

ASHLEY KADIRA N.O
versus
CLADIUS NHEMWA N.O
and
JONATHAN SAMUKANGE N.O
and
THE MASTER OF THE HIGH COURT
(DR 2909/92 AND DR 151/21)
and
MARTIN THODLANA
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 26 January & 10 February 2023

Opposed Matter

Ms *G Ganda*, for the applicant
Mr *K. S Shamu*, for 1st respondent
No appearance for 2nd respondent
No appearance for 3rd respondent
Ms *E Mudede*, for 4th respondent
No appearance for 5th respondent

MUCHAWA J: This is an application in which the following order is sought;

“IT IS ORDERED THAT:

1. The sale agreement entered between the 4th respondent and the late Samson Katsande in his capacity as the then executor of the estate of the late Christian Tatenda Kadira in respect of stand 77, the Grange, Harare, be declared a nullity.
2. The reversal of the transfer from the late Christian Kadira to the 4th respondent
3. The title deed 2004/2001 be and is hereby cancelled.
4. The 4th respondent to surrender title deed 2004/2001 to the 5th respondent within 48 hours of service of the order by the applicant’s legal practitioners for the 5th respondent to endorse cancellation on the deed.
5. The 4th respondent shall bear costs of suit on a legal practitioner client scale, should he oppose the application.”

The brief background to this matter is that the late Christian Tatenda Kadira nee Katsande was the registered owner of several properties at the time of her death on 12 October 1992. She was survived by her husband Richard Kadira and two children, Tendai Ashley Kadira and Simba Theodore Kadira. Upon her death, Mr Samson Katsande, her father was appointed executor.

It is common knowledge that the properties owned by the late Christian Tatenda Kadira had been purchased by her father and registered in her name as he had done for his other children. On 25 January 2016, Samson Kadira and his two children executed and filed renunciations of inheritance in the estate of the late Christian Tatenda Kadira, in favour of Samson Katsande, her father. Samson Katsande also passed on and the applicant was appointed executor in his late mother's estate as it had not yet been wound up.

One of the properties owned by the late Christian Tatenda Kadira was stand 77 the Grange, Harare which she held under title deed DT 3152/79. In 2001, this property was disposed of by the executor Samson Katsande to the fourth respondent and is currently held under DT 2004/01. The applicant submitted that upon perusal of his mother's estate file held by the fifth respondent, he noticed that stand 77, the Grange as well as another Marlborough property, had not been included in the estate account. A deeds search established that the Grange property had been transferred to the fourth respondent in 2001 at the instance of the now late Samson Katsande. It is averred that there is no proof of the sale having been authorized by the Master nor the Master's fees having been paid in respect of the transaction.

The relief set out above is sought on the basis that since the Grange property was disposed of without the approval of the Master, it is a nullity at law.

In the initial application, the applicant had cited Patrick Nyeperayi in his capacity as co-executor of the estate as the second respondent. A notice of amendment of this citation was made in terms of r 41(1). In which Patrick Nyeperayi N.O was substituted with Jonathan Samukange N.O who was in fact the co-executor of the estate late Samson Katsande and not Patrick Nyeperayi.

The first and second respondents are cited in their official capacities as co-executors of the estate late Samson Katsande. The third respondent is also cited in his representative capacity in compliance with r 61 of the High Court Rules (2021) as this matter concerns deceased estates. The fourth respondent is cited as he is the current registered owner of stand 77, the Grange, Harare.

The fifth respondent is cited in his official capacity as the Registrar of Deeds who is the only one who will be able to carry out some the terms of the order sought.

This application is opposed by the first and fourth respondents. The first respondent raised three points in *limine* as follows;

1. That the applicant has lack of substantial interest in the issue at hand and cannot approach this court or that he has *no locus standi*
2. That the matter has prescribed
3. That the founding affidavit is defective.

The fourth respondent joined issue with the point on prescription.

I handed down a judgment in which I dismissed all the three points *in limine* and directed that the matter be set down for hearing on the merits. The matter was set down for hearing on 26 January 2023. The first and fourth respondent then advised that they were consenting to judgment, albeit with a minor amendment to the order. The parties were however not agreed on the question of costs as the applicant's counsel was insisting on an award of costs on a higher scale. I heard the parties on this and reserved my ruling. This is it.

