JULIET KADUNGURE
and
ANDERSON KADUNGURE
and
NERIA KADUNGURE
versus
PATRICIA DARANGWA (NO)
and
MASTER OF THE HIGH COURT OF ZIMBABWE (NO)
and
NOMATTER ZINYENGERERE

HIGH COURT OF ZIMBABWE
TSANGA J
26 NOVEMBER 2021 & 24 FEBRUARY 2022

REVIEW

S Ushewokunze, for the applicant
S Hashiti with *Ms L Rufu,* for the 1st respondent
TTG Musarurwa, for the 3rd respondent
No appearance for 2nd respondent

The Background

TSANGA J: On 5 March 2021 under HC 136/21[1], in a decision pending the hearing of a review matter, Justice Chirawu-Mugomba of the High Court issued a provisional order interdicting the first respondent, Patricia Darangwa herein, from administering the estate of the late Genius Kadungure under DR No.177/20. The Master of the High Court, the second respondent herein was also interdicted from accepting any process in relation to the administration of the estate of the late Genius Kadungure under DR No. 177/20 filed by and on behalf of the first respondent. Furthermore, the first respondent was interdicted from presenting the letters of administration issued to her in Zimbabwe under DR No.177/20, to the Master of the High Court in the Republic of South Africa for purposes of administration of the deceased's estate in relation to assets in that country.

[1] *Juliet Kadungure Ors v Patricia Darangwa & Anor* HH 85/21

To give context to the parties herein, the first to third applicants are family members of the late Genius Kadungure. The first and third applicants are his sisters whilst the second applicant is his father. The first respondent is the executor of the estate of the deceased, whilst the second respondent is the Master of the High Court who appointed the first respondent as executrix. The third respondent, Nomatter Zinyengerere has since been joined to the hearing of this review by consent for expediency. His interest is his alleged inheritance of a Lamborghini vehicle which he claims was willed to him by the deceased in the will that is the cornerstone of this review.

The conduct of concern which led to the granting of the interdict is amply captured under HC 136/21. It included alleged false claims by the executor that she was a lawyer when she had persuaded the family to accept the now disputed will; her refusal to avail the will when requested; and the subsequent haste with which she then sought to dispose of the Lamborghini without following due process. The court's concern was that the acceptance of the will was a legal nullity. Also there was need to stop her in her tracks as she was already in the process of disposing of some assets of the deceased estate during the lock down period more specifically a Lamborghini motor vehicle using a distribution account that was never availed nor approved by the Master.

The first respondent appealed this interim order.[2] This was on the grounds that the court *a quo* erred in exercising jurisdiction in a matter redolent with material disputes of fact not resolvable on the papers. Another ground of appeal was that the facts actuating the applicant's complaint had subsisted for well over four months yet no timeous action had been taken. There were also said to be beneficiaries who were not joined. The appeal was dismissed.

This is therefore a hearing of the return date in which the applicants seek a review of the Master's decision to accept the unsigned document as the will of the deceased Genius Kadungure, who died on 8 November 2020. They also seek the reversal of the first respondent's appointment as the executrix testamentary of the estate.

As for the facts as to how the will came to be, these were articulated by the first respondent at a meeting held on 25 November 2020 with the Master, family members and other interested parties. Essentially, she had met the deceased in early October 2020 and had gotten an appointment to meet him on 23 October 2020 where upon they had discussed "will writing"

[2] See *Patricia Darangwa v Juliet Kadungure & Ors* SC 136/21

and "estate planning". She had then been given instructions to draft a will. On the 27 October 2020, she had met the deceased to discuss the draft.

She said he was happy with it but instructed her to see his Manager Godfrey Dangwa who said he would call but did not. She was given his contact on the 3 November 2020 and went to see him on the 5th of November 2020 at Dreams Night Club. Mr. Dangwa called the deceased who said they would meet the following week as he was waiting for 'Kit Kat' to arrive from South Africa. She then phoned the deceased to agree on date and time of meeting which was set for 10th November 2020. The deceased died on 8 November 2020 before the meeting could take place.

