SHINGIRAI USHEWOKUNZE
versus
GEORGE LENTAIGNE INGRAN LOCK N.O.
and
EASTLEA HOSPITAL (PRIVATE) LIMITED
and
MASTER OF THE HIGH COURT ZIMBABWE N.O.
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 9 February & 2 March 2023

**Opposed Application**

Applicant in person
Mr *Maanda*, for the 1st respondent
2nd respondent barred
No appearance for 3rd and 4th respondents

**TSANGA J:**

1. The applicant filed an application in which he sought a declaratur to the effect that the Master of the High Court's appointment of George Lentaigne Ingran Lock as executor in a deceased estate of Farida Hattena DR 722/17 be declared null and void. George Lock is the first respondent in this matter whilst the Master is the third respondent. Also sought was that the removal of one Freddy Chambari as curator *bonis* in that estate be declared null and void. However, Freddy Chimbari is himself not a party to the application. The agreement of sale of the deceased Farida Hatttena 's immovable property by the executor to Eastlea Hospital Private Limited, (Eastlea Hospital) the second respondent herein, was also sought to be declared null and void and that the deed of transfer to it be cancelled. In its stead applicant sought the revival instead of the original Deed. All acts done by the executor in that estate were equally sought to be declared null and void. Costs were sought on the higher scale.

2. All this is against the backdrop of the applicant ‘s tenancy at the property in question called stand 3057 Salisbury Township measuring 1929 square metres and registered under Deed of Transfer 4841/201. The property is otherwise known as Killarney Court Eastlea.

3. Applicant averred that he has occupied that property since 2012 together with other named tenants. The gist of his quest for a declaratur is that for many years they paid rentals to one Ceil Madondo, including owner’s charges until such time that they queried who and where was the owner of the property since tenants were incurring expenses which should ordinarily have been borne by the owner. It is not in dispute that the property belonged to Farida Hattena who had emigrated overseas soon after independence in 1981. Upon the resident’s enquiry and establishing that she was deceased, they had moved to register the estate under DR 722/17 on the assumption that it was derelict property. The Master of the High Court had appointed a curator *bonis* being Freddy Chimbari to take charge of the property. Subsequent to this Mr Lock had been appointed as executor dative to the estate. It had emerged that the late Farida Hattena had left a will in which the property was to be sold. Her own children being dead the proceeds of the sale went to her two grandchildren.

4. The pith of the applicant’s dispute to the scenario that unfolded is that the tenants had offered to buy the flats as individual units. In principle, the Master had had no objection to the idea which had been put to the executor. However, the property had been sold to the second respondent. It is on this basis that the applicant filed this application querying a range of issues pertaining to the estate; the existence of the will and its beneficiaries and the validity of the appointment of Mr Lock as executor when a curator *bonis* had been appointed. He also averred that the requisite exchange control procedures were not followed in paying those beneficiaries. As a result of the property having been sold to Eastlea Hospital, eviction has been sought against the applicant which he is resisting. Secondly he has a standing request to purchase the property together with other tenants. With Eastlea Hospital having instituted eviction proceedings against him, his wish is that the court enquires into the ownership right that the purchaser intends to enforce against him.

5. He pointed to the fact that Mr Freddy Chambari was removed without an order of court. As such he questioned the validity of the appointment of Mr Lock as executor without a formal removal of Mr Chimbari by an order of the court and submitted in his application that a curator *bonis* cannot be appointed alongside an executor. Further, he says no will exists under

DR 722/17 and that there is no provision for resealing a will under our law. He further queried bequests made to non-residents.

6. Several points *in limine* were raised by the first respondent as being largely dispositive of the matter, chief of which is the *locus standi* of the applicant. The essence of the objection in that regard was that the applicant is neither a relative no a family member but is simply a tenant at the property. As such it was submitted *in limine* that he does not have any substantial or real interest in the matter.

