

SUSAN RUFUDZA
versus
OLIVER MASOMERA
(in his capacity as Executor Dative of estate late
Socrates Zimunhu)
and
TINASHE MAGAIZA
and
ABYGAIL MAGAIZA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 18 September 2017 & 22 January 2020

Civil Continuous Roll

F. Siyakurima, for the plaintiff
F. Nyakatsapa, for the 1st defendant
E. Ngwerewe, for the 2nd & 3rd defendants

NDEWERE J: The facts of the matter were that Susan Rufudza was the customary widow of the late Socrates Zimunhu. She married him in terms of the Customary Marriages Act, [*Chapter 5:07*], in 1994. They had one child, now an adult, Abiola, born on 09 September 1998. They divorced in 2003. The plaintiff was awarded a 40% share from the value of stand 14410/5 Kuwadzana as a property distribution award in terms of the divorce order. The parties reconciled in 2004. They agreed not to dispose of the property and they resumed living together till the deceased's death. Two minor children were born out of the union after reconciliation, namely, Abiola, born 17 May 2005 and Abinah, born 18 December 2011. There was no indication that the marriage was re-solemnised after the reconciliation.

The first defendant was appointed executor of the late Socrates Zimunhu's Estate. The Letters of Administration were dated 17 June, 2013. After appointment the first respondent wrote to the deceased's family who included the plaintiff and her sister, Nelia Rufudza, advising them of his appointment as executor and inviting them to attend a meeting with him to discuss the assets, beneficiaries, estate distribution plan and liabilities. The date of the

meeting was 26 June, 2013 at the Executor's offices, at 10.30am. All interested parties were also invited.

On p 73 of the plaintiff's bundle of documents there appears a letter to the Master of the High Court dated 26 June, 2013, which confirms that the meeting which the executor called for 26 June 2013 and to which all interested parties were invited took place on 26 June as scheduled at the Executor's offices. There is a list of those who attended the meeting. The plaintiff did not attend the meeting. Her lawyers said they had other commitments.

That meeting identified the assets including stand 14410/5 Kuwadzana. It listed the beneficiaries, who included the plaintiff as first wife and her sister Nelia Rufudza as 2nd wife. The plaintiff's minor children were also listed as beneficiaries. Another meeting was scheduled for 5 July, 2013 at 10.30 hours at the Executor's offices. Messrs Sawyer & Mkushi were asked to confirm their availability since their client was required to confirm her status as a spouse and to confirm if the assets' inventory was correct.

It is not clear from the papers what happened after the invitation to the 5 July, 2013 meeting. What is clear is that there was a dispute between the plaintiff and the executor which culminated in a court application by the plaintiff in HC 5463/13, which got struck off the roll later on. After the matter was struck off the roll the executor sought the Master's authority to dispose of some assets to meet the estate's liabilities. The authority was given on 18 February, 2016.

Pursuant to the authority to dispose some assets granted by the Master; the Executor authorised estate agents to advertise stand 14410/5 Kuwadzana, Harare for sale on 23 May, 2016. Before the Kuwadzana property was purchased, the Executor engaged the plaintiff as confirmed by the letter dated 8 June, 2016 by the Executor to the plaintiff. In that letter plaintiff was furnished with the estate's liabilities and asked to propose a payment plan for the liabilities within 7 days or else the Kuwadzana house would be sold.

The plaintiff appeared unhappy with the intended sale. On 29 June, 2016, her lawyers wrote to the Master, protesting his consent to sell the property. The Master then called for a meeting on 17 August, 2016, at 10.30 to discuss the issues raised. But by 17 August, the house had already been sold. The agreement of sale was concluded on 27 June, 2016. On 26 July, 2016, the Master consented to the cession of the property into the second and third defendants' names

The plaintiff persisted in her objections to the sale. In a letter dated 30 August, 2016, the Master of the High Court conceded that the executor may not have exercised due diligence

by failing to seek the views of the potential beneficiaries. He said despite there being liabilities for the estate, it was prudent for the executor to consult with the beneficiaries before rushing to sell the family home. He said by copy of his letter, he was asking the executor to explain himself. "I will give further directions after receiving the executor's explanation," said the Master.

