MISHECK MUKARATI
and
LOVEMORE MUKARATI
versus
MASTER OF THE HIGH COURT N.O
and
NOREEN CHIKAKA N.O
and
CHITUNGWIZA MUNICIPALITY
and
ANDERSON REMUYANGA
and
LYDIA CHIKAKA

HIGH COURT OF ZEMBABWE
TSANGA J
HARARE, 23 September 2022 & 9 March 2023

Opposed Application

P R Zvenyika, for applicants
D C Kufaruwenga, for 4th respondent
No appearance by 1st, 2nd, 3rd and 5th respondents.

TSANGA J: The two applicants seek to reverse the sale of a property in a deceased estate. The property is known as 16286 Unit M, Seke, Chitungwiza and it belonged to the estate of the late David Chirikure Mukarati who was their father. They also seek that that the agreement of sale of that property entered into by the executor Noreen Chikaka, being the second respondent herein, with the purchaser being Anderson Remuyanga who is the 4th respondent herein, be declared null and void. They also want title of the property to be resuscitated in the name of the late David Chirikure Mukarati. As for the Master, who is the first respondent, they want the confirmation of the final a liquidation and distribution account to be set aside as unlawful, unreasonable and unfair. They also want the Master and the Executor to be mulcted with the costs of this application.

The context is this. Their father died in 1994. The first applicant says he is the eldest son of the late David Chirikure Mukarati (hereinafter referred as the deceased). The second applicant is his younger brother. The deceased's estate was not dealt with until 2016 for reasons which do not emerge from the application. The second respondent, Noreen Chikaka was appointed as Executor.

On 18 March 2016, the applicants lodged a complaint with the Master on how the estate was being administered. Their precise complaint was that they had been excluded as beneficiaries. The Master referred their grievance to the Executor who replied on 8 April 2016. The Executor highlighted that the deceased had five wives and had divorced others. At the time of his death he had been left two wives who the Executor said were to share the matrimonial home. Since there would be no residue, no children would inherit. The letter also showed in its thrust and content that the Executor was clearly applying the Administration of Estates Act [*Chapter 6:01*] as amended in 1997 by basically allowing the widows to inherit. In July of that year, the Master had consented to the sale of the house. An agreement of sale had been entered into between the Executor and Anderson Remuyanga in August 2016.

On 4 October 2016, the applicants, this time through their erstwhile lawyers, *Machaya & Associates*, had written to the office of the Master complaining about the intended sale by the Executor to a third party on the grounds that they had intended to have the house remain as a family home. Their grievance was that the Executor should, at the very least, have offered to sell the house to the remaining descendants or offer them the right of first refusal. On 11 October the Master had respondent stating that the consent to sell had already been granted and the Executor had prepared the first and final distribution account which was still open for inspection. That response is extremely relevant as it further stated that if the applicants had any claims on the property in relation to that distribution account, they should file the same for consideration.

It is common cause that they did not file the necessary objections and the account was confirmed by the Master. Thereafter the matter then acquired a distinct history before the court. They filed an application for condonation of late filing of review of the decision of the Master. This application was dismissed for reasons fully articulated by MUSAKWA J in an unreported judgment, *Misheck Mukarati & Anor* v *Noreen Chikaka (No) & 4 Ors HH 802/19 (*HC 3923/17). Their attempt to appeal against that judgment to the Supreme also failed as their matter was struck off the roll.

Undeterred, they have now brought the same application under the Administrative Justice Act [*Chapter 10:28]*, on the premise that the merits of the matter were not canvassed and that the application can still find its way for disposal using this Act on the basis that the Master failed to act lawfully, reasonably, and in a fair manner in accordance with s 3(1) of the Administrative Justice Act when he received their complaint in March 2016. This application is brought under s 4(1) of the same Act which subject to any other law, allows any person who is aggrieved by the failure of an administrative authority to comply with section *three to* apply to the High Court for relief.

They claim they were not afforded an opportunity to be heard when the consent to sell was granted by the Master. The gist of their objection is that the wrong law was used to administer the estate as the current law on intestate succession under customary law had not yet come into effect when their father died in 1994. By using the wrong law the master's actions are said to fail the test of lawfulness and reasonableness. They had also raised this aspect in the dismissed application for condonation, the applicable amendment to the Administration of Estates Act [*Chapter 6:01]* having only taken effect on the 1st of November 1997. Despite this, the application for condonation had been dismissed with the court having looked at the totality of the circumstances leading to the late application for review. The court also highlighted that the application was brought some ten months after the decision of the Master.

Mr Remuyanga, the purchaser of the property filed his opposition premised on the grounds that the applicants are in fact seeking to determine the same case using the Administrative Justice Act when in fact the matter was dealt with under HC 3923/17 as well as by the Supreme Court as stated above. The parties were said to be same as is the subject matter. His submission were that if parties whose matters have been concluded in whatever way by the court, are allowed then bring the same matter under the Administrative Justice Act, every litigant who would have lost a case would simply return to court using that avenue and there would be no finality to litigation. Pertinently he argued that s 7 of the Administrative Justice Act gives the court unlimited discretion to refuse to entertain an application brought under it where it considers that there are other remedies which applicant can pursue.
It states as follow:

> **"7 Discretion to entertain applications**
> Without limitation to its discretion, the High Court may decline to entertain an application made under section *four*, if the applicant is entitled to seek relief under any other law, whether by way of appeal or review or otherwise, and the High Court considers that any such remedy should first be exhausted."

Materially, in terms of s 4 (1) of the Administrative Justice Act an application brought under that provision is subject to any other law that may be in place. It is trite that when it comes to the administration of estates the Act lays down time frames within which challenges are to be made if one is unhappy with the liquidation and distribution account which in this case the Master drew their attention to as an avenue for their objection. Section 52 (9) provides as follows:

> (9) The Master shall consider such account, together with any objections that may have been duly lodged, and shall give such directions thereon as he may deem fit:
> Provided that—
> (i) any person aggrieved by any such direction of the Master may, within thirty days after the date of the Master's direction, and after giving notice to the executor and to any person affected by the direction, apply by motion to the High Court for an order to set aside the direction and the High Court may make such order as it may think fit;

According to the judgment under HC 3923/17, the condonation application for late filing of review was only sought some ten months later when it ought to have been made after eight weeks from the Master's decision.

In any event, there was nothing untoward in how the Master proceeded in terms of the exact nature of complaints that were actually placed before him by the applicants themselves at the time. The issue brought before the Master in the initial instance was never about the wrong law being used. When the Master received their complaint in March 2016 it was about beneficiaries being excluded, and that matter was referred to the Executor who responded. It is also common cause that when the Applicants' through their lawyer further wrote to the Master in October 2016, again the Master took action and highlighted that the distribution account was still open for inspection and objection. The complaint at the time was about not being given the right of first refusal. No action was taken by the applicants.

The property was long since sold in 2016. Condonation was long since refused in 2019. The applicants long since appealed to the Supreme Court with equally no joy. In bringing this application now under the guise of the Administrative Act, the applicants are indeed seeking condonation through the back door, alleging failure on the part of the Master to take action when the facts speak otherwise as to what action was taken with regard to each of their complaints.

The application lacks merit and is dismissed with costs.

Muchirevesi & Zvenyika Applicants legal Practitioners
Dzimba Jaravaza & Associates 4th Respondent's Legal Practitioners