7. The second point was that the application for a declaratur, seeking as it does the removal of an executor, was and is improperly before the courts since the proper procedure ought to have been a timeous application (within eight weeks) for review under r 62 of the High Court Rules instead of seeking to do so some three years later through a declaratur. In essence, the argument was that the application was well out of time. In particular, in terms of s 26 (iii) any person having an interest in the estate has the right to apply for the setting aside of the appointment of the executor which the applicant did not do. Two of the tenants namely Nomsa Sithole and Martha Ndoro were averred to have attended the meeting at the Master's office and were therefore said to have been aware of his appointment. They also failed to challenge it only for the applicant to now seek to do some three years later through a declaratur.

8. Another point *in limine* captured in the application related to the draft order. In so far as the application sought relief on behalf of Mr Chimbari who was present and at the meeting and was legally represented, it was submitted that the applicant has no right to represent him. In any event, it was also submitted that Mr Chimbari had been notified of the decision to appoint Mr Lock as the executor of the estate and in terms of s 22 Administration of Estates Act [*Chapter 6:01*] his term as a curator *bonis* ended upon appointment of the executor.

9. In addition, it was said that there are material disputes of facts since the applicant disputes the existence of beneficiaries. They would need to come and give *viva voce* evidence. The challenge on the appointment of the executor and the removal of the curator *bonis* would also need oral evidence. Upon these points *in limine* it was argued that the present application ought to be dismissed with costs on higher cable.

10. Notably applicant had not filed any answering affidavits to Mr Lock's averments as executor. Applicant had only filed heads of argument after the first respondent had taken action to prosecute the matter and filed its own heads of argument. Subsequent to filing heads of

argument, the applicant had additionally filed supplementary heads which the executor as the first respondent had had to further respond to.

11. Eastlea Hospital had failed, to serve its notice of opposition on the applicant through negligence at its own lawyers. No formal written application for upliftment of the bar had been made prior to the hearing explaining the failure to file the notice of opposition. It was therefore barred. Mr Kuchenga purported to appear on behalf of the Hospital and to render from the bar the explanation for the infractions. In his instance there was not even a notice of opposition filed on the applicant. As for uplifting of the bar he had been aware of his firm's own failure to serve the applicant the notice of opposition and yet had deliberately waited for the hearing to seeking condonation for uplifting of bar. He had also tried to improperly submit heads of argument. His approach did not meet favour with the court as the case of *Lesley Faye Marsh (Pvt) Limited & Ors* v *ABC Bank Ltd & Anor* 2019 (1) ZLR 268 (S) which builds on the case of *GMB* v *Muchero* 2009 (1) ZLR 216 (S) elucidates on the approach to be adopted by the court where heads of argument have not been filed timeously by a respondent. Applicant's matter proceeds on the merits or the matter where appropriate may be referred to the unopposed roll. In this case no heads of argument could even be filed without the notice of opposition having been served on the applicant. The ruling was thus that he remained barred. There was no appearance of the third and fourth respondents being the Master and the Registrar of Deeds respectively.

12. At the hearing Mr *Maanda* appearing for the executor the first respondent, highlighted that the application is invalid for the reason that the application was not served on the Registrar of Deeds in accordance with s 79 of the Deeds Registry Act. In terms of the provision in question notice is supposed to be given of an intended application. See *Makuvire* v *Chipato* 2015 (2) ZLR 272 (H). As it turned out, the Registrar of Deeds and not filed any papers he had not been served in accordance with the legal requirements by the applicant. The application was therefore said to be a nullity no far as it sought action on the part of the Registrar of Deeds.

13. Further, the estate had been wound up and finalised and no objection had been laid to the final liquidation and distribution account by any aggrieved party. Further emphasised was that the applicant ought to have used available remedies namely, by applying for a review given the displeasure with the appointment of an executor, the acceptance of a will and an acceptance of the final liquidation and distribution account. See *Chinzou* v *Masomera* 2015 (2) ZLR 274

14. As for challenges to the will he was not an interested person and in any event the will ought to have been challenged in terms of s 8 (6) of the Wills Act [*Chapter 6:06*], within 30 days of its acceptance by the Master. Also emphasised was the fatal non joinder of beneficiaries who had benefitted and yet were not before the court. In addition, it was submitted that the applicant could not seek an order in the absence of a representative he recognised, being Mr Chimbari.

