ASHLEY KADIRA N.O
versus
CLADIUS NHEMWA N.O
and
JONATHAN SAMUKANGE N.O
and
THE MASTER OF THE HIGH COURT
(DR 2909/92 AND DR 151/21)
and
MARTIN THODLANA
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 15 June & 7 September 2022

Opposed Matter

Ms *G Ganda*, for the applicant
Mr *K S Shamu*, for first respondent
No appearance for second respondent
No appearance for third respondent
Ms *E Mudede*, for fourth respondent
No appearance for fifth respondent

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

"IT IS ORDERED THAT:

1. The sale agreement entered between the 4th respondent and the late Samson Katsande in his capacity as the then executor of the estate of the late Christian Tatenda Kadira in respect of stand 77, the Grange, Harare, be declared a nullity.
2. The reversal of the transfer from the late Christian Kadira to the 4th respondent
3. The title deed 2004/2001 be and is hereby cancelled.
4. The 4th respondent to surrender title deed 2004/2001 to the 5th respondent within 48 hours of service of the order by the applicant's legal practitioners for the 5th respondent to endorse cancellation on the deed.
5. The 4th respondent shall bear costs of suit on a legal practitioner client scale, should he oppose the application."

The brief background to this matter is that the late Christian Tatenda Kadira nee Katsande was the registered owner of several properties at the time of her death on 12 October 1992. She was survived by her husband Richard Kadira and two children, Tendai Ashley Kadira and Simba Theodore Kadira. Upon her death, Mr Samson Katsande, her father was appointed executor.

It is common knowledge that the properties owned by the late Christian Tatenda Kadira had been purchased by her father and registered in her name as he had done for his other children. On 25 January 2016, Samson Kadira and his two children executed and filed renunciations of inheritance in the estate of the late Christian Tatenda Kadira, in favour of Samson Katsande, her father. Samson Katsande also passed on and the applicant was appointed executor in his late mother's estate as it had not yet been wound up.

One of the properties owned by the late Christian Tatenda Kadira was stand 77 the Grange, Harare which she held under title deed DT 3152/79. In 2001, this property was disposed of by the executor Samson Katsande to the fourth respondent and is currently held under DT 2004/01. The applicant submitted that upon perusal of his mother's Estate file held by the fifth respondent, he noticed that stand 77, the Grange as well as another Marlborough property, had not been included in the estate account. A deeds search established that the Grange property had been transferred to the fourth respondent in 2001 at the instance of the now late Samson Katsande. It is averred that there is no proof of the sale having been authorized by the Master nor the Master's fees having been paid in respect of the transaction.

The relief set out above is sought on the basis that since the Grange property was disposed of without the approval of the Master, it is a nullity at law.

In the initial application, the applicant had cited Patrick Nyeperayi in his capacity as co-executor of the estate as the second respondent. A notice of amendment of this citation was made in terms of r 41(1). In which Patrick Nyeperayi N.O was substituted with Jonathan Samukange N.O who was in fact the co-executor of the estate late Samson Katsande and not Patrick Nyeperayi.

The first and second respondents are cited in their official capacities as co-executors of the estate late Samson Katsande. The third respondent is also cited in his representative capacity in compliance with r 61of the High Court Rules (2021) as this matter concerns deceased estates. The fourth respondent is cited as he is the current registered owner of stand 77, the Grange, Harare.

The fifth respondent is cited in his official capacity as the Registrar of Deeds who is the only one who will be able to carry out some the terms of the order sought.

At the hearing, I granted the application for condonation of late filing of the first respondent's notice of opposition filed under case number HC 7047/21 by consent of the parties and incorporated the notice of opposition which was already filed of record.

This application is opposed by the first and fourth respondents. The first respondent raised three points *in limine* as follows;

1. That the applicant has lack of substantial interest in the issue at hand and cannot approach this court or that he has no *locus standi*
2. That the matter has prescribed
3. That the founding affidavit is defective.

The fourth respondent joined issue with the point on prescription. I heard the parties on the points in *limine* and reserved my ruling. This is it and I deal with each point, in turn below.

