STELLA HAPAGUTI
versus
CECIL MADONDO (in his capacity as Executor Dative
in the Estate of the Late EXISTO FRANCIS HAPAGUTI, DR 401/09)
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 12 February 2015

Opposed Application

K. Gama, for the applicant
R. Moss, for the 1st respondent
No appearance for 2nd respondent.

CHITAKUNYE J. This is an application for a declaratory order to the effect that the applicant is entitled to two quarters of a third of the net estate of the late Existo Francis Hapaguti. It is duly opposed. The applicant is a surviving spouse of the Late Existo Francis Hapaguti who died on 10 April 2009 in the United Kingdom.

The 1st respondent is the Executor Dative in the Estate late Existo Francis Hapaguti. The second respondent is cited in his official capacity.

Facts giving rise to this case were that in 1993 the late Existo Francis Hapaguti (hereinafter referred to as the late Existo) entered into a customary law marriage with Runyararo Violet Kadzunge, in 1995 he entered into another customary law union with applicant and later he married Charity Paradza under customary law. The marriages were unregistered.

Later applicant and late Existo went to live in the United Kingdom whilst the other two wives remained in Zimbabwe. Whilst in the United Kingdom applicant and the late Existo had their marriage solemnised in terms of Marriage Act 1949 on 17 May 2003. It thus became a monogamous marriage. The late Existo had apparently been issued with a 'Non-Marriage certificate' by the Registrar General of Marriages. It was on the basis of that

certificate that he was able to have his marriage to applicant solemnised in terms of the Marriages Act, 1949.

At the time of his demise the late Existo owned immovable and movable assets in both Zimbabwe and the United Kingdom.

The late Existo Hapaguti was survived by 11 children and three wives. Three of the children were with applicant.

The late Existo was laid to rest in Zimbabwe and subsequently his estate was registered under DR 401/09.

The first respondent was duly appointed Executor Dative of the estate late Existo Francis Hapaguti.

As the late Existo was already married to two other women when he purported to enter into a monogamous marriage with applicant, it follows that in terms of the proviso to s 68 (4) of the Administration of Estates Act, the applicant was deemed to have been married in terms customary law. That subsection states that:-

> "A marriage contracted according to the Marriages Act [chapter 5:11] or the law of a foreign country under which persons are not permitted to have more than one spouse shall be regarded as a valid marriage for the purposes of this Part even if, when it was contracted, either of the parties was married to someone else in accordance with customary law, whether or not that customary law marriage was solemnised in terms of the Customary Marriages Act [chapter 5:07];
>
> **Provided that, for the purposes of this Part, the first mentioned marriage shall be regarded as a customary- law marriage." (**emphasis is mine**)**

From the given dates of marriages, the applicant is the second wife as she married late Existo in 1995. Runyararo Violet Kadzunge is the first/senior wife having married the late Existo in 1993.

As the applicant is ordinarily resident in the UK she appointed her Cousin brother G.M. Chivazve and A. A. Musunga of Musunga and Associates to be her agents to represent her in the administration of the estate late Existo. In this regard she signed a General Power of Attorney appointing the two as her agents. See annexure THC3 dated 30 April 2009. G.M. Chivazve later terminated the services of Mr. Musunga and for all intents and purposes remained as the sole agent.

The first respondent proceeded with the administration of the estate in terms of the relevant provisions of the law and on 7 December 2009 produced the first Interim Administration and Distribution account (the inheritance plan (Annexure C)). The account

was duly advertised and no objection was raised hence it was confirmed by second respondent on 12 February 2010 in terms of ss 68 D and 68 E of the Administration of Estates Act [*Cap 6:01*].

That inheritance plan outlined the late Existo's assets and how they were to be distributed to the beneficiaries. The plan also explains why some assets were outstanding and that those issues were still to be resolved by the executor

In terms of annexure C the applicant's entitlement in the estate is governed by s 68 F (2) (b) (1) of the Act. That subsection section provides that:-

> "(b) Where the deceased person was a man and is survived by two or more wives and had one or more children-
>
> (1) One third of the net estate should be divided between the surviving wives in the proportions two shares to the first or senior wife and one share to the other wife or each of the wives as the case maybe."

