

TRYPHINE SIBANDA

Versus

LIBATI MOYO

And

TALKMORE NOMATHAMSANQA KHUMALO

And

BENJAMIN NLEYA

And

THE MASTER OF THE HIGH COURT N.O.

And

CITY OF BULAWAYO N.O.

And

REGISTERAR OF DEEDS N.O.

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 28 JULY 2020 & 25 MARCH 2021

Opposed Application

Miss S. Mbondiya for the applicant

S. Siziba for 1st respondents

MAKONESE J: In terms of our law, and in accordance with the provisions of section 25 of the Administration of Estates Act (Chapter 6:01), a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. An executor accepts the position of legal representative of the deceased with all the rights and obligations attached to that position. It follows that because the deceased estate is vested in the executor, he is the only person who has *locus standi* to bring any action relative to property belonging to the deceased estate. Any person who purports to institute proceedings

on behalf of a deceased estate without the requisite authority does not enjoy the right of audience before a competent court. Authority to institute proceedings on behalf of a deceased estate derives from the provisions of the Administration of Estates Act.

The applicant seeks an order against the respondents in the following terms:

“It is ordered that:

- (a) The respective and purported cession of rights, title and interest in the immovable property, being stand number 864/2 Old Magwegwe, Bulawayo by the 2nd respondent in her official capacity as the executrix dative of the Estate Late Richard Moyo DRBY No. 1584/02 to the 2nd respondent and him in turn to 1st respondent be and is hereby declared null and void and accordingly set aside.
- (b) The 5th respondent be and is hereby directed to effect the cancellation of the respective memorandum of agreement between itself the third respondent, and in turn the 1st respondent, in respect of the immovable property being stand number 864/2 Old Magwegwe, Bulawayo.
- (c) The memorandum of agreement of sale between 5th respondent and the late James Moyo be and is hereby reviewed.
- (d) The 4th respondent be and is hereby directed to re-open the respective estates of the late James Moyo DRBY No. 950/02 and Richard Moyo DRBY No. 1584/02 for the purposes of effecting the redistribution of the estates in accordance with the laws of intestate succession governing Zimbabwe.
- (e) The 4th respondent be and is hereby directed to appoint a neutral executor to facilitate the proper distribution of the assets of the estate of the late James Moyo DRBY No. 950/02, Richard Moyo DRBY 1584/02 and Knowledge Moyo DRBY No. 992/19, respectively in accordance with the laws of intestate succession governing Zimbabwe.
- (f) 1st, 2nd and 3rd respondents to pay the costs of suit jointly and severally, the one paying the other to be absolved.”

The matter is opposed by the 1st respondent who has raised certain preliminary points which would be dispositive of the matter, if sustained. It shall be necessary to deal with those preliminary objections before dealing with the merits.

Factual background

The applicant in this matter claims to have been married to the late Knowledge Moyo. It is apparent from the founding affidavit that the matter concerns the Estate of the Late James Moyo who died on 25th January 2001. The matter also deals with the estate of the late Richard Moyo who died in November 2002. Richard Moyo and Knowledge Moyo were sons of the late James Moyo. The applicant alleges that she was customarily married to the late Knowledge Moyo sometime in 1991. During the time they lived together they resided at stand number 864/2 Old Magwegwe (the property in dispute). On 16th March 2010, Knowledge Moyo died. 1st respondent purchased stand number 864/2 Old Magwegwe, Bulawayo in the year 2003 from the 3rd respondent. 1st respondent was responding to an advertisement for the sale of the property which appeared in the Chronicle Newspaper. 1st respondent paid the full purchase price for the property. Transfer of the rights, title and interest in the property was effected into the names of 1st respondent. At the time of the sale of the property in dispute 1st respondent never met the late James Moyo, the late Richard Moyo and 2nd respondent. 1st respondent

never met the applicant and crucially, at the time of the sale of the property applicant was not the executor of any of the deceased estates of the late James Moyo, the late Richard Moyo nor the late Knowledge Moyo. The applicant has stubbornly remained in the property in dispute and has sought to re-open estates that were wound up years ago in terms of the law.