Whether the applicant has locus standi to bring this matter

Mr *Shamu* submitted that it is trite that for a party to institute proceedings, before the court, it needs to have a real and substantial interest in the matter. Reference was made to the case of *Stevenson* v *Minister of Local Government & National Housing & ORS* SC 38/02.

In this case as Richard Kadira, Tendai Ashley Kadira and Theodore Simba Tsvakai Kadiro renounced any benefit accruing to the estate of the late Christian Tatenda Kadira through the renunciations appearing on pp 17 to 19 of the record. It was argued that this had extinguished any real or substantial interest they may have in the estate of the late Christian Tatenda Kadira.

The letter written to The Master, on behalf of the Kadiras which is on record p 20 which seeks to withdraw the renunciations of inheritance on the basis that they had made their renunciations on condition that the late Samson Katsande would set up a trust and donate the estate property and his other property to the trust for the sole benefit of all his grandchildren is alleged to be unhelpful to the Kadiras. This is so, because the renunciations do not include this condition and this letter comes some five years after the renunciations. Mr *Shamu* argued that he who alleges must prove and yet the applicant has not placed anything before the court to prove the assertion of conditional renunciation of benefits in the estate of the late Christian Tatenda Kadira.

Furthermore, it was contended that the Kadiras are bound by the *caveat subscriptor* rule, having signed renouncing their benefits, they are bound.

Ms *Ganda* submitted that the first respondent has misconstrued the role in which the applicant has approached the court. She explained that there are two hats worn by Ashley Kadira. In the first place he is the son of the late Christian Tatenda Kadira and a potential beneficiary to the estate. The second is that, he is the now executor of the estate of the late Christian Tatenda Kadira. Each role was said to carry its own rights and obligations. In this matter the applicant's founding affidavit in para 1 of p 8 is said to make clear that he is approaching the court in his capacity as executor of the estate of his late mother and not in his personal capacity. This was said to explain why the other potential beneficiaries of the estate have not been made part of the application.

Furthermore, Ms Ganda enunciated that in this application, the applicant as executor is saying that when the late Christian Tatenda Kadira passed on, she had property she held in her name which was unlawfully transferred to the fourth respondent and she has a right or duty to recover it in the interests of the estate. It was contended that what is before the court is not the wish to inherit the property but that it be returned to the estate. Once returned, only then can the issue of the validity of the renunciations be determined. Ms Ganda went further to state that a beneficiary has an interest in estate property and not a right to the estate property as rights only arise when the estate account has been confirmed. She also averred that even if the renunciations of benefits are held to be valid, the late Samson Katsande had no right to recover or retain estate property and that duty falls squarely on the executor of the estate who in this case is the applicant.

In the case of *Stevenson* v *Minister of Local Government and National Housing supra* the issue of *locus standi* was adequately covered as follows;

> "Similarly, on the issue of *locus standi* to file an application, the learned authors say the following at p 364:
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> "As in the case of a summons, it must appear from the application that the applicant has an interest or special reason entitling him to bring the application – that he has *locus standi* in the matter."

In many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as "a real and substantial interest" or as "a direct and substantial interest". See, for example, *United Watch & Diamond Co (Pty) Ltd and Ors* v *Disa Hotels Ltd and Anor* 1972 (4) SA 409 (C) at 415; *P E Bosman Transport Works Committee & Ors* v *Piet*

Bosman Transport (Pty) Ltd 1980 (4) SA 801 (T) at 804B; *Zimbabwe Teachers Association & Ors* v *Minister of Education and Culture* 1990 (2) ZLR 48 (HC); and *Jacobs En 'n Ander v Waks En Andere* 1992 (1) SA 521 (A)."

In *casu,* the applicant specifically and adequately addresses his *locus standi* in his founding affidavit when he says,

> "1. I am the applicant in this matter in my capacity as the executor of the estate of my late mother, Christian Tatenda Kadira (nee Katsande). Please find attached hereto the letters of administration marked Annexure A."

