

**IN RE: ESTATE LATE ZACHARIA NYONI R/F 16/15**

IN THE HIGH COURT OF ZIMBABWE  
MUTEMA J  
BULAWAYO 2 APRIL, 2015

**Review Judgment**

**MUTEMA J:** This matter was referred to this court for review from the Magistrate's Court. The history of the dispute appertaining to the estate can be summarised as follows:

Charity Siziba claims that she was customarily married to the late Zacharia Nyoni who died on 14 January 2015. She approached the Magistrate's Court to have the deceased estate registered. She was advised to bring in tow three members from the deceased's family. She says she sent them money via eco-cash, \$18 for transport from Lupane but no one from that family turned up. Apart from the desire to have the estate registered she also wanted the court to help her recover the property which she listed in the annexure she attached to her application which she alleged was in the possession of the deceased's family members. Charity's "founding" affidavit which is filed of record is dated 9 February, 2015. Also filed of record is the deceased's father Mtshumayeli Nyoni's "opposing" affidavit dated 25 February, 2015 wherein he disputes that Charity was customarily married to the deceased son but avers that she was merely a girlfriend. He also listed property he says belonged to the deceased in an attached affidavit and averred that the rest of the property listed in Charity's affidavit did not belong to the deceased.

The record then goes on to show that the application was heard on 12 March, 2015 by his worship S. Jele. It is not disclosed that parties were served with any notice of set down for that date neither is it disclosed which parties appeared before the court for the hearing. In order for the detached reader to appreciate what actually transpired at the hearing, I am constrained to quote *in extenso* what was recorded.

"In the Estate of the late Zacharia Nyoni

Magistrate

S. Jele

HB 75-15  
HCAR 480-15  
R/F 16-15

Interpreter  
Date

Sikwela  
12-03-015

Applicant

Q What are you applying for

A There is property which we acquire (*sic*) with my late husband. The court may assist me to get the property. We were customarily married. The respondent said the property to his child (*sic*). The property belonged to me with my late husband and we have 2 children with the deceased (*sic*).”

Thereafter nothing was recorded except on the record cover where the following appears:

“Claim with costs is dismissed.  
Jele 12-03-15”

The mystery did not end there. The record does not reveal what happened after ruling. It is not known whether this was a default order since it is not indicated that respondent Mtshumayeli Nyoni was in default or present. No reasons for the ruling were written. There is also no indication that such reasons were given *ex tempore*.

Immediately below the recorded proceedings quoted above, on the same page of the bench paper appears what his worship V. Mpofu recorded on 19/03/15:

“V. Mpofu  
P. Sikwela  
19/03/15

Applicant

I still stand by my affidavit. I wish to add that I was customarily married to the deceased. He was a temporary teacher in 2001. He came to my parents with his brother and paid “ukhangaziwe” and other things. I discussed with the deceased and agreed to pay for his collage fees and everything. I acquired all these properties with the deceased.

Respondent

HB 75-15  
HCAR 480-15  
R/F 16-15

I do not refuse what she has claimed, however I do not object to what I have enlisted knowing to be what she can get. I only have a problem this women does not respect me at all. What she will get is even the corpse of the deceased.

Ruling:

By consent, the applicant to obtain the property admitted by the respondent. The applicant is to obtain the property listed by the respondent as annexure attached to this judgment.”

Then on 23 March, 2015 his worship V. Mpofo, signing as the Additional Assistant Master sent the record of proceedings on review with a covering minute worded in this vein:

“May you please place the record before a Judge for review of the proceedings therein.

The writer presided over the matter as an Additional Assistant Master at Tredgold in which the parties had a row over the deceased’s estate.

The matter had initially appeared before Mr Jele S. whose proceedings indicated he only partly heard the Applicant’s case and went no further. Having perused the entire documents including the Respondent’s response in which he was not objecting to the Applicant’s prayer, I made a ruling by consent. Having entered the ruling, I then was advised of Mr Jele’s ruling on the similar issue in which he dismissed the Applicant’s case with costs. This ruling by Mr Jele was merely endorsed on the record cover but not inside the proceedings. It is then that I learnt of the complication already existent in this matter.

I therefore seek further guidance from the Judge(s) in this matter following our two conflicting ruling on the same matter.”

It is apparent that this record is redolent of irregularities and confusion. It is not known how the application having been dismissed by magistrate Jele on 12 March, 2015 was brought back to the same court and entertained while it stood dismissed. Equally strange is how magistrate Mpofo proceeded to re-hear the application and recorded what I quoted above without noticing the earlier handwritten notes by the first magistrate and even the ruling exitant on the cover as well as the typed same ruling filed of record date-stamped a day before he heard the same application.

HB 75-15  
HCAR 480-15  
R/F 16-15

However, from a procedural point of view, it is beyond question that *prima facie*, the second proceedings are a nullity since they occurred when there was in existence an earlier contrary ruling or order involving the same parties and the same subject matter or cause of action. Even if the earlier ruling were wrongly made the bottom line is that the order is still standing – it has not been legally overturned.

I am also constrained to advert to one other fetter hamstringing the latter proceedings and their outcome. The ruling by the second magistrate is baffling. It is tantamount to distribution of the deceased estate by the court *qua* executor when that estate has not yet been registered and an executor appointed yet the applicant wanted the court’s help to enable her to register the estate in the first place. The latter court should not have entertained the applicant’s claim to the property at that juncture. It is the duty of the executor of the estate to call for such property.

In the event the latter court’s proceedings are hereby declared a legal nullity. The proper course open to the applicant is to have the deceased estate registered and an executor/heir appointed who should see to the administration and final distribution of that estate.

Kamocha J ..... I agree