

EASTER MZITE
(In her capacity as the Executrix Dative of the Estate Late
Chemayi Joseph Mtize)
v
(1) **DAMAFALLS INVESTMENTS (PRIVATE) LIMITED** (2)
THE MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
HARARE: JULY 18, 2016

D.P. Drury (Pro amico), for the applicant
Ms Matshiya, for the first respondent
No appearance for the second respondent

IN CHAMBERS

BHUNU JA: This is an application for condonation and extension of time within which to note an appeal in terms of r 31(3) of the Supreme Court Rules 1964. The applicant is the widow of the late Chemayi Joseph Mtize. She is the duly appointed executrix dative of his deceased estate.

The first respondent, Damafalls (Pvt) Ltd is a duly registered company in terms of the laws of Zimbabwe whereas the second respondent, the Master of the High Court is cited in his official capacity. He is responsible for the administration of deceased estates.

The first respondent sued the applicant in the High Court alleging that during his life time the deceased sold stand number 2699, Gwelo Township to it. In consequence whereof it sought the following relief against his deceased estate:

1. An order for the setting aside by the second defendant of the distribution of Stand 2699 Gwelo Township to the beneficiaries of the estate Late Chemayi Joseph Mtize.
2. An order for the transfer of Stand 2699 Gwelo Township from the estate of the Late Chemayi Joseph Mtize to the plaintiff, failing which the Deputy Sheriff Gweru be authorised to sign the transfer documents.
3. An order for the eviction of the first defendant from Stand 2699 Gwelo Township.
4. An order for payment of US\$2 800-00 together with a sum of US\$400-00 per month from 1 December 2014 to date of eviction of first defendant and all those claiming occupation in her name. Or alternatively an order for payment to the plaintiff by the first defendant of the value of the said property currently US\$60 000-00.
5. An order for payment of legal costs on an attorney client scale.

The applicant unsuccessfully defended the respondent's suit in the court *a quo* with judgment being given against her on 23 December 2015. If she intended to appeal against that judgment she had 15 days from the date of judgment to note her appeal in terms of r 30 of the Supreme Court Rules 1964. She however only approached this court on 26 February 2016 with this application for condonation of late noting of appeal and extension of time to file the appeal. By then she was 26 days out of time excluding weekends and public holidays.

The requirements for the application of this nature to succeed are well known as outlined in the case of *Kombayi v Berkout* 1988 (1) ZLR 53 (S). These are:

1. The extent of the delay;

2. The reasonableness of the explanation for the delay; and
3. The prospects of success on appeal.

I now proceed to consider the three requirements in sequence.

The Extent and Reasonableness of the Explanation for Delay

The judgment sought to be appealed against is dated 23 December 2015 but was issued to the applicant on 25 January 2016. Rule 30 of the Supreme Court Rules 1964 requires that where leave to appeal is not necessary the aggrieved party must appeal to this court within 15 days of the date of judgment.

The applicant's explanation for delay is that despite frequent enquiries with her erstwhile Legal Practitioners she was consistently told that judgment was not yet ready. She only received notification that the judgment was now ready for collection on 19 January 2016. Her erstwhile Legal Practitioners did not receive the notification timeously because the Law Firm had closed for the Christmas and New Year holidays.

It was her submission that when she received the letter advising her that judgment was ready for collection, she promptly consulted her current Legal Practitioners and made arrangements to travel from Gweru to Harare to collect the judgment. She however only managed to collect a copy of the judgment from the Registrar of the High Court on 25 January 2016.

Having received a copy of the judgment on the 25 January she only filed this application on 23 February 2016 which is almost a month after receipt of a copy of the

judgment. Her explanation for this further delay is that she was conferring with her current legal practitioners.

That explanation is rather unsatisfactory but considering her indigent state and the importance of this case to her and her family, it is difficult to dismiss her explanation off-hand as being unreasonable. I take that view because her current legal practitioners are representing her *pro amico* out of their generosity and benevolence of their good heartedness.

In the normal run of things I consider that it is difficult to find a legal practitioner willing to offer his services for free within a short space of time.

The applicant presents a picture of an elderly unsophisticated widow, desperately fighting to save her home with paltry resources and scanty knowledge of the legal intricacies. Despite those impediments she did not sit back doing nothing about this case. She fought tooth and nail in search of justice in circumstances where she could not afford legal representation. For that reason there is need to give her the benefit of a reasonable doubt so as to consider and ventilate her prospects of success on appeal on the merits.

Prospects of success on Appeal

The plaintiff relied on the evidence of four witnesses in the court *a quo*, comprising Martin Mataranyika, Edmore Samson, Priscilla Marume and Ravheti Kaseke.

Martin Mataranyika was the main witness for the plaintiff. It was his testimony that he was a business consultant with a company called Millennial Insurance Company. The first

respondent was the principal shareholder whereas, the late Joseph Chemayi Mtize was one of the executive Directors.

Sometime in 2005 there was need to inject more capital in the company. He then advised the executive directors to top up their nominal shareholding in a board meeting to avoid their shareholding being diluted to zero by the envisaged increase in capital. The late Chemayi Mtize who had no money offered to sell the disputed property to the first respondent to raise funds to purchase more shares. He is not privy to the contract of sale but he knows that the late Mtize travelled to Gweru with a representative of the respondent company to view the property. Following the trip to Gweru the late Mtize later bought more shares from Millennial Insurance Company.