It is clear that the applicant is not approaching the court in his capacity as a potential beneficiary of the estate late Christian Tatenda Kadira but as executor of the estate. In the case of *Tryphine Sibanda* v *Libati Moyo & Ors* HB 51/21, the position of the law showing the *locus standi* of an executor was spelt out as follows,

> "In terms of our law, and in accordance with the provisions of section 25 of the Administration of Estates Act (Chapter6:01), a deceased estate is represented by an executor or executrix duly appointed and issued with letters of administration by the Master. An executor accepts the position of legal representative of the deceased with all the rights and obligations attached to that position. It follows that because the deceased estate is vested in the executor, he is the only person who has *locus standi* to bring any action relative to property belonging to the deceased estate. Any person who purports to institute proceedings on behalf of a deceased estate without the requisite authority does not enjoy the right of audience before a competent court. Authority to institute proceedings on behalf of a deceased estate derives from the provisions of the Administration of Estates Act."

It is without any doubt clear the applicant, as executor has *locus standi* to bring this application. The issue of renunciation of benefit relied on by the first respondent, does not arise at this point. I find no merit in this point in *limine.*

Whether this matter has prescribed

Mr *Shamu* submitted that the claim has prescribed as the immovable property was sold on 9 March 2001, well over 20 years ago. It was argued that in terms of the Prescription Act, [*Chapter 8:11*] in s 15 (d) as read with s 2, in the instance of a debt, a claim should be lodged within 3 years yet applicant waited for over 20 years to bring his claim. It was prayed that the claim be dismissed with costs.

Ms *Mudede* associated herself with the first respondent's submissions.

Ms *Ganda s*ubmitted that for the Prescription Act to apply as alleged, the debt itself must be legal as no rights can flow from a nullity at law. The Master's report on p 143 of record which states that the property in dispute was never declared as an estate asset on the executor's inventory and no authority to sell the property was ever granted by the Master nor were the proceeds from the sale accounted for is relied on to show the illegality in the transaction in issue. It was argued therefore that prescription cannot be an issue at this juncture.

Additionally, Ms *Ganda* submitted that since the transaction was a sale of estate property and the law says 4% should be paid as Master's fees, and if applicable, estate duty is levied on the estate, s 15 of the Prescription Act cannot apply as payment is prescribed by an enactment. Further, it was argued that even s 4 of the Prescription Act which provides for acquisitive prescription where title has been held for an uninterrupted period of thirty years is not applicable as the property in issue has only been held by the fourth respondent for only twenty-two years from 2021.

Clearly, s 4 of the Prescription Act is not applicable in *casu* as it provides as follows;

> **"Acquisition of things by prescription**
> Subject to this Part and Part V, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for—
> (*a*) an uninterrupted period of thirty years; or
> (*b*) a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years."

The first and fourth respondent were right not to rely on this provision as the period *in casu* falls far short of the thirty years prescribed.

The Prescription Act defines a debt in s 2 as follows; "debt", without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

S 15(d) relied on by the first respondent provides as follows;

> **"Periods of prescription of debts**
> The period of prescription of a debt shall be—
> (*d*) except where any enactment provides otherwise, three years, in the case of any other debt."

In the case of *Ndlovu* v *Ndlovu & Anor* 2013 (1) ZLR 110, the Honourable NDOU J dealt with a case wherein the applicant sought a declaratory order to the effect that the purported sale of his house to the first defendant was unlawful and void and for an order restoring possession of the

house to him. The application was made well over three years after the first defendant had taken possession of the house and the issue was whether the claim had prescribed in terms of the Prescription Act.

The Honourable NDOU J distinguished between a debt as defined in s 2 of the Prescription Act and public rights. His reasoning which I fully associate with went as follows:

> "The point worth noting in this definition of "debt' is that the suit or claim must be "by reason of obligation" on the part of the debtor arising from the stated bases. In my view, a declaratory order is a remedy to secure the public interest of certainty or correct legal position. Such a remedy cannot prescribe – *Oertel NNO* v *Director of Local Government* 1981 (4) SA 491 (T) at 492. In this case the court held –
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> > "Public rights are excluded from the operation of the Prescription Act … and "debt" in the Act must be necessarily restricted to such claims as arisen in the field of private law. Whilst every debt encompasses an obligation not every obligation constitutes a debt for the purposes of the Prescription Act."

