

KUDAKWASHE LINUS NKOMO
versus
EMMACULATE NHUNDU
and
ALBERT CHITAUNHIKE N.O
and
REGISTRAR OF MARRIAGES
and
CHAMUNORWA SHUMBA
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 7 November, 2022 and 15 February 2023

OPPOSED MATTER-DECLARATORY ORDER

S Kuchena, for the applicant
M. I. Mutero, for the first respondent
K Mutyasira & M Magiya, for the second respondent
T Mpofu, for the fourth Respondent
No appearance for the 3rd, fifth and sixth respondents

MAXWELL J

Applicant is the only surviving son to the late Zephania Nkomo (also known as Zephania Jones Nkomo) (the deceased), born out of a marriage in terms of civil rites to Diana Nyasha Nkomo, nee Mutambabende (Diana) (now deceased) in terms of the Marriage Act 1964. The marriage was solemnized by a Minister of Religion on 27 of August 1977. On 25 September 1987, deceased entered into a marriage with first respondent. Diana died on 10 September 2000. The deceased's estate is being administered by fifth respondent through the second Respondent. first Respondent approached fifth Respondent's office claiming to be a surviving spouse to Estate Late

Zephania Jones Nkomo (the Estate) and fifth Respondent, accepted her claim. Applicant alleged that first respondent has, claiming to be a surviving spouse to the deceased's estate, started giving directions to the second and fourth Respondents as to how the estate should be administered and claiming maintenance from the estate. Further, that first respondent has, through second Respondent, written to fifth Respondent requesting authority to dispose of stand number 745 Greendale Township 2 of Lot 160 A Greendale in the District of Salisbury, measuring 4047 square meters, also known as 32 Dawn Hill Road, Greendale, Harare. As a result, an agreement of sale was concluded between second Respondent in his official capacity and fourth Respondent.

Applicant has approached this court in terms of section 14 of the High Court Act [*Chapter 7:06*] seeking an order in the following terms; -

1. The application be and is hereby granted.
2. The purported marriage of 25 September 1987 between the first respondent and the late Zephania Jones Nkomo be and is hereby declared a nullity.
3. The actions of the first respondent acting through the second respondent of writing to the fifth respondent seeking consent to sale stand number 32 Dawn Hill road Greendale Harare, the fifth respondent's letter of authority to sell, and the subsequent agreement of sale made and entered into between the second respondent and the fourth respondent be and is hereby declared a nullity.
4. It is hereby declared that the second respondent did not act in the best interests of the Estate by failing to bring the irregularities attendant to the first respondent's purported marriage to the now deceased Zephania Jones Nkomo to the attention of the fifth respondent.
5. The purported transfer of stand number 745 Greendale Township 2 of lot 160A Greendale in the District of Salisbury measuring 4047 square meters also known as 32 Dawn Hill Road, Greendale, Harare at the offices of sixth Respondent from the names of Zephania Jones Nkomo into the names of Chamunorwa Shumba, the fourth respondent be and is hereby declared a nullity.

6. The original title deed under 3489/2016 in the names of the late Zephania Jones Nkomo be and is hereby revived and declared to be in extant.
7. The first Respondent bears costs of suit at an attorney-client scale.”

Applicant contended that he has a direct and substantial interest in his father’s estate, particularly that his estate be inherited by the right beneficiaries in terms of the law. According to him, first, second and firth Respondents were aware of his mother’s marriage to the deceased and that first respondent’s marriage to his father which was concluded during the subsistenece of a monogamous marriage was unlawful, but decided not to disclose that fact.

