

GRAHAM GARNET METCALF HALL
versus
GREGORY GRAHAM HALL
and
ESTATE LATE NORREECE LESLY HALL
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 25 July 2016 and 20 October 2016

Trial cause-opposed application

J Wood, for the plaintiff
T Zhuwarara, for the defendant

MWAYERA J: The matter came up for trial before me on 26 July 2016 following which the defendant made an application for summary dismissal of the matter based on two preliminary points. The application was opposed. The preliminary points raised being

1. That the plaintiff brought the matter up after 30 days as is required by s 8 (6) of the Wills Act.
2. That the deceased estate was improperly cited.

Mr *Zhuwarara* argued that the plaintiff's matter was not properly before the court because the infraction relating to statute rendered the plaintiff's claim fatal. The plaintiff was aware of the Master's decision which she seeks to impugn but failed to note an appeal within 30 days as is statutorily required in the Wills Act s 8 (6). The defendants argued that the applicant was statute barred as there was no compliance with a peremptory statutory provision. Mr *Zhuwarara* referred the court to the case of *Le Roux and Another v Griggs Spall* SA 1946 AD 244.

The brief facts of this case are clearly reflective of a statutory infringement. The Board had no jurisdiction to entertain the application for review because it was out of time stipulated for review, that is 21 days of the order of the Rent Board.

The case is distinguishable from circumstances of this case where the plaintiff who initially approached the court on application basis had proceedings converted to action

because of apparent disputes of facts and need to adduce evidence. The plaintiff did not approach the court on appeal against the Master's decision such that the time limit of appeal having to be lodged within 30 days of the Master's decision is not applicable. What is before the court is whether or not the Will presented and accepted by the Master in terms of section 8 (5) of the Wills Act is a genuine Will or not. Section 8 (5) of the Will Act reads

“Where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended, as a will for the purposes of the Administration of Estates Act[Chapter6:01].Even though it does not comply with all the formalities for-

- a. The execution of wills referred to in subsection (1) or (2); or
- b. The amendment of wills referred to in subsection (2), (3) or (4) of section nine.(my emphasis)”

The applicant in approaching the court in this case is not seeking an appeal against the Master's decision to accept and register the will but is seeking redress on an aspect which as a matter of fact and law cannot be determined by the Master. The determination of whether or not a will is genuine is a dispute which can only be decided by the court. The issues which fall for determination would entail determination of the genuineness or otherwise of the Will and whether or not the deceased at the time of making the Will was married. The Master is not empowered to determine the marital status of the deponent of the Will and from the papers filed of record that aspect also falls for determination hence the approach to court for hearing of the action and not an appeal against the Master's decision to accept and register the will as reflected on p 11. It can easily be discerned from the founding affidavit of the plaintiff that the issue of whether or not the deceased had mental capacity to depose to a will was raised. Mental capacity challenge, of necessity goes to the validity of a Will which is a matter for determination by the court. It is important for the administrative function of the Master in so far as acceptance and registration of a will is concerned to be understood. Further the role of the Master in administration of an estate should not be misread to oust the court's jurisdiction where there is a challenge on the validity or otherwise of a Will. Such a dispute falls for determination by the court hence the approach by the plaintiff to court is properly before the court. Initially the matter was brought by way of application and same was converted to action proceedings for the obvious reasons that the nature of dispute is contentious and requires full ventilation including adducement of evidence which would require testing of its veracity by cross examination. The preliminary point raised cannot be sustained given what is before the court is not an appeal against the Master's decision but

determination of a dispute on the validity or otherwise of the registered Will. The plaintiff is therefore not statute barred as the 30 day time limit for an appeal is not applicable under the circumstances.

The second preliminary point raised pertains to the citation of the parties. It is fairly settled that an estate can only sue or be sued through the Executor. Section 25 of the Administration of Deceased Estates Act, [Chapter 6:01] makes it clear that a deceased estate is represented by the executor or executrix duly appointed by the Letters of Administration by the Master. The law is abundantly clear that no relief can be obtained against an estate unless it is sued through the executor or executrix. KUDYA J in *Nyandoro and Ors v Nyandoro and Ors* HH 98/08 underscored the need on bringing an action on behalf of an estate to bring action through the duly appointed executor. The Honourable KUDYA J just like MORTON J in *Clark v Baranade NO and 2 Ors* 1958 R and N 358 emphasised the need for an executor dative or testamentary to be appointed as only the executor can sue and be sued for and on behalf of the estate.

See also *Mhlanga v Ndlovu* HB 24/2004 and *Mary Chijaka v Fanuel Taguta*. Worth noting in all the cases referred to above is the fact that the estate was improperly cited in that no executor testamentary or dative was appointed or even cited as a party to the proceedings. In the *Chijaka* case *supra* the appellant was assumed to be liable by virtue of marriage yet she was not legally appointed an executrix. That scenario is distinguishable from the circumstances of this case in that there are Letters of Administration Annexure E p 19 appointing the first defendant Gregory Graham Hall as the executor testamentary of the Estate late Norreece Lesly Hall. What falls for determination in the main matter is the validity of the will which occasioned the appointment of the Executor testamentary the first respondent Gregory Graham Hall. Given the circumstances of this case one cannot say the proceedings are fatally defective and a nullity for want of existence of respondents because the first respondent is the executor per the Letters of Administration and is a party to the proceedings given the cause of action and nature of relief sought in the main. In this case the Executor per the letters of administration is Gregory Graham Hall, the first respondent. The second respondent is the Estate late Norreece Lesly Hall which as a matter of law is represented by the executor duly appointed by letters of administration and the third respondent is Master of the High Court. It is apparent from a reading of the papers that the first respondent is sued in his personal capacity and that he is the appointed executor the Estate the second respondent. What is before the court is a dispute as regards validity or

otherwise of the Will which occasioned the nomination and appointment of the first respondent as Executor Testamentary. The first respondent Mr Gregory Graham Hall is being sued in his personal capacity and by virtue of being Executor Testamentary which is what is being challenged on dispute over validity or otherwise of the Will. The omission of reflection of the second respondent as Estate late Norreece Lesley Hall duly represented by Gregory Graham Hall in the circumstances of this case is not fatal. Firstly because the first respondent is cited personally and he is the executor. The misjoinder alleged is not material given the nature of dispute before the court and the fact that the plaintiff has indicated in their Heads of Argument intention to amend pleadings so as to reflect second respondents as represented by the first respondent the executor per letters of administration. In an event there is no prejudice that will be occasioned to the plaintiff the defendant by spelling out that the Estate is represented by the first defendant given the first defendant is the appointed Executor per the challenged will. It is also apparent the first respondent accepts in papers filed of record p 31 that he is cited as a beneficiary and Executor of the Estate late Norreece Lesley Hall. Rule 87 of the High Court Rules 1971 is instructive on misjoinder and non joinder it states.

“No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interest of the persons who are parties to the cause or matter”

Rule 87 (2) (b) is also relevant, it states

“At any stage of the proceedings in any case or matter the court may on such terms as it thinks just and either of its own motion or an application order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure before court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party.”

Clearly the circumstances of this case are such that the application to have the matter dismissed under the umbrella of being statute barred in absence of prejudice nor statute bar is misplaced. It is my view that the matter should be properly ventilated on merit as the technicality sought to be clutched on by the defendant has not been substantiated and sustained.

The preliminary points raised are accordingly dismissed.

Atherstone & Cook, applicant's legal practitioners
Gill Godlton & Gerrans, 1st & 2nd legal practitioners