REPORTABLE (77)

1) ZEBEDIAH BANGAJENA 2) CLEOPATRA KOGA
v
1) SILAS DANGAREMBIZI 2) ESTHER N'ANDU 3) C. V. MUZA 4) MASTER OF THE HIGH COURT 5) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
HARARE: 20 SEPTEMBER 2022 & 28 JULY 2023.

T. L. Mapuranga with *W. Nyakudanga*, for the Applicant

P. T. Chakanyuka, for the first respondent

P. Kudyakwenzara, for the third respondent

No appearance for the fourth respondent

No appearance for the fifth respondent

CHAMBER APPLICATION

BHUNU JA:

[1] This is an opposed application for condonation of late noting of an appeal and extension of time within which to note an appeal. The application is brought in terms of r 43 of the Supreme Court Rules, 2018.

FACTUAL BACKGROUND

[2] The dispute in this case has to do with the estate of the late Margaret Kudyakwenzara who allegedly died testate at Harare on 14 June 2005 leaving a certain piece of immovable property known as Stand 1574 Kambuzuma Township measuring 293

square metres. Various persons have since laid claim to the Stand posturing as the deceased's closest relatives.

[3] The Stand was sold to the applicants by the second respondent before the registration of the deceased's estate resulting in the dispute spilling into the courts. That much is not in dispute. What is in issue is the validity of the sale. The applicants claim to be innocent purchasers of the stand.

[4] The first respondent Silas Dangarembizi who claims to be the rightful heir to the deceased's estate then approached the High Court (the court *a quo*) seeking a declaration of nullity of the sale agreement entered into between the second respondent and the applicants in respect of the Stand. He alleged that the Stand had been fraudulently sold and transferred in breach of the law and the deceased's will. The deceased's estate has since been registered. The second respondent's case was that now that the deceased's estate is registered, the Stand must form part of the deceased's estate so as to be distributed according to law.

[5] The first respondent was successful in his endeavours to have the contract of sale nullified and the Deed of Transfer canceled. On 15 October 2020 he obtained a court order in the following terms:

> "Accordingly it is ordered as follows:
> 1. The 6th respondent be and is hereby ordered to cancel deed of transfer 1872/2006 in favour of 3rd and 4th respondents *(Now the applicants)* in respect of certain piece of land known as Stand Number 1574 Kambuzuma Township measuring 293 square metres, and revive the Deed of grant No. 2138/84 in favour of Margaret Kudyakwenzara.
> 2. The immovable property known as Stand Number 1574 Kambuzuma Township measuring 293 square metres shall revert to being an asset in the estate of the late Margaret Kudyakwenzara registered under DR No. 728/09

and shall be dealt with in accordance with the law by a duly appointed and authorized Executrix Dative under the supervision of the 5th respondent.

3. 3rd and 4th respondents shall pay costs of suit."

[6] In its determination the court *a quo* found that the sale of the Stand was unlawful because it had not been authorized by the Master of the High Court.

[7] Aggrieved, the applicants sought to appeal to the Supreme Court for relief. In pursuit thereof they noted an appeal to this Court under Case Number SC 499/20.

[8] What however perverts the application is that the court *a quo* presided over the judgment now sought to be appealed against in circumstances where both the second and third respondents had already died and their respective estates were not yet registered with the Master of the High Court. The second respondent died on 27 May 2014 whereas the third respondent died on 26 December 2007. They were therefore not represented at the trial. That much is not in dispute.

[9] In his summation of the facts the learned judge *a quo* makes it clear in his written judgment at p 15 of the record that third respondent drew the court *a quo*'s attention to the impropriaty of suing the first and second respondents who were already dead without proper representation. This is what the learned judge *a quo* had to say:

> "Third respondent also contends that it was wrong for applicant to sue first and second respondents in their individual capacities when they were both deceased."

[10] It is amazing that despite the issue having been expressly raised in open court, the learned judge ignored the third respondent's objection and proceeded with the hearing

to finality treating the second and third respondents, Esther Ngandu and C.V. Muza as if they were still alive and taking part in the proceedings.

[11] Seeing that both legal practitioners were prepared to proceed with the merits of the application as if everything was normal, I raised the query as to the propriety of the proceedings both before me and in the court *a quo*. Advocate Mapuranga conceded that the proceedings were a legal nullity considering that judgment had been obtained in proceedings where two litigants were already dead and not substituted. He submitted that this was an appropriate case to invoke the provisions of s 25 of the Supreme Court Act [*Chapter 7:13*]. He pointed out in the process that a judgment that could be executed against the second and third respondents had been irregularly obtained.

[1 2] On the contrary, Mr *Chakanyuka* took a different view. He contended that the court *a quo* was alive to the fact that the second and third respondents were late. It therefore took care to make no order affecting their deceased estates. The proceedings in the court *a quo* were therefore not vitiated by the mere citation of both deceased persons without substitution.

[13] Mr Kudyakwenzara who is a self-actor submitted that he has since substituted the second respondent and is ready to carry on with the hearing.

