NORMSA SITHOLE
and
MICHAEL JANSEN
and
ALMA HORNE
and
PRINCE NDONGWE
and
GOODNESS OTENG
and
SAMANTHA MOYO
and
WADZANAI CHITSINDE
and
LEWIS HORNE
and
JANE SAMANTHA MASHAKADA
and
MARTHA NDORO
and
LUCIA CHAPERUKA
and
SHELLY PHIRI
versus
ESTATE LATE FARIDA HETTENA (DR 722/17)
and
GEORGE LENTAIGNE INGRAM LOCK
and
EASTLEA HOSPITAL
and
MASTER OF HIGH COURT [N.O]
and
THE REGISTRAR OF DEEDS [N.O]

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 11 May & 12 July 2023

OPPOSED MATTER

V C Maramba, for the applicant
T Maanda & T Tichawangana, for the 1st & 2nd respondent
T G Kuchenga, for 3rd respondent.

MAXWELL J: At the hearing of this matter points *in limine* which are the subject of this judgment were raised on behalf of first' second and respondents (respondents).
Applicants approached the court seeking an order for the reopening of the estate of the late Farida Hettena, appointment of an executor testamentary and administration of the estate within 30 days as well as the reversal of the sale and transfer of Stand no. 3057 Salisbury Township Portion of Salisbury Township lands measuring 1929 square metres held under the Deed of Transfer No. DT567/1949. Applicants are tenants at a block of flats in a deceased estate. Eight points *in limine* were raised. They will be considered hereunder.

1. **That Applicants have no *locus standi***

Respondents submitted that applicants are neither relatives nor beneficiaries to the estate and that their relationship with the estate is that of landlord and tenant. Further that their contracts of lease do not give them any other rights other than those that arise from the contracts of lease, therefore they have no *locus standi* on matters regarding the administration of the estate of Farida Hettena. Mr *Maanda* referred to the case of *Shingirai Ushewokunze* v *George Lock and Others* HH 165/23 in which the same property was involved and the court held that the tenant did not have *locus standi*. Mr *Kuchenga* pointed out that applicants claim to have a real and substantial interest in the matter because they are due to be evicted. He submitted that the threat of a legal eviction does not clothe a litigant with *locus*. Further that applicants also claim an interest monetary in nature but do not state that they could have benefited from the estate therefore they have no basis to challenge the appointment of second respondent. In response Mr *Maramba* submitted that applicants had a financial interest in the subject matter. He submitted that they have improvements liens, and as tenants, their *locus standi* was not questionable. Mr *Maramba* chose to ignore the findings made in a matter involving a tenant at the same premises. He did not comment on the case of *Shingirai Ushewokunze* v *George Lock and Others* (*supra*) in which a tenant was found lacking *locus standi.* There has been no distinction made between

Shingirayi Ushewokunze and the applicants in this case. Similarly, the applicants have no *locus standi* on matters regarding the administration of the estate of Farida Hettena.

2. **Non-compliance with section 79 of the Deeds Registries Act [*Chapter 20:05*]**

It was submitted for the respondents that the application is fatally defective for non-compliance with the mandatory requirements in s 79 of the Deeds Registries Act [*Chapter 20:05*]. Further that the order sought requires the reversal of a transfer of an immovable property which can only be done by the Registrar of Deeds and that no notice was given to the Registrar of Deeds before the filing of the present matter as required. The said section states; -

> **"79 Notice to registrar of application to court**
> Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant <u>shall</u> give the registrar concerned reasonable notice before the hearing of such application, and such registrar may submit to the court such report thereon as he may deem desirable to make."(underlining for emphasis)

The use of the word "shall" makes the provisions of this section peremptory. In *Shumba & Another* v *Zimbabwe Electoral Commission & Another* SC11/08, CHIDYAUSIKU CJ (as he then was) stated; -

> "It is the generally accepted rule of interpretation that the use of peremptory words such as "shall" as opposed to "may" is indicative of the legislature's intention to make the provision peremptory. The use of the word "may" as opposed to "shall" is construed as indicative of the legislature's intention to make a provision directory."

In response, applicants conceded that no notice was given but urged the court to rely on Rule 7(b) of the High Court Rules. The rule provides as follows; -

> "***7. Departure from rules***
> The court or a judge may, in relation to any particular case before it or him or her, as the case may be—
> (a)……
> (b) give such directions as to procedure in respect of any matter not expressly provided for in these rules as appears to it or him or her, to be just and expedient."

As submitted for respondents, the rule applicants seek to rely on does not authorize departure from statute, but from rules. The notice to the Registrar of Deeds is required before an

application is filed. Therefore where there has been no compliance as *in casu*, the matter will be improperly before the court. The second point *in limine* has merit and it succeeds.

3. **Non-citation of Executor of the Estate.**

Respondents submitted that a deceased estate cannot represent itself and applicants ought to have sued the estate through the executor. They further submitted that there is no representative for the estate in this matter. They made reference to *M & Others* v *Estate late Knm & Others* HH 677/16, *Nyandoro & Another v Nyandoro & Others* 2008 (2) ZLR 2129 and *Estate Late Ngavaite Jack Chikuni & 2 Others* v *Chikuni & 5 Others* HB 143/2002 in which it was stated that the citation of a deceased estate as a party to litigation is wrong. In response applicants stated that where the removal of the executor is sought he must be cited in his personal capacity. They referred to the case of *Chiangwa* v *Katerere & Others* SC 61/21 in support of that submission. What applicants do not appreciate is that it was wrong to have Estate Late Farida Hettena as first respondent in this matter. According to para(s) 13 and14 of the founding affidavit, applicants intended to sue both the estate and the executor. In *Chiangwa* v *Katerere & Others* (*supra*) it was stated that when an action is brought against an executor in his representative capacity, it is an action against the estate, rather than one against the individual. Applicants ought, therefore to have sued the executor in both his individual and representative capacities. This point i*n limine* also has merit and succeeds.