First Respondent opposed the application. She raised three points *in limine*, that the application is premised on a moot point and therefore ought to fail, that applicant has no *locus standi in judicio* and that applicant does not meet the legal requirements of section 14 of the High Court Act [*Chapter 7; 06*] as he has not stated what his perceived right is. On the merits, she submitted that upon marriage to the deceased, she was advised by the deceased that he was divorced. Further that her status of surviving spouse is not derived from the civil marriage only as prior to the marriage, she was married to the deceased customarily in terms of Shona tradition on 23 August 1987. She argued that she is a surviving spouse whether or not the civil marriage is valid and that in that capacity she gave her views in respect of the sale of the Greendale house. She pointed out that Applicant consented to the sale of the property which was sold to take care of administration expenses of the Estate, the sale was sanctioned by the firth respondent and transfer has already passed to fourth respondent and there is no reason at law for it to be reversed. She confirmed filing a maintenance claim against the Estate of her late husband as a surviving spouse and a dependent. She further pointed out that when she married the deceased, applicant’s parents were divorced and that even if they were not, applicant’s mother pre-deceased his father and from 10 September 2000 she was the only spouse of the deceased. She prayed for the dismissal of the application with punitive costs.

Second respondent raised a point *in limine* to the effect that the application is defective for failure to cite the current registered owner who has a material interest in the relief sought by applicant. On the merits, he disputed that he was aware that the deceased was married to first Respondent at the time of the marriage of September 1987. He pointed out that he was appointed as a neutral executor to the estate of the late Zephania Jones Nkomo on 2 August 2019. Further

that after his appointment, first respondent produced her marriage certificate and he had no reason to doubt its authenticity. He denied being advised by applicant's legal practitioners that first Respondent's marriage to the deceased was improperly obtained. He averred that applicant consented to the sale of the property which consent he used to apply for first Respondent's authority to sell. Further that applicant did not challenge the sale and was accessing the proceeds of the sale every month as maintenance from the estate. He also averred that the relief sought by the Applicant is untenable as Applicant is seeking to nullify a sale whose proceeds he is accessing thereby attempting to have his cake and eat it at the same time. He pointed out that the declaration that first Respondent is not a surviving spouse would not change the fact that the estate was illiquid and needed to dispose of the property to fund its administration. He prayed for the dismissal of the application with costs on a punitive scale.

Fourth respondent pointed out that he purchased the property in question and is not privy to what happened in the Applicant's family. He further pointed out that he got to know that the property was for sale through an estate agent, expressed his interest and did his due diligence prior to the sale. He also pointed out that when he was satisfied that the sale was above board he paid the purchase price in full and the property was transferred to him. He submitted that Applicant should be estopped from challenging the agreement of sale and transfer of a property whose sale he consented to. He prayed for the dismissal of the application with costs on an attorney and client scale.

In answering to the respondents' submissions, applicant reiterated that his father was in a monogamous marriage at the material time and there is a live controversy as to whether first respondent is a surviving spouse of the deceased. According to him first respondent had no defence to the merits of the matter that is why she raised points *in limine* without merit. He submitted that he has a legal right to protect his father's estate from vultures as the only surviving child and sole beneficiary to the estate late Zephania Jones Nkomo. He maintained that the executor was not acting in the best interest of the estate as he did not disclose to the first respondent that first respondent's purported marriage was entered into during the subsistence of a monogamous marriage and was therefore unlawful. He denied being actively involved in the sale of the Greendale property and indicated that he did not consent to its sale, arguing that agreeing to a

proposal is not the same as consenting to a sale. He pointed out that he did not sign any beneficiary consent to sale forms and disputed that the sale was for raising estate administration fees.

He denied accessing maintenance from the proceeds of the sale of the property and submitted that he claimed maintenance from the money left by his father in FBC Accounts. At the hearing of the matter, Mr Mpofu raised the following five points *in limine*.

1. There is no cause of action against the fourth respondent.
2. The title holder is not before the court.
3. Applicant improperly made his case in the answering affidavit.
4. Applicant has no locus standi as he consented to the sale of the property in question and did not withdraw his consent.
5. Applicant ought to have approached the court on review.

