OSEFELUPILU MOYO (Nee SEDANGE) **APPLICANT**

AND

ESTER KELLY N.O **1ST RESPONDENT**

AND

ASSISTANT MASTER OF THE HIGH COURT **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 3RD AUGUST 2010 AND 2ND SEPTEMBER 2010

Mr R. Ndlovu for applicant
Mr C. P Moyo for 1st respondent

MATHONSI J: The late Lucas Tangani Moyo was a polygamist with at least 3 wives, one of whom is the Applicant in this matter. He died on the 11th December 2005. At the time of his death, the late Lucas Tangani Moyo and the Applicant had been separated for 6 years although no divorce proceedings had been set in motion.

Prior to his death, the deceased had, on the 25th January 2002 executed a handwritten Will in terms of which he made certain bequests to the exclusion of the Applicant. That Will was lodged with the second Respondent on the 8th March 2006. It was accepted. The offices of the Master and that of the Assistant Master are public offices in terms of section 3 of the Administration of Estates Act, [Chapter 6:01] and in terms of section 4 they are offices of record. The second Respondent is charged with the administration of estates and in doing so he/she make binding decisions as a quasi judicial body.

Although the Will of the deceased was accepted by the second Respondent on the 8th March 2006, it was not until the 26th February 2007, almost a year later, that the Applicant in this matter instituted proceedings in this Court by summons action under case No. HC 394/07 seeking an order inter alia nullifying the Will in question and removing the first Respondent from the position of Executrix which she held. Applicant sought an order in the alternative declaring that a partnership existed between her and the deceased and therefore that she be awarded certain items of property belonging to the estate.

It is not clear on what basis the Applicant imputed the existence of a partnership when she and the deceased were married in accordance with the Customary Marriages Act, [Chapter 5:07]. Regarding her challenge on the validity of the Will, Applicant alleged that it did not comply with the provisions of the Wills Act, [Chapter 6:06] dealing with the drafting and signing of Wills.

That action was opposed by the first Respondent and the pleadings were pursued until Discovery Affidavits were filed. In fact the last document filed in that matter is the Plaintiff's Discovery Affidavit filed on the 17th September 2009. Since then nothing has been done to prosecute the case.

Be that as it may, the Applicant launched the present application on the 31st August 2009 in which he seeks an order nullifying the winding up of the estate of the late Lucas Tangani Moyo under DRB No. 99/06 and costs of suit on an attorney and client scale. The Applicant alleges that the moment both Respondents were served with his summons in Case No. HC 394/07, they were supposed to immediately halt further action on the estate and the

second Respondent should not have allowed the first Respondent to frame and lodge a distribution account of the estate but instead await the outcome of his claim under Case No. HC 394/07.

It is common cause that the Applicant did not seek to stay the winding up of the estate, neither did he appeal the decision of the second Respondent to accept the Will. It is also common cause that when the First and Final Distribution Account in respect of the estate was produced and lay at second Respondent's office for inspection, the Applicant did not object to it, neither did she submit a claim to the Respondents. According to the second Respondent's report dated 12th July 2010, "the Deputy Master's office only proceeded to confirm the estate account well over four months after the estate account had been advertised to lie for inspection and no objection had been received."

After the confirmation of the estate account, the first Respondent proceeded to distribute the estate to the beneficiaries in terms of the Will. As it is now, there is nothing left of the estate and the first Respondent has been retired.

The Wills Act, [Chapter 6:06] empowers the second Respondent to accept a Will which does not comply with the provisions of the Act relating to the drafting and signing of a Will. Section 8(5) provides:

> "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 the 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."

Clearly therefore when second Respondent accepted the document submitted as the deceased's Will, he was standing on firm ground. Subsection (6) provides a remedy for those aggrieved by the decision to accept a document as a Will. It reads:-

> "Any person who is aggrieved by a decision of the Master may appeal to an appropriate Court within 30 days of being notified of the decision of the Master."

The Applicant, as already pointed out, did not appeal the second Respondent's decision within 30 days or at all. I have already stated that the Assistant Master is the authority charged with the Administration of Estates Act and makes binding decisions in that regard. In this case he made the decision to accept the document and that decision still stands. It has not been appealed against as provided for in the Wills Act and this Court cannot substitute its own decision when one of a quasi judicial body already exists. It cannot be said that the Applicant's summons action filed under Case No. HC 394/07 was an appeal within the meaning of section 8(6) of the Wills Act.

Even if one were to be charitable and accept it as such, it would still be hopelessly out of time as to do violence to the Act. This is particularly so in light of the fact that the Court has not been asked to condone the delay.

Mr. Ndlovu, appearing for the Applicant argued that the winding up process should be nullified because Respondents ignored Applicant's claim to the estate made under Case No. HC 394/07. There is a procedure to be followed when making a claim against an estate and it is provided for in Part III of the Administration of Estates Act. It was not followed. I agree with *Mr Moyo* for the first Respondent that the first Respondent was then entitled to proceed with

the winding up in accordance with the law and it was naive to expect her to stay the process which was obligatory according to the governing statute when there was no Court order to that effect *Mujuru N.O and Others v Tungamirai and Another* HH22/06.

I am mindful, of the fact that Applicant's customary marriage to the deceased was all but an empty shell at the time of the deceased's death, they having gone their separate ways some 6 years earlier. She therefore does not even have the protection of section 5(3) if the Wills Act and without prejudging the claim under Case No. HC 394/07, to base a claim on allegations of a partnership in the circumstances of this matter is simply to stretch the imagination to elasticity limits. In any event there must be finality to litigation. See *Ndebele v Ncube* 1992(1) ZLR 288(S) 290 C-D. The estate has long been put to bed.

Accordingly I conclude that there is no merit in the application. It is therefore dismissed with costs.

Messrs R. Ndlovu and Company, applicant's legal practitioners
Messrs Moyo and Nyoni, 1st respondent's legal practitioners