

TAWANDIRA MUZUNGU  
and  
PAUCHERIA MUZUNGU  
and  
PELAGIA MUZUNGU  
and  
SIMON MUZUNGU  
and  
DAVISON MUZUNGU  
and  
BIG-BRAIN MUZUNGU  
versus  
BLANDINA MUZUNGU  
and  
THE MASTER OF THE HIGH COURT  
and  
THE DIRECTOR OF HOUSING MARONDERA MUNICIPALITY

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 26 February, 2015

### **OPPOSED APPLICATION**

Applicants in person.  
1<sup>st</sup> Respondent in person  
No appearance for 2<sup>nd</sup> and 3<sup>rd</sup> respondents

CHITAKUNYE J: The six applicants are all children of the late Fanuel Karimanjonda Muzungu and the late Laurenta Muzungu. The late Fanuel Karimanjonda Muzungu (herein after referred to as the late Fanuel) died intestate at Wedza on 17 June 2004. The late Laurenta Muzungu died intestate on 30 November 2008.

The first respondent was the second wife to the late Fanuel Karimanjonda Muzungu. The late Fanuel married the two wives in terms of customary law. The marriages were registered in terms of the Customary Marriages Act [*Chapter 5:07*]; the marriage to the late Laurenta Muzungu was solemnised on 24 July 1974 whilst the marriage to first respondent was solemnised on 27 April 1995.

The circumstances giving rise to this matter were that upon his demise the late Fanuel was survived by the two wives and about eight children, 6 from the first wife and two from the second wife.

Neither of the wives nor any of the late Fanuel's close relatives registered his estate. The family continued with their family life. In 2010 the first respondent outside the knowledge of the applicants registered the estate of the late Fanuel.

On 20 September 2012, the applicants approached the Master of the High Court seeking to register the estate late Fanuel. The applicants were then advised that the first respondent had already registered the estate and had been appointed executrix. They were further advised the first respondent had in fact submitted the administration and distribution account which the second respondent had confirmed after the usual advertisement. In the administration of the estate the first respondent had awarded herself the only immovable property in the estate namely house number 1145 Rutenga Road, Cherutombo, Marondera.

Faced with the above, the applicants approached this court seeking:-

1. The setting aside of the amended first and final distribution account in the estate late Fanuel Karimanjonda Muzungu DR1122/10 which the second respondent had confirmed on 20 September 2011;
2. That the said estate be reopened;
3. That the first respondent be removed from the office of executrix and a neutral executor be appointed by the second respondent to administer the estate in accordance with the Administration of Estates Act, [*Chapter 6:01*]; and
4. That the cession of rights into 1<sup>st</sup> respondent's name be reversed such that the property be registered in the estate late Fanuel Karimanjonda Muzungu's name.

The applicants' basis for seeking the above order was that the first respondent had misrepresented to the Master that she was the only surviving spouse as the late had divorced his first wife Laurenta Muzungu after which he had proceeded to marry her. She also misrepresented that as at the time of the demise of the late Fanuel she had been living at the property in question as her matrimonial home when that was not so. Through her misrepresentation she was appointed executrix and proceeded to administer the estate without the knowledge and participation of applicants as family members and beneficiaries in the estate. The applicants are in fact alleging fraudulent conduct on the part of the first respondent in the process of seeking appointment as executrix and in the manner she administered the estate.

The first respondent opposed the application. In her opposition she contended that the property in issue had been acquired by the late Fanuel and herself. It is pertinent to note that in her opposition she does not deny that the late Fanuel was in fact married to two wives and this was the situation at the time of his demise. It thus follows first respondent was not candid with the Master when she represented that the late had divorced his first wife. It is also apparent that in response to allegations of misrepresentation first respondent merely alluded to the fact that she advertised the estate's first and final distribution account and no one raised objections to it. There is no denial that she was appointed executrix as a result of a misrepresentation and that she deliberately left out applicants in her administration of the estate. She in fact did not deny that in the registration and administration of the estate she used her daughter's Harare address and not the family address in Marondera where she alleged she was residing or the rural home address.

