NOREEN CHIKAKA N.O
versus
MISHECK MUKARATI
and
LOVEMORE MUKARATI
and
THE MASTER OF THE HIGH COURT N.O
and
CHITUNGWIZA MUNICIPALITY
and
ANDERSON REMUYANGA
and
LYDIA CHIKARA

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 19 & 20 February 2019

Opposed Application

D.V Kufaruwenga for the applicant
No appearance for the respondents

CHIRAWU-MUGOMBA J: The applicant in this matter was an executor in the estate of the late David Chirikure Mukarati who passed away on the 22nd of October 1994. Despite the legal requirement that the Master be notified of such death within fourteen days after its occurrence through a death notice as per s 5 of the Administration of Estates Act [*Chapter 6:01*], "the Act", the estate in *casu* was only registered on the 7th of March 2016, a period of twenty two years after. Although the applicant referred to herself as the executrix dative, the facts show that she had discharged her obligations as executor. The deceased left an immovable property situated in Chitungwiza called house number 16286, Unit M, Seke, Chitungwiza. At the time of his death, he was survived by two wives and many children among them the first and second respondents. The distribution plan reveals that the applicant allocated the immovable property to the deceased's wives in equal shares, no doubt relying on s 68(2) (ii) of the Act. In her notes that appear in the distribution plan the applicant stated the following, *"The deceased passed on leaving his two wives Lydia Chikara and Margaret*

Ellen Mbono. The two wives were sharing the matrimonial home and the deceased passed on whilst they were staying together at house no. 16286 Unit M. Unfortuetly (sic) Margret Ellen Mbono passed away before finalisation of her husband's estate. She died on the 7th November (sic) 2005.' The plan was confirmed by the third respondent on the 4th of November 2016.

The applicant proceeded to seek the authority of the third respondent in terms of s 120 of the Act to dispose of the immovable property other than by way of public auction which was duly granted. The property was duly disposed of by sale to the fifth respondent. The fourth respondent subsequently consented to the cession and as matters stand, the rights, title and interest in the property are in the name of the fifth respondent.

In May 2017, the first and second respondents filed an application under case number HC 3923/17 being one for condonation of late filing of an application for review. They chronicled in the application a series of complaints that they had raised with the third respondent in relation to the administration of the estate of their late father. They averred that they had prospects of success in the intended application for review on the basis that the applicant had wrongly applied the law. In one letter authored by the applicant, she wrongly made reference to s 3A of the Deceased Estates Succession Act [*Chapter 6:02]* as being applicable to their late father's estate and yet he passed away before the 1st of November 1997 and therefore that section could not apply to his estate. They also raised issues related to possible fraud in the endorsement of names on the property at the offices of the fourth respondent but these are inconsequential.

The applicant opposed the application for condonation. On the 21st of June 2017, the first and second respondents filed their answering affidavits and thereafter they did nothing to pursue their application. The applicant was thus entitled in terms of Order 32 R 236(4) (b) to apply for dismissal of the applicant's claim for want of prosecution.

In their notice of opposition to the claim, the first and second respondents averred as follows: - that the third respondent did not consider their objections contrary to s 52(9) of the Act; that the fourth respondent's conduct in effecting cession was questionable in the absence of a court order. They conceded that a period of seventeen months had lapsed between the filing of their answering affidavit and the current application. However, they faced financial challenges; that the applicant could also have set down the matter and that r 4C allows the court to condone a departure from the rules.

In her answering affidavit, the applicant dismissed reliance by the first and second respondents on s 52(9) of the Act since it provides that any person who is aggrieved with the decision of the Master has a period of 30 days to apply to have the direction set aside. It is however, the applicant's response on the applicable law that deserves scrutiny. Applicant stated as follows;

> "2.4 Secondly, because the deceased **David Chirikure Mukarati** was customarily married to two wives at the time of his death, his estate must, in terms of section 68G of the **Administration of Estates Act** (Chapter 6:01), devolve in terms of Part 111 of the **Act** which deals with customary law estates.
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> 2.5 **Section 68F(2) (c) (ii)** of the **Act** in clear and unequivocal language, provides that if the Deceased is survived by two or more wives who lived in the same house at the time of Deceased's death, the wives will be entitled to receive joint ownership of such house when the Deceased's estate falls for distribution.
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> 2.6 Because the Deceased's two surviving spouses **Lydia Chikara** and **Ellen Mbono** lived together at House no. 16286 Unit M, Seke, Chitungwiza, at the time of the Deceased's death, I awarded joint ownership of the house to the two in compliance with the law. This decision was confirmed by the 3rd Respondent (The Master).
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> 2.7 I cannot see how the 1st and 2nd Respondents can succeed in their half-hearted and feeble quest to set aside the decision to award House no. 16286 Unit M, Seke, Chitungwiza to the Deceased's two surviving spouses when such decision is firmly anchored in the law."

Rule 236 (4) provides:

> "Where the applicant has filed an answering affidavit in response to the respondent's opposing affidavit but has not, within a month thereafter, set the matter down for hearing, the respondent, on notice to the applicant, may either.
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> (a) set the matter down for hearing in terms of rule 223; or
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> (b) make a chamber application to dismiss the matter for want of prosecution, and the judge may order the matter to be dismissed with costs or make such other order on such terms as he thinks fit."

