HH 113-2006
HC 3122/03

JOSHUA KADENGU — 1ST APPLICANT
and
LAMECK KADENGU — 2ND APPLICANT
and
ROSA KADENGU — 3RD APPLICANT
versus
OLGA KADENGU (In her personal capacity and as guardian of her two minor children Mugumo and Duncan Kadengu) — 1ST RESPONDENT
and
RICHARD JOHN CHIMBARU — 2ND RESPONDENT
and
THE MASTER OF THE HIGH COURT — 3RD RESPONDENT

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 13 July and 1 November 2006

Opposed Application

Advocate Zhou, for the applicant
Mr *Mutizwa*, for the 1st respondent
No appearance for 2nd & 3rd Respondents

KUDYA J: On 24 March 2003, three of the beneficiaries of the estate of the late Job Bruno Kadengu filed this application seeking the variation of certain clauses of the Last Will and Testament of the testator. The application was served on the respondents on 2nd April 2003, 17 April 2003 and 16 March 2005 respectively.

The 1st respondent opposed the application on 18 August 2003 while the 2nd respondent did so on 1st September 2003.

The testator died testate on 25 March 1990. He executed his 9 paged Will on 20 February 1990. It contains 20 clauses.

One *Gregory Slater* of *Gollop and Blank legal practitioners* of Harare was appointed the executor testamentary and was issued with letters of Administration by the Master on 14 June 1990 in line with clause 3 of the Will.

Slater attempted to administer the estate DR No. 665/90 but by 30 September 1998 he had not finished doing so. He fled the country under allegations of misappropriation of funds. *Messrs Gollop and Blank* proceeded to renounce their appointment as Executors of and trustees to the estate on 5 September 1997. The Master then appointed the 2nd respondent as Executor Dative on 2nd July 1999.

The new executor failed to remedy the problems that *Slater* left unresolved. By 28 September 2000 the 1st and 2nd applicants together with Martin Kadengu, another beneficiary, wrote to the Master complaining of the inaction of the 2nd respondent and his resultant failure in winding up the estate in accordance with the wishes of the testator. The desired result was not achieved.

The applicants instituted the present application in the belief that:-

> "This estate can no longer be wound up in terms of the will as some of the clauses have become irrelevant with the passage of time whilst others have been overtaken by events."

They referred to clause 9 which dealt with the formation of a trust whose trustee was to be senior partner in the law firm of *Messrs Gollop & Blank* which law firm had renounced their appointment as trustees and executors even before the trust had been formed. They pointed out that the beneficiaries had not and could not agree on a suitable substitute. In any event to them the trust would not achieve its intended purpose as some of the beneficiaries could not be located while others had left Zimbabwe.

They sought the dispensation of the formation of the trust and the liquidation of the estate in a way consistent with the overall intention of the testator that a commodious enough house be purchased for 1st respondent and the residue be shared equally to all the deceased's children.

The only assets belonging to the estate were given as 4 000 shares in Paradise Park Motel (Pvt) Ltd and certain piece of land situate in the district of Makoni called Alloa Farm. They therefore prayed for the disposal of the 4 000 shares in Paradise Park Motel (Pvt) Ltd by private treaty, and that clause 6 of the will be implemented for "a large enough and

commodious enough house be purchased for 1st respondent in the Northern suburbs of Harare" from the proceeds and that the residue be shared equally amongst the beneficiaries. They further prayed for the registration of Alloa Farm, in the names of all the beneficiaries, as a family home which would not be sold and that costs be borne by the Estate in the event of the 1st and 2nd respondents did not oppose the application.

