

DANIELA RITA LAURA FARINA
versus
MASTER OF THE HIGH COURT
and
SUSAN MARY BRIGHTON

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 8 March & 21 December 2023

Opposed Application

S M Bwanya, for the applicant
No appearance for first respondent
T Zhuwarara, for the second respondent

WAMAMBO J: Nadia Farina who was also known as Nadia Barnwell died testate. The applicant is her sister and she seeks an order in the following terms:

- “1. The application be and is hereby granted.
2. The will of Nadia Farina (aka Nadia Barnwell) dated 26 July 2007 under Estate Nadia Farina be and is hereby set aside.
3. The appointment of second respondent as Executor Testamentary of Estate Nadia Farina DR 931/22 per first respondent’s letter dated 8 June 2022 be and is hereby set aside.
4. Any act of the second respondent in relation to Estate Nadia Farina under DR 931/22 be and is hereby set aside.
5. Second respondent be and is hereby ordered to pay cost (sic) of this application on a higher scale”

Nadia Farina (hereafter referred to as Nadia) had a long term relationship with Archibald Gilbert Black (hereafter called Mr Black). Mr Black in turn has a son in law one Kevin Forest.

The long and short of it is that the applicant is of the view that Mr Black and Kevin Forest burnt and/or tore the updated will of Nadia. The applicant bases her view on the fact that Mr Black and Kevin Forest destroyed some of Nadia’s documents. It is applicant’s averment that amongst those destroyed documents was the updated will of Nadia.

It is also averred by applicant that Nadia's wishes were that her (applicant's) children should benefit from her estate.

The second respondent is literally caught in the cross fire. She comes in as an executor of Nadia's estate, this flowing from the will that was filed with the first respondent. She happens to be a partner of Gill Godlonton and Gerrans who are according to the will appointed to be the executors of Nadia's Estate.

The application is heavily contested by second respondent. She is of the contrary view that the existing and filed will reflects the intentions of Nadia on the distribution of her estate. Among other issues she raises the issue that no one saw the purported and for all intents and purposes avers that the existence of the purported updated will is but speculative.

At the hearing of this matter Mr Zhuwarara for second respondent raised preliminary points. It was averred that the applicant has no *locus standi* to institute this application and further that Mr Black and Kevin Forest should have been cited as respondents as they are the ones who are alleged to have destroyed Nadia's updated will.

I will presently deal with these points *in limine*.

Mr Bwanya for the second respondent argued that applicant has *locus standi*, being a sibling of Nadia. Further that there are various obligations placed upon family members when a person is deceased. Among the obligations is procuring a death certificate and the registration of an estate.

He further argued that the fact that she seeks no direct benefit from Nadia's estate is neither here nor there.

A number of cases were cited by Mr Bwanya to buttress his submissions among them *Darangwa v Kadungure & Ors* SC 126/21.

I do not find this particular matter of relevance to the points *in limine* as raised as it did not determine any issue of *locus standi*.

In Tryphine Sibanda v Libati Moyo & Ors HB 51/21 MAKONESE J at pp 3-4 said:

"It is trite that *locus standi* is the capacity for a party to bring a matter before a court of law. The law is clear on the point that to establish *locus standi*, a party must show a direct and substantial interest in the matter.

See *United Watch & Diamond Company Private Limited & Ors v DISA Hotels Ltd & Anor* 1972 (4) SA 409 (C) and *Matambanadzo v Goven* SC 23-04.

It is clear from the circumstance of this case that the applicant is not an executor in the estate of the late James Moyo, Richard Moyo and Knowledge Moyo.