Annexure C further states that the other wives were considered and that provisions of s 68 F (2) (c) relevant to immovable assets and the respective household goods was taken into account.

It is in these circumstances that on 15 June 2012 the applicant filed this application for a declaratur.

The application is opposed. In his opposition the first respondent raised some points *in limine.*

After a careful perusal of the application I was of the view that a resolution of the points *in limine* will decide the matter.

The first respondent raised issues of this court's jurisdiction; the fact that though the application has been brought as an application for a declaratur, applicant is , in fact, asking this court to review decisions made by the Master; as the inheritance plan was confirmed assets distributed to beneficiaries, beneficiaries should have been cited, their non-joinder is fatal; the application is an academic exercise to the extent that the assets which are the subject of the relief sought have been passed from the estate and lastly, that the applicant is bound by the actions of her lawfully appointed agent.

Jurisdiction

The first respondent contended that by asking court to declare what she is entitled to and to what extent, applicant is asking court to usurp the jurisdiction vested in an administrative body and declare her as the first wife or the extent of her inheritance. The applicant on the other hand contended that she is only seeking a declaratory and not to interfere with the Master's jurisdiction.

A careful analysis of the applicant's case shows that she is in fact intent on this court making a decision on what has already been made by the Master. For instance the issue of ranking of wives is within the functions of the Master upon being presented with evidence. What share a surviving wife inherits is dependent on that ranking. Section 68F (2) (b) of the Act is very clear on how the Master has to proceed in this regard. I am of the view that this court cannot determine the issue of ranking of wives at first instance as that has already been done. If it is that applicant is not satisfied with the Master's decision the recourse is not to ask this court to make a fresh determination as if at first instance. There are procedures for review and appeal available to a dissatisfied beneficiary which applicant could have resorted to. Section 68 J states that:-

> "Any person who is aggrieved by any decision of the Master in terms of this Part may appeal against the decision to the High Court within the time and the manner prescribed in rules of court."

In *casu*, on 17 August 2009 the Master made a decision that the marriage of applicant to the late Existo did not nullify the other marriages and so the estate has to fall under customary estates. Upon the executor preparing the inheritance plan as per guidance from the Master, he prepared an inheritance plan and submitted it to the Master for approval. In this regard s 68 E (3) (a) of the Act states that:-

> "If the Master is satisfied that a plan submitted to him in terms of subsection(1) has been agreed to by all the beneficiaries concerned or by such of them as the executor could with reasonable diligence have consulted, the Master shall approve the plan and authorise the executor to distribute or administer the estate in accordance with it."

This the Master did as confirmed by the approval of the plan on 12 February 2010.

These decisions by the Master were important and cannot be ignored as they determined the next step to be taken by the executor and beneficiaries.

It is my view that in as far as applicant did not challenge these decisions by the Master she cannot seek to undo those decisions through the back door under the pretext of seeking only a declaratory order.

Nature of the Application

The first respondent argued that though the application has been brought as an application for a declaratory order it is in fact an application for review. The applicant disputed that and contended that this is purely for a declaratory order.

In their submissions Counsel alluded to what would constitute an application for a declaratur and an application for review. There was not much of a dispute that court has to look at the grounds of the application to ascertain the true nature of the application.

In *Geddes Ltd* v *Tawonezvi* 2002 (1) ZLR 479 (S) court held that:-

> "In deciding whether an application is for a declaration or review, the court has to look at the grounds of the application and the evidence produced in support of them. The fact that an application seeks a declaratory relief is not itself proof that the application is not for review. The court should look at the grounds on which the application is based, rather than the order sought…"

In *Musara* v *Zinatha* 1992(1) ZLR 9 at p 14 ROBINSON J had this to say on the same subject:-

> "At the outset I would observe that the bulk of the petitioner's petition raises matters, such as malice, gross irrationality, the application of the *audi alteram partem* principle and bias, which relate to the subject of review and which would only render the act in question voidable and not void. Consequently, those issues are not properly before this court in the present application which seeks a declaratory order specifically and exclusively on the ground that the petitioner's purported suspension is null and void. Fortunately for the petitioner, there is just sufficient information on the papers to enable the court to consider the petition as one seeking a declaratory order in regard to the petitioner's suspension- had there not been such information so that the petition amounted to a review *simpliciter,*..... then I would have dismissed the petition on the ground that it was out of time as a review matter and that no cause had been shown on the papers for the court, in terms Rule 259 of the Rules of court, to extend the prescribed eight week period within which a review is to be instituted,"

See also *Kenias Mutyasira* v *Barbra Gonyora and Master of the High Court* SC 80/06.