There are no guidelines in terms of what option an applicant may select. The election is upon the applicant as to which option to take. The applicant was well within her rights to seek dismissal of the application for condonation for lack of prosecution- See -*The Permanent Secretary, Ministry of Higher and Tertiary Education* v *College Lecturers Association of Zimbabwe & Ors* HH 628/15. This is buoyed by the first and second respondents' admitted that a period of sixteen months and counting (in terms of the rules they had one month after the filing of the answering affidavit to set the matter down for hearing) had lapsed. In *Guardforce Investments (Pvt) Ltd* v *Ndlovu and Ors* SC 24/16, CHIDYAUSIKU CJ (as he then was), cited by the applicant in the heads of argument, stated as follows:-

> "The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration –
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> (a) the length of the delay and the explanation thereof;
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> (b) the prospects of success on the merits;
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> (c) the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time".

The first and second respondents were barred for failure to file heads of argument. Despite this and their failure to attend having been served with notice of set-down, R238 (2b) gives discretion to a court or a judge to deal with the matter on the merits or direct that it be set down on the unopposed roll. I opted to deal with the matter on the merits. *D. V Kufaruwenga* for the applicants stood by the papers filed of record and prayed for an order in terms of the draft.

Although the length of the delay seems inordinate, I cannot outright dismiss the explanation given by the first and second respondents that they lacked means to engage a legal practitioner. Although legal aid is available, every litigant has a right to be represented by a legal practitioner of their choice. It is also worth noting that dismissing a matter for lack of prosecution is a drastic remedy that should not be granted lightly. It potentially infringes on the rights set out in s 69 of the 2013 Constitution – right to a fair hearing. It is however the prospects of success on the merits that I consider to be important in this matter. One of the major considerations in an application for condonation is that of the prospects of success in the main case. As already stated, the deceased passed away on the 22nd of October 1994. The Administration of Estates Act amendment number 6/1997 (commonly referred to as the new law of inheritance) states as follows:-

> **"6. Act not to affect distribution of estates of persons who died before its date of commencement**
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> The amendments to the principal Act effected by sections *three* and *five* shall not have effect in relation to the estate of any person who died before the date of commencement of this Act."

The commencement date of the amendment was gazetted in statutory instrument 233/97 published in G.N 429/97 on the 25th of July 2007 as the 1st of November 1997. Section 3 of the Act that the applicant purports to have used to allocate the house to the two wives deals with estates of persons subject to customary law **but only for estates of persons who died**

on or after the 1st of November 1997 (my emphasis). The third respondent seemingly erred in accepting a distribution plan based on the new law of inheritance. Unless and until the commencement date is repealed or struck down, the 'old' law of inheritance still applies to estates of persons who died before the 1st of November 1997. The applicable law is/was in terms of the then s 68 of the Act which read(s) as follows:-

> ***Estates of Africans Married by African Custom***
>
> **"68 When estate of African to be dealt with according to usage of his tribe**
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> (1) If any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.
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> (2) If any controversies or questions arise among his relatives or reputed relatives regarding the distribution of the property left by him, such controversies or questions shall be determined in the speediest and least expensive manner consistent with real and substantial justice according to African usages and customs by the provincial magistrate or a senior magistrate of the province in which the deceased ordinarily resided at the time of his death, who shall call and summon the parties concerned before him and take and record evidence of such African usages and customs, which evidence he may supplement from his own knowledge.
>
> (3) Every decision of a magistrate under this section shall be subject to an appeal to the High Court at the instance of any person alleging an interest in the distribution of such property."

The repealed section is still relevant in so far as it applies to estates of persons who died before the 1st of November 1997. The dominant inheritance pattern under customary law was based on the male primogeniture rule, meaning that the eldest son was the preferred heir. [1]On that basis, in my view, the first and second respondents have prospects of success in their application for condonation.

Regarding the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time, it is pertinent to point out to the fact that the applicant was an executor. I have deliberately used the term was because in my view she has discharged her obligations as executor unless the decision of the third respondent in confirming the estate account is set aside. The immovable property is already in the name of the fifth respondent. The applicant has not alleged that she has not been paid her dues as executor.

The decision whether or not to grant an application for dismissal for lack of prosecution lies with the court. In my view, the application must fail. I have considered that R236 (4) (b) gives me discretion to make such other order on such terms as I deem fit. In

[1] See – Chirawu S (WLSA) – *Principles of the law of succession in Zimbabwe* (2015) at page 89

consideration of the fact that the application for condonation in HC 3923/17 ought to be brought to finality, I will put the first and second respondents to terms in respect of that matter lest it is left open for a long period. I will also put the applicant to terms in the event that the first and second respondents do not abide by the order.

The Registrar is directed to bring this judgement to the attention of the third respondent.

DISPOSITION

It is ordered as follows:-

1. The application be and is hereby dismissed with no order as to costs.
2. The 1st and 2nd respondents are ordered to set down HC3923/17 in which they are the 1st and 2nd applicants respectively within 30 days from the date of this order.
3. In the event that the 1st and 2nd respondents fail to comply with paragraph 2 of this order, the applicant may set down HC 3923/17 in terms of Rule 223 of the Rules of the High Court of Zimbabwe.

Dzimba, Jaravaza and Associates, applicant's legal practitioners
Muchirewesi and Zvenyika, 1st and 2nd respondent's legal practitioners