Applicant alleges that the late Knowledge Moyo was entitled to benefit from the estate of the late James Moyo and that as such, she is also entitled to benefit from the estate of the late James Moyo by virtue of being married to the late Knowledge Moyo. The applicant seeks to make decisions in respect of the estate of the late James Moyo through the estate of Knowledge Moyo. Applicant has not placed any cogent proof to show that she is the surviving spouse of Knowledge Moyo. Knowledge Moyo never laid any claims in the estate of the late James Moyo during his life time. Applicant has not shown the basis under which she is representing the late Knowledge Moyo and the late Richard Moyo. 1st respondent contends that in essence applicant has no cause of action and has no power to institute these proceedings. Further, and in any event, 1st respondent avers that applicant's claims are prescribed at law in that applicant failed to bring the claims within the required period. A further point raised *in limine* is that there are material disputes of fact which cannot be resolved on the papers. The procedure adopted is wrong and for that reason the matter ought simply to be dismissed without hearing the merits.

Locus standi

It is not in dispute that applicant is not claiming that she is a beneficiary in the estate of late James Moyo. Applicant is claiming that her customary husband the late Knowledge Moyo ought to have benefited from the estate of his father the later James Moyo. It is apparent therefore, that the applicant is seeking to claim a benefit from the estate of the late James Moyo through her husband who is now deceased. What this means in practical terms is that applicant is seeking to represent the interests of her late husband, if ever he had legitimate claims in the property in dispute. It is clear that the applicant is not an executrix in the estate of the deceased persons, James Moyo, Richard Moyo and Knowledge Moyo.

Applicant clearly has no *locus standi* to institute the proceedings against the respondents. The position in our law is settled. In terms of section 25 of the Administration of Estates Act a deceased estate is represented by an executor or executrix duly appointed by the Master.

See *Nyandoro vs Nyandoro* HH-89-08, where KUDYA J (as he then was) clearly laid down the position that an executor occupies the position of a legal representative of the deceased. The executor has full rights and obligations to bring action on behalf of the deceased estate. In this matter the applicant may not claim a benefit that is not due to her.

It is trite that *locus standi* is the capacity for a party to bring a matter before a court of law. The law is clear on the point that to establish *locus standi*, a party must show a direct and substantial interest in the matter. See *United Watch & Diamond Company (Pty) Ltd & Ors v DISA Hotels Ltd & Anor* 1972 (4) SA 409 (C) and *Matambanadzo v Goven* SC-23-04.

It is clear from the circumstances of this matter that the applicant is not an executor in the estates of the late James Moyo, Richard Moyo and Knowledge Moyo. It is settled law that for a person to have *locus standi* to bring proceedings in any action, he must have sufficient

personal interest in the matter concerned. Usually, only a person who has direct, personal or financial in the remedy sought has the *locus standi* to seek the remedy in court. The personal interest that a person may have will provide the basis for legal standing to bring to court any legal action or cause. Personal interests include personal liberty, monetary claims, legitimate expectation in property claims, amongst several other remedies.

I conclude therefore, that on the facts before me, the applicant has no capacity to institute these proceedings as she has not been appointed executrix to the estate Knowledge Moyo's estate. In any event it has not been shown that Knowledge Moyo was entitled to benefit from the estate of the late James Moyo. Knowledge Moyo who died way back in 2010 never lodged any claim in the estate of his late father James Moyo who died earlier in 2001.

I would uphold this preliminary point and rule that the applicant has failed to show that she has *locus standi* to bring this action. For the sake of completeness, however I shall proceed to the other preliminary objections raised in this matter.

Material disputes of fact

There are substantial disputed facts in this matter which the court cannot dispense with without landing *viva voce* evidence. The applicant has to prove to this court that indeed she is the surviving spouse to the late Knowledge Moyo. The applicant is claiming fraud that occurred at the 4th and 5th respondent's offices. Both parties have to give evidence surrounding these allegations. These disputes of fact are material and cannot be resolved without the need to call oral evidence from these authorities. The alleged fraud has to be proved. It is not sufficient to make bald and substantial allegations.

In *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H), MAKARAU JP (as she then was) held that in application proceedings a material dispute arises when the material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence. This matter is fraught with disputes of fact which cannot be ventilated without leading oral evidence. Most of the parties mentioned in this dispute are now deceased. The allegations raised by the applicant cannot be dealt with by the court without calling evidence from the cited parties, who themselves may not have direct knowledge regarding the estate of James Moyo and other deceased persons whose estates have long been wound up.

