

ESTATE LATE WILLARD MWAYERA  
versus  
HORLODGE INVESTMENTS (PVT) LTD  
and  
THE DEPUTY SHERIFF-HARARE  
and  
THE REGISTRAR OF DEEDS  
and  
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
HLATSHWAYO J  
HARARE, 6 May 2010 & 30 January 2019

### **Stated Case**

*B. Chidziva*, for the applicant  
*D. Matimba*, for the first respondent  
No appearance for 2<sup>nd</sup>- 4<sup>th</sup> respondents

HLATSHWAYO J: This matter was postponed *sine die* to allow the parties the opportunity to pursue and out-of-court settlement, failing which the matter was to proceed as a stated case in terms of Order 29 r 199 of the High Court Rules, 1971. The parties failed to settle and have now filed the stated case and additional heads of argument. The facts informing the stated case are common cause.

Willard Mwayera died on 9 November 2001. The Late Willard Mwayera owned the property in dispute known as Stand Number 4075//6 Stones Shopping Centre Old Highfield, Harare. The estate of the Late Willard Mwayera was registered under DR 3888/01 in November 2001. The same estate was then registered for the second time under DR 3888/01 by the late Enara Mwayera despite her knowledge that it had been registered as evidenced by her participation in the appointment of Eswell Mwayera wherein she signed a waiver of security of the estate under DR3888/01. She was subsequently appointed executrix. Her appointment and the re-registration of the estate were set aside.

The late Enara Gorerokufa Mwayera was then appointed executrix. She died on the 10<sup>th</sup> July 2008. Oswell Mwayera was appointed executor before being removed from executorship following on application by the Master of the High Court in terms of section 117

of the Administration of Estates Act [*Chapter 6:01*] on the 5<sup>th</sup> of June 2007 under case No. HC 2715/07. Fanuel Mwayera was then appointed executor on 21<sup>st</sup> day of April 2009.

The first defendant concluded an agreement of sale in terms whereof it “purchased” the property in dispute from Oswell Mwayera and Willard Mwayera in 2004, though the agreement of sale was only executed by Oswell Mwayera and Joseph Magashu representing first respondent. At the time the aforesaid agreement of sale was concluded Willard Mwayera had since died. The agreement of sale had two “sellers”, Willard Mwayera and Oswell Mwayera though it was only executed by the latter only and the purchaser. In the agreement of sale Oswell Mwayera did not describe himself as the executor in Willard Mwayera’s estate. In fact, the first respondent did not know that Willard Mwayera was deceased and Oswell Mwayera was the executor. Oswell Mwayera did not seek nor obtain the Master’s consent to dispose of the property in dispute.

The parties asked the court to make a determination on the following issues:

1. Whether the agreement of sale in respect of stand number 4075/6, Stones Shopping Centre, Old Highfield between the first defendant and Oswell Mwayera and Willard Mwayera (who was late) is valid.
2. Whether the Plaintiff is entitled to recover the property in dispute in terms of section 42 of the Administration of Estates Act.
3. Whether the first defendant was a *bona fide* purchaser.
4. Whether the disposal of estate property without the Master’s consent is valid.

It is pertinent to note that the applicant is cited as Estate Late William Mwayera. This is a fatal irregularity which the court cannot overlook despite the fact that the respondent did not raise it. A deceased estate finds persona through its executor/executrix. It cannot sue in its own name, but has to be represented by an executor. In *Chijaka v Taguta* HH 308-15 at p 4-5 of the cyclostyled judgment MWAYERA J correctly stated thus:

“In terms of s 25 of The Administration of Deceased Estates Act, [*Chapter 6:01*] a deceased estate is represented by an executor or Executrix duly appointed with letters of administration by the Master. **The law makes it clear no relief can be obtained against an estate unless one sues the executor or executrix and properly cites the estate.** In the case of *Nyandoro and Ors v Nyandoro and Ors* HH 89/08 KUDYA J emphasised the need of bringing an action on behalf of an estate to be through the duly appointed executor.” (my emphasis)

In *Standard Bank Financial Nominies (Pty) Ltd v Lurie* 1978 (3) SA 338A 346A-B the court held:

“Finally, on behalf of the 1<sup>st</sup> defendant, it was contended that there had been an incorrect citation. It was conceded on behalf of the plaintiff that this was so. This concession was obviously correct. **A deceased estate is not a persona.** (*Commissioner for Inlands Revenue v Emary N.O* 1961 (2) SA 621 (A)) **The usual way in which an estate sues, or is sued is through the executors** (*Estates Hughes v Fouche* 1930 TPD 41 at 42)...

A deceased estate can be briefly described as an aggregate of assets and liability of the deceased. The totality of the rights, obligations and powers of dealing therewith vests in the executor, so that he alone can deal with them. **Only the executor can sue and be sued for and on behalf of a deceased estate.**” (my emphasis)

In light of the above authorities, there is no applicant before the court. The applicant is a deceased estate and on its own, it lacks legal personality. It ought to have sued through its executors. The need for the proper citation of parties is highlighted in, Cilliers, A.C. et al in Herbstein & van Winsen’s *The Civil Practice of the High Courts of South Africa*, 5<sup>th</sup> ed, vol.1 p 143 as follows:

“Before one cites a party in a summons or in application proceedings, ***it is important to consider whether the party has locus standi to sue or be sued (legitima persona standi in iudicio)*** and to ascertain what the correct citation of the party is.” (my emphasis)

Further, in *Gariya Safaris (Pvt) Ltd v Van Wyk* 1996 (2) ZLR 246 (H) 252F-253C MALABA J (as he then was) said:

“A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. **If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void ab initio.**” (my emphasis)

The applicant not being a legal persona has no capacity to sue or be sued hence the proceedings before this court were null and void. Moreso, a court cannot pass a judgment in favour of or against a party which is not a legal persona as that judgment will not be capable of enforcement. This irregularity goes to the root of the application, with fatal consequences. The application cannot stand. The respondents did not raise this critical point of law. Therefore, it is fair and just to depart from the rule that costs follow the outcome and order that each party should bear its own costs.

Accordingly, it is ordered as follows:

“The application is hereby dismissed with each party bearing its own costs”

*Kantor & Immerman*, applicant’s legal practitioners.  
*Matimba & Muchengeti*, 1<sup>st</sup> respondent’s legal practitioners