On 23rd July 2003 a default judgment was entered by this court. It was ordered that:-

1. The Trust which was to be set up in terms of clause 9 of the will be and is hereby abandoned.
2. The deceased's 4 000 shares in the Paradise Park Motel (pvt) Ltd shall be sold to the best advantage of the beneficiaries.
3. "A large enough and commodious enough" house shall be purchased for the 1st respondent and her minor children from the proceeds of the sale of the Paradise park Motel (Pvt) Ltd. The Master of the High Court (3rd respondent) shall determine whether or not the house which the estate shall be purchasing for the 1st respondent and her children is large enough and commodious enough.
4. After purchasing the house described above for the 1st respondent and her children, the residue shall be equally distributed among the surviving beneficiaries. The shares of beneficiaries who are outside the country or who are not part of these proceedings shall be deposited with the Master of the High Court.
5. The immovable property situate in Makoni District, namely Alloa Farm, held under Deed of Transfer 7689/81 shall not be sold. It shall be retained as a family home to be registered in all the beneficiaries' names or to be registered in the name of the nominated beneficiary in trust for the rent of the beneficiaries.
6. The costs of this application shall be borne by the estate.

Both parties were agreed that this order was rescinded by consent.

The 1st respondent in her opposition averred that the will was valid and effectual and that the 2nd respondent be afforded the opportunity to administer it and give effect to the deceased's wishes. She averred that improper conduct by *Slater* or delays and inaction by 2nd respondent were not recognized grounds for setting aside the will.

She further averred that the shares in Paradise Park Motel did not belong to the estate as the deceased had not paid for them at the time of his demise. An open invitation was extended to those beneficiaries willing to participate in the purchase of these shares to do so but only the 1st defendant responded positively. She produced a letter written to the applicant's then legal practitioners of 23 April 2002 which indicated that a dispute existed as to the ownership of the shares. Further she averred that Alloa Farm be dealt with in terms of the will.

The 2nd respondent on the other hand in his opposition noted that the estate was illiquid and this hampered his ability to discharge his mandate. He believed that the issue of the ownership of the 4 000 shares be determined first before the estate could be wound up.

Three issues were argued before me. These are:-

1. Whether or not the estate can no longer be wound up in terms of the will because some clauses have become irrelevant.
2. Whether or not the 4 000 shares in Paradise Park Motel (Pvt) Ltd form part of the deceased's estate.
3. Whether or not Alloa Farm can still be dealt with in terms of the will.

It seems to me however, that a more fundamental point, which unfortunately was not addressed, arises. It is whether or not the applicants have *locus standi*, that is a direct and substantial interest in seeking variation or alteration or rectification of the will.

In *Henri Viljoen Pty Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at pages 166H-169H, HOROWITZ AJP dealt with the question of direct and substantial interest with

respect to joinder and discussed at 167 C-F the meaning that may be ascribed to the term with reference to a lessor, lessee and sub-lessee. At 169H he held that:-

> " 'the direct interest required' by the Appellate Division decision must be an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation."

In Zimbabwe, as far as I am aware, the question of a beneficiary's direct and substantial interest in a will was considered by MORTON J in *Clark v Barnacle N.O. and two others* 1958 R & N 348 (SR). In that case two executors sued a third executor in the estate of one Henry Douglas Clark to recover assets of the estate. The third executor's functions as such had been suspended by a court order pending the determination of the suit. The applicant was one of four residuary heirs who sought to be joined in as a co-plaintiff with the other two executors in order to protect his interests. He held that while an executor was the only person who had *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate, the residuary heir could seek the intervention of the court for the proper performance of the executor's duty or to seek his removal. The application for joinder was dismissed both in terms of Common law and Rule 7 Order 12 of the Rules of Court in existence at the time.

See (1) *Fischer v Liquidators of Union Bank* 8 SC 46 at 54 and *Liquidators of Union Bank v Watsons Executors* 8 SC 200 at 306 where in both cases which were decided in 1890, DE VILLERS CJ the executor alone is looked upon as the person to represent the estate of a deceased person. In the later case at 306 he stated:-

> "As between the executor and the heirs he (the executor) acts, in a certain sense, as their mandatory, but towards the rest of the world the occupies the position of legal representative of the deceased, with all rights and obligations attaching to that position."