The Executor explained himself in the letter to the Master dated 31 August, 2016 on p 36 of the plaintiff's bundle. The Executor's explanation was that the plaintiff never co-operated with the executor from the outset and that she had been given time to find money to pay the liabilities, but failed. He also said her 40% claim to the Kuwadzana property as part of her 2008 divorce order was never mentioned until after the house had been sold. He said the plaintiff can still claim her 40% award from the estate. He also said the plaintiff's lawyers were unhelpful as they walked out of a meeting called to address the complaints raised.

In a letter dated 12 September, 2016 the Master replied that the remedy for the plaintiff was to approach the courts since the executor was adamant that he had acted properly.

On 14 October, 2016, the plaintiff issued summons against the defendants' claiming:

- (a) That the agreement of sale between the first and the second and third defendants dated 27 June, 2016 in respect of stand 14410/5 Kuwadzana Township, Harare, be and is hereby set aside.
- (b) The cession of stand 14410/5 Kuwadzana Township, Harare, from the late Socrates Zimunhu to second and third defendants be and is hereby declared null and void.
- (c) Should it become necessary to dispose of 60% share of the late Socrates Zimunhu in stand 14410/5 Kuwadzana Township, Harare, it shall be sold to plaintiff and she shall be given 60 days within which to raise 60% of the value of the said stand 14410/5 Kuwadzana Township, Harare.
- (d) First defendant be and is hereby removed as Executor of the estate of the late Socrates Zimunhu DR 520/13 and he shall not be entitled to any remuneration from the estate.
- (e) Fourth defendant shall convene an Edict meeting to appoint an executor to administer the estate of the late Socrates Zimunhu, alternatively plaintiff be and is hereby appointed Executrix Dative in the estate of the late Socrates Zimunhu.
- (f) costs of suit against the first Defendant on a legal practitioner and client scale *de bonis propriis*.

The first defendant filed his plea on 2 December, 2016. He raised a preliminary point. He said the plaintiff's claim against the defendant was fatally defective and could not be cured because she should have approached the Master of the High Court first to seek a remedy from the Master. Only after that could he approach the High Court to review the Master's decision if he was unhappy. He said on that basis alone, the plaintiff's claim must be dismissed with costs on a legal practitioner and client scale.

The second and third defendants filed their plea on 28 November, 2011. They too raised preliminary points. They said the plaintiff approached the court prematurely and in the wrong manner. They said since she was raising improper handling of the estate by the executor dative, she should have lodged a complaint with the Master. It is only after being aggrieved by the decision of the Master that the plaintiff should have approached the High Court on review. They also said since the second and third applicant were seeking the removal of the executor from office, she should have proceeded against him in his personal capacity, she said the plaintiff's claim should be dismissed with costs on a legal practitioner and client scale on these preliminary points alone.

On the date of the hearing the parties made submissions on the preliminary points only, and judgment was reserved. Parties were later requested to provide the case authorities they had referred to during argument as citation had not been captured clearly. The parties chose to file written submissions on the preliminary points.

The issue of failing to cite the executor in his personal capacity was not pursued during argument. It was proper for the defendants to abandon this issue since r 87 of the High Court rules provides remedies on joinder and non-joinder. Rule 87 (1) says no case shall be defeated by reason of misjoinder or non-joinder while rule 87 (2) provides that at any stage of the proceedings, the court *mero motu* or on application, can order a person improperly joined to the proceedings, to cease to be a party. Likewise, it can order a person not joined; to be joined. So joinder and non-joinder can never be fatal to a case. Those omitted can be joined at any stage and those wrongly joined can be removed at any stage.

The defendants persisted with their points *in limine* in respect of the premature approach to the High Court and the adoption of a wrong procedure.