Upon the above evidence, the will had been read and submissions sought. The deceased's father confirmed he had heard of the will from the first respondent at the funeral and had agreed to its use. The sisters, Juliet and Neria Kadungure had also confirmed that the will captured the intention of the deceased and had at the time also agreed to its use for administrative purposes. The will was accordingly accepted in terms of s 8(5) of the Wills Act [*Chapter 6:06*] as embodying the will of the testator despite falling short of compliance with will formalities.

Grounds of Review

1. The first ground of review is on the basis of illegality and absence of jurisdiction in that:
    a. The second respondent, the Master had no jurisdiction to accept as a will a document which was neither drafted nor signed by a person who has since died.
    b. The decision of the second respondent is illegal and contrary to s 8(5) of the Wills Act [*Chapter 8:05*] and the decision is therefore a nullity.
2. The second ground of review is on illegality in that the will was personally written by the first respondent and confers a benefit on her.
3. The third ground of review is on the basis of fraud, speculation and malpractice in that the document accepted as the deceased's will was :
    a. not dated.
    b. is bereft of confidential details.
    c. is imprecise in many respects and includes bequests to beneficiates of shadowy identity.

d. the deceased's estate has been rocked by manoeuvers by the first respondent to dispose of a part of deceased's estate without following the due process of the law.

4. The fourth ground is gross irregularity in that the second respondent, the Master made a grossly irregular and illegal decision of issuing letters of administration and appointing first respondent as testamentary executrix on the basis of a will that is null and void. As such it is sought that that the letters of administration be revoked and annulled in terms of s 30 (1) of the Administration of Estates Act [*Chapter 6:01*].

In Limine

Mr Hashiti raised several points *in limine* as to why the order should not be confirmed. Firstly, he argued that there was non-joinder of interested parties. This includes Fatuma Chokowore, the deceased's domestic helper who had been nominated as a beneficiary in the Trust. Godfrey Dangwa, Precious Mlambo and Michael Mubaiwa had also been nominated and were not before the court. As such, he argued that the matter could not be resolved as joinder was a necessity. Though the rules of court indeed state that non joinder is not fatal, this, he argued, was not meant to absolve litigants from being joined.

Secondly, he argued that there were material disputes of fact which could not be resolved on papers. He referred in particular to the affidavit by Juliet Kadungure in which she had said she had no objections to the unsigned will. Furthermore, Mr Kadungure the father had confirmed that the will should be used for administration purposes. Also at the meeting at the Master's, Mr Dangwa was a witness present who was not cited herein and who needed to be cross examined. His thrust was that it must be challenged why those who were present at the Master's meeting did not raise any issue as to the identity of Kit, the third respondent. As such Mr Hashiti argued that he too needs to be cross examined. To the extent that duress is alleged, he stated that it cannot be proven or disproven on affidavit. He further asserted that the Master too needs to be cross examined on his turn around since a meeting by the Master resolves questions of distribution. His last point *in limine* was that the removal of an executor can be done in motion proceedings but not the challenge of the validity of a will.

Mr Musarurwa, counsel for the third respondent, also a raised points *in limine.* He agreed with Mr Hashiti that there were material dispute of facts. He also raised the issue that the application ought to have been made within an eight (8) week period from the Master's decision. Furthermore, no application for condonation had been made. The review having been

only sought much later through an urgent chamber application, Mr Musarurwa maintained that it was made out of time and remained out of time. He therefore prayed that the review application be dismissed on this ground.

In response to these points, Mr Ushewokunze emphasised that non-joinder was not fatal. He highlighted that reliance on the document deemed to be a will was mistaken since it is only after it has been adjudged valid that persons can claim on its basis. The Master accepted a document which is challenged on the basis that it was not drafted by the deceased. He also submitted that in essence the points *in limine* raised were adequately dealt with in the two decisions in this matter preceding this review hearing.

