

TATENDA MHERE

versus

JEREMIAH MATENHESE N.O.

(In his capacity as Executor Dative for Estate Late Obert Mhere)

And

THE MASTER OF THE HIGH COURT N.O.

And

THE ASSISTANT MASTER OF THE HIGH COURT FOR MASVINGO N.O.

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO, 14 & 23 March and 7 September, 2022

FRT Chakabuda for the applicant

No appearance for all 3 respondents

Application for default judgment

ZISENGWE J: What the applicant seeks by way of default judgment is an order removing the 1st respondent as the Executor Dative of the estate of the late Obert Mhere and a raft of other ancillary relief stemming from or associated with such removal. To put matters into perspective a brief background as same can be gathered from a perusal of documents filed of record will suffice. The late Obert Mhere died on 8 January 2007. He was survived by his wife Sinikiwe Mariva and four children namely, Tatenda Mhere (the applicant), Ratidzo Tapiwanashe Mhere, Charles Mhere and Nobert Mhere. His estate was rather modest comprising as it did mainly of some residential dwelling namely House No 4181 Lancaster Close, Mucheke, Masvingo (hereinafter referred to simply as “the house”).

In due course his estate was registered with the Master of High Court and subsequently a firm of Estate Administrators, Polka Executors, was appointed as Executors thereto. The 1st respondent as an official within the employ of the said firm, was then appointed executor dative for the estate of the late Obert Mhere.

Thereafter the administration of the estate appeared to proceed seamlessly and without incident culminating in the beneficiaries of the estate apparently consenting to the sale of that house to third parties. I use the word “consenting” guardedly owing to the fact that this consent was soon to fall under attack from the applicant as having been obtained fraudulently.

The applicant avers that the procedure leading up to the sale of the house by the 1st respondent is fraught with irregularities not least that it is tainted by a fraudulently acquired consent for the disposal of that asset. He claims that the 1st respondent fraudulently sought the 2nd and 3rd respondents’ consent to the sale of the property by counterfeiting his signature. He distances himself from the entire process wherein consent to the sale of the property was obtained.

To add insult to injury, so the applicant avers, the 1st respondent has since entered into a double sale of the property to a third parties potentially throwing a favourable winding up of the estate into extreme jeopardy. He further claims that the 3rd respondent is complicit in the entire improper administration of his late father’s estate.

To compound matters, the applicant avers that his father left behind a will supposedly bequeathing his house to his wife Sinikiwe and in the event of her death to his children including the applicant in undivided shares. The applicant therefore avers that any purported sale of the house constitutes a nullity.

Through a chamber application, the applicant then seeks to have the 1st respondent removed as executor in terms of Section 85 of the Administration of Estates Act, [*Chapter 6:01*] alleging that same is not a fit and proper person to see to a proper and safe winding up of the estate.

The order that he seeks is couched in the following terms:

IT IS ORDERED THAT:

- 1. The application be and is hereby granted.*
- 2. The 1st respondent be and is hereby removed as executor dative for Estate Late Obert Mhere DRMS 179/18*

3. *The 2nd and 3rd respondents be and are hereby directed to revoke and cancel all Letters of Administration issued in favour of the 1st respondent forthwith.*
4. *The 1st respondent be and is hereby directed to personally account to the applicant and 2nd respondent for all proceeds obtained from any sale he conducted in disposing of the property commonly known as House No. 4181 Lancaster Close, Mucheke Township, Masvingo within (48) hours from the date of service of this order.*
5. *In the event that 1st respondent does not account in terms of paragraph 4 above, the 2nd respondent be and is hereby authorised to take all necessary measures to ensure that the property commonly known as House No. 4181 Lancaster Close, Mucheke Township, Masvingo Township, Masvingo remains property belonging to Estate Late Obert Mhere in terms of the laws of Zimbabwe unless interfered with by a competent order of court.*
6. *The 1st respondent to pay costs of suit on the scale of legal practitioner and client.*

The 1st respondent filed a Notice of Opposition and in his Opposing Affidavit denied any impropriety or malfeasance in administering the estate. Needless to say he denied any fraud or forgery in obtaining consent to dispose of the property. He pointedly averred that as a matter of fact it was applicant and his mother who made arrangements for the sale of the property to one Rhodia Mashakada. He further averred that in any event the house stood to devolve to applicant's mother in her capacity as the surviving spouse to that estate in terms of applicable laws of intestate succession. He dismissed the will as a nullity as same did not satisfy the requirements of a valid will. He also denied having conducted or intending to conduct multiple sales of that property.

When the matter was set down for hearing on the 15th of March 2022, none of the respondents were in attendance despite having been properly served. This prompted the matter having to be referred to the Unopposed Roll. This course of action was necessitated by the fact that the High Court Rules, 2021("the Rules") appear to be silent as to the disposal of an application where a party does not appear on the date on which the application is set down.

