SILENCE MUBARIKI
versus
MASTER OF THE HIGH COURT
and
OBRAM TRUST COMPANY
and
MAGRET KUDZAISHE MUBARIKI
and
SAMUEL MUBARIKI
and
NORDITA MUBARIKI
and
MAGRET MUBARIKI
and
DAVIDE MUBARIKI
and
SIMBARASHE MUBARIKI
and
TINASHE MISHECK MUBARIKI
and
ADMIRE MAKETO
and
PORTIA MAKETO
and
PAULINE MUBARIKI
and
OLIVER MASOMERA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 & 15 June & 21 September 2023

Opposed application (Review)

T L Mapuranga, for the applicant
No appearance for 2nd & 13th respondents
No appearance 3rd to 5th respondents
E Mavuto for 6th to 9th respondents

TSANGA J:

This is an application for review of the decision of the first respondent herein (the Master) in accepting the will of the late Haggai Morel Mubariki who passed away on 8 January 2021. The review application is brought by his widow, Silence Mubariki, with whom the deceased had a civil marriage. It is brought on the following grounds that:

a) The 1st respondent committed a gross, substantial and material error at law that manifested in a miscarriage of justice by accepting the will produced by the 6th respondent when in actual fact the will did not comply with the provisions of s 8 of the Wills Act.
b) The decision by the 1st respondent to accept the will was grossly unreasonable in light of the fact that the recommendations made by the Assistant Master were against accepting the said will and the fact that the will did not comply with formalities under section 8 of the Wills Act.
c) The 1st respondent acted contrary to the dictates of the Administrative Justice Act by accepting the will without stating the reasons for having accepted the will in light of the recommendation by the Assistant Master.

What is sought is an order that the decision of the Master, the first respondent, be set aside and that the estate be dealt as intestate. The appointment of the second respondent, Obram Trust, through Oliver Masomera as executor, is also sought to be set aside. In his stead the applicant seeks that she be appointed as executor.

As for the identity of the other parties, the third to fifth respondents are the applicant's biological children with the deceased. The 6th respondent Magret Mubariki, is the deceased's sister whilst the seventh respondent, Davide Mubariki, is his brother. They were the witnesses to the will. The eighth and ninth respondents are also the deceased's other children with a different mother and are cited as interested parties. The tenth respondent is an uncle of the deceased whilst the eleventh is a niece and the twelfth respondent is a sister in-law. It is only the applicant and the sixth to ninth respondents who were represented and argued as respondents at the hearing.

The factual background

Following Haggai Mubariki's death, an edict meeting at the Master's Office was called for on the 17th of June 2021 at which applicant expressed her concerns about the will. It was drafted at the hands of her late husband's brother, Davide Mubariki, and, produced by

his sister Magret Mubariki as being the deceased's last will and testament. The will contained a litany of defects which deviated from the formal requirements of the Wills Act [*Chapter 6:06*] for a will to be valid.

Among the defects included the failure by the testator to sign each page of the will as required. The testator's signature only appeared on the last page of the will and the other pages contained only his purported initials. Also, not all the witnesses had signed each page of the will. Davide Mubariki's signature only appeared on the last page of the will and also against amendments made in the body of the will but it was not there on the end of each page. The amendments had been signed for by Davide Mubariki only. The testator himself had not signed them. The will further deviated from the formalities in that the witnesses were both beneficiaries to some stands in the will contrary to the Wills Act which bars beneficiaries from being competent witnesses.

Additionally, the will had distributed property which applicant said did not belong to the deceased, an example being a house in Chishawasha Hills which the applicant said belonged to her. She attached to this application cession papers to the Chishawasha property to show that it belonged to her. Property belonging to a company in the form of a stand had also been awarded to Davide Mubariki. A Mercedes Benz car said by the applicant to belong to her brother had been distributed. A certain wrongly described farm had also been awarded to the applicant. Applicant had therefore emphasised at that edict meeting that it was unlikely that her husband could have drafted a document with descriptive errors of the property he sought to bequeath. The wrong information on the property in question was said to indicate fraud on the basis that the testator would have known for sure what property belonged to him. Further, the dates on will were also said to be problematic. The face of the will reflected the years 2019 and 2020 with a cancellation of both years being signed for by Davide Mubariki. It captured 16 October 2019 as the effective date.

The applicant had also highlighted that at the time her husband was fully mentally capacitated and there would have been no reason for the will to have been written on his behalf. He could read and write. The will had also been brought to the applicant's attention some three months after her husband's death thereby indicating that it was not in existence at the time of his death and had been crafted afterwards. Magret Mubariki, who produced the will, was said to have in fact asked at a family meeting soon after the late Haggai's burial if he left a will. Applicant's point at the edict meeting was that if she knew he had left one, she

should have stated so at the time. For all the above reasons, applicant had therefore argued at that meeting that the will was so non-compliant with the formalities that it should simply not be accepted.