(2) *Estate Smith v Estate Follet* 1942 AD 364 at 383 and *Commissioner of Inland Revenue v Estate Crewe and Anor* 1943 AD 656 at 692. In both cases WATERMEYER JA

held that an heir or legatee is entitled to claim his inheritance from the executors of the estate after confirmation of the executor's account. In the latter case he stated:-

> "The right to make such a claim no doubt vests in the heirs on the death of the deceased, and may be said to have dominium of the right, although it is not immediately enforceable."

(3) *Meyerowitz* in *The Law and Practice of Administration of Estates and Estate Duty* 1995 at page 18:12 *in fine* is in agreement with WATERMEYER JA's statement of the law as it applies in South Africa.

It seems to me therefore, that the applicants in *casu* are obliged to show the direct and substantial interest that they have in the subject matter before me of seeking the variation of certain clauses of the will. In terms of the will they are residuary heirs. They will only be able to benefit from the will after clause 9 thereof has been fulfilled. Clause 9 reads:-

> "After discharging my debts and taxes and paying the legacies and providing for the aforesaid usufruct and generally dealing with my directives detailed hereinabove, my Executor shall sell and liquidate and turn into cash the entire balance of my Estate and my Executor shall hold the resultant monies in his own name as Trustee of a Trust Fund and he shall apply the income and capital thereof as hereinafter directed. The successor in office as Trustee of my Trust Fund shall be the Senior Partner for the time being of the said *Messrs Gollop and Blank*."

The executor's primary duty is set out in clause 5. He was to gather all the testators' property, pay debts and taxes and expenses for administering the Estate. This was to be followed up by the purchasing of a large enough and commodious enough house for the 1st respondent (surviving spouse and her progeny by him) in the Northern suburbs of Harare, in the Executor's discretion. The house was to be hers. She was to receive all household furniture and effects in the house they lived in together at time of his death. The executor was to ensure the testator's mother received all the farming implements, livestock and other movables at Alloa Farm and that she exercised a life usufruct over the said farm.

He was also to implement the subdivision of the portion of the farm. The clear language of clause 8 indicates that the portion to be hived off the farm was known especially by Mr JRF Walker of Rusape who was involved. It was to be smaller than the remainder. If any difficulties arose, the Executor was to have the determining and final say. This hived off portion together with $50- 000 was to be given to the testator's sister Rosa Chimambo.

The ownership of the farm occupied for life by the testator's mother was to vest in the Trustee. The Trust would be formed after the payment of debts, taxes and administration expenses and after the purchase of the house for the surviving spouse and her progeny by him. The subdivision of the farm and the life usufruct would not hold up the formation of the Trust. It is clear from clause 9 that the Trust would be formed from the residue funds which remained after the major bequests had been done. A corollary to that phrase was that if no such residue remained then the Trust would have no funds until after death of the testator's mother when the farm was to be sold and the proceeds there from devolved to the Trust.

It was envisaged by the testator that the provisions of clause 10 with regards to maintenance, education and advancement of the surviving spouse, his mother, and all his progeny including the 14 persons mentioned therein were to be implemented from the income of the Trust. Death of the mother, remarriage of the surviving spouse and the age of 25 of the minor beneficiaries were to be the outer limits of the maintenance. The surviving spouse was in addition to have a reliable motor vehicle from the Trust income. If the income was insufficient he could utilize the capital of the Trust Fund. When the youngest of the minor children reached 25, the Trustee was to dissolve the Trust and share all proceeds amongst the surviving beneficiaries.

In my view, there is no ambiguity about the clauses relating to the formation, operation and dissolution of the Trust. The accession of the envisaged benefits by the beneficiaries was obviously dependant on the existence of surplus income after the major items had been provided for. The interest of the applicants in the present matter would arise

once the Trust was formed and once it was liquid. It is only in these circumstances that they would have an expectation of benefit. That is also when they would have vesting. Once vesting was achieved, it seems to me, only then would they have a direct and substantial interest in the provisions of the will. They would then have the entitlement to claim under the provisions of the will. In other words before vesting was achieved, they had no business seeking the alteration of the will. In my opinion, even at vesting they would not have a direct and substantial interest in the alteration of the will. All they would have would be a direct and substantial interest to seek compliance with the provisions of the will, that affected them, by the Executor either through the Master of by bringing an application if so advised for review to this court, if dissatisfied by the Master's decision.