Ms *Ganda* submitted that they had prayed for costs on a higher scale if the matter was opposed. She averred that the basis upon which the application was filed was that there was no consent from the Master authorizing the sale of the Grange property. Reference was made to the letter from the Master's office which appears on p 29 of the record in which it was made clear as early as 2 December 2021 that there was no consent to the sale of the property. The executor's first and final distribution account were attached. In addition to this, a letter is said to have been written to the fourth respondent seeking clarity as to how the property was sold and transferred to him without the Master's approval and pointing out that the sale was therefore illegal. Such letter appears on p 35 and is dated 27 September 2021 and it requested any documentary evidence the fourth respondent had which dispelled this notion. It was allegedly ignored prompting the current application as had been warned. It was argued that despite knowledge of the illegality of the sale and that the fourth defendant had no defence to the relief sought, he still went ahead and opposed the application.

Furthermore, Ms *Ganda* pointed out that the notice of opposition did not dispute that there is no consent from the Master but simply said that there were special reasons to justify a departure from the order sought as he was an innocent purchaser would just pay the Master's fees. The first respondent is alleged not to have disputed that there was no Master's consent but they too talked about rectifying the non- payment of the Master's fees at any moment. In the circumstances, it was argued that there was no need to oppose the application in the face of the ample evidence availed to the parties that the sale had not been authorized. Because of their election to oppose, Ms *Ganda* contended that the matter was set down twice, firstly for the points *in limine* and then for hearing on the merits. She stated that the applicant unnecessarily had to file an answering affidavit and heads of argument and this could have been avoided had they consented to judgment earlier.

The respondents' attempt to delay finalization of the matter was alluded to by reference to my earlier judgment on the points *in limine* in which I castigated the respondents by reference to the case of *Telecel Zimbabwe (Pvt) Ltd v Portraz & Ors* HH 446/15 wherein I expressed that the raising of the points *in limine* was merely an abuse of the court's time which has resulted in the applicant being unnecessarily put out of pocket and the estate being unduly prejudiced.

Mr *Shamu* submitted that they are opposed to the awarding of costs on a higher scale as these are awarded only in exceptional circumstances or the conduct of the losing party as per *Nel v Waterbank* 1946 AD 597. He however accepted that the award of costs is within the court's discretion.

Furthermore, Mr *Shamu* submitted that the first respondent's opposition was buoyed by the renunciations of inheritance by the potential beneficiaries of the late Christian Tatenda Kadira which appear on pp 17, 18 and 19 of record. Such renunciations are said to have been unconditional as the reality was that the late Samson Katsande would register properties in his children's names but retain control and enjoy the fruits of such properties. This, it was argued, was the basis upon which the first respondent opposed the application. The actions of the first respondent are alleged not to fall into the class of dishonest conduct, malicious conduct or frivolous or reckless proceedings so as to warrant costs on a higher scale.

Ms *Mudede* added that the forth respondent is only a victim of circumstances as he is an innocent purchaser who has been staying at the property from 2002 to date who has now decided to consent to the application and need not be penalized with an order of costs on a higher scale.

Ms *Ganda* retorted that the fourth respondent was not without recourse from the moment he became aware of the illegality of the sale as he could lay a claim against the first respondent and would have been adequately compensated. As to the first respondent's response, it was averred that the issue of renunciation of benefits was irrelevant at this point as the real issue was whether the disposal of estate property was above board given the absence of the Master's consent.

I take a leaf from the reasoning by my sister, Honourable MUSHORE J in the case of *Criff Investments (Pvt) Ltd & Anor v Grand Home Centre (Pvt) Ltd & Ors* HH 12/18. She reasoned along these lines;

“The awarding of costs at a higher scale is within the discretion of the Court. Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a favourable decision against a genuine complaint. The learned authors Hebstain and Van Winsen in *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed: Vol 2 p 954, put it thus:

“The award of costs in a matter is wholly within the discretion of the Court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties...”

According to the leading authority as to attorney and client costs in South African law, *Nel v Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597 at 607 where his LORDSHIP TINDAL JA stated:

“The true explanation of awards of attorney and client costs not authorized by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the courts incase considers it just, by means of such order, to ensure more effective than it can do by means of judgment for party and party costs that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation .”

AC Cilliers in *The Law of Costs* 2nd ed p 66, classified the grounds upon which would the court be justified in awarding the cost as between attorney and client:

- (a) Vexatious and frivolous proceedings
- (b) Dishonesty of fraud of litigant
- (c) Reckless or malicious proceedings
- (d) Litigant's deplorable attitude towards the court
- (e) Other circumstances

In essence, the cases establish a position that courts should award costs at a higher scale in exceptional cases where the degree of irregularities, bad behaviour and vexatious proceedings necessitates the granting of such costs, and not merely because the winning party requested for them. Costs should not be a deterrent factor to access to justice where future litigants with genuine matters which deserve judicial alteration. In awarding costs at a higher scale the courts should therefore exercise greater vigilance.”