4. **That the Appointment of first respondent was not challenged in terms of the process set out in the Administration of Estates Act [*Chapter 6:01*]**

Respondents pointed out that section 26 of the Administration of Estates Act [*Chapter 6:01*] provides an avenue for challenging the appointment of an executor which applicants did not utilize. Further that applicants cannot impugn what was done by the second respondent in his office as an executor which they did not challenge. Applicants' response was to say that the failure to challenge the appointment did not bar them from approaching this court by application to seek the remedy needed. They placed reliance on the case of *Ibrahim* v *Ibrahim* HH 448/18 in which it is stated that it is imperative that where a statute has provided domestic remedies a litigant should resort to such unless there are good and sufficient reasons for skipping the remedy so availed as a port of first instance. Applicants did not outline the good and sufficient reasons for skipping the domestic remedies. For that reason the point *in limine* succeeds.

5. **That there was no objection to the distribution account in terms of section 52 of the Administration of Estates Act [*Chapter 6:01*]**

Respondents pointed out that there was no challenge to the account and therefore applicants cannot seek it's reversal. They referred to the case of *Chinzou* v *Masomera* 2015 (2) ZLR 274 in which the application was said not to be proper as applicant had not followed the procedure. applicants sought to rely on the fact that in *Chirisa* v *Mugadzaweta & Others* HH 323/14, it was held that the court could not fold its hands and perpetuate an illegality on the basis that the applicant should have approached the court earlier. In that case the applicant was a relative of the deceased and the application was premised on fraudulent misrepresentation. The cited case can therefore not be of assistance to the applicants as they are not relatives of the deceased. On that basis the point *in limine* succeeds.

6. **Non-Joinder of the beneficiaries and executor**

Respondents submitted that the beneficiaries of the estate named in the distribution account were not cited yet they have already benefitted. Further that if there is need for reversal, the beneficiaries would have to disgorge their gains therefore not citing them is fatal. Also that a revival of the title deed is sought yet the estate is not represented in view of the fact that second respondent is not recognized as the deceased estate's executor. Applicants referred to R 32(11) of this Court's Rules of 2021 which provides as follows; -

> "(11) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

They submitted that the point *in limine* should fall away. The law relating to non-joinder is a well traversed subject in this jurisdiction. GARWE JA (as he then was) in the case of *Wakatama and Others* v *Madamombe* 2011 (1) ZLR 11 at p 14 A-D stated:

> "The question whether the non-joinder of the Minister is fatal need not detain this court and can easily be disposed of by reference to r 87 of the High Court Rules which provides:
>
> '1. No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party, and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> 2. At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application-

> (a)…………………………
>
> (b) Order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party."
>
> The above provision is clear and allows of no ambiguity. The non-citation of the Minister is not in the circumstances fatal."

The above provisions are now in Rule 32 (11) and (12 in Statutory Instrument 202 of 2021. It therefore follows that *in casu* the non-joinder of the beneficiaries and the executor was not fatal to this matter. The remedy for non-joinder is provided for in rule 32 itself. A party who is aggrieved by the non-joinder of another party must proceed in terms of rule 32 (12) and make the necessary application for the joinder of that other party. The point *in limine* therefore fails.

7. **That there are material disputes of fact**

Respondents submitted that there are disputes of fact which cannot be resolved on the papers. A material dispute of fact was defined in *Supa Plant Investments (Pvt) Ltd* v *Edgar Chidavaenzi* HH 92/09 in the following terms; -

> "A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

Applicants disputed that there are material disputes of fact. That is surprising in view of the fact that answering affidavits in reply to what was averred by the respondents were not filed. What is before the court are two irreconcilable positions. What respondents stated in opposition is contrary to what applicants stated in their finding papers. The court is left with no ready answer to the dispute between the parties in the absence of further evidence. The point *in limine* succeeds.

8. **No challenge to the Will**

Respondents submitted that in terms of the Wills Act [*Chapter 6:06]* applicants had 30 days from the date the will was accepted by the Master to challenge it, if they had the right to do so. In Response applicants pointed out that they are not concerned with the formalities of the Will therefore there was no basis to resort to s 8(6) of the Wills Act [*Chapter 6:06*] which gives 30 days to challenge a Will. Applicants are strangers to the estate of the late Farida Hettena. There was therefore no basis for them to challenge the will and they cannot seek to have it set aside. The point *in limine* succeeds.

Costs

Applicants have pursued this matter in the face of a judgment that defined their rights and clarified their position *vis-a vis* the estate of the late Farida Hettena, HH 165/23. Some of the points *in limine* subject of this judgment were dealt with in HH 165/23. The displeasure of the court at the conduct of the applicants in ignoring that judgment will be expressed through punitive costs. respondents have been unnecessarily put out of pocket on a matter that ought not to have been pursued.

DISPOSITION

Only one point *in limine* failed. In the face of lack of *locus standi* on the part of the applicants, the one point in which respondents failed does not affect the outcome. Accordingly the matter is struck off with costs on a legal practitioner and client scale.

Maseko Law Chambers, applicants' legal practitioners
Henning Lock, first & second respondents' legal practitioners
Makurur and Partners, third respondents' legal practitioners