WALLMAC CHIRIMBA
versus
CHARLES CHIRIMBA
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 24 JANUARY and 4 MARCH 2022

Opposed Matter

T Mukwesha NO, for applicant
First respondent, in person
Second respondent, no appearance

MUCHAWA J: This is an application in which the following final order is sought:

a. "That the first respondent sign all documents necessary that stand number 8577 Kuwadzana phase 3, Harare, otherwise known as stand 8577 Kuwadzana Township of Fountainbleau Estate be reversed into the late Timothy Chirimba.
b. Second respondent be and is hereby ordered to reverse the transfer of stand No. 8577 Kuwadzana phase 3, Harare otherwise known as stand 8577 Kuwadzana Township of Fountainbleau estate registered under deed of transfer number 1694/2009 to the estate of the late Timothy Chrimba (DR 1006/2020)
c. First respondent to pay on higher scale."

A provisional order was issued on 17 August 2020 whose term was as follows:

i. "The second respondent be and is hereby ordered to register a caveat on stand 8577 Kuwadzana Township of Fountainbleau Estate, registered under Deed of Transfer number 1694/2009."

The applicant and the first respondent are allegedly siblings born to the late Timothy Chirimba, though applicant disputes that first respondent is indeed his father's son. At the centre of the dispute is an immovable property, stand number 8577 Kuwadzana phase 3 (hereinafter called the property). It is common cause that Timothy Chirimba who died on 22 January 2005 was father to applicant, Letwin Chirimba and Joyce Chirimba. The first respondent claims that he was also a son to the late Timothy Chirimba but this is disputed by applicant. During his lifetime

the late Timothy Chirimba was a cooperative member of the Chindunduma Housing Cooperative and that is how the property was allocated to him. After the death of Timothy Chirimba, it appears that by some means, the first respondent got his name substituted for the late Timothy Chirimba at cooperative level and thereafter proceeded to get the title in the house passed to him including title deeds. This was done without the estate of the late Timothy Chirimba having been registered. This estate was only registered by the applicant in 2020.

At the hearing of the matter, the first respondent raised a point in *limine*. I heard the parties and reserved my ruling. I proceeded to hear the parties on the merits and reserved my judgment. Below, I start off with the point in *limine.*

Whether the applicant has *locus standi* to bring this application

The first respondent submitted that as the applicant purports to represent a deceased estate, but has not filed any letters of administration entitling him to act on behalf of the Estate Late Timothy Chirimba, he has no *locus standi*. It was averred that the holder of such letters of administration is one Takura Mukwesha who applied for and got a court order for joinder under case HC 7408/20. The court order is impugned, however, for its failure to stipulate whether Takura Mukwesha is being joined as an applicant or as a respondent and how she should proceed to file any papers in relation to the matter before the court. It is averred that despite the order for joinder, granted in favour of Takura Mukwesha, she is alleged to have proceeded to substitute the applicant through r 85A (3). Such substitution is said to be bad at law as to amount to a nullity as substitution can only be done where a party to the proceedings dies before finalization of the matter. As the late Timothy Chirimba was never a party to the proceedings and it is sought to substitute Wallmac Chirimba who is alive, and has always been incapable of representing the deceased estate. It was prayed that the application should be dismissed with costs.

In his heads of argument, the applicant contended that he has *locus standi* as he is the one who registered his father's estate under DR 1006/20 and is the first born son to the deceased and he qualifies to be the executor and has the right at law to protect his father's estate from looters.

Ms Mukwesha submitted that she was appointed executor after the applicant had already filed the current matter and the applied for joinder. The notice of substitution was said to have been filed following a direction from the court. She explained that upon substitution, she adopted what was filed by the applicant as she was advised that all documentation had been filed and there

was no opposition to this position. She urged the court to proceed to the merits of the matter as this concerns a deceased estate and beneficiaries are feuding and going back and forth over the estate. She argued that as it is not in dispute that an estate administrator has been appointed, she is properly before the court.