I would therefore dismiss the application on the basis that the applicants did not have *locus standi* to seek the variation of some of or any of the clauses of the will.

In the event that I am wrong in finding that they have no *locus standi*, I proceed to deal with the issues that were extensively argued before me.

(a) Whether or not the estate can no longer be wound up in terms of the will because some clauses have become irrelevant in particular clause 9.

Mr *Zhou* for the applicant submitted that clause 3 which appointed *Harold Hillel Gollop* or the Senior partner for the time being of *Messrs Gollop and Blank legal practitioners* of Harare, Executor had been overtaken by events relating to the renunciation of appointment to that office by the law firm in question. On the other hand Mr *Mutizwa* for the 1st respondent submitted that an executor dative was appointed by the Master in place of the said law firm. That submission by Mr Mutizwa was common cause. In terms of section 23 of the Administration of Estates Act [*Chapter 6:01*], all estates in this country are administered by an executor appointed by the Master.

It is accepted that there have been inordinate delays in winding up this estate, but the Act in section 53 permits any interested party to approach this court on one month notice to the executor for such an executor to show cause why a liquidation and distribution account

has not been lodged with the Master within 6 months after the grant of letters of administration. The Master is empowered to make the decisions on whether or not to grant the executor an extension of time. Where the interested party is unhappy with the Master's decision he may subject that decision on review.

The applicants have not demonstrated that they have approached the Master with such a complaint. In my view, they must first exhaust their domestic remedies by invoking section 116 and if so advised section 117 of the Act before seeking the court's intervention. They should seek that the executor winds up the estate in the manner set out in the Act.

Mr *Zhou* further submitted with reference to clause 9 that the appointment of a Trustee was now a practical impossibility. He submitted that the will envisaged the appointment of *Messrs Gollop and Blank* as trustees. The Master appointed the 2nd respondent as executor. The 2nd respondent cannot assume the office of Trustee in terms of the will, therefore the formation of a Trust was still-born by the renunciation of *Gollop and Blank*, so his argument went.

Mr *Mutizwa*, on the other hand, referred to clause 2 of the will which defines executors or executor as "meaning either executors and administrators or trustees or any two or all of these offices as may be appropriate in the circumstances and in the context thereof and the term 'executors' includes the singular and plural" and submitted that the testator foresaw problems such as the ones experienced in his estate. He further contented that in terms of the will the executor could assume the office of Trustee. This was still capable of implementation as the will did not have an expiration date.

Mr *Zhou* retorted that the testator wished the appointment of a testamentary trustee as he had certain expectations about that trustee's duties. He maintained that the trustee could only be from *Gollop and Blank*.

It is clear from clause 3 that the testator preferred the law firm he nominated to hold the office of executor. Clause 4 reads:-

> "Any executor of this my will or any trustee of any Trust Fund hereinafter created who is by a profession, a legal practitioner or conveyancer or accountant or notary may charge the estate or any such Trust Fund....."

This clause should be read in conjuction with the first line in clause 10, clause 15(c), clause 17, 18 and 20. They simply show that the testator did contemplate the appointment of a trustee who was not from the preferred law firm. In fact particular attention should be paid to the first line of clause 10. It reads:- "My executor as trustee". The first trustee was to be the first executor. In the second and last sentence of clause 9, the successor in office as trustee was to be a senior partner for the time being of the preferred law firm. My view is therefore that as far as the testator was concerned the person who was the executor was to be the trustee too. That executor could still appoint a trustee or trustees regard being had to clause 2.

I therefore agree with Mr *Mutizwa* that the appointment of a trustee, even now, is not an impossibility. The will decrees the appointment and spells out how this should be done. The Trust is still capable of formation in line with the provisions of the will.