The Assistant Master agreed. He had recommended in full support of these observed concerns that the will not be accepted given concerns raised pertaining to its content, alterations, and dates. The Assistant Master had also taken into account that the custodian of the will had asked at one point if there was a will and had not revealed that she was in possession of one soon after the burial. This was said to be questionable.

However, on 24 June 2021, the Master of the High Court had reversed that decision and accepted the will. The Master had gone further to appoint an independent executor, Mr Oliver Masomera of Obram Trust, as executor dative and issued letters of administration. This was because at the edict meeting, Davide Mubariki had argued that as the deceased left seven children of whom five were from different mothers, a neutral executor was necessary.

In this application, applicant therefore also averred that the appointment of an independent executor was not justified and was unreasonable as no one would be prejudiced if she was appointed as executor as the surviving spouse. The Master's decision to go against recommendation of the Assistant Master was said to amount to an administrative decision that is unfair and illegal.

The Master did not file any opposing papers to this review application whilst Mr Masomera, who swore an affidavit on behalf of the second respondent said that the wrong party had been cited and that he himself was appointed in his personal capacity. He had been joined. Suffice it to say by the time of the hearing he was no longer contesting the matter.

As for the sixth, seventh, eighth and ninth respondents who opposed the matter and were represented at the hearing, Davide Mubariki as the seventh respondent swore to the affidavit which the sixth, eighth and ninth respondents agreed with. He averred that the Additional Master's recommendations were not binding on the Master. He also stated that the applicant had been made aware of the will soon after burial and insisted that the will was a correct representation of the assets of the deceased. The fact that the will, by a lay person, was not properly drawn, was said not to make it fatal as it did not change its letter and spirit. He denied that it contained any false information or that the property distribution was in any way unfair to the applicant. As for the appointment of an independent executor, this was said to be justified on account that the deceased left seven children of whom five were from different mothers.

The legal arguments

The gist of applicant's arguments was that the will was not executed according to formalities in light of the defects already alluded to. Also emphasised was that the rationale for formalities is to combat fraud and that the set procedures for amendments to a will as laid out in s 9 of the Will's Act had not been observed as only the writer of the will, being the seventh respondent, had signed those amendments. Due to the patent errors, applicant's lawyer, Mr *Mapuranga*, argued that the will could not be rescued by s 8 (5) of the wills Act as it came nowhere near substantial compliance. He argued that it was grossly unreasonable on the part of the Master to accept a will which the Assistant Master had said should not be accepted. Furthermore, the Master had not explained how his discretion to accept the will had been exercised. The applicant was also said to be capable and willing to be appointed as an executor.

Mr *Mavuto*, on behalf of the stated respondents argued that the Master acted within his authority in terms of s 8 (5) in accepting the will since the provision is curative in that it allows acceptance of a will that does not meet all the formalities if it has been drafted and executed by the testator himself. Further, he emphasised that at the edict hearing, the applicant had not queried the authenticity of the deceased's signature. As for the Master's reasons for acceptance, he was said to have considered the representations made at the edict meeting and decided to accept the will. He thus objected that the decision had in any way been arrived at arbitrarily. Also, the applicant had not queried the signature of the deceased and hence there was no basis for claiming that the decision was arrived at unreasonably. As for the alleged inadvertent disinheritance of the surviving spouse, Mr *Mavuto* relied on *Chigwada* v *Chigwada SC 188/20* to argue that a deceased is not obliged to leave any property to a spouse since marriages are out of community of property.

Law and factual analysis

The following legal provisions are pertinent to this matter. Section 6(2)(a) to (c) of the Wills Act prohibit the following persons from being capable of receiving any benefit conferred by or in terms of a will:

> (*a*) any person who signs the will **as a witness to the making thereof** or as a witness to the making of any amendment in the will;
> (*b*) any person who…. **signs the will or any amendment in the will in the testator's presence and at his direction**;
> (*c*) any person who, on behalf of the testator or at his direction, **personally writes out the will or any part of it that confers a benefit upon him**;

To the extent that Davide Mubariki signed as a witness, and additionally signed the amendments, and also wrote the will conferring a benefit upon him, he cannot inherit. To the extent that Magret Mubariki signed the will as a witness, she too cannot benefit.

Turning to what constitutes valid execution of a will, in terms of s 8 (1), it must be in writing and in terms of s 8(2) the testator, or some other person in his presence and as directed by the testator, must sign each page of the will closely to the end of the writing as is possible. The signature of the person making the will or the signature of a person instructed by the testator must appear on each page. Further, the testator's must sign in the presence of two or more witnesses or must acknowledge his signature in the presence of two or more witnesses present at the same time. Execution of the will involves either signing in the presence of at least two witnesses or acknowledging a signature in their presence. The subject of acknowledgment is the signature of the testator in terms of the wording of the statute. This is presumably upon the logic that where a testator acknowledges a signature then the instrument upon which the signature is being acknowledged is his/hers. The will, in this instance, was not signed on every page by the testator and neither had both witnesses signed every page as directed by the law.