The Master submitted a report in terms of Rule 248 of the High Court Rules, 1971. In that report the Master virtually confirms that the first respondent misrepresented to him leading to the appointment of the first respondent as Executrix Dative and subsequent confirmation of the final distribution account. The Master confirmed that the first respondent declared herself as the only surviving spouse as at the time of late Fanuel's death when as he subsequently learnt there were two wives who survived the deceased. It is also apparent, as alleged by the applicants, that first respondent only provided names of her daughter and her other relatives not well known to applicants as relatives to be invited for an edict meeting. She thus deliberately left out the applicants.

Section 68B of the Administration of Estates Act enjoins the Master to 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 a deceased person's estate. The Master would, to a large extent, depend on the information provided by the person or persons who would have come to register. If therefore such person does not provide the correct information or deliberately conceals the true state of the deceased's family, the Master will invite those persons he has been advised of and appoint an executor there from. The Master in his report in effect confirms the fraudulent conduct of the first respondent.

Despite the findings by the Master on the conduct of the first respondent the Master did not proceed to act in terms of s 117 of the Act on the removal of an executor. That should however not bar this court from proceeding with the removal where as alluded to above the

ground advanced is one of fraud. Under common law this court has inherent jurisdiction to remove an executrix. See *Katirawu v Katirawu Others* 2007(2) ZLR 64 (H).

The appointment having been influenced by the fraudulent conduct of the first respondent cannot stand.

The first respondent's ill conduct did not end there. She proceeded to administer the estate without consulting the other beneficiaries. Section 68D (2) of the Act mandates the executor to consult the deceased's family and beneficiaries. That subsection states that:-

“When drawing up a plan in terms of subsection (1), an executor shall-

- (a) pay due regard to the principles set out in subsection(2) of section *sixty-eight F*, to the extent that they are applicable; and
- (b) so far as is practicable, consult the deceased person's family and the beneficiaries and endeavour to obtain the beneficiaries' agreement to it.”

In *casu*, the executrix instead of consulting the late Fanuel's family in its polygamous nature, deliberately avoided the applicants who are children from the first wife and so beneficiaries in the estate.

I am of the view that the first respondent's conduct cannot be condoned. I thus conclude that a case has been made for the setting aside of the inheritance plan. The first respondent has shown herself not to be an honest and worthy executrix. She has certainly put her selfish interests above those of the estate. She cannot be an executrix in this estate. As a spouse she is a beneficiary and should be duly awarded her entitlement in terms of the law once the estate has been properly administered.

The second respondent must appoint an independent executor to administer the estate. In the meantime the transfer or cession of rights in the immovable property in question which may have been effected at the instance of the first respondent must be reversed.

Accordingly it is hereby ordered that:-

1. The amended First and Final Distribution Account in the Estate Late Fanuel Karimanjonda Muzungu DR1122/10 confirmed by 2<sup>nd</sup> respondent on 20<sup>th</sup> September 2011 be and is hereby set aside.
2. The Estate late Fanuel Karimanjonda Muzungu shall be re-opened for administration by an independent executor to be appointed by 2<sup>nd</sup> respondent in terms of the law.
3. The appointment of 1<sup>st</sup> respondent as Executrix Dative in the Estate late Fanuel Karimanjonda Muzungu be and is hereby set aside.
4. The 2<sup>nd</sup> respondent is hereby ordered to appoint an independent executor to administer the above estate in terms of the law.

5. The transfer or cession of rights in the immovable property namely House number 1145 Rutenga Street, Cherutombo, Marondera, that may have been occasioned by 1<sup>st</sup> respondent into her name is hereby set aside and the property shall revert to being in the name of the late Fanuel Karimanjonda Muzungu till the process of administration is completed.
6. Each party shall bear their own costs of suit