

DISTRIBUTABLE (3)

Judgment No. 5/11
Civil Appeal No. SC 72/10

THANDIWE DUBE-MAVANKENI v (1) DONALD DONATI
VUNDLA (2) THE REGISTRAR OF DEEDS, BULAWAYO

SUPREME COURT OF ZIMBABWE
HARARE, FEBRUARY 23, 2011

H Zhou, for the applicant

R Moyo, for the first & second respondents

Before CHEDA AJA: In chambers in terms of r 31 of the Supreme Court
Rules.

This is an application for leave to appeal out of time.

The applicant took over the case from her husband who is now late.

The judgment appealed against was handed down on 12 April 2007. The application for leave to appeal was filed on 18 March 2010, a delay of three (3) years. The applicant concedes that there was a long delay and has given reasons that I will deal with hereunder.

The dispute concerns a property that was sold by the applicant and her late husband to the first respondent.

According to the judgment of the High Court, the applicant received a large part of the purchase price leaving a balance of \$800 000.00. This balance was tendered before the final date for its payment but was rejected by the applicant.

However, the applicant, in numerous correspondence addressed to the first respondent accepted liability and stated in the letter dated 3 March 2003 that he had no defence to the claim by the first respondent but was only pleading for mercy and understanding on the part of the first respondent, that the sale be reversed. Numerous other letters including those written by the applicant had the same message. The applicant never disputed liability.

I must now subject this application to the usual test laid down in r 31 and in *De Kuszabas-Dabrowski & Uxor v Steel N.O.* 1966 RLR 60(A) in order to determine whether the application for condonation should be granted. Three of those principles appear to be both relevant and decisive and I intend to deal with those only. They are the length of the delay, the reasonableness of the explanation for the delay and the prospects of success if leave to appeal is granted.

As stated earlier the judgment was handed down on 12 April 2007. This application was filed on 10 March 2010. The applicant's explanation is that she is a

person of no means and so was her husband. She says this is her only property and she sold it in order to purchase another property and have some income to enable her to survive. This is not true given the fact that she first sold one part of the property which had to be subdivided. She got paid for that portion. She was now selling another portion of the property. She says when the matter ended up in Court she had to pay legal fees and relied on donations to meet the costs. She does not say what she had done about the sums already paid to her for the property.

If by then she had not purchased another property she would still be having the money. If she was depending on donations, she has not shown how the donations were used when she did not note the appeal timeously. The record also shows that she changed legal practitioners several times for reasons not stated. I find that the length of the delay is unduly long and the explanation for the delay is not reasonable.

On these points alone, I am of the view that the application should not succeed.

On the prospects of success, the record shows that the applicant did not dispute liability, but repeatedly wrote to the first respondent pleading for mercy, and even stated that there was no defence to the claim.

At some stage the applicant stated that there was no resistance to the requirements to move out of the house except that the Mavankeni's had nowhere-else to

go. The applicant was now claiming that the money she had was inadequate and that the first respondent had paid the money for which he was liable. This she stated in a letter dated 25 February 2002. All this shows that she acknowledged her liability to transfer the house to the first respondent. There was no dispute of liability which could have triggered the running of prescription against the first respondent.

On this point again, I am of the view that the appeal cannot succeed if the application for leave to appeal is granted.

The applicant has previously made another application which she later withdrew, only to make yet another one after a period of three (3) months. The lapse of time between these steps by the applicant does not give the picture of a person who is determined to pursue the matter to finality and timeously. The way she handled the matter amounts to an abuse of Court process. I see no reason why she should not be ordered to pay costs at a legal practitioner and client scale.

I therefore order as follows:

1. The application for leave to note an appeal out time is dismissed.
2. The applicant is to pay costs on a legal practitioner and client scale.

Messrs Mawere & Sibanda, applicant's legal practitioners

Coghlan & Welsh, first & second respondent's legal practitioners