DAVID MAPURISA JACK
and
THERESIA MARIA JACK
and
THERESA JACK
versus
LLOYD TAKUDZWA MUSHIPE (In his capacity as joint executor
of Estate late Keresia Jack)
and
SIMBARASHE PETER MUSHIPE
and
JESCA MAIDEI MUSHIPE
and
KERESIA MUSHIPE
and
THE REGISTRAR OF DEEDS HARARE N.O

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24 March 2015

Urgent Chamber Application

I Mataka, for the applicants
N Mugiya, for the 1st to 4th respondents

CHITAKUNYE J: The applicants and first to fourth respondents are children of the late Keresia Jack who died intestate on 15 March, 1997. The late Keresia Jack's estate comprises an immovable property namely house number 1935 Highfields Township, Harare. The estate was initially registered under DRH 1942/04 and Lloyd Cypran Mushipe was appointed executor. He however died before winding up the estate. His wife Georgina Chidhakwa was then appointed executor on 16 May 2006 at the Magistrate court.

That registration and administration excluded the applicants. Upon discovery of the administration that excluded them, the applicants alleged they approached court and that registration and appointment of Georgina Chidhakwa as executor was nullified and in its place a new registration under DRH 1602/06. Under DRH1602/06 Lloyd Takudzwa Mushipe and David Jack Mapurisa were appointed joint executors. As a result of the new joint

executor ship the property in question was awarded to all the children comprising applicants and first to fourth respondents in equal shares. They each were allowed to rent out a room and enjoy rentals there from. They alleged that that was the position till recently when respondents moved out of the house and indicated that applicants should move out as the house had been sold. Applicants further stated that they were never advised of the sale nor of the name of the buyer.

It is this occurrence that spurred them to file this application on 20 February 2015. The applicants filed the application as self actors. Upon perusal of the papers I opined that the matters raised therein needed urgent attention. I thus had the matter set down for hearing.

On the date of the first hearing the applicants appeared in person as self actors. The respondents' legal practitioner requested for a postponement of the hearing as he had just been served with the application on that day and so he was not ready to argue his clients' case. There was also no proof of service of the application on fifth respondent.

As a result of the above the matter was postponed to 27 February 2015. I also advised the applicants to seek legal representation so that their case maybe well presented and argued.

On 27 February 2015 the applicants came represented by Mr *Mataka*.

Mr *Mugiya* for the respondents raised three points *in limine.* These were that:

Firstly, that the application is incurably defective and so technically there was no application before me. He argued that the application was not in compliance with r 241(1) of the High Court rules 1971. That Rule states that an urgent chamber application shall be in form 29B and state the grounds for the application.

Secondly, rule 244 requires that the urgent chamber application should have a certificate of urgency prepared by a legal practitioner. The application before court has an affidavit of urgency by first applicant.

The third point *in limine* was to the effect that as the dispute pertains to a deceased estate the Master should have been cited as a party. Failure to cite the Master and the executor of the estate is a fatal defect.

Mr *Mugiya* argued that because of the above grounds the application must be dismissed.

Mr *Mataka* for the applicants contended that the application should not be dismissed on the points *in limine* but should be determined on the merits. He contended that there is an application before court that is why court set it down for hearing. Since applicants were self actors one could not be strict on the requirement for the application to be in a certain format.

Court has to look at the papers before it and decide whether to hear the parties or not. In this case court decided to hear the parties. In any case the defect is not fatal.

On the second point *in limine,* Mr *Mataka* contended that r 244 does not make it mandatory for self actors to file certificate of urgency by legal practitioner. The certificate is required were a party is to be represented by a legal practitioner. In this case applicants were self actors at the time of preparing and filing the application. They were still self actors on the date of first hearing.

On the last point Mr *Mataka* contended that the Master as custodian of deceased estates could have been cited but failure to cite the Master was because no relief was being sought against the Master. The official cited is the Registrar of Deeds as relief was being sought against him.

In deciding on the points raised I will start with the last point. Whilst accepting that in cases involving deceased estates it is important to cite the Master as the official entrusted with overseeing the administration of deceased estate, I am however of the view that the non citation of the Master is not fatal to this case. This court can still make a determination as between the parties cited.

In this regard rule 87(1) states that:-

> "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."

See *Moyo* v *Ncube & Others* 2008(2) ZLR 333(H).

From the foregoing it must thus be clear that the non joinder of the Master is not fatal to the application.