ANALYSIS AND DETERMINATION

[14] The adage that dead men tell no tales is apt. The second and third respondents were therefore incapacitated by death. In that state they could no longer participate in the affairs of this world. They thus could neither appear nor be heard in their personal

capacities by the court *a quo* on any matters affecting their deceased estates. The *audi altera paterm* rule which forms the bedrock of our legal system requires that every litigant be heard before the determination of any legal suit or application. In *Reserve Bank of Zimbabwe v Siwawa's Estate's Executor* 1965 (1) ZLR 185 at 188F – G where the deceased employee had died before judgment and counsel for the employer sought to proceed with the hearing regardless of the deceased's demise, GUBBAY CJ had this to say:

> "Of course, the ensuing death altered the situation. There cannot now be a hearing to determine whether or not the contract of employment should be terminated. No disciplinary proceedings under the Code of Conduct can be brought against the deceased. He cannot be heard in his defence. And prior to death he made no admission of misconduct. To hold a hearing on the issue would be a breach both of the *audi alteram partem* rule and s 18(9) of the Constitution of Zimbabwe. It would be akin to prosecuting a dead accused for an offence alleged to have been committed during his lifetime. Indeed, an accused who died during the course of a trial upon a charge he denied could not be found guilty. Death ends the proceedings even to the extent that where an accused dies after noting an appeal against conviction, the action does not survive unless a fine had been imposed which might have to be paid out of the estate. In that event, the executor may be allowed to appeal. See *R v Tremearne* 1917 NPD 117 at 121; S *v P* 1972 (2) SA 513 (NC) at 514D; S *v Molotsi* 1976 (2) SA 404 (O) at 406 D-F; S *v January* 1994 (2) SACR 801 (A) at 809 h-i. (My emphasis).

[15] I might as well add, that s 29 as read with s 30 of the Supreme Court Act confers on every litigant the right to be present and to be heard in any legal proceedings. It is however not a legal requirement that one appears in person. The litigant may appear and be heard by proxy according to the prevailing laws.

[16] If death terminates legal proceedings, it stands to reason that no proceedings can be initiated against a dead person or the person's deceased estate without following laid down procedures. The death of a person while final, does not however sound the death knell for the deceased person's estate. The Supreme Court Rules do not expressly

provide a remedy of substitution to facilitate proxy representation of the deceased estate. There is therefore, need to have recourse to the High Court Rules 2021 in terms of r 73 which permits recourse to the High Court Rules where there is a lacuna in the domestic Rules. The rule provides as follows:

> ***"73.Application of High Court rules***
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> In any matter not dealt with in these rules, the practice and procedure of the Supreme Court shall, subject to any direction to the contrary by the court or a judge, follow, as closely as may be, the practice and procedure of the High Court in terms of the High Court Act [*Chapter 7:06*] and the High Court Rules."

[17] Rule 32 (7) and (8) of the High Court Rules 2021 provides for the substitution of a party who dies during legal proceedings to avert the legal proceedings dying with the deceased party.

(7) No proceedings shall terminate solely as a result of the death, marriage or other change of status of any person, unless the proceedings are thereby extinguished.

(8) If, as a result of an event referred to in sub rule (7), 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 sub rule (10), the proceedings shall continue with the person so joined or substituted, as the case may be, as if he or she 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;

[18] The termination of the proceedings upon pronouncement of judgment by the court *a quo* effectively shut the door against both deceased litigants before they could be heard by proxy. This rendered serious prejudice to their respective deceased estates and beneficiaries. The conduct of proceedings without substitution of deceased litigants constitutes a fatal procedural irregularity warranting the intervention of a Supreme Court judge in terms of s 25 of the Supreme Court Act which provides as follows:

> "**25 Review powers**
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> (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
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> (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.
>
> (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination."

[19] The import and effect of the above section is lucid and self-explanatory, it needs no further elucidation. The long and short of it all is that the section confers on the Supreme Court the same powers of review as exercised by the High Court.

DISPOSITION

[19] Considering that the institution of judicial proceedings against a dead person without substitution constitutes a fatal procedural irregularity, the proceedings before the court

a quo cannot stand. The matter will have to be remitted for a hearing *de novo* before a different judge as the initial presiding judge's vision is already clouded by his quashed judgment.

COSTS

[20] As the issue of the fatal procedural irregularity was raised by the court, neither party deserves an award of costs.

[21] In the result, by virtue of the powers conferred upon a judge of this Court in terms of s 25 of the Supreme Court Act [*Chapter 7:13*], it is accordingly ordered that:

1. The judgment of the High Court under Case Number 2640/16 that is to say judgment number HH 644/20 be and is hereby quashed and set aside.
2. The matter is remitted to the High Court for a hearing *de novo* before a different judge.
3. There is no order as to costs.

Nyakudanga Law Chambers, applicant's legal practitioners.
Messrs Mutetwa & Nyambirai Legal Practitioners, 1st respondent's legal practitioners.