Analysis of Points *in Limine*

On non-joinder of interested parties, this argument indeed misses the point that the matter is very narrowly about whether the will should have been accepted by the Master in the first place. In granting the interdict in the first place, the court had made the point very clearly that the interests of beneficiaries accrue when the estates assets and liabilities have been settled. At this point when the issue is simply about the acceptance or non-acceptance of a will based on whether it fell to be admitted within the ambit of s 8(5) of the Wills Act, non-joinder of beneficiaries cannot be said to be fatal.

The issue of there being dispute of facts and the need to call those witnesses who were present when the will was accepted by the Master is also simply a re-hash of a point of *in limine* that was addressed by the appeal court in dealing with its judgment. As the Supreme Court clearly articulated:

> "The fact that the respondents initially accepted the unsigned document as the will and the appointment of the appellant as executrix is of no moment in the inquiry on the authenticity and validity of that document. This is not a "touch-is-a-move" game of draft in which the stakes turn against the player once he or she touches the lid. Where new facts have emerged the court should be engaged to solve the issues."

In other words, the core is the validity of the will. This does not at all turn on the joinder of beneficiaries but on the legal requirements. The point *in limine* is accordingly improperly taken and is dismissed.

Similarly, the issue of the timing of the urgent application pending review is also another rehash of a ground that was amply traversed. The judge in accepting the urgent application pending a review, articulated very clearly the reasons for the timing of the urgent application for the interdict pending review:

> "The applicants have outlined the basis upon which they believe that the document presented is fake and should be nullified. They cannot be said to lack a cause of action. They have explained the circumstances that led them to go along with the document. The 1st respondent has also explained in detail circumstances surrounding the preparation and presentation of the document. The acceptance of any document that does not meet all the requirements is not a walk in the park. In my view, there are prima *facie* red flags in the document itself, processes and manner leading to the acceptance of the document as a will that **may** (*my* emphasis) result in a court sitting on review making a finding in favour of the applicants. This is what I would refer to as 'live' issues that need to be considered."

If there were problems with the filing of the review at that point, a Judge would not have granted the interdict as it would have made no sense to grant an interdict pending an invalid process. The Supreme Court also accepted the above circumstances under which the interdict was granted pending review. Also, the facts as they unfolded at the hands of the first and third respondents, materially brought to the surface the key concerns regarding the validity of the will itself. The point *in limine* is simply diversionary of the key concerns around the will and is therefore, also dismissed.

The Merits

On the merits, the applicants' lawyer Mr Ushewokunze argued that there were two sets of factors that were common cause. Firstly, the will was not drafted by the deceased as required by s 8(5) of the Wills Act that the will must have been drafted by a person who has since died. By specifying the life status of the drafter the provision was said to have clearly intended to do away with any dispute as to who the drafter had to be. He argued that the provision does not provide for drafting by a third party. As such the thrust of the argument was that the first question the Master ought to have asked was who drafted the document and that the moment it had emerged that the first respondent, Ms Darangwa, had drafted it, it ought to have been the end of the matter. Furthermore, the document was not signed or dated and to him this was all the more reason why the drafter ought to be the deceased. Being undated and unsigned the document was said to be susceptible to speculation and fraud.

The second common cause was the fact that executorship was conferred on the drafter of the will. Section 6 (1) (c) of the Wills Act includes a person incapable of benefitting under a will as one who, on behalf of the testator or at his direction, writes out the will or any part that confers a benefit. Section 6 (6) further clarifies that appointment under a will as an executor, administrator, trustee or guardian, constitutes a benefit. Section 6 (6) of the wills Act was therefore said to have been violated. In the result, his argument was that anything done in

violation of a statute is nullity. The appointment of the first respondent was therefore done pursuant to a document which was nullity.

He also zeroed in on the array of differing identities linked to the respondent in his various a court application. In some he is referred to as Nomattter **Zinyengere** whilst in others he appears as Nomatter **Zinyengerere**. As for the purported bequest of the Lamborghini, the thrust of his submissions was that it made no sense for the deceased to have bequeathed a vehicle he had bought through a loan to someone of questionable identity. Moreover, the release of the vehicle that the executor had sought to make to the third respondent had been done without following due process and without even an estate account being lodge. Cumulatively, his submissions were that there could be no better set of facts of fraud and applicants could not have just stood aside.

