

ESTATE LATE CHARLES MAPUNGWANA MHLANGA DR1678/98  
(Duly represented by Constance Felicity Mhlanga in her capacity  
as the Executrix Dative)  
versus  
SARAH MAPUNGWANA  
and  
MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE  
SIZIBA J  
MUTARE, 7 November 2024

### **CIVIL ACTION**

Mr *M. Mavhiringidze*, for the plaintiff  
Mr *T. Tazvitya*, for the defendant

SIZIBA J: The parties in this matter came before me for a civil trial which was set to commence on 17 October 2024. The summons had been filed in the name of the plaintiff which is a deceased estate. The case is for the eviction of the first defendant and all those claiming occupation of plot number 19 Chinyaduma in Chipinge through her. The action was contested by the first defendant until the pleadings were closed. The issues which were referred for trial were as follows:

1. Whether or not the cited plaintiff has *locus standi* to sue.
2. Whether or not the plaintiff's title is invalid.
3. Whether or not the first defendant acquired ownership of plot number 19 Chinyaduma by operation of acquisitive prescription.
4. Whether or not the defendant and all those claiming right of occupation through her should be evicted from plot number 19 Chinyaduma, Chipinge.

Since the first issue of *locus standi* of the plaintiff, if upheld, had the potential to dispose of the matter, I directed the parties to address me on that issue. The parties opted to do so by way of written submissions and I gave them an opportunity to do so.

## **SUBMISSIONS BY THE PARTIES**

Mr *Tazvitya*, submitted on behalf of the first defendant that there was no plaintiff before the court as the party cited as the plaintiff is non-existent at law. It is the Executrix Dative who ought to have been cited. The summons were accordingly void. He relied on *Veritas v ZEC and Others* SC 103/20 for the position that the citation of a non-existent party leads to a nullity. He also relied on several cases on this jurisdiction to support the view that a deceased estate is not a legal entity.

On the other hand, Mr *Mavhiringidze* argued on behalf of the plaintiff that the citation of the plaintiff was proper as long as it was indicated that the deceased estate was duly represented by the Executrix Dative whose name was indicated in the summons. Counsel argued that the case of *Vandira v Estate late George William Noble and Others* HMA 10/23 was distinguishable from the case at hand because in the present matter there was an indication that the deceased estate was duly represented by the named Executrix Dative. Counsel further contended that I am bound by the decision of two High Court judges in the matter of *Tundiya v Estate Late Idah Tandiwe Mangwaira (Represented by Sanra Felistas Shonhiwa), the Executor* HMA 39/23. The case of *Makosa v Estate Late Felix Chasi Represented by Francis Chasi the Executor* HCC 08/24 was also cited and that of *Lemukani v Estate late Enara Muyunza and Others* HCC 156/24 as the latest authorities dealing with a similar scenario where the proceedings were not held to be a nullity. It was contended that the plaintiff's eviction suit is not a nullity as the Title Deed is in the name of the deceased's estate.

In reply, Mr *Tazvitya* maintained his stance. His submissions were an attempt to distinguish all the cases cited by the plaintiff from the case at hand. He submitted that in *Tundiya v Estate Late Idah Tandiwe Mangwaira (Represented by Sanra Felistas Shonhiwa) (supra)*, the ground of appeal which dealt with the issue of the wrong citation was withdrawn and hence the court did not specifically deal with it. He further contended that in the cases of *Makosa v Estate Late Chasi (Represented by Francis Chasi the Executor) (supra)* and *Lemukani v Estate Late Enara Muguza and Others (supra)* the issue of the wrong citation of the estate did not arise.

## **THE LAW AND ITS APPLICATION TO THE CASE AT HAND**

The position that a deceased estate is not a legal *persona* which is clothed with *locus standi* to sue at law is well settled in this jurisdiction. In *Chiyangwa v Katerere and Others* SC 61/21 at p 15 of the cyclostyled judgment, it was articulated thus:

*“It follows that in a case involving estates of deceased persons there shall be appointed a representative who is empowered through letters of administration to act for and on behalf of the deceased’s estate. This is so because **the deceased estate cannot represent itself. In terms of s 25 of the Act a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master.**”*

In *Nyandoro & Anor v Nyandoro & Ors* 2008 (2) ZLR 219(H) at 222H-223C KUDYA J aptly restated the legal position as follows:-

*“In *Clarke v Barnacle NO & Ors* 1958 R&N 358 (SR) at 349B -350A MORTON J stated the legal position that still obtains to this day in Zimbabwe. It is that “whether testate or intestate, an executor, either testamentary or dative, must be appointed.....so that the executor and he alone is looked upon as the person to represent the estate of the deceased person.” He left no doubt that towards the rest of the world the executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position and that **because a deceased’s estate is vested in the executor, he is the only person who has locus standi to bring a vindicatory action relative to property alleged to form part of the estate.***

*Arising from the nature of a deceased estate as described in *Clarke v Barnacle*, supra, and *Mhlanga v Ndlovu*, supra, it must follow that **the citation of a deceased estate as a party to litigation is wrong. The correct party to cite in lieu of the deceased estate is the executor by name. The citation of the second plaintiff and second defendant in casu was therefore improper and incurable. It makes their presence before me a nullity.**” (Added emphasis)*

The above pronouncement by the Supreme Court is buttressed by numerous decisions which include *Vandira v Estate Late George William Noble and Others* HMA 10/ 23, *Estate Late Ngavaite Jack Chikuni and Others v Chikuni and Others* HB 143/21.

