GOODWILL NKALA

Versus

NOMSA HAZEL NCUBE
(in her capacity as Executrix Dative of Estate Late
ALICE NKALA

And

JABULANI OWEN MPOFU

And

MARTHA MPOFU

And

THE ASSISTANT MASTER OF THE HIGH COURT

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 14 JUNE 2019 AND 21 MAY 2020

Opposed Application

R Ndlovu, for the applicant
Advocate P Dube, for the 1st respondent
N Mazibuko, for the 2nd and 3rd respondents
No appearance, for the 4th and 5th respondents

MABHIKWA J: This matter relates to the administration of an estate. The brief facts are that the late Alice Nkala died testate on 10 February 2010. She nominated Nomsa Hazel Ncube Senior Partner of the law firm Lazarus and Sarif legal practitioners (1st respondent) to be executor of the Will. 1st respondent is therefore Executor Testamentary of the said estate in terms of the Will. Applicant and his three (3) younger sisters were bequeathed each a 25% share in a house.

Apparently, the will and the estate, comprising only of a house, stand 44908 Mzilikazi Township a.k.a No. F 90 Mzilikazi, Bulawayo, has taken a period in excess of ten (10) years to administer and execute. This I must say from the onset, is undesirable.

It appears also even from the applicant's own papers that at the start of the estate's administration, applicant made a claim that he made improvements on the house and is therefore owed by the estate. In my view, one could well say that another child would probably not have made a claim against his own mother's estate for such improvements. Be that as it may, his siblings did not contest the claim and an order by consent was granted per KAMOCHA J (as he then was) awarding him $8 000-00 representing the value of improvements he made on the house. At the same time, he was himself ordered to pay $2 500-00 arrear rentals as well as some yet to be calculated outstanding utility bills due to the Bulawayo City Council. I must mention that I notice that in his application and founding affidavit, applicant conveniently states only the $8 000-00 that was in his favour and not the payments against him.

Applicant further complains that on 9 December 2013, the 1st respondent proceeded to sell the house to one Berthi Moyo without the "authority" of the "beneficiaries" or his consent. On the other hand, the 1st respondent complains that it is the applicant who frustrated the sale and therefore the winding up of the estate by being utterly unco-operative and making unwarranted demands including the demand to buy out his siblings. He also withheld his consent so that the 4th respondent would issue a certificate in terms of Section 120 of the Administration of Estates Act to authorize the sale. Applicant's lack of co-operation and withholding of his consent pushed the said Berthi Moyo to abandon the sale negotiations.

Applicant also complains that on 22 March 2014, 1st respondent issued summons seeking to evict him from the house. He resisted eviction because he had not consented to the issuance of a Section 120 Certificate and that it (Certificate) had not been issued therefore. On the other hand 1st respondent complains that she started administering the said property in fact from the time the testator was ill. Applicant always intended and still intends to benefit alone to the exclusion of his sisters. According to 1st respondent, all the other beneficiaries consented to the issuance of the Section 120 Certificate but applicant deliberately and

selfishly withheld his consent. This was calculated to ensure that he continues to reside alone on the property and also benefit on the rentals he continued to collect from tenants.

At some stage, 1st respondent was again forced to apply for Summary Judgement which applicant opposed and succeeded in having it dismissed in March 2015. Applicant avers that after the dismissal of the Summary Judgement on 19 March 2015, the 1st respondent neglected to prosecute case No. HC 638/14. He says he however continued to withhold his consent for the issuance of section 120 Certificate and claims that he does not understand 1st respondent's "insistence" on selling the house. It appears that the 1st respondent had to file yet again matter No. HC 1322/16 to compel the 4th respondent to issue the Section 120 Authority to sell. The parties were once again back in court in case No. HC 1550/16 wherein applicant sought joinder in HC 1322/16 so as to oppose it. He continued on his push to "buy out" the shares of his sisters.

Applicant says that he was surprised to later learn that the 1st respondent eventually got the Section 120 Certificate from 4th respondent but he does not know how. There was also a protracted argument on the valuation of the house in question. In short, the applicant and 1st respondent disagreed at almost every turn.

