

MARITHA MWINJILO

Versus

LOVIE CHARITY MUNYORO

And

MAGISTRATE L. RWODZI

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 14 JUNE 2019 & 5 MARCH 2020

Opposed Application

A. Chihiya for the applicant
Advocate S. Siziba for the 1st respondent

TAKUVA J: This is an application for review in terms of O33 r256 wherein the applicant seeks the setting aside of a judgment handed down by the 2nd respondent sitting at Kwekwe Magistrates' Court on 17th December 2010 on the following grounds:

- “1. 2nd respondent's order is improper, incompetent and invalid.
2. The 2nd respondent sitting as an Assistant Master of the High Court could not substitute letters of administration properly issued and granted by an Assistant Master of the same court in the absence of the revocation of the prior letters of administration by the Master of the High Court as provided for under section 117 of the Administration of Estates Act (Chapter 6:01)
3. The order of the magistrate was wholly inappropriate and unreasonable as it sought to appoint 1st respondent as a co-executor of deceased's estate when there was clear evidence that 1st respondent had been separated or divorced by the deceased person some thirty years prior to the death of the deceased.

4. The judgment of the learned magistrate was incompetent and there was nothing to show that the appointment of the applicant had been induced by fraud or mistake.”

Background facts

The applicant is the surviving spouse of the late Washington Munyoro (Washington) who died at Kwekwe on the 11th October 2010. Applicant was married to the late Washington in 1994 in terms of the African Customary Law and there is one child of the marriage namely Angeline Munyoro born 7 February 1996. On 11 October 2010, applicant registered Washington’s estate at Kwekwe Magistrates’ Court and she was issued with Letters of Administration by the Assistant Master of the High Court. On 16 November 2016, 1st respondent lodged a complaint with the Assistant Master claiming that she was also a surviving spouse. Second respondent proceeded to conduct a hearing which she *mero motu* called out Richard Munyoro, a son to the 1st respondent to testify.

After hearing evidence, 2nd respondent declared 1st respondent as co-executrix to the estate of the late Washington on 17 December 2010. The 2nd respondent then issued and signed fresh Letters of Administration without revoking the letters of administration issued to the applicant. This decision led to this application.

One of the grounds for review is that the magistrate failed to comply with the provisions of the Administration of Estates Act (Chapter 6:01) in particular sections 116, 117, 29A and 68(1)(b). Section 29A states:

“The Master shall not grant letters of administration to a person ... unless that person is:-

- (a) registered under the Estates Administration Act (Chapter 27:20).
- (b) a surviving spouse or next of kin of the deceased person concerned.”

The applicant’s contention here is that the 2nd respondent’s finding of fact that the 1st respondent had not been divorced was unreasonable in its defiance of logic that no reasonable person faced with similar facts would have made such decision. The judgment by the court *a quo* is therefore wrong at law as it does not comply with the relevant legislation.

Section 68(B) states;

“68B Appointment of Executor

- (1) Upon the death of a person referred to in subsection 1 of section 68A, the Master shall summon the deceased person’s family or such members of the family as are readily available, for the purposes of appointing a person to be the executor of the deceased person’s estate.
- (2) The Master with the concurrence of the relatives present at a meeting summoned in terms of subsection (1) shall appoint a person to be executor of the estate of the deceased person referred to in that subsection:

Provided that:-

- (i) if the relatives are unable to agree upon a person to be appointed as executor, the Master shall appoint a person as provided in section twenty-six, which section shall apply *mutatis mutandis*, in relation to any such appointment.
- (ii) No person shall be appointed executor under this subsection unless he is (a) registered under the Estate Administrators Act (Chapter 27:20) or (b) a member of the deceased person’s family
- (3) ...
- (4) ...
- (5) ...”

Section 29 deals with the appointment of a new executor. It states:

“29. When by reason of any testamentary or assumed executor whom letters of administration have been granted having died or become incapacitated to act as such or having been removed from his office by the decree of any competent court or a judge thereof, there does not remain for the administration of the estate any executor whatever, ... and when it happens that any executor dative after letters of administration have been granted to him, dies or becomes incapacitated or is removed in a manner aforesaid then and in every such case proceedings for the appointment of an executor in place of such executor so dying or so become incapacitated or removed shall be taken by the Master in like manner on all respects as provided in section twenty-five, twenty-six and twenty-seven.”