Further, s 27 (1) of the High Court Act, [*Cap 7:06*] outlines the grounds for review as follows: -

"(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be-

(a) Absence of jurisdiction on the part of the court, tribunal or authority concerned;

(b) Interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case maybe;

(c) Gross irregularity in the proceedings or the decision."

In his submissions counsel for applicant argued that the application is not a review in that the grounds being advanced are nowhere near those for review. He then attempted to reproduce the grounds as-

"47. My case is, in terms of the law of Zimbabwe, am I entitled to inherit my late husband and if so, to what extent?

48. According to 1st and 2nd respondents, all I am entitled to is my husband's 50% share in our matrimonial home.

49. My interpretation of the applicable laws is clearly expressed in annexures 'D' and 'G'."

It was from these grounds that she is asking court to declare her entitlement.

A perusal of the applicant's founding affidavit shows that the above is an understatement of the actual grounds that she has put forth as the basis for seeking this courts interference. It is clear that the application is premised on applicant's dissatisfaction from the manner in which the late Existo's estate was administered and the decisions made by the Master in the process. Applicant alleges that: - 1st respondent was obviously too biased and personally interested in the estate and that the second respondent through an Assistant Master was biased and she felt she could not get justice. In fact in para 46 of her founding affidavit applicant states that: 'this is not an application for review but the palpably unfair treatment I got in Mrs Kashaya's hands cannot be swept under the carpet.' Clearly therefore the application is to undo what Mrs. Kashaya (Assistant Master) did which applicant felt was a biased decision. Applicant further alleges that she was not consulted and she did not agree to the inheritance plan as contemplated by s 68 E (2). She thus raises the issue of *audi alteram partem* principle in decision making by an administrative body.

The tone of applicant's affidavit gives the impression that she is bitter about such decisions as the acceptance by the Master of the existence of the two other wives, the

approval by the Master of the inheritance plan and the failure to consult her in the decision making process.

The decision to place her as the second wife and not the senior wife did not go down well with applicant. This is evident from her constant reference to herself as the senior wife and hence entitled to two quarters of a third share yet she is aware the Master, upon being furnished with information on the other marriages the late Existo had, ranked her as the second wife.

It is evident that the core of the applicant's dissatisfaction with the manner in which the estate late Existo was administered include allegations of bias, malice, collusion between the Master and the first respondent and her agent, interests in the cause by the first and second respondents when the reaching out agreement on the inheritance plan.

It is clear to me that applicant is in fact and in truth seeking a review of the Master's decisions made from the start of the administration of the estate to the approval of the inheritance plan. This is thus misplaced. The applicant ought to have made a proper application for review in terms of the rules or appealed against the Master's decisions. As it is she is way out of time from the time those decisions were made for either review or appeal.

It was also the applicant's argument that she was never consulted in the process hence the process was flawed. It is common cause that the applicant appointed two agents through a Power of Attorney comprising a legal practitioner and her own cousin brother. She clothed them with the necessary powers to look after her interests in the estate. The general power of attorney specifically states that its effect is to 'ratify, allow and confirm…….all and whatever my said Attorney, his substitutes, shall lawfully do or cause to be done by virtue of these presents.'

