

NABOTH GAZA
versus
NYUMAH BANDA
and
WALTER MAKUWERE
and
TAPIWANASHE WALTER MAKUWERE
and
REGISTRAR- GENERAL OF BIRTHS AND DEATHS N.O
and
OLIVER MASOMERA N.O
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
TSANGA J
13 February & 3 March 2025

Special plea and exception

RG Zhuwarara for Plaintiff
L Matapura for 1st to 3rd Defendants
4th to 6th Defendants cited in official capacity.

TSANGA J:

The plaintiff issued a combined summons and declaration in which the claim was outlined as follows:

The Plaintiff's claim is for:

- (a) A declaration that the information contained in the 3rd Defendant's Birth Certificate to the effect that the Late Agness Sakala was his mother is false.
- (b) For an Order directing the 4th Defendant to cancel Birth Certificate No. 8088760 AA and to re-register the 3rd Defendant's birth so that the certificate reflects the 1st Defendant as his mother;
- (c) A declaration that the 3rd Defendant is not a lawful Beneficiary of the Estate of the late Agness Sakala who died at London, United Kingdom on the 22nd September 2019;
- (d) An Order directing the 5th and 6th Defendants to exclude the 3rd Defendant from the Beneficiaries of the Estate of the Late Agness Sakala; and
- (e) An Order that the costs of this action shall be borne by the 1st and 2nd Defendants jointly and severally, the one paying the other one being absolved, on the Legal Practitioner and client scale.

The aforesaid relief is sought on the basis that the 1st and 2nd Defendants gave false information to the 4th Defendant's office when they registered the birth of the 3rd Defendant to the effect that the late Agness Sakala was his mother. Detailed particulars of the Plaintiff's Claim more fully appear from the Plaintiff's Declaration annexed to this Summons.

The first to the third defendants filed an exception and a special plea to the summons and declaration. The exception is on the basis that the summons does not contain a true and concise statement of the nature and grounds of the cause of action. The special plea is on the Plaintiff's *locus standi* in the matter.

Plaintiff has opposed the special plea and exception on two grounds. The first ground which would in fact dispose of the matter is that in terms of rule 37 (3) of the High Court Rules, 2021 the exception and plea were filed out of time on the basis that they were supposed to have been filed within ten days from the date of entry of appearance to defend. The second objection relates to failure to use the prescribed forms as per the rules in mounting these objections. The first to third defendants dispute that they were out of time. Having filed a combined summons and declaration, they draw strength in their standpoint that they operated within the confines of the law from the wording of Rule 12 (4) which they say gave them twenty days in total to file the exception or special plea.

The rule is worded as follows with respect to a combined summons and declaration:

“(4) Thereafter, if the summons is a combined summons and declaration, the defendant shall, **within a further 10 days after giving such notice to defend**, deliver a plea (with or without a claim in re- convention), an exception or an application to strike out”.

The combined summons and declaration were served on the defendants on the 15th of May 2024, and they in turn filed an appearance to defend issued on the 17th of May 2024. The argument by the three defendants is that having been served with a summons and declaration at the same time they had an extended to file any plea exception or special plea and that their 20 day period in total would have taken them to the 11th of June 2024. They filed their exception on the 11th of June after the plaintiff had served them with a notice of intention to bar issued on the 7th of June by the Registrar. The defendants in question argue that the notice was in violation of what they perceive to be the time frame permitted in terms of Rule 12 (4) of the High Court Rules 2021 in that the 20 days had not yet expired.

The plaintiff, in answer, emphasises that unlike the 1971 High Court Rules which permitted an extra ten days **after** the service of the **declaration**, the 2021 rules are now specific

that the plea (with or without a claim in re- convention), an exception or an application to strike out must be filed 10 days **after the notice to defend** has been entered.

The current rules clearly speak of **a further 10 days** after appearance to defend with reference to receipt of a combined summons and declaration. This current wording makes a world of difference and in fact harmonises rule 12 (4) with what is outlined in rule 37 (3) in so far as a plea, special plea or exception is to be taken within 10 days of the entry of appearance to defend. Rule 37 (3) reads as follows:

(3) Where the defendant has delivered notice of appearance to defend, he or she may, subject to rule 39, within ten days after filing such appearance, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out or special plea.

It is not in argument that the defendants filed their appearance to defend which was issued on the 17th of May 2024. The rule as it stands is crystal clear that they thereafter had ten days to file a plea, an exception or application to strike out. The word “further” may have created confusion for the defendants but the import of the rules is clear that once an appearance to defend has been entered, the defendants have 10 days at their disposal to file the requisite plea or exception. A 10 day period from the 17th of May 2024 would have taken the defendants to the 31st of May 2024. They were out of time in terms of the 10 day period required by the rules.

The defendants were out of line in filing an exception and special plea in response to the notice of intention to bar. It makes zero sense to respond to a notice to bar by filing a special plea or exception. Rule 40 which is the applicable rule for barring states as follows.

39. Procedure for barring

(1) A party shall be entitled to give five days’ notice of intention to bar to any other party to the action **who has failed to file his or her plea or request for further particulars** within the time prescribed in these rules and shall do so by delivering a notice in Form No. 8 at the address for service of the party in default.

It speaks to a party who has failed to file a plea or further particulars. The boat would have already sailed from choppy waters after 10 days of filing the appearance to defend if any exception or special plea has not been filed. A party who is already out of time cannot, just because they have been prompted by a notice to bar, suddenly awaken to the fact that they take great umbrage to the summons so much that it requires an exception when all along they have sat on their laurels.

In the circumstances the exception and special plea were clearly out of time. The other points in limine relate to the form used for filing the exception and the specials plea. In my

view, it is not necessary to address these as there was no valid exception or special plea filed in terms of the rules. The plaintiff has asked for a dismissal with costs on a higher scale. There was no motivation for these costs.

Accordingly:

1. The preliminary point is upheld that the exception and special plea are filed out of time.
2. The 1st to 3rd defendants' exception and special plea are struck off the roll with costs.

Danziger & Partners Plaintiff's Legal Practitioners

Mafongoya & Matapura first to third, Defendants Legal Practitioners