Be that as it may, when the matter was subsequently enrolled on the Unopposed Roll I requested counsel to submit heads of argue explaining a number of issues which I still found unclear *ex facie* the record. These were;

1. *Whether or not the estate was properly registered, if so whether it was through testate or interstate succession.*

2. *If it was not, was it proper to seek the removal of the Executor Dative instead of seeking the nullification of the registration of the estate itself.*
3. *If the estate was per testate succession why all the beneficiaries of thereof were not joined in the suit.*
4. *Why in one breath the applicant would impugn the validity of the registration of the estate and the appointment of the 1st respondent as a nullity yet in the next breath sought the removal of the 1st respondent as Executor Dative instead of simply a declaration of the nullity of the registration of the estate.*

Counsel for the applicant was clearly unhappy about the course of action taken in inquiring him to so submit heads of argument. This is because using some rather choice words, and in a testy rebuke harangued the court questioning the propriety of such a course of action. In his view once a party is found to be in default the court's hands are tied and is obliged to summarily enter default judgment in favour of the applicant. In other words, the court's role is relegated to that of merely rubber stamping that application no matter its merits or demerits, or legality or otherwise of the order sought. That is obviously an untenable preposition.

There is nothing that precludes a Judge or Court to whom an application is made from using its inherent powers from directing a party from providing additional information as may be necessary for a just resolution of a matter. The role of a court or judge cannot be relegated to that of merely rubber stamping an application ostensibly on the basis that it is an application for default judgment. The suggestion that the judge or court should merely endorse or rubber-stamp the order sought by an applicant where the respondent is default may yield untenable outcomes. It would imply that the court or judge is obliged to rubber-stamp the order sought even where the court or judge lacks jurisdiction (say in labour disputes), or where the order sought is patently unlawful or is contrary to public policy, or where one or other requirement for the granting of such an order has not been satisfied. The circumstances, therefore, under which a court or judge may decline to grant a default judgment are innumerable.

Further, the application having been brought as a chamber application in terms of rule 60 of the Rules, nothing precluded the judge from seeking clarification of issues attendant thereto in terms of subrule 8(b) of that rule. The said provision reads:

“8. A judge to whom papers are submitted in terms of subrules (6) or (7) may –

(a) ...

(b) Require either party's legal practitioner to appear before him or her **to present such further argument as the judge may require.** (Emphasis added)

That provision in my view is sufficiently wide to require a legal practitioner to provide written arguments on specific issues of concern attending to that application

It was on the basis of the foregoing that I sought clarification of the apparently contradictory averments made by the applicant in his Founding Affidavit. There appeared to be some dissonance between the order sought and the material averments made ostensibly leading to the same.

I will briefly address each.

Whether the registration of the estate was predicated on testate or intestate succession

In his Founding Affidavit the applicant averred that the deceased left behind a will supposedly bequeathing his property (or part thereof) to certain identified beneficiaries. He also attached a copy of the supposed hand-written will. It would however appear that the estate was administered as per interstate succession judging by the contents of the record.

The natural question that emerged, therefore, in respect of which I sought clarity was whether the administration of the estate in question was per testate or intestate succession. Different sets of considerations would apply from this basic distinction and different outcomes would equally ensue therefrom. This was not an issue that I could turn a blind eye to or gloss over in considering whether or not to grant the order sought.

Whether the estate was properly registered

In paragraph 13.4 of his Founding Affidavit, the applicant averred as follows;

“13.4 The registration of the deceased estate together with the appointment of the 1st respondent as Executor Dative is a fraud as it is predicated upon a draft copy of deceased's death certificate. It is a nullity.”

The question that obviously arose was why would the applicant seek only the removal of the Executor Dative leaving all the other stages in the administration of that estate intact. If the entire process amounts to a nullity everything that rested on it would be a nullity. It would be incongruous to cherry-pick which component of the whole process should be set aside. Logic dictates that if the registration of the estate was a nullity as averred what the applicant would

naturally seek would be an order declaring the nullity of the entire process. The removal of executors contemplated under Section 85 of the Administration of Estates, Act [*Chapter 6:01*] presupposes the removal of a properly appointed executor pursuant to a properly registered estate.

The failure to cite other beneficiaries

I also requested applicant to explain why he had failed to cite the other beneficiaries given that his application is founded on the averment that his late father's estate should be administered as per his will. In the document which the applicant insisted was his late father's will, the testator supposedly bequeathed his house to his wife Sinikiwe and in the event of her death, a usufruct in favour of all his children except one child identified as Charles. The question that naturally begs is the apparent omission of the other beneficiaries in the current suit, that is, of course if the estate devolves in terms of the alleged will.

These were the concerns which prompted me to request counsel to file heads of argument explaining the apparent dissonance between the basis of his application vis-à-vis the order sought. Without a proper explanation, the two are on the face of it, at war with each other.

However, this being effectively an application for default judgment one is best advised to refrain from delving into the substantive issues in the main application unless same is tainted by patent illegality, absurdity or is contrary to public policy. It however suffices to point out that the order sought in paragraph 5 of the draft order potentially affects third parties who, according to applicant may have purchased the property identified therein from the 1st respondent but were not cited as parties to the current application. Secondly, there is no justification in granting costs on the punitive attorney and client scale.

Ultimately therefore, the following order is hereby given.

ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

1. Respondents being in default at the hearing, default judgment is hereby granted against them.
2. The application succeeds as sought in the draft order subject to the deletion of paragraph 5 thereof.
3. 1st respondent to pay costs of suit.

Chakabuda Foroma Law Chambers – applicant’s legal practitioners