EDNA SONGORE
vs
JOSIAH GWEME
and
JOSHUA SONGORE
and
THE MASTER OF HIGH COURT

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 18 and 25 July and 16 October 2008

FAMILY LAW COURT-OPPOSED APPLICATION

D. Kufaruwenga, for applicant
I. Mabulala, for 1st and 2nd respondents

KUDYA J: This is an application for the review of the Master's decision of 3 September 2004 in which he approved the award of house number 1242 Unit A Chitungwiza (the immovable property) by Joshua Songore to Josiah Gweme. Josiah Gweme (the first respondent) counterclaimed for the eviction of the applicant from the immovable property.

The immovable property formed part of the estate of the late Zebediah Tapera Songore DRH 487/1991 who died on 5 May 1991. On 21 May 1991 his son Joshua Songore (the second respondent) was appointed the heir to the estate at an edict meeting held at the Harare Community Court attended by *inter alia* Edna Songore, the applicant. The deceased had two wives. These were Mirriem Songore, the first wife, who was Joshua's mother and the applicant. The two widows together with a brother, sister and an uncle of the deceased all declared the second respondent as the heir at the edict meeting of 21 May 1991.

The second respondent sold the rights in the property to Josiah Gweme (the first respondent) on 14 August 2002 for $2 million. The amount was paid in full in five instalments between 14 August and 10 December 2002 into the Commercial Bank of Zimbabwe account of the deceased's first wife.

The second respondent lodged the First and Final Administration Account and Distribution Plan with Assistant Master at the Harare Civil and Customary Law

Magistrates Court. He sought to distribute the immovable property in question to the first respondent. The applicant was awarded the property at Mukamba Business Centre in Wedza. The account was according to the Master's report of 11 July 2007 advertised and lay for inspection for 30 days. No objections were received and the Assistant Master at Harare Magistrates Court authorised the distribution on 3 September 2004.

The first and second respondents raised two preliminary points. The first was that the decision sought to be reviewed was made on 3 September 2004. The application for review was filed on 24 May 2007. It was made well out of the eight week period set out in Order 33 Rule 259 of the Rules of Court. The applicant did not seek condonation of the late filing of the application and it should accordingly be dismissed.

The applicant contended that she only became aware of the Master's decision approving the award of the property to the first respondent on 17 May 2007 when the Master's report of 6 June 2006 was availed to her legal practitioners. That report erroneously gave the date of approval of the liquidation and distribution account as 3 September 2005. It was also not approved on 2 September 2004 as averred by the second respondent in his opposing affidavit. The approval was actually given on 3 September 2004, as shown by the date stamp on annexure F of the applicant's opposing affidavit to the first respondent's counterclaim.

Mr. *Kufaruwenga,* for the applicant, submitted that the eight week period in Rule 259 started to run on the date on which the applicant became aware of the Master's approval and not on the date the approval was made. He contended that as the applicant became aware of the decision on 17 May 2007; her present application of 24 May 2007 was filed within one week of the eight week period. She was therefore not obliged to seek condonation.

The correctness of Mr. *Kufaruwenga's* submission is confirmed by MCNALLY JA in *Vrystaat Estates (Pvt) Ltd v President, Administrative Court &Ors* 1991 (1) ZLR 323 (SC) at 330B where he stated:

> "No authority is necessary for the proposition that the eight weeks cannot possibly apply to an applicant who does not even know of the decision for far longer than eight weeks after it was made, precisely because he was not informed of the

proceedings as he should have been……The appellant in this case has never had official notice".

See also *Sithole v City of Harare* 2002 (1) ZLR356 (H) at 358E-F.

Thus while Rule 259 refers to "within eight weeks of the termination of the suit, action or proceedings" the time starts to run from the date on which the applicant is notified of the decision she brings on review.

The undisputed facts demonstrate that on 23 June 2006, the applicant was in possession of the approved Final Liquidation and Distribution Account which had been approved by the Master but not the Master's report of 6 June 2006. She had sought for it from the two respondents' legal practitioners on 20 June 2006 together with the certificate of occupation, form of cession and memorandum of agreement of sale of first respondent. The letter from the respondents' legal practitioners to her legal practitioners of 14 May 2007 confirm as much. See annexure B and C of second respondent's opposing affidavit for which no answering affidavit disputing its correctness was ever filed by the applicant.

The applicant was aware of the Master's decision to award the property to first respondent by 23 June 2006 and not on 17 May 2007 as she claimed in her application. In terms of rule 259, she was obliged to bring the present application within eight weeks of her knowledge. See *Cluff Mineral Exploration(Zimbabwe) Ltd v Union Carbide Management Services (Pvt) Ltd & Ors* 1989 (3) ZLR 338 (SC) and *Clan Transport Company (Pvt) Ltd v Road Service Board & Anor* 1956 R&N 322 (SR). If she failed to do so she had to, on good cause shown, apply for condonation. See *Bishi v Secretary for Education* 1989(3) ZLR 240(H); *Jensen v Acavalos* 1993(1) ZLR 216 (S); *Kodzwa v Secretary for Health & Anor* 1999 (1) ZLR313 (S) at 314 H -315A and *Masuka v Chitungwiza Town Council & Anor* 1998 (1) ZLR 15 (H) at 30G and compare with *Jones v Strong* SC 67/2003 at page 4 which emphasized the need to seek condonation for a rescission under rule 63.