In *casu* the applicant sought that the agreement of sale entered into by the late Samson Katsande as executor of the estate of the late Christian Tatenda Kadirira and the fourth respondent, be declared a nullity and that there be a reversal of the transfer from the late Christian Tatenda Kadirira to the fourth respondent. The basis was that the sale was not above board as the sale had not been authorized by the Master nor had the Master’s fee been paid. Evidence of this was provided. The law was set out clearly that in the absence of the Master’s approval, the disposal was a nullity. Both the first and fourth had no defence to this position. Instead of consenting to judgment, they took the calculated risk of opposing the claim and going further to raise points *in limine* for which I had no kind words.

On *locus standi*, my finding was as follows;

“It is without any doubt clear the applicant, as executor has *locus standi* to bring this application. The issue of renunciation of benefit relied on by the first respondent, does not arise at this point. I find no merit in this point *in limine*”.

On the question of prescription I found as follows;

“In *casu*, the application is based on the fact that the sale is null and void *ab initio* on account of the sale of estate property which was never declared by the then executor as estate property in the inventory having been sold without the Master’s authority and the proceeds of the sale not having been accounted for. Further an illegality flows from the nonpayment of the 4% Master’s fees and estate duty if applicable.

This, in my considered opinion, is not a case where the Prescription Act would be applicable as alleged. I find no merit in this point *in limine* too.”

Lastly on whether the founding affidavit was defective, I made the following finding,

“There appears to have been no bar to the substitute second respondent filing papers in opposition, if he so wished. There seems to be no prejudice too as any position he may have wished to advance, would have been advanced by the first respondent as they represent the same estate as co-executors,

This, to me, is the kind of preliminary point which was just taken fully knowing that it would not resolve the matter at all, This matter would still proceed to be heard even with only the first respondent representing the estate of the late Samson Katsande.”

In *Telecel Zimbabwe (Pvt) Ltd v POTRAZ & Ors* HH 446/15 MATHONSI J, as he then was aptly expressed my sentiments when he said:

“Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client’s defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propriis*.”

I accordingly find no merit in this point *in limine* too.”

There was no basis for the respondents to have raised meritless points *in limine* in the hope that the court will find in their favour and only when they realized that they had nowhere to hide, to then consent to judgment.

In the case of *Mahembe v Matambo* 2003 (1) ZLR 149 at 150 C CHEDA J (as he then was) commenting on costs on a higher scale held:

“Our courts will not resort to this drastic award lightly, due to fact that a person has a right to obtain a judicial decision against a genuine complainant. It is therefore essential that the court only awards such costs in situation where it is clear that the losing litigant was not genuine in pursuance of a stand in litigation ...”

In *casu*, one will be forgiven, given the turn of events, to conclude that the respondents were not genuine in pursuance of their stand in the application before the court. They were just testing the waters and upon realizing that they were not dabbling in the shallow end, they then decided to consent to judgment. Such conduct amounts to an abuse of court process. I may even go as far as saying that the respondents mounted frivolous defences

In *Rodgers v Rogers and Anor* 2008 (1) ZLR 330 wherein MALABA JA (as he

then was) accepted the definition of frivolous and vexatious as in *S v Cooper and Anor* 1977 (3) SA 475 at 476 D where BISHOOF J said:

“the word ‘frivolous’ in its ordinary and natural meaning connotes an action characterized by lack of seriousness as in the case one which is manifestly insufficient” (**my emphasis**)

The applicant need not be unnecessarily put out of pocket by the conduct of the first and fourth respondents who were legally represented and should have known that they had no defence at law and should have consented and avoided wasting the court’s time too. Costs on a higher scale are therefore warranted.

Consequently I order as follows;

1. The sale agreement entered between the fourth respondent and the late Samson Katsande in his capacity as the then executor of the estate of the late Christian Tatenda Kadira in respect of stand 77, the Grange, Harare, be and is hereby declared a nullity.
2. The transfer of stand 77, The Grange, Harare from the late Christian Kadira to the fourth respondent be and is hereby reversed.
3. The title deed 2004/2001 be and is hereby cancelled.
4. The fourth respondent is to surrender title deed 2004/2001 to the fifth respondent within 48 hours of service of the order by the applicant’s legal practitioners for the fifth respondent to endorse cancellation on the deed.
5. The fourth respondent and all those acting through him are to vacate stand 77, the Grange, Harare, no later than 30th April 2023.
6. The first and fourth respondent shall bear costs of suit on a legal practitioner client scale.

Honey & Blanckenberg, applicant’s legal practitioners
C Nhemwa and Associates, first respondent’s legal practitioners
Mudede & Associates, fourth respondent’s legal practitioners