The Power of Attorney is quite clear on the extent to which the agents were expected to do which included to discuss and agree on the inheritance plan in terms of s 68 D (2) of the Act. That section provides that:-

> "When drawing up a plan in terms of subsection (1), an executor shall-
>
> (a) pay 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 confirmation of the fact that such consultation took place and an agreement reached, the applicant's agent Mr. G.M. Chivazve wrote a letter dated 7 August 2009 addressed to the executor, which letter, *inter alia*, stated that:-

> "In my representative capacity, and on behalf of my cousin sister Mrs. Stella Hapaguti, (the widow of the late Mr. Existo Francis Hapaguti), I acknowledge recent receipt of your letter dated 28 July 2009, together with one bound volume of the interim Forensic Audit Report, as well as a copy of the Draft Administration and Distribution Account thereof.
>
> I can confirm having had time to peruse both the Report and to analyze the Draft Administration and Distribution Account, and have found nothing warranting change or adjustment. In particular, I am happy that my initial wish as proffered at the preliminary meeting we had at my office on 28 May 2009, whereby I wished for my cousin sister Mrs. Hapaguti to exclusively inherit the UK matrimonial home, cars, furniture and other property there. I am happy that that wish has largely been adopted and respected.…….. l am in accordance thereof happy for you to send both Report and Draft Administration Account in their respective formats to the Master of the High Court, in terms of the Administration of Estates Act, (chapter 6:01), for his further consideration."

When the inheritance plan was advertised applicant's agent had occasion to examine it and this is what he said in para 2 of his letter of 15 January 2010 to the Executor.

> "I can confirm I did manage to visit the High Court within the prescribed period and managed to inspect the said First Interim Administration and Distribution Account and was satisfied beyond reproach that all was, as far as I was concerned, in order. For the avoidance of doubt or ambiguity, I can confirm that I do not have any objections with the Estate Account, nor have I any objections or reservations with the present Plan of Distribution."

This plan of distribution was borne out of a process of consultation and this is aptly captured in the agents letter dated 4 March 2010 after the confirmation of the plan wherein in para 4 thereof he said that:-

> "Meanwhile let me commend you and your team for the objective, non-biased; and professional manner that you have handled this otherwise complex estate where nearly everything seemed extra-ordinary, and indeed "hidden" from the eyes of my sister Mrs. Stella Hapaguti. Thank you one and all. **Yes we have fought, disagreed, and also quarrelled, but all for the ultima**te **benefit of all**. I am happy for my sister; my vazukuru, and all the other *bona fide* beneficiaries that include the surviving parents of the late Existo Francis, (Mr. and Mrs. Mazhindu)." (emphasis is mine)

The above confirms that there were intense consultations that took place till the executor and the beneficiaries reached an agreed inheritance plan. The agent was fully

involved in the discussions that took place and in the eventual agreed plan. His mandate had not been terminated.

From the applicant's own words she only terminated her cousin brother's agency on the 14 February 2012 well after the decisions in issue had been made with the participation of that brother. It is therefore not correct to say she was never consulted. The documents filed of record show clearly that applicant's brother was consulted in the process and he did agree to the final plan. It is my view that it was not incumbent upon the executor or the Master to consult applicant personally when she had appointed an agent for that purpose. The agent's mandate was adequate for the consultations to be valid and binding. I am of the view that the agent acted within his mandate. See *Seniors Service (Pvt) Ltd.* v *Nyoni* 1986 (2) ZLR 293 (S)

Disinheritance

Another point worthy noting is the applicant's allegation that she was disinherited. The letters by her agent show that there was no disinheritance but she was to inherit the UK properties. The inheritance plan shows that there were some outstanding issues to be dealt with including the UK properties which were allocated to applicant as her inheritance. That plan states that:-

> "In this distribution account Mrs. Stellah Hapaguti (nee Chivazve) has been left out on the understanding that she will inherit the estates 50% share in the property at No. 17 Oakhill, Letchworth Garden City, Hertfordshire, SG6 2RD in the United Kingdom. In this case the executor will be appointing an agent to administer the United Kingdom estate. It should be noted that if the value of assets cars included exceeds the average share of inheritance, we propose that the excess be shared among the 14 beneficiaries including Mrs. Stellah Hapaguti."

This is the share applicant was to inherit. The applicant seemed to labour under the belief that the UK estate should not be considered except those items she tendered, that was wrong. The executor gave applicant the opportunity to bring to the table the UK estate in a transparent manner by suggesting that an administrator be appointed to deal with the UK properties or, at the very least, she provided prove of the nature and extent of the estate in UK, but as the executor lamented, applicant has not been cooperative. She would rather the nature and extent of the estate in UK remained known to herself only.