Mr. *Mabulala,* for the respondents, correctly submitted that in the absence of an application for condonation, the present application is a nullity. I would dismiss it on this basis.

The second preliminary point that was raised was that the applicant could not seek to review a report made to the Court by the Master but the decision of the Master that

she found unpalatable. Mr. *Kufaruwenga* conceded that the applicant could not seek the review of the report in question as it was merely an opinion which was not binding on the Court. He however submitted that the report was attached as proof that the Master had actually made the decision that was being impugned. It seems to me that the applicant had the opportunity to challenge the liquidation and distribution account in terms of section 52 (8) of the Administration of Estates Act [*Chapter 6:01*] and could approach the Court in terms of s 58 (9) (i) to seek redress. Failure on her part to act would render any future attempt to reverse the approved distribution and liquidation account nugatory.

The other preliminary points raised on whether the consequential relief she sought to have the executor removed from office for failure to bring to account other properties was competent fell by the wayside due to the concession made by Mr. *Kufaruwenga* that by the time the application was brought, the executor had been discharge by the Master in terms of s 52 (11) of the Administration of Estates Act. Mr. *Kufaruwenga* also conceded that the failure to cite Chitungwiza Municipality, the owners of the property in dispute was also fatal to the application.

It seems to me that the applicant does not have the *locus standi* to bring the present application. The second respondent was appointed an heir before the advent of Act No. 6 of 1997. At that time the deceased's estate vested in the heir who would inherit all the immovable estate property in his name. See *Magaya v Magaya* 1999(1) ZLR 100 (SC) at 115G-116A, *Seva & Ors v Dzuda* 1992 (2) ZLR 34 (SC) at 36D and *Masango v Masango* SC 66/86 at pages 2-3. He was responsible for the administration of the estate. He stood in the shoes of an executor. He was the sole representative of the estate. See *Clarke v Barnacle NO & Two Ors* 1958 R&N 358 (SR) at 349B -350A and *Mhlanga v Ndlovu* HB 54/2004 at p. 3-4.

A person in the shoes of the applicant could not even seek the removal of the heir, even under common law, as she was not even a residual heir. She thus lacked the *locus standi* to institute removal proceedings against him. She could only claim for maintenance from the deceased estate and other entitlements that are set out in *Jena v Nyemba* 1986 (1) ZLR 138 (SC) at 142A-C.

I deal with the application on the merits for completeness of the matter.

The basis for the review was that the Master in approving the sale to which he had not given his prior consent was fatal to the agreement of sale entered into between the executor and the present cession holder. It will be recalled that rights, title and interest in this municipal owned property were vested in the Estate of the Late Zebediah Tapera Songore. The second respondent was appointed the heir on 21 May 1991. Amongst the persons who appointed him was the applicant. Her averment that she was not consulted and that she was not considered as a possible executor was therefore incorrect. She was not the only surviving spouse. Mirriem was the elder wife of the deceased. She was the one who lived at the property in issue while the applicant resided at the Mukamba Business Centre in Wedza at the date of her husband's death. This is apparent from annexure E, the minutes compiled by the Master at the meeting of 25 April 2004, filed by the applicant. The heir at the time could inherit the property in his own name. But even if he could not and the provisions of section 68F (2) (c) (i) of the Administration of Estates Act introduced by Act No 6 of 1997 as read with section 3A (a) of the Deceased Estates Succession Act [*Chapter 6:02*] were applicable, the surviving spouse who resided in the house in question was Mirriem and not the applicant. The property would have devolved to Mirriem. In fact Mirriem agreed to the sale of the property in question to the first respondent and utilized the proceeds which were all deposited into her Jewel bank account.

It does not appear to me that the sale to the first respondent was void for lack of the Master's consent. The cases that I have been able to find in which section 120 of the Administration of Estates Act was applied such as *Logan v Morris NO & Ors* 1990 (2) ZLR 65 (SC)-the present section 120 was then section 117- did so in a matter in which the deceased had died testate. As worded it seems to me that the Master's approval applies in a case in which there is a will. In the present matter the deceased died intestate. The heir was thus entitled to dispose of the property as it devolved to him on his appointment.

The applicant has failed, on the merits, to demonstrate her entitlement to the property in question. I would have dismissed her application.

In his counterclaim, the first respondent demonstrated that he holds cession in the property. The applicant admits as much. He received cession for value. That cession was taken after the Master and the local authority had approved the transfer of

rights to him. He is entitled to enjoy the fruits of his investment. The applicant does not have any discernable defence to his claim. She has put him to unnecessary cost to have her evicted. She has not been honest in the conduct her defence. He is entitled to his costs on a higher scale.

I would grant him the relief he seeks together with the costs that he prayed for in both the main and counter application.

Accordingly, it is ordered that:

1. The application in convention is dismissed with costs.
2. The applicant and all those claiming occupation through her be and are hereby evicted from Stand No. 1242 Unit A Seke Chitungwiza within 48 hours of the service of this order upon her.
3. The applicant shall pay the first respondent's costs of the counter application on the scale of legal practitioner and client.

Dzimba Jaravaza and Associates, applicant's legal practitioners
Mabulala & Motsi, 1st and 2nd respondent's legal practitioners