

ADONIA MAKOMBE
and
NYIKA CHIFAMBA
and
SAHUNGWE HUNGWE
versus
GUSHUNGO HOLDINGS (PRIVATE) LIMITED
and
ROBERT GABRIEL MUGABE
and
GRACE MUGABE
and
COMMISSIONER GENERAL, ZIMBABWE REPUBLIC POLICE (N .O)
and
MINISTER OF LANDS, AGRICULTURE & RURAL RESETTLEMENT (N.O)
and
CHIEF SUPERINTENDENT NHUBU
and
CHIEF SUPERINTENDENT KUNENE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 30 October & 6 November 2019

Opposed application

G Dzitiro, for applicants
E Mubaiwa, for 1st to 3rd respondents
T S Musambe, for 4th to 8th respondents.

TAGU J: This is an opposed urgent application for leave to execute a judgment of this Honourable Court pending appeal. The facts are that during the Pre-Trial Conference in case HC 5860/18 applicants applied for and were granted an order granting them among other reliefs the following:

- (a) Restoration to them of possession of their plots.
- (b) Eviction of all persons claiming occupation through 5th Respondent from Applicants' Plots.

The first, second and third Respondents appealed against the order. The appeal is still pending before the court. The applicants then filed the present application for leave to execute the

order in HC 5860/18 pending appeal. The application for leave to execute pending appeal was set to be heard on the 30th October 2019. However, on the 1st of October 2019 the counsel for the first, second and third respondents filed a letter which reads as follows:

“RE: MAKOMBE and Others vs GUSHUNGO HOLDINGS and Others: HC 1263/19

We refer to the Notice of Set Down for 30th of October 2019. As is now public knowledge, one of the parties, Robert Gabriel Mugabe is now late. The estate is still in the process of being registered and as such, an Executor is yet to be appointed. This being the case, the matter would have to be held in abeyance pending the due appointment of an Executor, who will be legally in a position to prosecute the matter on behalf of the estate. We have written this letter as a courtesy to the Court so as to avoid unnecessary time-wasting and costs to all parties involved.”

At the hearing of the matter counsel for the fourth, fifth, sixth, seventh and eighth respondents indicated that he did not oppose the matter. Counsel for the first, second and third respondents submitted that the second respondent is now deceased. The matter has to be held in abeyance until an Executor has been appointed. That process has not taken place. The process has just commenced. An Executor has to be appointed first. This process seeks to interfere with the appeal where the second respondent is a second appellant in the Supreme Court. He has to appear and defend his appeal. He prayed that this matter be removed from the roll pending registration of the Estate of the second respondent, and the appointment of an Executor. For this contention he relied on three authorities being *Catherine Guri* (in her capacity as Executor Dative of Estate late Zvichabveyo Claudius Guri) v *Claudius Guri* (in his capacity as the Executor Dative of Estate Late Fidelis Guri) and Master of High Court HH-08-14, *Patronella Charumbira* (in her capacity as the Executor dative of the estate of the late Adben Benjamin v *Hudson Musasa and Registrar of Deeds and Assistant Master* HH-152-09 and *Andrew Magarasadza & 34 others v (1) Freda Rebecca Gold Mine Holdings Limited t/a Freda Rebecca Gold Mine (2) Associated Mine Workers Union of Zimbabwe* SC- 46-2017. He further relied on the provisions of Order 13 Rule 85A of the Rules of this Honourable Court, 1971 which allows a joinder or substitution of a party who has died. Finally he urged the court to take judicial notice of the passing on of the former Head of State.

Counsel for the applicants opposed the application to have the matter removed from the roll pending appointment of an Executor. Her argument being that Rule 85A does not support the application made by the counsel for first, second and third respondents. She submitted that the party ought to make a Chamber Application before the Court hearing the matter. In *casu* she said there was no evidence of the registration of the Estate of the second respondent. She said the three cases referred to above a distinguishable. She said in the case of *Duri v Duri* supra none of the

parties had passed on. In the case of *Charunbira v Hudson Musasa and others* supra the case was a trial and not a chamber application. Finally she submitted that in the case of Magarasadza and 34 others, a chamber application for substitution had been made. Finally she submitted that the Court cannot take judicial notice of the passing on of the second respondent.

In response the counsel for the first, second and third respondents submitted that this is not an application for substitution. He said it was a request to have the matter removed from the roll so that an application for substitution could be made. He further submitted that an application cannot be made now because the process of registering the Estate of the second respondent is not yet complete. Once it is complete the Executor is now known. The application for substitution can then be made. It would not be feasible to make an application for substitution now when the Executor who is to substitute the second respondent has not yet been appointed and is not known. He urged the court to remove the matter from the roll as this will not prejudice anyone. The matter will still proceed after the substitution.

Order 13 Rule 85A is clear. It reads as follows:

“85A. Change of party through death, change of status, etc.

- (1) No proceedings shall terminate solely as a result of the death, marriage, or other change of status of any person, unless the cause of the proceedings is thereby extinguished.
- (2) If, as a result of an event referred to in subrule (1), it is necessary or desirable to join or substitute a person as a party to any proceedings, any party to the proceedings may, by notice served on that person and all other parties and filed with the registrar, join or substitute that person as a party to the proceedings, and thereupon, subject to subrule (4), the proceedings shall continue with the person so joined or substituted, as the case may be, as if he had been a party from their commencement:

Provided that-

- (i) Except with the leave of the court, no such notice shall be given after the commencement of the hearing of any opposed matter;
- (ii)
- (3) Where a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or other legal representative may, by notice filed with the registrar and served on all other parties to the proceeding, state that he wishes to be substituted for that party, and thereupon, subject to subrule (4), he shall be deemed to have been so substituted in his capacity as curator, trustee or legal representative, as the case may be.
- (4) A judge may, on chamber application being made to him within fifteen days after the service of a notice in terms of subrule (2) or (3) set aside or vary any joinder or substitution of a party effected in terms of subrule (2) or (3), as the case may be.”

In my view it is permissible for a deceased party to be substituted by another party. In the present case the hearing of the opposed matter had not commenced. The counsel for the first,

second and third respondents merely notified the court of its intention to make an application for substitution of the second respondent who recently passed on firstly by letter dated the 1st of October 2019 and orally in court. He however, pointed out that the proper chamber application for substitution has not yet been filed because the process of choosing a person who is to substitute the second respondent has not yet been completed. So what is before the court is not a chamber application for substitution but a request to remove the matter from the roll pending completion of that process. I do not agree with the counsel for the applicants that the court cannot take judicial notice of the passing on of a former Head of State given that his passing on was widely announced and some days of mourning were actually declared. His passing on is public knowledge. Secondly, since the other party intends to make a chamber application for substitution the court agrees with the counsel for the first, second and third respondents that given the time lapse from the burial of the second respondent it is not feasible that an Executor who is to substitute the second respondent could have been appointed by now.

I further agree that the removal of the matter from the roll pending appointment of executor will prejudice the applicants because the matter can still be heard as soon as the necessary processes have been completed. I therefore will grant the request.

IT IS ORDERED THAT

1. The matter is removed from the roll pending appointment of Executor to the Estate of the 2nd respondent and the lodgment of the chamber application for his replacement in case HC 1263/19.
2. There is no order as to costs.

Mugabe, Mutumbwa & Partners, 1st, 2nd and 3rd applicants' legal practitioners
Hussein Ranchhod & Co., 1st, 2nd and 3rd respondents' legal practitioners
Civil Division of the Attorney General's Office, 4th, 5th, 6th, 7th, and 8th respondents' legal practitioners