

FURURE KATIRAWU
versus
DAVID KATIRAWU
and
FLORENCE MOYO
AND THE MASTER OF THE HIGH COURT
and
THE DIRECTOR OF HOUSING
COMMUNITY SERVICES
CITY OF HARARE.

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 17 July and 8 August 2007.

Opposed Application

Mr W Bherebende for applicant
1st respondent in default.
Mr L Mauwa for 2nd respondent.

MAKARAU JP: Mairosi Katirawu died in Harare on 25 July 2005. He left an estate that included interest in a piece of land whose street address is no 23 Gora Street, New Mabvuku, Harare. He was survived by the applicant, as surviving spouse, two minor children and two adult children, one of whom is the first respondent.

On 20 June 2006, the first respondent obtained a death certificate for the late Mairosi Katirawu from the Harare Central Registry. On the death certificate, the deceased was described as a single retired man of 70 whose country of birth was Zambia. On 15 August, 2005, another death certificate had been issued in respect of the deceased in which he was correctly described as a married man aged 70.

It is on account of the issuance of these two certificates that the events that I will narrate hereafter were possible and in my view, a tightening of the registration of deaths and the issuance of copies thereof by the relevant authorities will greatly assist in curbing fraudulent activities regarding deceased estates.

Armed with the second death certificate and one that incorrectly described the deceased as single, the first respondent had the estate of the deceased registered with the Magistrates' Court? The first respondent misrepresented to the Assistant Master firstly that he was Never

Patinampamba, a son of the deceased and secondly, that he was the only beneficiary to the estate. In due course, he was granted letters of administration appointing him executor dative. He was also given the Master's consent to sell the immovable property in the estate which he did, selling the property to the second respondent. In concluding the agreement of sale with the second respondent, the first accused still masqueraded as one Never Patinampamba.

Rights in the property were in due course ceded to the second respondent.

On 19 February 2007, the first respondent was arraigned before the magistrates court charged with one count of fraud and one count of forgery arising from his dealings with the estate of the late Mairosi Katirawu. He pleaded guilty to both counts and was sentenced to 10 years imprisonment with 4 years suspended on conditions of good behaviour.

Realizing that the property is still registered in the name of the second respondent, the applicant filed this application praying for an order declaring the appointment of the first respondent as executor dative and the subsequent sale of the immovable property to the second respondent null and void and that the property be registered in the name of the estate of the late Mairosi Katirawu.

The application was opposed by the second respondent. In her opposing affidavit, the second respondent admitted that she had purchased rights in the property after she was shown letters of administration issued in favour of Never Patinampamba. She thus claims to be an innocent purchaser of rights in the property and further deny that she ever dealt with the first respondent.

While there is a dispute as to whether it was Never Patinampamba or the first respondent that sold the property to the second respondent, I am satisfied that on the evidence before me I can be robust and resolve this conflict of facts in favour of the applicant without doing an injustice to the respondents. (*See Zimbabwe Bonded Fibreglass v Peech* 1987 (2) ZLR 338 (SC)).

Attached to the applicant's papers was a copy of the record of proceedings in the magistrates' court, where the first accused pleaded guilty to forging the death certificate of the late Mairosi Katirawu and to defrauding the second respondent by misrepresenting that he had the requisite capacity and authority to dispose of the property. In such proceedings, the first respondent admitted that he misrepresented to the second respondent that he was Never Patinampamba. I am thus satisfied that it was the first respondent that the second respondent dealt with. I am fortified in coming to this finding by the fact that the burden of proof in a

criminal matter is higher than that in a civil trial. There is therefore abundant evidence before me that it was the first respondent that defrauded the second respondent.

In her heads of argument, the second respondent raised a legal point that has exercised my mind to some degree. It is whether the applicant has the *locus standi* to bring an application for the removal of an executor and to compel reversal of the cession of rights in favour of the second respondent.

The applicant has not in her papers alleged that she is the executor of the estate of the late Mairosi Katirawu.

The applicant is clearly a beneficiary in the estate of the late Mairosi Katirawu as the surviving spouse. The issue that then falls for determination is whether a beneficiary has no capacity at law to bring proceedings for the removal of an executor on any ground because the law gives the Master of this court the power to approach a judge in chambers for the removal of an executor.

Section 116 of the Administration of Estates' Act Cap 6.01 provides:

- (1) the Master may apply to a judge in chambers for the removal of an executor, tutor or curator from his office on the ground –
 - (a) that he was not qualified for appointment to such office or that his appointment was for any reason illegal ,or
 - (b)

It would appear to me that the wording of the above section is wide enough to empower the Master to have an executor removed from office on the ground that the appointment was procured by fraud as occurred in this matter. The issue however remains whether a person in the position of the applicant can approach court to have an executor removed from office.

It is trite that an executor of an estate may be removed from office at common law. The grounds for removing an executor from office at common law are inexhaustive as they are based on a broad principle.