15. Mr Ushewokunze, a lawyer by profession, appeared as a self-actor in this matter. In response to the points *in limine* he emphasised that he was now only seeking the cancellation of the agreement of sale in so far as an interest had been expressed to the Master to purchase the property. He conceded that without notice to the Registrar of Deeds his application may have been premature since what he is challenging is that sale to Eastlea Hospital and the granting of the Title Deed to it and the resulting quest for eviction that is being sought against him in the Magistrates' Court. In so far as failure to challenge the distribution account he submitted that the agreement of sale was outside the distribution account and there is no reference to a sale at all in that account. He emphasised however that there was no longer any need to focus on the point since in reality the order sought had shifted in its thrust to the narrower issue of the agreement of sale. He was abandoning the challenge to the will albeit maintaining that there was however no will to talk about.

16. The technical failure to give notification to the Registrar of Deeds indeed means there is no valid application in so far as any action is sought from them. However, what applicant sought was that the matter be struck off the roll for the simple reason that it would give him a chance to address the defect and refile the matter again. All very well save that there are other points *in limine* raised which this court still has a duty to address and which in this courts view if dealt with would be dispositive of the matter entirely without the need to keep going round in circles on the same matter.

17. The procedures to be followed in the administration of estates are covered by statute. The Administration of Estates Act gives adequate guidance on when and how a person who seeks to mount any challenges can and ought to go about this. To the extent that the applicant was unhappy with Mr Lock's appointment as executor he ought to have used s 26 (iii) to review such appointment if he deemed himself as having an interest to set aside such appointment. He did not do so because he knew and indeed knows he has no *locus standi*. He has zero interest in the deceased estate save for having been a tenant who is taking a chance on remaining on

the property out of a sense of entitlement. The issue of the lack of a direct interest in the administration of a deceased's landlord's estate by a tenant seeking to resist eviction and to assert non-existent rights in a deceased landlords estate was ably addressed in the case of *Newton Elliot Dongo* v *Babnik Investments (Pvt) Ltd & Anor* HH 384/17 which the first respondent highlighted in the heads of argument.

18. With regards to the will of the deceased it is a crucial point is that the applicant is not an interested person in the estate of the deceased. Not everyone can sow seeds of discontent regarding a will. A person must be an interested person in the will. Moreover, there are time limits for challenging a will. A stranger to an estate cannot contest a will but an heir or legatee can. The applicant is neither. The estate has been wound up and proceeds disbursed. His tenancy does not clothe him with the dignity of a beneficiary or interested person in any way. The point *in limine* that he has no *locus standi* is valid and is upheld.

19. Regardless of the quest to amend the draft order to canvass the narrower issue of impugning the agreement of sale, the reality remains that the applicant seeks to review proceedings belatedly through the back door relating to a sale in a deceased estate in which he has no *locus standi*. The point *in limine* that this is in fact a review filed out of time and clothed as a declaratur is a very valid one and is upheld. It cannot stand.

21. I do think that the application was recklessly made by the applicant, well knowing that he has no *locus standi*. The applicant deliberately refrained from filing an answering affidavit and also only filed heads in response to respondent's heads. He thereafter at every turn has fashioned his arguments only after he has assessed whether there is door he can use from the respondents arguments. Well knowing that the points *in limine* raised in their totality were valid he has sought to have the matter struck off the roll on the technicality of failure to give notice to the Registrar of Deeds. In other words, he has been building a case as he goes along depending on what has been said. The first respondent has been unnecessarily put out of pocket on a case which should never have been brought before the courts in disguise.

In the result the points *in limine* raised are upheld.

The application is dismissed with costs on a higher scale in favour of the first respondent.

*Henning Lock,* first respondent's legal practitioners