Revocation of letters of administration shall be done in terms of section 30 which *inter alia* provides that;

“... (4) The Master shall revoke letters of administration granted to a person as executor if the master is satisfied that:-

- (a) When the letters of administration were granted to him, that person was registered under the Estate Administration Act (Chapter 27:20) and his registration has subsequently been cancelled or suspended in terms of that Act, or
- (b) In the case of an executor dative, the person is not the surviving spouse or next of kin of the deceased person, and when the letters of administration were granted to him, he was not registered under the Estates Administration Act (Chapter 27:20) or his registration under that Act was suspended.”

Supervision of Executors by the Master is provided for in section 116 which states;

“116 (1) If it appears to the Master that any executor, tutor or curator is failing or neglecting to perform satisfactorily his duties or to observe all the requirements imposed upon him by law or otherwise in regard thereto or if any complaint is made to the Master by any creditor, legatee or heir in regard thereto, the Master shall inquire into the matter and take such action thereon as he shall think expedient.”

The Master is empowered to conduct a hearing, receive documents and hear viva voce evidence. Any party that refuses to comply with the Master’s directives shall be guilty of an offence.

The removal of an executor, tutor or curator from office is regulated by section 117 as follows;

- “117(1) The Master may apply to a judge in chambers for the removal of an executor, tutor or curator from the office on the ground-
- (a) that he was not qualified for appointment to such office or that his appointment was for any other reason illegal; or
 - (b) that he has failed to perform satisfactorily any duty or requirement imposed upon him by or in terms of any law; or
 - (c) that he is mentally or physically incapacitated of performing satisfactorily his duties; or
 - (d) that in his opinion such person is no longer suitable to hold such office; and the judge may, upon such application remove the executor, tutor or curator concerned from his office or make such other order as he sees fit.
2. Where an executor, tutor or curator has been removed from his office, the Master shall revoke any letters of administration or confirmation, as the case may be which have been granted to such person.” (my emphasis)

The 1st respondent opposed the application on the following two grounds. Firstly, it was argued that the 2nd respondent's decision to appoint 1st respondent as co-executor was regular because the 2nd respondent did not remove the applicant from being executor but merely added 1st respondent as co-executor. Secondly, it was contented that the 2nd respondent's finding of fact that 1st respondent had not been divorced was reasonable.

In casu, it is common cause that the 2nd respondent proceeded to issue fresh letters of administration to applicant and 1st respondent before revoking the first set of letters of administration granted to the applicant in violation of s117(2) above. Put differently, where there is a need to appoint or add another person as executor, the previous letters of administration must be revoked. The reason is simple. It is not to permit two letters of administration in respect of one estate to co-exist in circumstances where it is not clear whether the new letters of administration automatically nullify the previously granted letters or whether they are to operate *pari pasu*.

In *Estate Late Bridget Makapila v Denia Matongo and Director of Housing and Community Services and the Master of the High Court* HH-71-08, the court was seized with deciding between two executrix, one appointed by the Master and the other in a Will. The court stated that "The Master's appointment of 1 October 1999 was not impugned by the testamentary executor or an interested party. In my view, it remains valid until set aside by a competent court. While the appointment of Bridget (the second appointed executrix) was invalid, that of the first respondent was valid as it was the first in time."

In casu, the applicant's appointment was the first in time and therefore should not be impugned. Further, the ill-conceived contention that the 1st respondent is a surviving spouse should not even have led to her appointment as co-executrix, the court a quo should not have entertained her claim the way it did as this has injurious effects on the legislative provisions relating to the appointment of executors.

In any event, the 2nd respondent could not have competently "reviewed" the decision of another magistrate sitting as Assistant Master. In *Drummond v The Master of High Court & Ors* 1992 (2) ZLR 232 (SC) it was held that,

“The Master derives his power only from within the four corners of the Administration of Estates Act.”

Accordingly, the new letters of administration were invalidly granted to the 1st respondent and applicant as co-executors. The method 2nd respondent used to arrive at her decision is *ultra vires* the Administration of Estates Act and grossly irregular.

In view of my finding in respect of the first ground of review, it is unnecessary to decide the 2nd ground in that even if I were to find in 1st respondent’s favour that would not justify her appointment as co-executor without 1st revoking applicant’s letter of administration. On the facts of this case, the confirmation as a surviving spouse would have simply granted her certain rights as a beneficiary and not an automatic right to be appointed as an executor where there was no such vacancy. There was no need for the appointment of a co-executor in the circumstances.

In the premise, it is ordered that:

1. The order granted by 2nd respondent at Kwekwe Magistrates’ Court under case number DRKK 23/10 on the 17th December 2010 be and is hereby set aside.
2. Each party shall bear its own costs..

Makonese & Partners, applicant’s legal practitioners
Mhaka Attorneys, 1st respondent’s legal practitioners