MISHECK MUKARATI
and
LOVEMORE MUKARATI
versus
NOREEN CHIKAKA (N O)
and
THE MASTER OF THE HIGH COURT
and
CHITUNGWIZA MUNICIPALITY
and
ANDERSON REMUYANGA
and
LYDIA CHAKARA

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 18 July & 11 December 2019

Opposed Application

P. R. Zvenyika, for the applicants
D. C. Kufaruwenga, for the first respondent

MUSAKWA J: This is an application for condonation of the late application for review.

The background is that the first respondent was appointed as executrix dative of the estate of the late David Chirikure Mukarati on 7 March 2016. On 18 March 2016 the applicants wrote a complaint to the second respondent regarding the manner in which the estate was being administered. A further complaint was raised by Machaya and Associates legal practitioners on 4 October 2016. On 11 October 2016 the second respondent wrote advising that he had since consented to the sale of the immovable property and could not reverse that decision.

The applicants contend that the decision that is sought to be reviewed was made on 20 July 2016 and communicated on 18 October 2016. They believed that their legal practitioners properly advised them to report fraud as they believed that the fifth respondent had fraudulently had her particulars endorsed on the records maintained by the third respondent in order to justify that she was a surviving spouse. As they awaited the outcome of investigations the first respondent filed summons for eviction on 17 November 2016. It was in the course of defending

the action for eviction that their new legal practitioners advised that they should a seek review of the Master's decision.

On prospects of success on review, it is contended that the first respondent applied the wrong legal provision in distributing the estate. This is because s 3A of the Deceased Estates Succession Act [*Chapter 6:02*] applies to estates of persons who died after 1 November 1997. The fifth respondent was endorsed on the third respondent's records to reflect her as a surviving spouse after the death of the late David Chirikure Mukarati. Thus the first respondent failed to carry out her duties with diligence as she awarded the property to an undeserving beneficiary.

The applicants finally contend that the delay in seeking review was not deliberate as it is attributable to the erstwhile legal practitioners.

In opposing the application the first respondent takes issue with the form of the application. It is contended that the application is neither in Form 29 nor Form 29B as required by r 241 (1) of the High Court Rules. As such the application should be struck off with costs.

On the merits the first respondent takes the issue that the explanation for the delay in seeking review of the second respondent's decision is unreasonable. She questions why the erstwhile legal practitioners would have advised the applicants to report fraud as opposed to applying for review themselves. She further contends that as of 25 December 2016 the applicants were being represented by Legal Rights Trust of Zimbabwe as opposed to Machaya and Associates. There is also no explanation why the new legal practitioners took long to seek condonation.

The first respondent also contends that the late David Chirikure Mukarati married eight wives during his life time. That entailed the application of customary law in the distribution of his estate. This means that Part 111A of the Administration of Estates Act governs the distribution of the estate. Thus the surviving spouses had preference to the property over the children. In any event the property has already changed hands.

In her submissions, Ms *Zvenyika* placed reliance on the judgment by CHIRAWU-MUGOMBA J, HH-150-19. In that case which involved the same parties the first respondent had sought the dismissal of the present matter for want of prosecution. In that matter CHIRAWU-MUGOMBA J refused to grant the application for dismissal on the basis that the distribution of an estate of a person who died prior to the amendment of the Administration of Estates Act in 1997 is done in terms of the old customary law of inheritance. The old customary law on inheritance preferred succession by the eldest son.

In his submissions before me Mr *Kufaruwenga* conceded the customary law view point. However, he further submitted that an application for condonation is not based on prospects of success alone. Thus he submitted that the delay of ten months is inordinate. As regards the blame attributed on the applicants' former legal practitioners, Mr *Kufaruwenga* submitted that it is not in all situations where a legal practitioner is tardy that the client is exonerated. He also attacked the advice given to the applicants (of challenging an administrative decision by lodging a report with Police) as being irrational. He also submitted that there is no supporting affidavit by the former legal practitioners.