The sale of the property was done procedurally and its title is not in fourth respondent's name. It is trite that where one seeks an order that affects the rights of a title holder, the title holder must be cited. Courts do not normally allow a skeleton of a case sought to be supplemented in an answering affidavit. See *Godfrey Chiparaushe & Others v Triangle Limited & Others* HH-504-16. Applicant consented to the sale of the property. He cannot turn around and challenge the same sale. A litigant cannot be allowed to approbate and reprobate at the same time. See *Kambuzi Nine Mine (Private) Limited v Palframan and Others* HB-26-16. To the extent that Applicant seeks to challenge procedural steps taken by second respondent in his capacity as the executor dative to Estate Late Zephania Jones Nkomo, Applicant ought to have approached the Court seeking review. It is trite that on review, the Court determines whether there were any procedural irregularities or any action which was reviewable. See *Administrative Law Guide in Zimbabwe*, fourth ed, 2006, by G. Feltoe.

I found the points *in limine* merited and dismissed the matter with costs on a higher scale against fourth Respondent.

PRELIMINARY POINT RAISED BY APPLICANT

Mr Kuchena submitted that the matter ought to be treated as unopposed as third, fifth and sixth respondents did not oppose the application and first and second respondents who initially

opposed the application are barred for failure to file and serve heads of argument on time. He pointed out that the applicant's heads of argument were served on respondents on 6 December 2021 and they had ten days within which to file and serve their heads of argument. In response, Mr Mutero highlighted that he had been made aware of the intention to raise a preliminary point but had not been favoured with the basis of such a point. He further highlighted that the heads of argument for first Respondent were filed on 1/12/21 and served on 6/12/21, during vacation time, and therefore Rule 59(21) was applicable. He made reference to General Notice (GN) 2245/20 which set the third term for the year 2021 as from 6/9/21 to 26/11/21, and GN 2932/21 which set the first term of 2022 as from 10/1/22 to 1/4/22. Mr Mutyasira indicated that the heads of argument for the second Respondent were filed and served on 10/1/22. He submitted that Counsel for Applicant is clutching at straw as the application to have the matter heard as unopposed has no merit.

Indeed Rule 59 (21) provides as follows

“(21) Heads of argument referred to in subrule (20) shall be filed by the respondent's legal practitioner not more than ten days after heads of argument of the applicant or excipients, as the case may be, were delivered to the respondent:

Provided that—

- (i) no period during which the court is on vacation shall be counted as part of the ten-day period;
- (ii) the respondent's heads of argument shall be filed at least five days before the hearing as long as the respondent shall not have been barred in terms of subrule (22).”

GN 2245 set the Christmas Vacation for the year 2021 as from 27 November 2021 to 9 January 2022. The certificate of service of Applicant's heads of argument stated that service was effected on the first and second Respondents on the sixth of December 2021. This was vacation time. The first term of 2022 was set as from 10 January 2022 to 1 April 2022. It follows that in accordance with Rule 59 (21), the 10 days within which respondents were to file heads of argument are to be counted from the 10th of January 2022. Had counsel for Applicant advised his colleagues of the basis of the preliminary point, time would have been saved as reference to the General Notices confirmed first and second respondents' arguments. The preliminary point had no merit and the matter was heard as an opposed matter.