Mr Hashiti submitted on behalf of the first respondent that a statute should be read in a manner which makes sense and that the applicant was reading it in a manner which did not meet this requirement. His argument was that what is important is that the document should have been intended by a person who has since died to be his will. In other words, he thrust was that the will does not have to have been drafted by him. In this instance, the document had been executed on the deceased's instructions. As for the document's lack of formalities, he stressed that wills have been accepted which did not comply with formalities. As for the third respondent's identity in the will as 'Kit Kat' he insisted that applicants indeed knew him by that name. He drew the court's attention to specific documents in the record which showed that he had indeed been referred to by the first applicant as Kitty or Kitt. As such he argued that there was no case of impropriety and that it was an abuse of court process for them to now allege that they did not know who Kit Kat was as stated in the will. Furthermore, he submitted that there is no law that says in a bequest you cannot use a nick name. All that is necessary being that the person is identifiable.

In so far as the applicants seek to review the validity of the will, he argued that what is reviewable is the Master's decision. This is because a review attacks procedural irregularities. A will, he submitted, could not therefore be set aside through a review whose thrust is a failure of procedure. Furthermore he argued that the removal of an executor cannot be done through a review as no opportunity had been given to the master to deal with any complaint s concerning the executor. As for the validity of the will he insisted that there were disputes of fact to be place d before a trial.

Mr Musarurwa for the third respondent argued that the Master had dutifully followed the procedure in coming to the conclusion to accept the will. He also submitted that the argument that the word "draft" means that the testator should have put his hands on pen and paper would be a very restrictive view of interpreting s 8(5). He submitted that wills have been written and crafted on behalf of people who will not have written the will such as soldiers wills, hospital wills and so forth. As such, he maintained that what the Act envisaged in the stated provision is that the document produced would have been the will of the deceased had it met the formalities provided for.

The real issue, he emphasised, was whether the Master had complied with s 8(5) and the court was confined to assessing the conduct of the Master. He argued that in this instance, the Master had complied with the wishes of the beneficiaries which were consistent with the law and that the estate had begun to be administered in terms of an accepted document. His view was that the validity of the will was a matter for another day which could not be addressed without hearing *viva voce* evidence. He equally opined that in so far as the applicant wants to set aside a will on review there was no authority which permitted such conduct. As for the complaints against the executor, he stressed that there was a separate procedure for the disqualification of an executor. He therefore moved that the application be dismissed with costs.

Factual and Legal Analysis

In terms of s 8(1) of the Wills Act for a will to be valid, it must be in writing and signed by the testator or another person at his direction, with the presence of witnesses at the same time. It is not disputed that the will met none of the formalities and it was sought to be admitted in terms of s 8(5) which provides as follows:

> "Section 8(5) where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended, as a will for the purposes of the Administration of Estates Act [*Chapter 6:01*] even though it does not comply with all the formalities for:
> (*a*) the execution of wills referred to in subsection (1) or (2); or
> (*b*) the amendment of wills referred to in subsection (2), (3) or (4) of section *nine*".

This section permits the Master to accept a non-compliant will if satisfied that the will was intended by the deceased to be his last will and testament. When the provision speaks of a document drafted by a person who has since died, the focus is on the acceptance of a will that was done by the deceased personally. It is trite that words in a statute are to be given their

ordinary meaning unless they lead to an absurdity of which there is no such absurdity evidenced here. The limitation of the provision to a person who has since died is deliberate as s 8(5) operates to narrowly accept only those wills made by a testator in those circumstances where he drafted a will himself which falls of short of the requirements but where it was unequivocally intended to be a final will. Section 8(5) was intended to primarily address the home crafted remedy where a testator writes or types a will which does not comply with the strict formalities of the law but was clearly intended by the drafter to embody his will. Clearly, a document which does not follow the requisite formalities but is written or typed personally by a person who has since died is naturally likely to be regarded as clothed with more authenticity as being that of the deceased compared to one which is not. It is also important to distinguish between what embodies the final intention of a testator and what may in reality be preliminary drafts. The circumstances of the will described by the first respondent for instance tend to speak of a draft for a preparatory meeting as opposed to a draft which embodied the full and final intentions of the deceased.

