

MARK TARUHLA
and
LUCKY TARUHLA
and
TENDAI TARUHLA
and
RATIDZO TARUHLA
and
KUDZANAI TARUHLA
and
HILDA TARUHLA
versus
FAKAZI SONNY TARUHLA
and
THE MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 1 June & 15 September 2021

Opposed application

Professor L. Madhuku, for applicants
T Shadreck, for 1st respondent

TAGU J:

INTRODUCTION

This matter was remitted from the Supreme Court with the following order attached-

“IT IS ORDERED BY CONSENT THAT

1. The appeal be and is hereby allowed with each party bearing its own costs.
2. The judgment of the court a quo is set aside.
3. The matter is remitted to the court a quo to be heard by a different judge, and which court shall determine the validity of the Certificate of Heirship reference WE4/158/96 issued in favour of the 1st respondent.”

The sole issue for determination in this matter is the validity of the Certificate of Heirship reference WE4/158/96 issued in favour of the 1st Respondent.

THE FACTS

The Applicants and the 1st Respondent are blood brothers and sisters, born of the same father and mother except for the 1st Respondent who is born of a different mother. The 1st Respondent is the eldest of them all. The parties' father SONNY TARUHLA died intestate on the 5th of September 1996. It was the understanding of all parties concerned that there was no formal registration and administration of the late's estate. In October 2018 the family resolved to formally register the estate. The parties attended for the registration of the estate at the Master of the High Court Harare and the estate was duly registered under reference DR 2965/18. An edict meeting was set. At the edict meeting the 1st Respondent through a representative one JAIROS B. MATANDIRE then advised for the first time that the deceased's estate was registered at Kadoma Community Court and was administered to finality. He tendered a certificate of heir WE4/158/96. Stunned by the development the rest of the beneficiaries and the Master of the High Court indicated that investigations of the allegations by the 1st Respondent were going to be made. The edict meeting was postponed pending the Master's efforts to investigate allegations by the 1st Respondent. The Master of the High Court generated a letter dated the 22nd November 2018 addressed to the Additional Assistant Master requesting for the file referenced WE4/158/96.

By letter dated 7 February 2019 the Additional Assistant Master and also a Resident Magistrate at Kadoma replied to the Master of the High Court as follows-

“We have searched with our Provincial archives the above record but there is none even the Reference number we use here at Kadoma Deceased estates starts with DRKM”

After the above response the 1st Respondent then requested to do an independent search at the Provincial and National Archives. The Master of the High Court allowed him to do so. While waiting for the results of the search the 1st Respondent filed an urgent chamber application suspending the administration of DR 2965/18 pending clarification of the origins, location and authenticity of the certificate of Heir WE4/158/96 Kadoma Community Court which Provisional Order was granted by consent of the parties.

By letter dated 15th February 2019 the Applicants' legal practitioners wrote to the Provincial Magistrate Chinhoyi enquiring on the authenticity of the Certificate of Heir. The Provincial Magistrate responded by letter dated 25 April 2019 as follows-

“Please note that National Archives of Zimbabwe (Harare and Chinhoyi) could not locate file WE4/158/96 in their repositories. Harare office indicated that they can only assist in respect of documents dating 1994 going down. For this particular record they referred us back to Kadoma court.

Unfortunately, Kadoma seem not to have the said record. Consequently, our office is unable to clarify the said document's origins, location and authenticity as per your request."

Given the above factual exposition regarding the Applicants' father's estate the Applicants sincerely believe the estate was never formally registered and administered to finality as alleged by the 1st Respondent hence the authenticity of the certificate of heir is questionable. The Applicants now seek the following relief-

"IT IS ORDERED AS FOLLOWS

1. That the certificate of Heirship referenced WE4/158/96 purportedly issued to the 1st Respondent in respect of the estate late Sonny Taruhla be and is hereby declared invalid and accordingly set aside.
2. That the 2nd Respondent be and is hereby directed to proceed with the Administration of the estate of late Sonny Taruhla registered under DR 2965/18.
3. That the 1st Respondent shall bear costs of suit on a higher scale of Attorney/client if he opposes this application."

Then 1st Respondent in his Opposing Affidavit alleged that the applicants are seeking to through the back door to rectify their non- opposition to the final order in this Honourable Court's final order in Case no. HC 1270/19 which ordered that he remain the sole heir to the Estate Late Sonny Taruhla and certified by the Community Court of Kadoma. He alleged that the certificate of Heirship W4/158/96 was well known by the Applicants and was authentic. He prayed for the dismissal of the Applicants' application.