Edmore Samson is the first respondent's Managing Director and a shareholder in Millennial Insurance Company. He confirmed Mataranyika's evidence that in 2015 there arose need to raise Millennial Insurance Company's share capital. It then became necessary for shareholders to increase their shareholding by purchasing more shares in the company. He corroborated Mataranyika's evidence to the effect that the late Mtize who had no money offered to sell his house to the first respondent.

It was his testimony that the first respondent then bought house Number 5 Cooper Road Southdowns being the disputed property. The property was bought for \$Z300 000 000 (three hundred million Zimbabwean Dollars) payable in instalments from May 2005 to August 2005. The agreement of sale was reduced to writing and signed by both parties. The written agreement of sale has since been misplaced and the first respondent's officials are still looking for it.

When the purchase price was paid in full, the late Mtize handed over the title deeds of the disputed property to the first respondent. He then took a copy of the title deeds saying he was taking it to ZIMRA for capital gains exemption since he was above the age of 60.

It is common cause that the first respondent had possession of the original title deeds of the disputed property which were produced in evidence at the trial in the court *a quo*. It is also not in dispute that the first respondent took peaceful and undisturbed occupation of the property way back in 2005 soon after payment of the purchase price in full as alleged.

Mrs Mtize the executrix dative of the late Mtize's deceased estate alleged without proof that the first respondent stole the title deeds from the late Mtize's office while he was ill. This unfounded allegation was denied by both witnesses for the first respondent, saying that Mtize's office was kept under lock and key during the duration of his illness. Despite those serious allegations of theft of property of immense value, Mrs Mtize did not bother to report the theft to the police.

Samson testified that Mrs Mtize only emerged about 9 years later when she invaded the property, forcibly took the keys and occupation of the property.

Priscilla Marume testified that at the material time she was employed as the first respondent's accountant. It was her testimony that she signed the agreement of sale as a witness in the presence of the late Mtize and Samson. She was responsible for paying the purchase price in full to the late Mtize. It was her evidence that she paid him the full purchase price starting from 13 May 2005 to 22 August 2005. Each time she paid him he would sign on a petty cash voucher to acknowledge receipt. She produced 3 cash voucher receipts dully signed by

the late Mtize. The amounts on the 3 petty vouchers add up to a total of \$Z300 000 000.00 (Three hundred million Zimbabwean dollars).

She denied that the first respondent ever managed the property on behalf of the late Mtize as alleged by Mrs Mutize.

It is common cause that Mrs Mtize in her first and final distribution account in the estate of her late husband Mtize deliberately left out the disputed property from the inventory.

According to Samson's evidence when he approached Mrs Mtize seeking transfer of the disputed property, she was surprised that the property had not yet been transferred to the first respondent's name.

Upon realising that the property was still registered in her husband's name she refused to effect transfer and filed a supplementary distribution account in which she included the disputed property in the distribution inventory. The supplementary account was advertised in the newspapers. The first respondent did not object because it did not see the advertisement.

In her evidence Mrs Mtize confirmed having deliberately left out the disputed property from the first and final distribution account. She also confirmed having included it in the supplementary account upon realising that it was still registered in her late husband's name. She explained that she initially left out the property from the initial distribution account because she wanted to investigate whether indeed the first respondent had purchased the disputed property as alleged.

The evidence on record however establishes that she carried out no such investigations. She only decided to claim the property after being approached for transfer and realising that it was still registered in her late husband's name.

It is only then that she started to question the validity of the sale. She alleged without proof that the first respondent was merely administering the property on her late husband's behalf. She did not know the terms of that arrangement or the commission her husband was paying to the first respondent. She first said Z\$325 after contradicting herself under cross-examination she ended up saying that she did not know.

Faced with the totality of the evidence placed before her, the learned judge in the court *a quo* weighed the credibility of witnesses and made material findings of fact: She had this to say:

“Looking at the evidence led before the court, I am inclined to find in favour of the plaintiff that there was indeed a sale agreement involving the late Mr Mtize's property in Gweru between the plaintiff and Mr Mtize. I am convinced because the plaintiff's witnesses gave their evidence very well and impressed the court as credible witnesses. They were truthful and did not exaggerate their testimonies”.

The learned judge in the court *a quo*'s summation of evidence and analysis of the credibility of witnesses is beyond reproach. The evidence clearly exposes Mrs Mtize as a desperate widow trying to pounce on the delay in effecting transfer to hang onto property which her husband sold during his life time. The late Mtize having validly sold his property during his life time, it cannot form part of his deceased estate.

For the foregoing reasons I consider that the judgment the applicant seeks to appeal against is water tight and unassailable. As such, there are no reasonable prospects of success on appeal.

Although the first respondent has asked for costs at the punitive scale, these are not warranted. The first respondent was in a way to blame by delaying in seeking transfer.

It is accordingly ordered:

1. That the application for condonation of late noting of appeal and extension of time within which to appeal to the Supreme Court be and is hereby dismissed.
2. That the applicant shall pay costs of this application at the ordinary scale.

Honey & Blanckenberg, applicant's legal practitioners.

Wilmot & Bennett, first respondent's legal practitioners.