I must say that it is important to note that section 52 (1) of the Administration of Estates Act (Chapter 6:01) provides that;

> "Every executor shall administer and distribute the estate in respect of which he is appointed according to law and the provisions of any will relating to that estate."

Secondly, it should be remembered also that an executor/executrix particularly such as is in the current case, where she is a legal practitioner and an officer of this court, is duty bound to do such acts as are prescribed by the Act to ensure a proper administration of the estate, timeously and for the benefit of all the beneficiaries. See *Mujuru (NO) and Others v Mujuru and Another* 2006 (1) ZLR where it was held that:

> "The position of executor is one of trust. Actions must be justifiable in terms of …. wishes of the heirs. The guiding principle which an executor must observe in the administration of a deceased estate is that he occupies a position of trust and his actions should be dictated by considerations which will best serve the interests of the beneficiaries."

Thirdly, it is pertinent to note also that the executrix *in casu* is an Executrix Testamentary who had to execute her mandate, duty bound by, not only the provisions of the law, but also and most importantly, the provisions of the will. A distinction should be made between the case *in casu* and a case such as *Katsande v Katsande and Others* 2010 (2) ZLR 82 (H) which was an administration of an estate involving mostly minors. The testator's will specifically directed in clause 3 (a) stated that the immovable property being house No. 18806 Unit L Seke, Chitungwiza shall revolve upon his son Kudzanayi Frank Katsande who in turn was directed in terms of the same clause to exercise the responsibility and execute such parental duties as the testator himself would have done over his minor daughter Milenda Tinashe Katsande. She resided at the said property. The executor was duty bound to comply with that unambiguous provision of the Will. Clause 3 (c)'s intention was also clear that the said property was only to be sold if, and only if the estate failed to meet claims and demands from creditors of the estate. However, there being no such failure to pay creditors and some of the beneficiaries being minors, Razmond Katsande, the dully appointed Executor Testamentary therein, failed to execute his duties properly in selling the house on 11 October 2007, and then fraudulently obtaining the Master's consent in terms of section 120 of the Administration of Estates Act (Chapter 6:01) which was granted only three (3) months after the actual sale had taken place. Further, both parties and the Master had failed to comply with the strict provisions of section 122 of the same Act since the estate involved minors. Regrettably and quite often, these strict provisions are often taken mistakenly as being contained in Section 120. Traces of such mistaken belief seem to appear in respect of the applicant in the current case. In *Katsande v Katsande* (supra), the court correctly held that the selling of the house had been unlawful and that the issuance of the Section 120 was not only fraudulently sought and issued but also unnecessary as the Will specifically provided that the property should not be sold.

For the avoidance of doubt the famous Section 120 of the Administration of Estates Act reads:

> "If, after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise by Public Auction, he may, if the Will of the deceased contains no provision to the contrary, grant the necessary authority to the executor so to act."(the underlining is mine).

It is clear therefore from the above that there is no law that there should always be a Section 120 Certificate issued if estate property is to be sold. The section is clear that it is only when the Master is of the opinion that it may be to the beneficiaries' advantage together with all other interested persons to sell the property, which does not always have to be a house by the way, that the Master may, (not must or shall) grant the authority. Impliedly therefore, the Master may even *mero-motu* grant the authority to sell the property with no one having asked for it, let alone consent to it, for as long as he genuinely is of the opinion that it is advantageous to the interested parties in the administration of that particular estate. That is the import of the section. Further, it is clear that the legislature in crafting section 120 intended that the Master be guided first and foremost by the Will of the deceased person if any. Where it was silent, or where the will did not prohibit the sale or where there was no Will at all then the Master may grant authority to sell. Clearly therefore there is no law that there should always be sought and issued, a Certificate in terms of section 120 as often misinterpreted and which the applicant *in casu* has used as his "peg hole."