It is settled law that for a person to have *locus standi* to bring proceedings in any action he must have sufficient personal interest in the matter concerned. Usually only a person who has direct, personal or financial (interest) in the remedy sought has the *locus standi* to seek remedy in court. The personal interest that a person may have will provide the basis for legal standing to bring to court any legal action or cause. Personal interests include personal liberty, monetary claims legitimate expectation in property claims, amongst several other remedies”

ZHOU J in *Tanaka Power (Private) Limited v Sheriff of the High Court & Ors* HH 518/19

p 2 had occasion to state as follows:

“In the case of *Zimbabwe Teachers Association & Ors v Minister of Education* 1990 (2) ZLR 48 (HC) at 52F -53B EBRAHIM J (as he then was) stated the principles as follows:

“ it is settled that, in order to justify its participation in a suit such as the present, a party... has to show that it has a direct and substantial interest in the subject matter and outcome of the subject matter and outcome of the application. In regard to the concept of such a direct and substantial interest CORBETT J in *United Watch and Diamond Company (Pvt) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) quoted with approved the view expressed in *Henri Viljoen (Pvt) Ltd v Awerbuch Brothers* 1953(2) SA 152 (O) that it concerned.

“an interest in the right which is the subject matter of the litigation and not thereby a financial interest which is only an indirect interest in such litigation.”

I have considered the above factors to be considered for *locus standi* to be established.

In the instant case applicant is the only surviving sibling of Nadia. By the nature of the relief she seeks she is a potential beneficiary if the will is invalidated.

Any process to follow thereafter will inevitably involve the applicant, including registration of the estate. The appointment of an executor would have the applicant as a participant before the first respondent. I find in the circumstances that applicant has a direct and substantial interest in the outcome flowing from invalidation of Nadia’s will and legal process that would naturally flow therefrom.

On the issue of non joinder of Mr Black and Kevin Forest, I find that this issue is aptly covered under the Rules of Court. Rule 32(11) of the High Court Rules 2021 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.”

Thus the fact that Mr Black and Kevin Forest were not cited or joined as parties in this matter is not fatal to the proceeding. Despite the two not being cited as parties I am of the view that the issues in despite can be resolved.

To that end I find that the non- joinder of Mr Black and Kevin Forest is not fatal to the matter and I dismiss that point *in limine*. I now turn to the merits.

Mr Black and Kevin Forest concede that they destroyed some personal documents that belonged to Nadia. It is the destruction of documents that caused applicant to conclude that amongst them was Nadia's updated will.

I find nothing in the affidavit of Stanley Matsika that adds any flesh to the suspicion that Nadia's will was among the destroyed documents.

One Jason is mentioned in para 4b as being a possible witness. He however did not depose to a supporting affidavit.

There is reference in para 33 of applicant's founding affidavit at p 9 that Marima Lobina a cousin was advised by Nadia of an updated will. Marima Lobina did not depose to a supporting affidavit on record.

Applicant is said to have been invited to assist in going through Nadia's documents and she refused. This is not disputed.

There is no one who saw the updated will. No one attests to its contents. No one attests to the form and format of the will.

The explanation given by Kevin Forest on why he was requested to assist sorting Nadia's documents appears reasonable. His father in law Mr Black was understandably distraught after the loss of his partner Nadia and needed assistance.

The further explanation that documents which were destroyed were considered irrelevant or duplicates also sounds reasonable.

This is a scenario of documents that had piled up at Nadia's offices for a considerable period of time. I find that the applicant has not proven the existence of an updated will.

The second respondent having been cited because her appointment flows from the existing will also opposed the application. It would appear to me that some speculative remarks were made in her direction.

Flowing from the finding that there is no evidence of an updated will second respondent's appointment as an executor remains intact.

I find in the circumstances that the application has no merit.

Mr Zhuwarara sought costs on a higher scale. I am not convinced that he has justified this course of action.

I will employ my discretion and grant costs on the ordinary scale on the basis that this matter involves a deceased estate wherein applicant appeared genuinely interested in the resolution of issues raised.

I order as follows:

The application be and is hereby dismissed with costs.

Jiti Law Chambers, applicant's legal practitioners
Gill, Gerrans and Godlonton, second respondent's legal practitioners