The defendants submitted that the plaintiff should have filed a complaint to the administrative authority first, asking him to remedy the situation. Thereafter if dissatisfied, they should then have approached the High Court for a review of the Master's decision.

I am persuaded to agree with the submissions made by the defendants.

The administration of deceased estates is a branch of the law that was assigned to the Master of the High Court to administer. The court cannot administer deceased estates in the first instance. Everything about deceased estates starts at the Master's office; and most deceased estates end there. The High Court comes in as a court where an aggrieved party is dissatisfied by the Master's decision.

From the facts of this case, it is clear that the plaintiff approached the Master's office with a complaint concerning the manner in which the executor appointed by the Master was administering the disputed deceased estate. The Master delved into the issue, wrote letters seeking clarifications and called meetings. At the end of it all the Master was supposed to make a definitive decision for or against the plaintiff. But it is clear from the papers on record that the master avoided the issue and referred the plaintiff to the courts.

That referral did not stop the plaintiff from formally engaging the Master and insisting on a decision by the Master, before he could approach the courts. In my view the defendants are correct when they state that the plaintiff approached the court prematurely, before the Master had concluded the issue by finding for or against the plaintiff, or for or against the executor. In my view, the plaintiff should go back to the Master and obtain the Master's decision on the complaint raised. The High Court cannot delve into the matter until the Master has made his own decision. For the court to make a decision at this juncture is tantamount to interfering with the administrative authority of the Master.

It is correct that the plaintiff was aggrieved by the appointment of the first defendant as an executor. It is clear from the papers that when she filed her application, in case HC 5436/13, she was challenging the executor's appointment. This means she was not happy with the Master's decision to appoint the first defendant as an executor. So her remedy is to seek a review of the Master's decision to appoint first defendant as an executor.

As regards the sale of the Kuwadzana house, the law is very clear. Without the Master's consent, the house could not be sold. Without the Master's consent, cession could not be effected into the second and third defendants' name. In fact, without the Master's consent, the executor had no power to dispose of any property. So while it is true that the person who was moving the process on the ground was the executor; it is the Master's consent which enabled him to dispose of the house. So anyone challenging the sale was also challenging the Master's authorization because without it there would have been no sale and no cession. That means the sale challenge must also be brought by way of review of the Master's decision to authorize the executor's decision to dispose of the property.

In *Matsinde v Nyamukapa* 2006 (1) ZLR 200, the court stated as follows:

“I pause here to observe that the removal of an executor dative in my view should primarily be done by the Master on good grounds shown. The appointment of an executor is an administrative function in the hands of the Master. It is therefore to him that allegations of unbecoming conduct by an executor should be made in the first instance. The decision of the Master to remove or to retain the executor after complaints have been lodged with him is then brought on review to this court on the recognised grounds of review of an administrative decision.”

The position enunciated in the case above clarifies the legal position. The plaintiff was aggrieved by the choice and decisions of the executor appointed by the Master. It is to the Master that she must direct her complaints and obtain a definite decision. Thereafter; if still unhappy she is free to bring the Master’s decision on review to this court.

Section 116 of the Administration of Estates Act, [*Chapter 6:01*] also provides for complaints to the Master.

The points in *limine* raised by the defendants must therefore be upheld.

The plaintiff shall pay costs on the higher scale because of her insistence on the wrong procedure, despite being alerted through the pleadings.

Accordingly, it is ordered:

- (a) that the preliminary points raised by the 1st, 2nd and 3rd defendants about a premature approach to the High Court and the use of a wrong procedure be and are hereby upheld.
- (b) the plaintiff’s claims be and are hereby struck off.
- (c) that the plaintiff shall pay the 1st, 2nd and 3rd defendants’ costs on a legal practitioner and client scale.

Sawyer & Mkushi, plaintiff’ legal practitioners
Makonyere & Pfigu Law Chambers, 1st defendant’s legal practitioners
Chatsanga & Partners, 2nd & 3rd defendant’s legal practitioners