This issue has already been exhaustively dealt with in the case of *Nyandoro & Anor v Nyandoro & ORS* 2008 (2) ZLR 219 (H). I quote extensively below;

"I agree with both counsel that the second plaintiff is not before this Court. In our law, in terms of section 25 of the Administration of Estates Act, a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. In *Mhlanga v Ndlovu* HB 54/2004, NDOU J stated as follows:

> "The executor of an estate has certain rights and powers in connection with the liquidation and administration of the estate and also certain duties to perform. What they consist of is to be found both in common law and the Administration of Estates Act, *supra* – and *The Law and Practice of Administration of Estates* (5thEd) by D Meyerowitz at page 107 and *Fischer* v *Liquidators of Union Bank* 8 SC 46. What must be noted is that the applicant, as executor, is legally vested with the administration of the estate. He is not a mere procurator or agent for the heirs. In *The Law and Practice of Administration of Estates, supra* the learned author correctly observed on p 123 –
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> "A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them. He has no principal and represents neither the heirs nor the creditors of the estate …" – *Malcomess NO* v *Kuhn* 1915 CPD, *In re Brown* 7 SC 237; *CIR* v *Emary NO* 1961 (2) SA 621 AD and *Goosen* v *Bosch and The Master* 1917 CPD 189."

In *Clarke v Barnacle NO & Two 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 part 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."

In *casu,* the applicant confirms that at the time of the institution of this matter, he had no letters of administration. He still does not have same. It is not enough that he registered his late father's estate, nor that he is the first son. He needed to be clothed with legal authority to represent the Estate Late Timothy Chirimba in the form of letters of administration. Only then could he competently represent his late father's estate. He therefore has no *locus standi* and his presence before me is a nullity which cannot be cured.

The second inquiry is whether the executor, Takura Mukwesha is properly before me. A notice of substitution was filed on 1 April 2021 in which it was notified that Wallmac Chirimba ceased to be capable to act in this matter upon the appointment of an executrix dative, Takura Mukwesha. It was advised that all papers filed of record should be amended by the deletion of Wallmac Chirimba as applicant and his substitution with Takura Mukwesha N.O, in her capacity as executrix dative in the estate of the late Timothy Chirimba. This was purportedly done in terms of Order 13 r 85A (3). This Rule provides as follows:

> ***"85A. Change of party through death, change of status, etc.***
> [Rule inserted by s.i. 43 of 1992]
> (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) the copy of the notice filed on the person to be joined or substituted shall be accompanied by copies of
> all documents previously filed or served in the proceedings.
> (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 proceedings, 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."

It is clear that this rule deals with a situation where a party to proceedings dies whilst such proceedings are pending. This is when the executor can file a notice of substitution in which he is substituted for the deceased party. In *casu* the executrix seeks to be substituted for a party that was already not properly before the court and is alive. Rule 85A cannot be used to cure the standing of a party who is not deceased but is improperly before the court. The notice of substitution is therefore of no force and effect.

There is another inherent flaw in the position taken by the executrix. She seems to have pitched camp with one of the beneficiaries by seeking to be substituted to step into his shoes and proceed on the basis of the applicant's papers filed of record. Such a stance was impugned as shown above in the case of *Mhlanga v Ndlovu* HB 54/04. See below;

> "A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them. He has no principal and represents neither the heirs nor the creditors of the estate …"

A perusal of record HC 7408/20 shows that there was no order of joinder granted. Can the proceedings be saved? I think not. This is because a finding that the applicant is not properly before the court means that there is no application before me as an application stands or falls on its founding papers. The founding affidavit is that of the applicant whose presence and papers are a nullity. They cannot be saved. Neither can the executrix hope to survive this sunken boat. She too is equally improperly before the court in these proceedings. As a legal practitioner, she should have known better. She would have to properly approach the court as executrix of the Estate Late Timothy Chirimba.

Consequently, both Wallmac Chirimba and Takura Mukwesha have no *locus standi* in these particular proceedings. The point *in limine* is upheld. As I have already said that what is

before me is a nullity, there is nothing to dismiss. There is also no basis to proceed to the merits. Costs will follow the cause.

The application is therefore struck off the roll with costs.

Muchawa J……..