Further the claim is based on the fact that sale is null and void *ab initio*. As stated by Lord Denning in *MacFoy* v *United Africa Co. Ltd* (1961) ALL ER 1169 (PC) at 1172 –

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is convenient to have the court declare it to be so … you cannot put something on nothing and expect it to stay there. It will collapse …" – *Ngani* v *Mbanje & Anor* 1987 (2) ZLR 111 (SC) at 115E – F."

In casu, the application is based on the fact that the sale is null and void ab initio on account of the sale of estate property which was never declared by the then executor as estate property in the inventory having been sold without the Master's authority and the proceeds of the sale not having been accounted for. Further an illegality flows from the nonpayment of the 4% Master's fees and estate duty if applicable.

This, in my considered opinion, is not a case where the Prescription Act would be applicable as alleged. I find no merit in this point *in limine* too.

Whether the founding affidavit is defective

Mr *Shamu* submitted that as a general rule an application stands or falls on the founding affidavit as stated in the case of *Muchini v Adams &Ors* SC 47/13. In *casu* the applicant instituted proceedings but wrongly cited Patrick Nyeperayi N.O as second respondent. This citation was amended and substituted with that of Jonathan Samukange N.O. The averments in the founding affidavit are alleged not to be against the now second respondent, co-executor Jonathan

Samukange N.O who has an interest in the matter but cannot participate due to the defect in the founding affidavit. It was argued that the only way forward is to withdraw the application and file a fresh application. It was prayed that the application should be struck off the roll.

Ms *Ganda* submitted Patrick Nyeperayi had been cited in his representative capacity and was aptly cited as co-executor of the estate late Samson Katsande. This mistake is alleged to have been caused by misrepresentations by Mr Nyeperayi himself and was corrected as soon as the error was discovered. It was averred that there was no prejudice as Mr Samukange was served with the application after the substitution and he was given an opportunity to respond. Further the other co-executor is said to have been actively responding to the matter so fully preserving the interests of the estate.

Ms *Ganda* contended that the second respondent is pointed out with sufficient accuracy so as not to render the founding affidavit defective as per the case of *Masuku* v *Delta Beverages* 2012 (2) ZLR 112 (H).

In para 4 of p 9 of the record, this is how the second respondent is described;

> "The 2nd respondent, Patrick Nyeperayi, the co-executor off (sic) my late grandfather's estate cited herein in his official capacity."

It is clear that the applicant is not cited in his personal capacity but as co-executor of the estate of the late Samson Katsande. Even the citation on p 8 of record says, "Patrick Nyeperayi N.O" The Notice of Amendment made in terms of r 41(1) makes clear that the citation of Patrick Nyeperayi N.O was to be deleted and substituted with Jonathan Samukange N.O.

In the case of *Masuku* v *Delta Beverages supra*, it was held that in general, proceedings against a non-existent entity are void *ab initio* and therefore a nullity. However, where there is an entity which through some error or omission is not accurately cited, but it is pointed out with sufficient accuracy, the summons will not be defective. *In casu*, though the case deals with an application and the issue at hand is about the defectiveness of the affidavit, this position can safely be extended to hold that the office of the co-executor is the one cited and throughout the papers show that second respondent, either as originally cited or as substituted, is sued in that capacity.

There appears to have been no bar to the substitute second respondent filing papers in opposition, if he so wished. There seems to be no prejudice too as any position he may have wished to advance, would have been advanced by the first respondent as they represent the same

estate as co-executors, This, to me, is the kind of preliminary point which was just taken fully knowing that it would not resolve the matter at all, this matter would still proceed to be heard even with only the first respondent representing the estate of the late Samson Katsande.

In *Telecel Zimbabwe (Pvt) Ltd* v *POTRAZ & Ors* HH 446/15 MATHONSI J, as he then was, aptly expressed my sentiments when he said:

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal practitioners who have no confidence in their client's defence *viz-a-viz* the substance of the dispute, in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners. In future, it may be necessary to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs *de bonis propiis*."

I accordingly find no merit in this point *in limine* too.

Consequently, there being no merit in the points *in limine,* I dismiss them all and direct the Registrar to set this matter down for hearing on the merits at the next available date.

Honey and Blanckenberg, applicant's legal practitioners
C Nhemwa & Associates, first respondent's legal practitioners
Mudede & Associates, fourth respondent's legal practitioners