby ordered that

1. The application for condonation of late noting of appeal is dismissed.
2. The applicant shall pay costs of suit on a legal practitioner and client scale.

Messrs Dururu & Associates, applicant's legal practitioners
Messrs Mufadza & Associates, respondent's legal practitioners