Mr *Kufaruwenga* further submitted that the grounds for review allege that the Master did not comply with s 52 (9) of the Act. That provision relates to estates governed by general law. In that regard a matter stands or falls on its founding papers. Therefore the applicants cannot seek redress on a wrong legal foundation. Mr *Kufaruwenga* also distinguished the case of *Alex Chimhowa and Others* v *Joyce Chimhowa and Others* HH-183-12 on the basis that it dealt with a dispute relating to property that was acquired during an earlier marriage.

Disposition

In his address Mr *Kufaruwenga* did not persist with the issue of the wrong form of application. It will be taken that he abandoned the issue as he concentrated his address on the merits.

Section 52 of the Administration of Estates Act relates to administration and distribution accounts. It relates to estates in general. I do not see any basis for Mr *Kufaruwenga* to seek to confine it to general law.

In terms of s 52 (9) (i) of the Administration of Estates Act, the applicants were entitled to challenge the Master's direction to have the property disposed of within thirty days. This they failed to do. No explanation is given in that regard.

A court application for review must be instituted within eight weeks of the decision whose review is sought. The applicants' explanation for the failure to institute the review proceedings within eight weeks is that they believed that their legal practitioners were handling the matter as they were advised to lodge e report for fraud and forgery. I do not see anywhere the applicants claim they instructed their legal practitioners to challenge the distribution of the estate which was approved by the Master.

It has been held that condonation is at the discretion of the court. That is why even where a respondent consents, condonation may still be denied. Where a legal practitioner is at

fault the consequences may visit the client. In this respect see *S* v *McNab* 1986 (2) ZLR 280 (S). In *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) SANDURA JA made reference to the case of *Saloojee And Another NO* v *Minister of Community Development* 1965 (2) SA 135 and said the following at 252-253:

> "Although the fault was most probably that of the appellant's legal practitioners, the appellant cannot escape the consequences of the lack of diligence on the part of its lawyers. As STEYN CJ A said in the Saloojee case supra at 141B-E:
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> ``I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the rules of this court. Considerations ad misericordiam should B not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the rules of this court, was due to negligence on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

This passage was quoted with approval by DUMBUTSHENA CJ in *S* v *McNab* 1986 (2) ZLR 280 (S) at 284A-D.

Since the applicants are willing to place the heads of the erstwhile legal practitioners on the block it was incumbent on them to procure an affidavit from Machaya and Associates. As was held in *Cobra and the Wild Cat (Pvt) Ltd* v *Tundu Distributors (Pvt) Ltd* 1990 (1) ZLR 133 and at 135-

> "Where, as is implied in applicant's affidavits in this case, the allegation is made which amounts to charging a legal practitioner of gross dereliction of duty, and a flagrant violation of this Court's rules it is my view that it is incumbent upon the applicant to afford the legal practitioner involved an opportunity to condemn himself, if that be the case, from his own mouth; he should be asked to swear an affidavit as to the facts for which he is being blamed. Failure to do so on the part of the applicant, particularly after his attention has been drawn to the need to do so, as in this case, must inevitably lead the court to draw the necessary inference that the applicant is not being truthful……."

With the Master having made a decision which was communicated to the applicants' legal practitioners on 18 October 2016, the applicants were expected to challenge that decision within thirty days by filing an application before the High Court. It is in respect of that decision that the first applicant states the following in his founding affidavit:

> "Since then, the applicants were of the belief that their legal practitioners were handling the matter as they were advised to file a report for fraud and forgery."

The above cannot be said to be a reasonable explanation. The first applicant does not specify whether they instructed their legal practitioners to challenge the decision. Apart from that failure to explain what instructions were given, there is the more significant failure to file a supporting affidavit from the former legal practitioners. There being no reasonable explanation for the delay in seeking review, the applicants cannot succeed in their quest for condonation.

In the result the application is dismissed with costs.

Muchirewesi & Zvenyika, applicants' legal practitioners
Dzimba Jaravaza & Associates, first respondent's legal practitioners