The second preliminary point is upheld. The applicant adopted the wrong procedure. This matter cannot be resolved by way of a court application. The applicant was aware that there were several disputes of fact but nonetheless proceeded with these claims.

That applicant's claims are prescribed at law

The stated position is that any claim or challenge against the distribution of estate property in a First and Final Liquidation and Distribution Account must be brought within 3 years of the Master's certification of the said account otherwise the claim becomes prescribed. See *Nyandoro & Anor v Nyandoro & Ors* (*supra*) and *James & Others v Sikariyoti & Ors* SC-29-05.

In the matter of *James & Ors v Sikariyoti (supra)* the applicant was the eldest son of the deceased father who had passed away in 1983. He had done nothing to assert his rights to heirship against his young brother who had been appointed heir from 1986 up to 2003 when the stand in dispute was sold to an innocent purchaser and he thereafter filed an urgent application at the High Court to try and block the cession of rights on the alleged basis that he was the heir. The High Court held that his claim regarding the stand in question prescribed. This decision was upheld by the Supreme Court on appeal. At pages 4 to 5 of the cyclostyled judgment, CHIDYAUSIKU CJ stated as follows.

“On these facts the learned judge in the court a quo dismissed the application on the basis that James and the rest of the appellants had done nothing over a period of time to protect their rights. In this regard he placed reliance on the case of Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd 1972 (2) SA 464 (W) at page 477-478 where it was held that –

“It is the idle and slovenly owner, and not one who is alert but incapable of acting, who may lose his property by prescription”.

The rationale of our law of acquisitive prescription is that an owner who negligently fails to protect his interest against a stranger in possession of his property shall forfeit the property to the possessor. The learned judge concluded that the principles set out in the above was applied to the case before him, and accordingly dismissed the application”.

The Supreme Court in *James & Ors v Sikariyoti (supra)* concluded the matter with the following remarks:

“The applicants in this matter were fully aware that the stand was registered in the name of Sikariyoti since 1986. They did nothing about it and it was only when Sikariyoti had sold his rights in the stand that they sought to assert their rights. In my view the learned judge was correct in dismissing the application. It is for these reasons that the appeal is dismissed with costs”.

In this matter the applicant and her alleged husband did nothing to assert their alleged rights against the estate late James Moyo from 2002 when they were aware of all the facts constituting their alleged cause of action. They did not seek to have the estates re-opened. As if that was not enough, the applicant and her alleged husband became aware that 1st respondent had purchased the property in question before 2006 and did absolutely nothing until 2010 when the late Knowledge Moyo passed on. Therefore, the applicant continued to reside at the property knowing fully well that she had no right at law to do so. Applicant has made her bed of thorns and she must lie thereon.

Another relevant case is *Ngwenya v Hlabangana & Anor* HB-106-10 where an illegitimate son of the deceased had failed to challenge heirship of the widow to his father’s deceased estate timeously. At page 6 to 7 of the cyclostyled judgment, MATHONSI J (as he then was) held as follows:

“Having come to that conclusion it means that Georgina was entitled to have the house transferred to her name after the death of her husband and she did secure that transfer. Coupled with this fact that Thwasile did not lodge a claim when the late William’s estate was dealt with and did not challenge the appointment of Georgina as heiress, his challenge has come rather late in the day”.

On the facts of this matter this third preliminary objection is meritorious. I would uphold the objection and find that the applicant’s claims have become prescribed.

Disposition

The applicant certainly has no *locus standi* at law. She is not an executrix in the estate of her late husband. She had no legal interest in the matter. She may not make a claim on behalf of the estate of the deceased who himself failed to exercise his rights if any, when he was still alive. There are material disputes of facts which are not capable of resolution without hearing evidence. Applicant chose the wrong preclude. The claims are evidently prescribed by operation of law.

In the result the preliminary points are upheld, the application is hereby dismissed with costs.

Webb, Low & Barry applicant’s legal practitioners
Ndlovu, Dube & Associates, 1st respondent’s legal practitioners