Turning to the legal requirements for execution of amendments to a will, these are dealt with by s 9 (2) and (3) of the Wills Act. Amendments to a will are generally presumed to have been made after the will was signed unless the contrary is proved. In terms of s 9 (2) amendments made before a will is signed are signified by the signature, initial, or mark of the testator or some other person at his direction as well as the signatures, mark or initials of competent persons signing the will.

Where amendments made after the will is signed then in terms of s 9 (3) of the Act the **full signatures** of the testator or of some other person made in his presence and at his direction. The full signatures of two competent witnesses present at the same time are also required for these amendments in the presence of the testator.

In this instance, it is not stated whether the amendments were made before or after the will was signed but regardless of that, the defect is that only the witness signed for the amendments effected contrary to the provisions outlined above.

Significantly, in terms of s 9 (4) where the amendments have been signed by the making of a mark or by some other person on behalf of the testator and at his direction, additional safeguards are required. A magistrate, presiding officer, justice of peace or

commissioner of oaths or designated official must certify before the testator's death that he is satisfied as to the identity of the testator and that amendments were made at his request. It is trite that none of this was done in the case before me. An appropriate court may also declare an amendment valid if it is satisfied.

However, where a will does not comply with formalities in terms of its execution, it is s 8 (5) that contains the curative remedy. It states as follows:

> (5) Where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended, as a will for the purposes of the Administration of Estates Act [*Chapter 6:01*] even though it does not comply with all the formalities for
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> (*a*) The execution of wills referred to in subsection (1) or (2); or
> (*b*) the amendment of wills referred to in subsection (2), (3) or (4) of section *nine*.

In other words, a will which does not comply with the provisions for valid execution or the provisions for valid amendment may be accepted by the Master, the condition being that it must have been drafted and executed by the person who has since died intending it to be his will. Intention of the testator is key and so is the critical issue of who drafted or executed that will. An informed conclusion has to be reached from looking at all these.

In *Juliet Kadungure & 2 Ors* v *Patricia Darangwa (NO) & 2 Ors* HH 116/22 this court had occasion to consider the meaning of "drafted by a person who has since died" and reached the conclusion that the provision is deliberately narrow in limiting recognition to only a will drafted by the testator themselves.

There is absolutely no doubt that the issue of the testator having drafted or executed the will are captured as key considerations even where the will deviates from formalities in order to avoid fraud. Where a will has been written by a deceased personally, it enhances the chances of its legitimacy. It is vital to note that there is no qualification in the above provision to the effect of some other person having drafted or signed the will on behalf of the testator. If the legislators had intended wills done under such circumstances to fall within the ambit of recognition where the will is defective in some way, they would have simply stated so. As it stands, a will or the amendments must have been **drafted or executed by a person who has since died**. By limiting recognition to a will written and executed by the testator s 8(5) plays an important protective function against fraud. In other words, where a document is written by the testator himself and embodies his intention, it is the absence of the likelihood of fraud

which equally guides the acceptance of such a non-compliant will with the formalities. It is the courts' uppermost duty to protect testators against fraud.

Materially, the will in this case was not written by the testator and moreover the defects with its execution do suggest fraud. The amendments were also not affected by the testator himself and neither were they signed for by him. The property appears not to have been fully known by the testator. There are also no reasons given by the proponents of the document why it was not written by the testator himself who is said to have been in good health at the time or why he never took action to regularise the will as intended since he only died a year and three months later. Having not been written by the testator, the will falls outside the ambit of the vital requirements for the recognition of a non-compliant will s 8 (5). The will is a nullity. The will should not have been accepted by the Master under the circumstances. I need not determine the issue of whether the Master acted properly in appointing a neutral executor as the appointed Executor Mr Masomera no longer opposes the applicant's quest to administer her own husband's estate. His appointment will therefore be set aside.

Accordingly, it is therefore ordered that:

1. The decision of the 1st respondent of the 22nd of June 2021 accepting the will produced by the 6th and 7th respondents under DR 1022/21 as the deceased's last will and testament be and is hereby set aside.
2. The estate of the late HAGGAI MOREL MUBARIKI who died on the 8th of January 2021 be dealt with as intestate.
3. The decision by the 1st respondent to appoint the 2nd respondent represented by the 13th respondent as the executor in the estate of the late Haggai Mubariki is hereby set aside.
4. The applicant is appointed as he Executrix in the estate of late HAGGAI MOREL MUBARIKI who died on the 8th of January 2021.
5. Costs of this application shall be borne by the estate.

Murisi & Associates, applicant's legal practitioners
Maposa & Ndomene Legal Practitioners, sixth, seventh, eighth and ninth respondents legal practitioners