Section 8(5) thus worded, condones inadvertent errors or omissions in compliance that may have been made by a testator in setting out his wishes but not by a third party. In examining the ambit of this provision regard has to be always borne in mind that the formalities such as writing signing and witnesses as spelt out in s 8 (1) of the Wills Act s 8(1) have their purpose just as the general requirement of strict compliance also serves its purpose.

> "First, the writing requirement serves the cautionary function by preventing the execution of a will through a careless oral expression of testamentary intent. Because "[w]rating has always been regarded as the most solemn form of expression, ' testators more likely approach the execution of a written will with greater aforethought than they would the execution of an oral will. Second, one's signature has traditionally indicated authenticity and finality of intent, and therefore the signature requirement also reminds the testator of the importance of will execution. Finally, by introducing outsiders into the testamentary experience, the formality of attestation sets the execution of a will apart from ordinary transactions."[3]

Compliance with formalities is also said to give testators a coherent and defined framework for expressing their wishes. Courts are therefore more able to recognise these expressions of testamentary intent within a recognised framework. Bearing these important purposes in mind it becomes clearer why a departure from the requirements was deliberately narrowly expressed in s 8(5) to the level of limiting recognition of incomplete wills or those erroneously executed to only those that have been drafted by the deceased evincing final

[3] See Mark Glover *Decoupling the law of Will-Execution* **St Johns Law Review Vol 88 No.3 Fall 2014** pp 597 -652 at p 622

intentions. Drafting here does not mean hand written only but also includes typewritten by the deceased but certainly not by a third party.

Section 8(5) certainly requires the Master to play a procedural and an adjudicative function in determining whether or not the will should be accepted. In other words, the Master is expected to determine in line with the law from the facts articulated whether a will fits the requirements of having been made by a person since deceased, intending it to be his will. The Master is not performing a simple administrative task but also a clearly adjudicative one in determining this key issue. He or she decides whether the will meets the dictates as provided by the law before he accepts or rejects it for purposes of estate administration. The point that the validity of the will can only be done in trial proceedings therefore overlooks the fact that the focus of this matter is on the Master's role in determining the acceptance of a will.

Once accepted, the Master then carries out administrative functions such as issuing necessary letters, and approving the final accounting and distribution accounts, but that initial task of will acceptance is clearly adjudicative. That task is of course always easier where wills have followed formalities.

I am also persuaded to the narrower interpretation of this provision by the South African case of *Bekker* v *Naude* 2003 (5) SA 173 (SCA) which interpreted a similarly worded provision, being s 2(3) of their Wills Act which reads:

> "If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills".

Though our provision speaks directly to the Master whilst theirs allows the court to order the Master to accept such a document, the import of the provision is the same in that it must be a document that was executed by a person who has since died, intending the document to be their will. The Supreme Court, in the case of *Bekker v Naude* ruled that the deceased had to have a document which he or she intended to make a will and that this document had to be "self-written, or typed or otherwise personally established". A document that the deceased had done through a lawyer or bank or third party does not qualify for ratification by virtue of s 2 (3). It further ruled that it is clear from the Act, that the legislature intended the narrower more

limited approach by deliberately introducing the requirement of a personal set up where documents do not comply with the formalities of a will.

