

PRECIOUS MADAKA

Versus

MASTER OF HIGH COURT

And

MAXWELL TAWONESA

And

RUGARE MANDIMA N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 8 & 18 NOVEMBER 2021

Opposed court application

Applicant in person
T. Kamwemba, for the 2nd respondent

DUBE-BANDA J: This is an opposed court application. Applicant seeks an order declaring an immovable property being stand number 1996 Mkoba 6, Gweru to be the property of the Estate of the late Aaron Madhaka, and that 2nd respondent pays the costs of this application. The application is opposed by the 2nd respondent. The 3rd respondent, the executor of the estate of the late Aaron Madhaka filed a notice of opposition and an opposing affidavit, and a notice of intention to abide, indicating that he shall abide by the decision of this court. The Master of the High Court was cited in its official capacity because the implementation of the order sought by the applicant, if granted may require its services.

Factual background

This application will be better understood against the background that follows. Mr Aaron Madaka is late. Applicant is a daughter and beneficiary to the late Madaka. 3rd respondent is the executor of the estate of the late Madaka. The executor prepared a Final Distribution Account, the account was signed by all the beneficiaries, including the applicant. After the signing of the account, the executor was informed that a property known as number 1996 Mkoba 6 Gweru had been omitted. The executor made inquiries about the property, and he learnt that it is occupied by the 2nd respondent, who had been in occupation during the

lifetime of the late Madaka. The 2nd respondent claims to have purchased the property from the late Madaka, while the applicants and other beneficiaries claim it is estate property. The surviving spouse and the brother of the deceased confirm that 2nd respondent purchased the property from the late Madaka. Applicant does not agree that 2nd respondent purchased the property. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary objections

At the commencement of this hearing, Mr *Kamwemba*, counsel for 2nd respondent informed the court that he intends to take points *in limine*. Counsel took the following preliminary points, *viz*; the first constituted an attack on the *locus standi* of the applicant to institute these proceedings at all. It is contended that applicant is not an executor of the estate of the late Madaka, therefore she has no *locus standi* in this matter. It is argued that it is only the executor who is clothed with *locus standi* to litigate on behalf of a deceased estate; and that applicant has not exhausted internal remedies provided by the law for the resolution of such disputes. It being submitted that in the first instance the grievance must be submitted to the Master before it escalates to this court. 2nd respondent urged this court to dismiss this application on the points *in limine* without a consideration of the merits.

The applicant's reply to the points *in limine* by the 2nd Respondent, can be summarized as follows: she contends that she has jurisdiction to institute proceedings on behalf of the estate, because she is a beneficiary to the estate of the late Aaron Madhaka. She is not distributing the assets of the estate, but merely identifying estate property to be included in the inventory. She contends that the Master was approached and he advised that he had no jurisdiction to resolve this dispute, he then referred applicant to this court.

Locus standi

Locus standi relates to whether a particular applicant or litigant is entitled to seek redress from the courts in respect of a particular issue. In support of the point that applicant has no *locus standi* to litigate on behalf of the estate, Mr *Kamwenda* referred to Section 23 of the Administration of Estates Act [Chapter 6:01], which provides that the estates of all persons dying either testate or intestate shall be administered and distributed according to law under

letters of administration to be granted by the Master to the testamentary executors or executors dative. The import of this legislative provision is that a person who administers and distributes an estate must do so in terms of letters of administration in his name. See: *Cosma Chiangwa v (1) David Katerere (2) Robert Adrian Campbell Logan (3) Israel Gumunyu (4) Registrar of Deeds (5) Edmond Chivhinge (6) Master of The High Court* SC 61/21. Applicant does not have letters of administration in respect of the estate of the late Madaka.

In *Nyandoro & Anor v Nyandoro & Ors* 2008 (2) ZLR 219(H), the court stated that in our law, in terms of section 25 of the Administration of Estates Act, a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The court cited with approval the remarks of NDOU J in *Mhlanga v Ndlovu* HB 54/2004 where the learned judge stated that the executor of an estate has certain rights and powers in connection with the liquidation and administration of the estate and also certain duties to perform. What must be noted is that the executor is legally vested with the administration of the estate. He is not a mere procurator or agent for the heirs. A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them. He has no principal and represents neither the heirs nor the creditors of the estate.

In *Clarke v Barnacle NO & Two Ors* 1958 R&N 358 (SR) at 349B -350 cited in *Nyandoro & Anor v Nyandoro & Ors (supra)* the court stated the legal position that still obtains to this day in Zimbabwe. It said “whether testate or intestate, an executor, either testamentary or dative, must be appointed.....so that the executor and he alone is looked upon as the person to represent the estate of the deceased person.” In *Nyandoro & Anor v Nyandoro & Ors* the court said to the rest of the world the executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position and that because a deceased’s estate is vested in the executor, he is the only person who has *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate.

I take the view that the common law principle that anchors *locus standi* of a direct and substantial interest in a matter is not applicable in this matter. *Locus standi* to institute proceedings on behalf of an estate must be located in legislation, i.e. the Administration of Estates Act. It is the executor who has to bring a vindicatory action relative to property alleged to form part of the estate. In *casu*, it is only the 3rd respondent who may institute such proceedings regarding

property alleged to form part of the estate. That is the exclusive domain of the executor. It is for the executor to sue for the recovery of estate assets. Applicant as a beneficiary of the estate, has no *locus standi* to institute proceedings on behalf of the estate.

I would uphold this point *in limine* and rule that the applicant has no *locus standi* to bring this application. Having found that applicant has no *locus standi* to institute these proceedings it is not necessary for me to consider the other point *in limine* taken by the 2nd respondents. As such would just be for academic purposes only.

The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the applicant.

Disposition

On this facts of this matter, I come to the conclusion that applicant has no *locus standi* to institute these proceedings.

In the result:

1. The point *in limine* that applicant has no *locus standi* is upheld.
2. This application is dismissed with costs of suit.

Tavenhave & Machingauta, 2nd respondent's legal practitioners