

SILAYSE USENI
versus
ESNATH NYAMUPINGIDZA
and
THE MASTER OF THE HIGH COURT
and
ASSISTANT MASTER OF THE HIGH COURT
and
KADOMA CITY COUNCIL

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 16 March & 12 July 2023

Opposed Matter

P Nhokwara, for the applicant
M Nkomo, for the 1st respondent
No appearance for 2nd, 3rd and 4th respondents

MAXWELL J: Applicant approached this court seeking the following order; -

“IT IS ORDERED THAT

1. The appointment of 1ST Respondent as the Executor of the Estate late Leah Nyamazana DR KM 24/22 be and is hereby set aside.
2. The award of house number 22 Chiverenga Street Rimuka Kadoma to first Respondent be and is hereby set aside, consequently all acts done by the first respondent at fourth respondent including change of ownership through cession are null and void and set aside.
3. Cost of suit on a higher scale.”

Applicant was married to the first respondent’s brother, Wellington Dube, who passed away in 2018. She has been staying at the property called number 22 Chiverenga Street Rimuka, Kadoma (the property), which forms part of her late mother-in-law’s estate, the late Leah Nyamazana. First Respondent is Leah Nyamazana’s daughter and the executor of her estate. She inherited the property in terms of the first and final distribution account filed and approved by the third respondent. Applicant was aggrieved and seeks to have the appointment of first respondent as executor set aside. In her founding affidavit, applicant states that she made renovations to the property, extended the house thereon and put a perimeter wall on the house.

She alleged that First respondent fraudulently wound up the estate of her late mother-in-law without her knowledge. She stated that she has a claim to the estate of the late Leah Nyamazana on the basis that a share belonged to her husband. In addition, she justifies her claim on the basis that she made improvements on the property and therefore has a lien. She also claims an interest in both her late father-in-law and her late mother-in-law's estates.

In opposing the application, First Respondent stated that her late mother's estate was registered in July 2022 and that notices were published in the government gazette and local newspapers and no objections were raised. She further stated that there is no legal requirement to include a daughter-in-law in the registration of her late mother-in-law's estate. She submitted that the structures added by applicant are illegal as there was no approval from forth respondent and a penalty had to be paid for the unauthorized improvements. She disputed the allegations of fraud.

In heads of argument, applicant justifies her request for the removal of the executor on the basis of the common law. She relied on the case of *Katirawu v Katirawu* 2007 (2) ZLR 64 in which MAKARAU JA (as she then was) stated; -

“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 is alleging fraud. She is not alleging any of the grounds listed in s 117 for the removal of the first respondent as executor of the estate.”

She also referred to the case of *Muzungu & Others v Muzungu & Others* HH172/15 in which the court held that the appointment of the executrix having been influenced by the fraudulent conduct of the first respondent cannot stand. In that case the Master had confirmed the fraudulent activities. First respondent pointed out in heads of argument that applicant did not file an answering affidavit as a result of which the clear rebuttal of her claims in her founding affidavit has not been responded to therefore the facts in the opposing affidavit are uncontroverted. Further that the removal of an executor by the court using its extensive common law power and inherent jurisdiction requires the discharge of a steep burden of proof which applicant has failed to discharge. She prayed for the dismissal of the application with costs on a higher scale.

At the hearing of the matter Mr Nkomo argued that applicant has no *locus standi* to challenge the appointment of first respondent as executor as she is approaching the court in her individual capacity. He pointed out that applicant is not a beneficiary to the estate and therefore

does not have the right to challenge the appointment of the executor. He submitted that no legal basis was laid for the allegation that applicant is vindicating the rights of her late husband's estate as nothing was placed on record to establish that she was appointed executor of her husband's estate. He further submitted that in the founding affidavit the particulars of the alleged fraud are not given and the allegation remains unsubstantiated. Mr Nkomo also pointed out that Applicant does not qualify as a relative of the late Leah Nyamazana in terms of s 25 of the Administration of Estates Act [Chapter 6:01] and therefore could not be invited to the edit meeting.

Mr Nhokwara submitted that the challenge to *locus standi* was being raised for the first time and that applicant is the executor of her late husband's estate. I allowed him to file proof of the appointment of applicant as executor of her husband's estate. In terms of s 25 of the Administration of Deceased Estates Act [Chapter 6:01], a deceased estate is represented by an executor duly appointed and issued with letters of administration by the Master. The executor becomes the legal representative of the deceased with all the rights and obligations attached to that position. He or she is the only person with *locus standi* to bring any action relative to property belonging to the deceased's estate.

On 17 March 2023 Applicant's Certificate of Authority to administer the estate of the Late Wellington Dube was filed. It was issued on 13 September 2018 purportedly in terms of s 33(1) (b) of the Administration of Estates Act [Chapter 6:01]. I say purportedly because the reference to section 33(1) (b) must be an error. Section 33 neither has a subsection nor a paragraph. In addition it merely provides interpretation relating to ss 34 to 37. The template used by the Master's Office therefore contains an error. The correct section must be s 32 which deals with the administration of small estates.

The Certificate of Authority further confirms that applicant had no *locus standi* to institute these proceedings. She was not authorized in terms of s 25 of the Administration of Estates Act [Chapter 6:01] under which executors are appointed, but under s 32 of the same act which deals with the administration of small estates. The section authorizing her provides as follows; -

“32 Administration of small estates

(1) If any person dies whose estate is unrepresented and, in so far as the same is in Zimbabwe, appears to the Master to be under the value of such amount as the Minister may specify in terms of subsection (2), the Master may—

- a)
- (b) dispense with the appointment of an executor dative and direct how such estate shall be administered and distributed.”

The authority applicant was given was in terms of a law that dispenses with the appointment of an executor dative. The authority empowered her to collect the balance of moneys due to the deceased from a specified POSB bank account. The argument for first respondent that a certificate of authority is issued for very limited purposes is therefore correct. The one issued to Applicant does not authorize her to institute proceedings on behalf of an estate. The submission by Mr Nhokwara that applicant is the executor of her husband’s estate is baseless.

The applicant has no *locus standi* to institute these proceedings. The following order is therefore appropriate.

The application be and is hereby struck off the roll with costs.

A copy of this judgment must be brought to the attention of the Master.

Madzingira and Nhokwara, applicant’s legal practitioners
DNM Attorneys, first respondent’s legal practitioners