Secondly, and most importantly, there is a Will in this case, which directs in precise terms that the house be sold and the proceeds be shared in equal shares (25%) each amongst applicant and his 3 sisters. There was absolutely no reason for the section 120 authority there. The Executrix (1st respondent) was in fact within her rights and mandate, until the applicant managed to throw her of course together with the Master when he continuously "threw spanners into the works screaming Section 120". I must say that the obsession by the applicant and many others about the section 120 authority having to be sought and granted all the time is misguided. Even more alien to our law is applicant's belief that he should first consent before authority is given. Finally, a reading of Section 120 will show that it is silent on the form of the authority. There is no law that the Master should grant or issue a written authority but quite often, the Master and executors are made to tumble and lose their balance over the "Certificate" or "authority" issue when the Master had in fact initially, properly granted verbal authority to sell.

As already stated above, it is where minors are involved especially as beneficiaries that the law is strict in terms of section 122. The parties, or executor would have to approach the Master for the said authority in terms of section 120. The Master would have to properly and judiciously consider the facts and circumstances before exercising his discretion. Where

he is not sure, he would also have to approach a Judge in Chambers for guidance and for the authority.

I have taken time to emphasise the above including the provisions of Section 120 because a reading of the current application makes sad reading. The applicant properly admits at the beginning of the application that his mother died testate bequeathing to him and 3 sisters the said house which the mother directed should be sold and the proceeds thereof be shared equally. This is pure inheritance under a deceased's estate.

Regrettably however, other than that short admitted history, the applicant from then on wages quite a tiger fight with the Executrix. I must say that one cannot help but notice that during that "fight" the applicant unwittingly behaves as if the property is in fact his or should be his, which also is the Executor's complaint, that he wants the whole house to himself. For over ten (10) years, the executor *in casu* has been taken up and down a winding road in the execution of the estate. Applicant has used a combination of factors like sheer lack of co-operation, being litigious and raising claims and perceived legal niceties and technicalities such as the Section 120 issue. For instance though not necessary he managed to cow everybody else to buy his obsession on the issue of the Section 120 authority. When all the other consented to it being issued, he withheld his consent and insisted that, without his consent, the house cannot be sold. Papers also show that he also disputed the value of the house. This was expected since he wanted to "buy out" the others. It appears also that in at least two occasions, he was given a chance to buy out his sisters' shares. Annexture "P" which is a letter dated 22 August 2016 clearly shows that applicant was being given yet another chance to buy out his sisters. He did not. In fact this was the second time after a second valuation of the property as per his demand. Earlier, the property had been evaluated and sold to a buyer after applicant had again failed to buy out his sisters. The Executor complains and perhaps correctly so, that the buyer got frustrated and withdrew from the sale because of the squabbles that ensued between the four (4) siblings, particularly applicant's lack of co-operation. It is this court's finding that it was ultimately reasonable to put the property on sale again as every reasonable Executor would have done so. The letter of 22 August 2016 gave the applicant thirty (30) days after the evaluation of the property as the period within which to buy out the other beneficiaries. However, the property was only sold 9 to 11 months later. To that extent, applicant was given more than enough time. He apparently and simply does not want to part with the house as he continues to treat it as his

own. One wonders if he ever intended to pay his sisters their shares in "buying them out." Meanwhile, the other (3) beneficiaries and the two (2) innocent purchasers of the property, have had a long wait with abated breath and anxiety. As the others wait, the applicant and the Executor have taken each other to court in at least six (6) court cases including case Nos, HC 2403/12, HC 638/14, HC 1474/14, HC 1322/16, HC 1550/14 and the current one 2757/17.

It has not been alleged or argued that the Executor acted fraudulently, recklessly, partially, or to her own benefit etc. This court also finds no impropriety in her conduct in winding up the estate. In any event, the executor *in casu* as stated above, is in effect an officer of the court who, the law demands should administer, execute and wind up the estate with utmost good faith, diligence and within time limits at the lowest cost and expense for the benefit of all the beneficiaries. That in my view, she did. It matters not that there are off-shoot matters that are allegedly hanging. That cannot stop the winding up of the estate. Applicant is at liberty to pursue those matters and claim damages where necessary and possible in his view.

In the circumstances, the application is dismissed with costs.

R. Ndlovu and Company, applicant's legal practitioners
Messrs Lazarus & Sarif, 1st respondent's legal practitioners
Calderwood, Bryce Hendrie & Partners, 2nd & 3rd respondents' legal practitioners