In terms of the Administration of Estates Act, an executor is required to consider the value of all property, goods and effects, movable and immovable, of whatever kind belonging to the estate which he has been appointed to administer. The net estate the executor is to

distribute, in terms of s 68 F (2) (b) of the Act, is the residue of an estate remaining after the discharge or settlement of the claims of creditors, (s 68). It is thus the net estate of the entire estate and not of the estate in Zimbabwe only. It was thus not disinheritance for applicant to be awarded the UK estate. The misfortune is that the value of that estate was not known as applicant has not deemed it necessary to provide the UK estate account and the distribution account by the relevant authorities in UK.

The applicant through her agent objected to the appointment of a UK based agent to administer the UK part of the estate contending that it will only duplicate efforts and inundate the estate with more expenses. They suggested concentration be on the Zimbabwe estate. It was in that light that applicant's agent and other beneficiaries reached the decision that the applicant inherits the UK estate.

I am thus of the view that from the above discourse, the application cannot succeed. If for some reason one were to proceed on the merits of the order sought, I am of the view that such would still not succeed. The applicant wishes to be declared as being entitled to two quarters of a third of the net estates yet she is not the senior wife. In her papers she did not deny the existence of the other women and the dates of their customary law marriages to the late Existo. Her contention seemed to be that because the late Existo obtained a Non-Marriage Certificate, and proceeded to marry her in terms of the Marriages Act 1949, she should rank first. Unfortunately for her the ranking of wives is not dependant on the type of marriage but on the dates of the marriages. In that regard Runyararo Violet Kadzunge's marriage of 1993 ranks first and so she is the senior wife. As already alluded to in terms of s 68F (2) (b) of the Act, the senior wife is expected to inherit two shares whilst the junior wives inherit a share each.

In *casu*, as there were three wives, it means the one third share had to be divided into four shares. The senior wife Runyararo inheriting two shares whilst applicant and Charity inherited a share each. Those shares are of the third of the net value of the entire estate as defined in section 68 of the Act, and not of a part of the estate. This would thus include the assets in Zimbabwe and in the United Kingdom. I must emphasise that the sharing ratio is in terms of shares.

A further point to note is that the sharing ratio is not cast in stone as it is also subject to what the beneficiaries may decide to agree on.

It is in that light that the beneficiaries in this estate engaged in consultations and reached agreement that applicant inherits the United Kingdom estate as reflected in the inheritance plan.

A declaratory order as sought by applicant can therefore not be granted in the circumstances.

Costs

The applicant asked for costs on a higher scale and so did the first respondent. The first respondent in fact asked for costs *de bonis propriis*. He contended that the applicant and her legal practitioner have taken an unreasonable stance in refusing to concede at the very least that actions taken by an agent under a duly executed power of attorney lawfully bind the principle. He also alluded to the arrogant and intemperate language used in reference to the respondents.

After a careful analysis of the submissions I am of the view that the applicant's language in the application shows an unwarranted level of intemperance. The serious allegations made against the respondents were clearly uncalled for. If only applicant and her legal practitioner had cared to realise the implication of appointing an agent. In the circumstances first respondent felt duty bound to respond in a lengthy and at times provide unnecessary detail. This culminated in too long a response.

In reading the founding affidavit one got the impression that the applicant's legal practitioner was oblivious of this court's warnings on the use of impolite, arrogant and intemperate language in court documents. See *Nyandoro* v *Sithole & Others* 1999 (2) ZLR 353.

The language of abuse and intolerance we subject each other to in our social interaction should not be brought to the corridors of the courts. I do hope that the legal practitioner in question will seriously attend to basics of appropriate language that is respectful of other court users even when you disagree with them. Failure to take heed may result in punitive measures against the legal practitioner. For today I am of the view that costs on a legal practitioner client scale will suffice.

Accordingly, the application is hereby dismissed with costs on attorney- client scale.

Gama & Partners, applicant's legal practitioners.
Scanlen &Holderness, first respondent's legal practitioners