THE SUBMISSIONS

Counsel for the Applicants Professor *L Madhuku* submitted that if regard is head to the developments before the Master of the High Court the 1st Respondent's document is fraudulent and not authentic. He said the 1st Respondent's evidence is unreliable and fraudulent in that no explanation is given how the documents were suddenly found when all previous searches yielded no such documents. He said the documents surfaced firstly in SC 23120. Further there are no supporting affidavits from staff members mentioned in S. M. Mutiro's letter, namely Mr. Mudzonga and Mr. Siraha who ought to have explained where they found the documents notwithstanding the two letters on record by the previous Resident Magistrate T. Gwazemba. Further, in some previous proceedings the 1st Respondent filed an irregular and unlawful affidavit by one Caroline Chigumira, a former Magistrate who claimed to have been the magistrate who registered the estate in 1996. She was deposing to an affidavit some 23 years later at a time she was no longer a magistrate. It was not clear how she came to be found for the purpose by the 1st Respondent. It was Mr. *L Madhuku*'s submission that the 1st Respondent had the onus to convince

the court that the document is valid and authentic. On a balance of probabilities the 1st Respondent failed to prove the same regard being had to the fact that the old s 68 (2) of the Administration of Estates Act [*Chapter 6.01*] which was applicable at the time required “controversies or questions” among ‘relatives’ to be determined by a magistrate. This was not done and no such record was found. More fundamentally, the deceased had several assets. A meeting of relatives of the deceased could not conceivably have distributed all those assets to the 1st Respondent without regard to the other children of the deceased. So whatever the position of the heir under the ‘old’ customary law, our law recognizes the role and responsibility of the meeting of relatives under customary law. Therefore, there is no doubt that WE4/158/96 would have been issued without regard to a proper resolution of family disputes under customary law hence it is not authentic and must be set aside.

In response counsel for the 1st Respondent Mr. T. Shadreck submitted that the 1st Respondent managed to adduce evidence in his supplementary affidavit that the document is authentic. He said the document is not fraudulent as they are there at Kadoma, only that it took long to produce them. He said there is an order by KUDYA J (as he then was) that confirmed that the 1st Respondent is the heir to the estate of the late SONNY TARUHILA hence it is not permissible for this court to vary the order of a parallel court. See *Unitrack (Pvt) Ltd v TelOne (Pvt) Ltd* SC 10/18. He said therefore the order being sought by the Applicants is incompetent.

ANALYSIS

A perusal of the papers filed in this case as well as the submissions clearly reveal that prior to October 2018 it was the general understanding of all beneficiaries that the Estate of the Late Sonny Taruhla had not been formally registered and administered. It was on this basis that in October 2018 the beneficiaries decided to have the Estate formally registered. If indeed they were aware the Estate would not have to be registered for the second time with the Master of the High Court. It is common cause the rest of the beneficiaries were not aware and had not participated in its registration. It was only during the edict meeting that it became apparent that indeed the Estate had been registered and that the 1st Respondent had been appointed the heir to the late’s estate. This prompted the Master of the High Court and the Applicants to carry out an investigation as to what could have happened. What emerged was that there was no proof at Kadoma Magistrate’s Court that the Estate had been dealt with. If indeed it had been dealt with then the million dollar question

is why were the rest of the beneficiaries not aware? Clearly the rest of the beneficiaries had not participated in its administration. It is surprising that only the 1st Respondent was aware that the estate had been registered and administered to finality. All efforts to locate the file came to naught. To make the whole exercise, if it took place suspicious is that the reference WE4/158/96 does not exist at Kadoma Magistrates Court where all estate dealt with there at the time had the following reference “DRK M”. This leaves the authenticity of the Certificate of heir in doubt.

The court indeed took note of the Order by KUDYA J (as he then was) case HC 1270/19. That order granted in default simply confirms the 1st Respondent as the heir. That order did not deal with the authenticity of Certificate of heirship WE4/158/96. For avoidance of doubt the order by KUDYA J (as he then was) reads as follows-

“Mr. T. Marinda for the applicant
Respondents in default

WHEREUPON, after reading documents filed of record, and hearing Counsel
IT IS ORDERED THAT:

1. The applicant remains the sole heir to the Estate Late Sonny Taruhla as appointed and certified so by the Community Court of Kadoma on 19th December 1996 under reference number WE4/158/96.
2. 1st respondent be and is hereby ordered and directed not to re-open the administration of the deceased estate Late Sonny Taruhla reference number WE4/158/96 without an order of a court of competent jurisdiction to that effect.
3. There is no order as to costs.”

A reading of the above order clearly in para 2 shows that the 1st respondent (The Master of the High Court) can only reopen the administration of the deceased estate Late Sonny Taruhla on the basis of a court order of competent jurisdiction to that effect. It being a default judgment it is open to be varied by a court of a competent jurisdiction.

Since the authenticity of certificate of heir W4/158/96 is in doubt it is in the best interest of justice and balance of convenience that the estate be administered de novo assuming arguendo that it was indeed once registered which is unlikely under the obtaining circumstances of this matter. In my view the administration of the estate under DR 2965/18 will not prejudice any of the beneficiaries including the 1st Respondent since everyone will be involved and the process will be done transparently to the benefit of every legally entitled beneficiary to the estate.

IT IS ORDERED THAT

1. The certificate of Heirship W4/158/96 is not authentic.

2. That the certificate of Heirship referenced WE4/158/96 purportedly issued to the 1st Respondent in respect of the estate late Sonny Taruhla be and is hereby declared invalid and accordingly set aside.
3. That the 2nd Respondent be and is hereby directed to proceed with the Administration of the estate of late Sonny Taruhla registered under DR 2965/18.
4. That the 1st Respondent shall bear costs of suit on a higher scale of Attorney/ client.

Lovemore Madhuku lawyers, instructed by Mufadza & associates, applicants' legal practitioners
Kanoti and partners, 1st respondent's legal practitioners