The bottom line is that the provision is to be narrowly construed. It is not in dispute here that the will was never authored by the testator himself but by the first respondent Ms Patricia Darangwa. It is also common cause that it was not attested to in the sense of anyone subscribing to it as a witness. There was therefore no basis upon which the Master could have accepted it as a valid will in terms of s 8(5) of the Wills Act. It was indeed a nullity and nothing can stand on it including the Master's appointment of the first respondent as an executor. The first ground of review that the Master had no jurisdiction to accept as a will a document which was neither drafted nor signed by a person who has since died is therefore upheld. The decision of the Master in accepting the will was illegal and indeed contrary s 8(5) of the Wills Act [Chapter 8:05] and the decision is therefore a nullity. In the circumstances, the late Genius Kadungure popularly known as Ginimbi, indeed died intestate. This is not a bad thing. His family gets to inherit.

The second ground of review is on the basis of fraud, speculation and malpractice in that the document accepted as the deceased's will was not dated; was bereft of confidential details; is imprecise in many respects and includes bequests to beneficiates of shadowy identity; and that the deceased's estate has been rocked by manoeuvres by the first respondent to dispose of a part of deceased's estate without following the due process of the law. Having found that the will was invalid and ought not to have been ever accepted in the first place, these concerns do not call for consideration.

Additionally, the same can be said of the third ground of review pertaining to the appointment of the second respondent as executor and granting her letters of administration. Her appointment having been in terms of an invalid will stands on nothing. See *Rachel Filon & Anor v Margaret Sibanda & Ors* HH 89/2011. Suffice it to say even if the will had been valid, her appointment would still have been an irregular appointment as she derived a benefit from the will which she wrote herself.

Costs have been sought on a higher scale from the first respondent. The applicant's costs should justifiably come from the estate given that the invalidity of the will in this instance has arisen from the will's failure to comply with the dictates of s 8 (5) of the Wills Act. Furthermore, it is the Master who accepted that will.

However, whilst the will was accepted by the Master, the first respondent's actions have been anything but professional. She was the one who, despite her claim at expertise in estate planning and will writing, put the whole defective train in motion inclusive of her own invalid appointment. There is no justification for having her costs borne by the estate of the deceased in having the will declared invalid and the resultant setting aside of her own defective appointment as executor. As for the third respondent, he most certainly acted in haste of his own accord to reach his much desired pot of gold. He could not even wait for proper processes and procedures to be even followed in a quest to have the Lamborghini released to him. More importantly, once the validity of the will was challenged in relation to its compliance with the dictates of the law, he simply ought to have allowed the law to take its course in making its finding. Alas, he insisted hastily on jumping into the river. But as our rich African proverbs teach us about life's follies, it is never a good idea to test the depth of a river with both feet. He too, in my view, must pay his own costs.

In the result:

1. The application is hereby granted.
2. The provisional order granted in this matter is hereby confirmed.
   It be and is hereby declared that:-
   2.1 The document registered with the second respondent on 25 November 2020 under DR. No 1771/20 as the will of the later Genius Kadungure ('the *deceased'*) (who died on 8 November 2020) is null and void; and
   2.2 The deceased died intestate.
3. The decision of the second respondent to register and accept the aforesaid document as the last will for purposes of administration of the estate of the deceased in terms of s 8 (5) of the Wills Act [*Chapter 6:06*] be and is hereby set aside.
4. The second respondent's appointment of the first respondent on 2 December 2020 as the testamentary executrix of the estate of the deceased and all acts done by the first respondent (personally or by other persons at her direction) under and by virtue of such appointment be and are hereby declared null and void.
5. The letters of administration issued by the second respondent on 2 December 2020 in favour of the first respondent under DR no. 1771/20 appointing her as testamentary executrix be and are hereby revoked.

6. The second respondent shall convene another meeting to appoint an executor of the estate of the deceased which meeting shall be presided over by an official other than the official who presided over the meeting on 25 November 2020 or any of the officials who previously dealt with the estate of the deceased; and
7. Only the applicants' costs shall be borne by the estate of the late Genius Kadungure.
8. The first and third respondents shall pay their own costs.

*Ushewokunze Law Chambers, a*pplicant's legal practitioners
Rufu Makoni Legal Practitioners, first respondent's legal practitioners
Shomwe Nyakuedzwa Attorneys, third respondent's legal practitioners