In *Bonsma NO v Meaker NO and Others* 1973 (2) RLR 16 at 21, GOLDIN J adopted the summary of the law on the subject matter on what SOLOMON ACJ had to say in *Sackville West v Norse & Another* 1925 AD 516 at page 527 in the following words:

“There is very little authority in our law with respect to the grounds which justify a Court in removing trustees from office, and what is still more strange is that there appears to have been an equal dearth of authority on this

subject in the law of England. The matter was however carefully considered in the case of *Lettersted v Broers* (9A.C. 371), which came before the Privy Council on appeal from the Supreme Court, and which has laid down broad principles by which, on this subject, Courts administering the Roman-Dutch law should be guided. In his judgment, Lord Blackburn says: ‘There is very little to be found to guide us in saying what are the cases requiring such a remedy, so little that their lordships are compelled to have recourse to general principles. The then quotes a passage from Story’s *Equitable Jurisprudence* (par.1298) as follows; ‘But in cases of positive misconduct Courts of equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy or conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity’”.

In my view, the net effect of the citation from the *Sackville West* case is to be found in the last sentence of the cited passage which reads:

“In exercising so delicate a jurisdiction as that of removing trustees, their lordships do not venture to lay down any general rule beyond the very broad principle above enunciated that their main guide must be the welfare of the beneficiaries.”

It has been held that under Roman Dutch Law, the court possess inherent power to remove a trustee or administrator (even one appointed under a will), on the ground that his continuance in office will prejudicially affect the future welfare of the estate entrusted to him. (See *Fey NO* and *Whiteford NO v Serfontein and Another* 1993 (2) SA 605 9(AD). In that case, the appeal court accepted as sound the reasoning by the trial court that:

“It would seem to me that the position of a trustee in insolvency is analogous to that of a trustee, administrator or executor in a deceased estate. He occupies a position of trust. Under the insolvency laws it is his function to liquidate the insolvent estate and account to creditors and the insolvent for his administration. In this respect, his fiduciary position differs little from that of an executor or administrator of the estate property. In my view, the Court has at common law the same power to remove a trustee in an insolvent estate as it has in respect of a trustee, or guardian or administrator in a deceased estate.”

In *Siziba v Siziba* HB 25/04, this court had occasion to discuss whether under s117 (1) of the Administration of Estates Act, any party other than the master may bring an application for the removal of an executor. The court held, and correctly so in my view, that the section does not empower any one else other than the master to seek the removal of an executor in terms of that section.

In *Van Niekerk NO v Master of the High Court* 1996 (2) ZLR 105 (SC) where MacNally JA was quite clear in that case that the Master's application was made, not under the common law, but specifically in terms of s 117(1), subsections (b) and (d), of the Act, namely:

"(b) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law"

and

"(d) that in his opinion such person is no longer suitable to hold such office."

While s117 (1) empowers the Master to approach the court for the removal of an executor for the listed grounds, in my view, such a power granted to the Master was not intended to take away the right of all those having an interest in the estate from approaching the court at common law to have the executor removed if they can establish to the satisfaction of the court that the continuance in office of the executor does not augur well for the future welfare of the estate and beneficiaries. The power granted to the Master by s117 is in my view complementary to the inherent power of the court at common law. In any event, if it was the intention of the legislature to revoke the common law power of the court in this regard, it would have done so in express language for the jurisdiction of the court is not ousted other than in clear language.

Applying the above law to the facts before me, it is my finding that the applicant as a beneficiary in the estate has the capacity to approach this court at common law to move the court for the removal of the first respondent as an executor. Her application was brought at common law as she alleging fraud. She is not alleging any of the grounds listed in s117 for the removal of the first respondent as executor of the estate.

Further, having established that the appointment of the first respondent as executor to the estate of the late Mairoso Katirawu was procured by fraud, the removal of the first respondent follows the finding for nothing legal can flow from a fraud. His appointment was null and void *ab initio* on account of the fraud. It is as if it was never made. It is a nothing and upon which nothing of consequence can hang.

In conclusion, the "rights" that the second respondent believes to have purchased and acquired from the first respondent are tainted by the same illegality and amount to nought by token of the same reasoning. It is as if there was never a sale between her and the first respondent and consequently, no rights can flow from a non- sale in her favour. The sale and the consequent cession of rights in her favour amount to nothing at law for nothing legal can flow from a fraud.

In the result, the application succeeds and I make the following order:

1. The appointment of the first respondent as executor dative in the estate of the Late Mairoso Katirawu is hereby set aside.

2. The cession of rights in no 23 Gora Street Mabvuku, Harare in favour of the second respondent is hereby set aside.
3. The fourth respondent is hereby ordered to within 7 days of service of this order upon him, restore the name of Mairosi Katirawu in his register as the holder of rights in No 23 Gora Street, Mabvuku, Harare.
4. The second respondent shall bear the costs of this application.

Mavhunga & Sigauke, applicant's legal practitioners.

Mutezo, Mushangwe & Company, second respondent's legal practitioners.