It may also be noted that in terms of r 248, the Master may still be asked to file his report on the estate even if he has not been cited as a party. That Rule states that:-

> "(1) In the case of any application in connection with-
>
> (a) the estate of a deceased person; or
>
> (b)….
>
> A copy of the application shall be served on the Master not less than ten days before the date of set down for his consideration, and for report by him if he considers it necessary or the court requires such a report."

The avenue for the Master to provide his input is thus available even if he has not been cited. Failure to cite the Master is thus not fatal especially where, as in this case, no relief is being sought against him.

On the second point *in limine,* Counsel for the applicant aptly responded to this. Rule 244 states that:-

> "Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph(b)of sub rule(2) of rule 242to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith."

Paragraph (b) of the above mentioned sub rule (2) of rule 242 states that:-

> "**unless the applicant is not legally represented** , the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons, his belief that the matter is uncontentious, ; likely to attract perverse conduct or urgent for one or more of the reasons set out in paragraph(a),(b),(c),(d) or (e)of sub rule(1)." (emphasis is mine)

I am of the view that where an applicant is a self actor a judge seized with such an application must assess whether despite the absence of a certificate of urgency the matter is urgent. To decline to take such a step just because a legal practitioner has not so certified would do injustice to indigent applicants who cannot afford a legal practitioner. I do not understand the rule to imply that such a legal practitioner will provide such a service for free. By this I am not in any way oblivious of the danger of an influx of such applications hence the judge once seized with the application must do a careful assessment and based on that decide on the urgency or otherwise of the application. I am aware of several self actors who have been entertained by this court on urgent basis based on their own papers alleging urgency and the judge assessing that the matter is really urgent.

In *casu*, the affidavit of urgency clearly shows the circumstances that make the application deserving of this court's urgent attention had it been properly before me.

In his first point *in limine* Mr *Mugiya* pointed to the requirements of r 241 (1) of which the papers before me were not in compliance with. He argued that the defect is such that there is no application before court. As for the fact that applicants were self actors and so could not be expected to assiduously adhere to the requirements of the rule, Counsel argued that whilst that may have been so, when Mr *Mataka* assumed agency he should have attended to the anomalies rather than seek to proceed as if the application was proper.

Mr *Mataka* on his part seemed not to appreciate the defective nature of the application. He contended that since the application is titled 'urgent chamber application for a

provisional interdict order in terms of Order 32 r 244 of the High Court Rules' that should suffice especially as court set it down for hearing.

The fallacy with this argument is that Counsel missed the point that as a legal practitioner he was engaged to assist the applicants to put their case in its proper perspective and ensure their rights and interests are protected. He ought to have addressed his mind to the anomalies pointed out and decided on how best to correct the anomalies. He could easily have applied for condonation for the failure to comply with the rules as applicants were lay persons and self actors and sought leave to attend to the anomalies so that the matter is decided on the merits.

Rule 241(1) states that:-

> "A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.
>
> Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

In form 29B an application is made for an order in terms of an annexed draft on grounds that are briefly set out as the basis of the application and affidavits are tendered in support of the application. In form 29 which is to be used with modifications as appropriate, the applicant gives notice to the respondents of his application for an order in terms of the draft and that the accompanying affidavits and documents shall be used in support of the application. The format further informs respondent of the procedural steps to be taken.
An analysis of the application before me shows that the format adopted by the applicants does not comply with either Form 29B or 29.

It does not contain the plethora of procedural rights that the respondents are alerted to in Form 29, or the summary of the grounds of the application required in form 29 B. This is a substantial departure from the rules which is fatal. See *Zimbabwe Open University* v *Mazombwe* 2009 (1) ZLR101 (H).

As already alluded to above Counsel for the applicants opted to proceed with the defective application without applying for condonation of the failure to comply with the rules. Ample opportunity was given for counsel to have addressed his mind to the issues at hand in the form of postponements of the hearing but, alas, he was adamant in proceeding with the papers as filed by self actors. I am of the view that the application cannot stand. The

application will be struck off the roll for non compliance with the rules with applicants to pay costs on the ordinary scale.

Accordingly the application is hereby struck off the roll with applicants to pay costs on the ordinary scale.

Chambati Mataka & Makonese, applicants' legal practitioners.
Mugiya & Macharaga law Chambers, 1st to 4th respondents' legal practitioners.