The last clause that the applicants contended was no longer capable of fulfillment was the disposal of Alloa Farm. The fate of the farm rests with the executor to whom *dominium* passes on the death of the testator's mother. The applicants have no power to direct the executor *cum* trustee on how to exercise his untrammeled powers, which are, as regards the farm subject to clause 12 which directs that the farm shall be sold and the proceeds added to the Trust Fund. I am not satisfied that this wish is incapable of fulfillment.

There is therefore is my judgment no basis for seeking to vary the testator's desired intention on the basis of delay or even impossibility of performance. It is true that inordinate delay has occurred. It is however the duty of the beneficiaries to approach the Master for the speedy winding up of the estate.

In so far as my determination of the first issue touches on Alloa Farm I have disposed of the third issue. I would decide the first and third issue against the applicants. The last

issue for determination revolves on the ownership of the 4 000 shares in Paradise Park Motel (Pvt) Ltd, that is whether these shares are part of the deceased's estate.

The applicants referred to affidavits by the 1st respondent in which she stated that the shares belonged to the Estate. They also attached the First Interim Liquidation and Distribution Account laid for inspection on 4 December 1992 and the subsequent First and Final Liquidation and Distribution Account of 1st November 1996 in which the shares are reflected as being assets belonging to the estate as proof that they are estate property.

In paragraph 13 of the Founding Affidavit the applicants aver that the shares belong to the Estate. In response in her opposing affidavit the 1st respondent averred that those shares in Paradise Park Motel (Pvt) Ltd had not been paid for at the time the testator died and that he never owned them. She then goes on to state that they never became part of the estate.

Apparently the sellers of the shares invited interested beneficiaries to participate in Paradise Park Motel (Pvt) Ltd. None was interested save the 1st respondent who negotiated transfer to herself and who took transfer.

In their answering affidavit the applicants insisted that the shares form part of the Estate, no doubt on the basis of the earlier statements on oath to this effect by the 1st respondent. The applicants did not dispute the averment that the letter of 23 April 2002 by Messrs *Gill, Godlonton and Gerrans* was written in response to the one by their then erstwhile legal practitioners *Messrs Musunga and Associates* over the transfer of an immovable property associated with Paradise Park Motel (Pvt) Ltd. This letter, on page 74 of the record, indicated that the agreement referred to was entered into between Auto Export/Import (Pvt) Ltd and Auto Import/Export (Pvt) Ltd as purchaser and that transfer could only be effected to Paradise Park Motel (Pvt) Ltd and not the Estate.

The applicants did not lay facts before this court on the status of Paradise Park Motel (Pvt) Ltd other than averments of the 1st respondent's sworn affidavit to the effect that that she would become co-director with the testamentary executor in this company which was

part of her late husband's estate. The letter from *Gill, Godlonton and Gerrans* seems to suggest that post payments of the purchase price were paid by 1st respondent. There would be need to lead evidence on the true circumstances surrounding the shares in question. It may very well be that the shares belong to the estate notwithstanding that in terms of section 104 (1) of the Companies Act [*Chapter 24:03*] the holder of a certificate duly signed and with the seal of the company is presumed to be the owner of the shares on a *prima facie* basis. This however is an area where further evidence will be needed. If so advised, it seems to me that this is an issue to be pursued by the 2nd respondent with the Motel and the 1st respondent.

When the applicants brought the application it must have been in their contemplation from the contents of the letter from *Gill, Godlonton and Gerrans* that a dispute of fact would arise on the question of shares. They did not cite the company. These factors are fatal to the present application.

I would thus dismiss the request to hold that the 4 000 shares belong to the estate in the absence of further evidence.

I however dismiss the application with costs on the basis that the applicants have not established that they have a direct and substantial interest in the subject matter to bring the present application.

It is accordingly ordered that:-

The application be and is hereby dismissed with costs.

Messrs Hungwe & Partners, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, 1st respondent's legal practitioners