Since there is no other plaintiff apart from the deceased estate in the case at hand, what it simply means is that there are no valid proceedings before me and as such there can be no valid trial. Mr *Tazvitya* is correct in distinguishing the case of *Tundiya v Estate Late Idah Tandiwe Mangwaira (Represented by Sanra Felistas Shonhiwa)* (supra) from the present case on the basis that the two judges who dealt with that matter dealt with the appeal on the basis of

other issues which remained after the ground of appeal that dealt with the point *in limine* on mis citation of the respondent had been withdrawn. The two judges did not consider the decided cases over the issue of the respondent's mis citation. Specifically, they did not consider the decision of the Supreme Court in *Chiyangwa v Katerere (supra)* where three Justices of Appeal held that a deceased estate cannot be cited as a party and also that the failure to cite an executor by name in a case dealing with a deceased estate is fatal to the proceedings as a deceased's estate can only be represented by an executor. Whilst it is correct that I am bound by a decision of two High Court judges, this cannot be so in this scenario for two reasons. The first reason is that there is a clear decision of the Supreme Court which has settled the same point which is binding upon the High Court by means of the doctrine of *stare decisis*. Secondly, the two High Court judges in question did not decide the appeal on the basis of the mis-citation of the respondent since the ground of appeal which dealt with the relevant point *in limine* had been withdrawn by the appellant.

In the cases of *Makosa v Estate Late Chasi (Represented by Francis Chasi the Executor) (supra)* and *Lemukani v Estate Late Enara Muguza and Others (supra)*, the issue of the wrong citation of the estates did not arise and hence there is nothing that was pronounced in those cases to buttress the plaintiff's contention.

The other most relevant case is that of *Mupfurira v Master of the High Court of Zimbabwe and Others* HH 328/23 where the citation of second respondent as *Estate Late James Chigwedere (Represented by Isaac Tichareva in his capacity as Executor Dative)* was held to be fatal to the application leading to the matter being struck off the roll. At pp 4 to 5 of the cyclostyled judgment, MUCHAWA J held as follows:

*“What emerges from these authorities is that the citation of a deceased estate as a party to litigation is wrong. It is the executor who must be cited by name. Failure to cite the executor/executrix would be fatal to an action against the deceased's estate. It does not matter that there are others remaining in the suit, if the suit is aimed against the deceased estate, failure to cite the executor is fatal. In terms of s 25 of the Administration of Estates Act [Chapter 6:01] a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. The case of Estate Late Ngavaite Jack Chikuni (supra) was saved by the fact that the executor was the second applicant. In casu, the executor has not been cited by name. This is not just a mis citation. It is fatal to the application.*

*It does not matter that Isaac Tichareva filed an opposing affidavit. He was not properly cited, and a point of law can be raised at any time. See Muchakata v Netherburn Mine 1996 (1) ZLR 153 (S) @157 A-B.*

*There is therefore nothing left for me to do except to strike this matter off the roll with no order as to costs as prayed for at the end.”*

The law clearly requires that in a matter involving a deceased’s estate, it is the executor who should be cited by name as representing the particular estate. The citation of the deceased estate as a party being duly represented by a named executor is wrong as it does not make the executor to be a party but a mere representative of an entity which is non-existent at law. This is the reason why the action at hand is a nullity. It is a nullity for two reasons. The first reason is that there is no proper plaintiff before the court. The second reason which arises from *Chiyangwa v Katerere (supra)* and other cases is that the case concerns a deceased’s estate but the Executrix Dative has not been cited by name as a party to represent the deceased’s estate. The result is that the action is an incurable nullity as the cited plaintiff is neither a valid legal *persona* nor a natural person. See *Veritas v ZEC and Others (supra)*.

This is a typical case where a special plea should have been taken at the onset of the case to avoid loss of expense and energy that has been spent this far. Since the matter involves a deceased’s estate, I am not persuaded to grant any order of costs against the estate as such would prejudice the beneficiaries. In any event, there is no valid plaintiff before this court. In the result, I will order as follows:

1. The 1<sup>st</sup> defendant’s preliminary point that the plaintiff has no *locus standi* to sue is hereby upheld.
2. The matter be and is hereby struck off the roll.
3. There shall be no order as to costs.

*Mavhiringidze and Mashanyare*, plaintiff’s legal practitioners  
*Bere Brothers*, defendant’s legal practitioners