

CHRISTIAN M KATSANDE

versus

THE MASTER OF THE HIGH COURT AND ANOTHER

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, 6 September, 2005 & 11 July, 2007

Opposed Application

Mr *GC Chikumbirike*, for the applicant

Mr *SJ Chihambakwe*, for the second respondent

Hungwe J: Applicant seeks an order, on by way of review, firstly, setting aside the appointment of the second respondent, his step-mother, and widow of the late Petros Peter Katsande, as executrix dative in the estate of the late Petros Peter Katsande. Secondly he seeks an order appointing a professional person to the office of executor in the estate of the late Petros Peter Katsande.

What has led to the present application may be summarized as follows. The applicant is one of the children of the late Katsande. The second respondent is his step-mother, she having married her late husband on 29 December 1973. On 26 March 1980 her husband bought lot 1 of lot 142 Athlone Township of Green Grove. Deceased, second respondent and applicant resided at this premises. The late Katsande died *ab intestatio* on 5 November 1983. After his death the parties continued to stay at the premises also known as 19 Hopley Avenue, Greendale.

On 1 June 1984 first respondent appointed applicant as executor dative in the estate of the late Peter Petros Katsande. In October 1984 first respondent at applicant's instance approved a distribution account whereby the property was

awarded to applicant. It was transferred into the names of the applicant on 30 June 1988. In about October 2002, the applicant who had always been in occupation of the property together with second respondent, wrongfully, unlawfully and maliciously forced second respondent under threats of serious bodily harm or death out of her matrimonial home. She left under protest.

Aggrieved by this conduct, she sought and obtained an order setting aside applicant's appointment as executor to the estate of the late Peter Katsande in case HC 11123/02. That order also directed the first respondent to ensure that the estate is properly wound up, among other things. In compliance with the order, first respondent called the edict meeting which was attended by all interested parties including the present litigants. In the meeting it was proposed to adopt one of two courses of action open to the attendees. They could appoint a professional executor or they could settle for an appointment by the first respondent of one from amongst them. If they were to choose an independent executor, each beneficiary would be called upon to make a financial contribution towards the costs of the executor. None of all those present including the present litigants, indicated willingness to make such a contribution. Faced with this situation and in the exercise of his discretion, the first respondent appointed second respondent as the executrix dative to her late husband's estate. He also directed in a letter to the parties that everybody be allowed access to the property. It is essentially the appointment of the second respondent and the permission granted to her to access the property that has irked applicant who considers the property to be his home to the exclusion of everyone else. He has approached this court for relief.

His grounds of review as can be gleaned from his founding affidavit as he does not set out the same as required by the rules of court, are that the appointment of second respondent was irregular as she will be biased against him and other

beneficiaries. He points to her institution of case HC 11123/02 as evidence of bias. Further he states that there was no basis of first respondent's order granting access to the property. He also states that the order does not permit first respondent to appoint an executor but to merely ascertain who the heirs to the estate were. As such the determination is liable to be set aside.

On the first ground of review put forward by applicant, it is said that the fact that she instituted process against applicant that demonstrates her bias against applicant. Mr *Chikumbirike* who appeared for the applicant persuasively urged this court to find that second respondent has shown potential biased against the applicant by instituting the application in HC 11123/02. If the ground is based on the simple fact of suing applicant, then it is ill-conceived. I say ill-conceived because S 26 of the Administration of Deceased Estates Act [*Chapter 6:07*] permits such an appointment and in fact specifically states that the surviving spouse is to be preferred where there is competition for the appointment of an executor. In my view the Act, in spite of the obvious interest potentially prejudicial to the interests of the other beneficiaries, recognizes the unique position of spouses in respect of their joint estates and purposively prefers the spouse ahead of others. Potential bias by the executor in my view is clearly not a ground for the setting aside of an appointment unless it is demonstrably clear that due to such bias the executor is completely incompetent or unable to discharge her duties as an executor. Section 26 allows for the appointment of even a creditor as executor. Had potential bias been ranked as such, then the Act would not have included this class of persons in the category of people from which executors may be appointed.

In any event, it is applicant who acted brazenly dishonestly in excluding second respondent from his distribution account, when he acted as executor, thereby necessitating the application by the widower. Bringing to the court's attention what

may strictly amount to a fraud cannot form a basis of a finding for prejudicial bias against the second respondent. There is nothing in her founding affidavit filed in HC 11123/02 which can be construed as remotely suggesting bias against applicant. His actions against her in fact do support such an allegation were she to make it against him. In my view the fact that one has an interest in an estate does not, without more, disqualify that person from being appointed as an executor. This is clear from the tenor of the Act. On the face of it she is eminently qualified to act in that position till evidence of such prejudicial bias is placed before the court. I can perceive of no basis why this court should set aside the determination by the Master in this regard especially when regard is had to applicant's failure to provide the requisite financial backing to the other course open to the beneficiaries.

As for the directive granting access to the property, unless second respondent has forced herself on the property against the wishes of the applicant, I do not see how an expression of the first respondent's opinion based upon the meeting he had with the parties, could be a ground for setting aside his appointment of the second respondent as an executrix. Second respondent has rights to the property in question. These have not been determined. As her matrimonial home she clearly is entitled to access it. The first respondent may have had this in mind when he expressed the view he did in his letter to all the parties, but that is insufficient ground upon which to set aside the appointment of second respondent as executrix to the estate. The court order clearly requires first respondent to ensure that the estate be wound up properly. For this to be done the first step is to set up an edict meeting. Those that attend assist first respondent in determining who the heirs are. Coincidental to the purposes of such a meeting is the appointment of an executor or executrix. The fact that the court order does not specifically authorize this necessary step does not vitiate the determination of the first respondent appointing second respondent as executrix. In any event the

appointment is part of the greater mandate given the first respondent by the order to ensure that the estate is wound-up properly.

There is another basis for dismissing this application.

In terms of Rule 257 of the rules of court, applicant is required, in an application for review, to state shortly and clearly the grounds which he seeks to have the proceedings set aside. This the applicant has not done.

In the result therefore I am satisfied that there is no basis for setting aside the appointment by first respondent of the second respondent as executrix in the estate of the late Peter Petros Katsande.

The application for setting the appointment of second respondent as executrix dative in the estate of the late Petros Peter Katsande be and is hereby dismissed. Applicant is to pay second respondent's costs.

Chikumbirike and Associates, applicant's legal practitioners

Chihambakwe Mutizwa and Partners, second respondent's legal practitioners