PRELIMINARY POINTS RAISED BY FIRST AND SECOND RESPONDENTS

Mr Mutero raised four preliminary points on behalf of the first Respondent. The first was that applicant had no *locus standi in judicio* to institute the present matter. He argued that applicant is a son to the deceased and the gravamen of his concern is the marriage rights accruing to first respondent in relation to his deceased mother. He argued that Applicant has no direct and substantial interest in the matter. In response, Mr Kuchena referred to first Respondent's opposing affidavit in which she admitted that Applicant has a right in the administration of his father's estate. In my view that admission would only assist Applicant if the order sought pertained to the administration of his father's estate only. The order sought is anchored on the second paragraph of the draft order which seeks the nullification of the marriage between first respondent and his father. Applicant did not state how his rights as a son are affected. He seems to be fighting for his deceased mother's rights, even though he did not state that he was acting on behalf of his mother's estate. His deceased mother's rights cannot by any means translate to his having a direct and substantial interest in the subject matter and outcome of the application. In *Zimbabwe Teachers Association & Others v Minister of Education and Culture* 1990 (2) ZLR 48 (H) it was stated that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the decision of the court. Applicant sought to rely on the case of *Newton Elliot Dongo v Joytindra Natverial Nak and Others* HH-73-18 in which the Applicant therein was held to have no *locus standi* to challenge the appointment of an executor in a deceased estate as he was neither a relative nor a beneficiary of the estate. In *casu*, applicant argued that as a son he was a beneficiary. His mother died on 10 September 2000 and his father on 4 December 2018. Applicant is not challenging the appointment of the executor. I find that applicant has no capacity to challenge the validity of his father's marriage to the first respondent in circumstances where his father and mother are both deceased. I uphold the first point *in limine*.

In the second point, Mr Mutero argued that the application did not meet the requirements of section 14 of the High Court Act, [Chapter 7:06]. He submitted that the court has power to determine any existing, future or contingent rights or obligations. He further submitted that the rights applicant is claiming are past and personal rights which accrued to his late mother. Mr Kuchena argued that the rights affected are not only past, but present and future rights, as they have a bearing on how the estate of the late Zephaniah Jones Nkomo will be administered. It is common cause that Applicant's parents are both deceased. Any issues related to them should be

taken up by executors of their estates. In my view it is only the executor who can seek a declaratur of existing, future or contingent rights or obligations in a deceased's estate. Applicant does not have that right as a son. In my view what he can do is to challenge any action or decision taken or made by the executor with which he does not agree. The second point *in limine* has merit and it succeeds.

In the third point, Mr Mutero submitted that applicant adopted a wrong procedure as he ought to have sought review of the Master's decision. He pointed out that in para 24 of the founding affidavit, applicant complains about first respondent's marriage yet Applicant and some relatives had advised the Master that first respondent was the surviving spouse at an edict meeting in January 2019. He submitted that what was before the court was an application for review disguised as a declaratory order. Mr Kuchena submitted that applicant had a right to approach the court seeking a declaratur in terms of section 14 of the High Court Act. The declaratur sought by the Applicant pertain to issues that had been dealt with and decisions made by the Master of the High Court in terms of the Administration of Estates Act [*Chapter 6;01*]. I am persuaded that seeking a review of the Master's decision was the appropriate route for applicant to take. I find merit in this point as well.

The fourth point was that the application seeks to address a moot point and is therefore merely academic. Mr Mutero submitted that the application seeks to uphold a marriage of persons who are now deceased. Mr Kuchena argued that the issue of the marriage affected present and future rights of the beneficiaries to his father's estate. The estate has already been dealt with in accordance with the law. Applicant did not place his issues before the Master as he ought to have done. The Master has already made decisions on the basis of the uncontroverted facts. Applicant has not challenged the Master's decision to accept the surviving spouse who was confirmed by the deceased's family. It would be a waste of time and resources to seek to revisit an issue decided upon after consultations with the deceased's family. I find merit in this point as well.

Mr Mutyasira raised one point *in limine* on behalf of second Respondent, to the effect that Applicant ought to have cited Eastlane Enterprises (Private) Limited as the holder of title to the property in question. In response Mr Kuchena submitted that the rules provide that no matter shall be defeated on the basis of non-joinder or joinder of a person as a party can be removed or joined

by court or upon application. Indeed rule 32 (11) of Statutory Instrument 202 of 2021 provides that

“(11) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

Indeed the non-joinder cannot defeat the matter. However the points *in limine* raised by the first respondent are merited and dispositive of the matter. Accordingly the matter is struck off the roll with costs.

Madotsa and Partners, applicant’s Legal Practitioners

Sinyoro & Partners, first respondent’s Legal Practitioners

Mubangwa & Partners, second respondent’s Legal Practitioners

Machinga Mutandwa, fourth respondent’s Legal Practitioners