PRISCILLA MASARA
versus
PATIENCE MASARA
*(*In her capacity as Executor of the Estate of the late
Hubert Masara*)*
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZMBABWE
TSANGA J
HARARE, 10 June 2022 & 11 January 2023

Opposed Matter

L T Nyama, for the applicant
D Sananga, for the respondent
No appearance for 2nd respondent

TSANGA J: The first applicant is a widow seeking a declarator to rights to a house. The first respondent is the daughter to the deceased and also the executor to his estate. On the face of the application she had been sued in her personal capacity but it was not in dispute that she is the executor of the estate of the late Hubert Masara. A point *in limine* was raised regarding the fact that as she had not been cited in her official capacity this could have possible implications on costs. An application was thus made at the hearing to cite the first respondent in her capacity as executor of the estate. There was no objection to the application and it was granted thereby disposing to the point *in limine* raised.

Turning to the facts surrounding the application, the now deceased Hubert Masara married the applicant on the 16th of September 2016. He subsequently amended his Will on the 8th of February 2018, leaving her a usufruct over his house, namely No 35 Rekayi Tangwena Morningside, Mutare. The "Will" stated that the house was to be transferred after her death to an existing Trust for the children from his former marriage, named the H Masara Family Trust (The Trust). The Trust was formed on the 6th of April 2006.

On the 28th of June 2019, the deceased swore to an affidavit which he submitted to the Registrar of Deeds instructing that the Trust be cancelled. He averred therein that it had been dormant for over 13 years from the date of its registration and the Trustees had not held any

formal meetings. Furthermore, according to his sworn statement, no property had been registered in the name of the Trust. He had enclosed the Trust Deed for cancellation.

On the 11th of July 2019 he passed away. The Trust, however, had only been cancelled on the 15th of July, some four days after his death. It is against this background applicant seeks a declarator that what should now be transferred her are real rights and not a usufruct since the Trust is no longer in existence. Her averment is that due to the decedent's long illness and advancement in age, he had failed to amend his will to reflect that the Trust was cancelled.

Applicant further averred that by cancelling the Trust, the deceased intended her to be the owner of the property. She also submitted that by virtue of s 20 (1) of the Wills Act [Chapter 6:06] a competent court can interfere with the deceased's will by deleting, inserting, substituting any words so as to carry out the testator's intentions.

The core of her submission in this regard is that the words "in the event of her death or remarriage, the said house will be surrendered to the Masara Family Trust" should be deleted as the Trust referred to was no longer in existence. She therefore seeks an order from the court that the clause in the Will entitling her to a usufruct, be converted to real rights making her the sole owner of the property.

In the heads of argument, applicant's counsel Mr *Nyama*, argued that using the words "I bequeath" in the Will, the testator in fact intended the applicant to be the sole owner of the property. He further emphasised that the fact that he cancelled the Trust meant that the condition he had imposed to the bequest fell away. He also emphasised the need to give meaning to s 26 (d) of the Constitution whose spirit is to protect the rights of spouses upon dissolution of a marriage whether through death or divorce.

The application was opposed. The fact that the cancellation only took effect **after** his death was said to be of significance in its effect in that his estate immediately vested in the Trust upon his demise. Further, the reasons for cancellation of the Trust had been disputed by the beneficiaries. In a letter written by their lawyer on the 17th of July 2019 to the Registrar of Deeds, the Trust was said to in fact own shares in Masara Transport Services (Pvt) Ltd. More importantly the first respondent argued that it was clear from the Will that the deceased intended applicant to have usufruct rights only and to stay in the house until her death or remarriage.

The amendment to the Will read as follows:

> "I bequeath house No. 35 Rekayi Tangwena, Morningside, Mutare with all household goods and effects to my wife Priscilla Machiri who is to stay in the said house until her death or

> remarriage whatever comes earlier. In the event of her death or remarriage, the said house will be surrendered to the Masara Family Trust**." (**Emphasis mine)

The first respondent therefore argued that it was never intended that ownership should pass to the applicant. Furthermore, the property had been acquired by the deceased and his late first wife well before the applicant's marriage to the deceased hence why he had not bequeathed rights to her. Moreover, it was argued that upon his death the property vested in the Trust as of the 11th of July 2019 when he died. In other words, the cancellation was said to have been overtaken by events. The first respondent thus maintained that the property stood to be distributed in terms of the provisions of the Trust with the applicant having usufruct rights as per provisions of the Will. It was also submitted that the claim that the Will should be rectified could therefore not stand since rectification stands to be effected where the Will is expressed in a way which cannot carry out the testator's intentions.

At the hearing the first respondent's counsel, Ms Sananga also submitted that in seeking a declarator, a wrong procedure of law had been chosen since the applicant does not have a "right" in the strict sense to the property and all she has are personal rights. When a declaratory is sought, she emphasised, one should have a right which they want the court to declare whereas in this case the applicant was seeking the court to give her rights. Her argument was thus in essence that one needs to show a right and not a factual argument for a right. As such she argued that a declarator could not be issued.

Her argument was also that paragraph 17 of the Trust document articulated fully how the Trust was to be terminated and this process had not been followed. That paragraph stated as follows:

> "17. Notwithstanding anything to the contrary hereinbefore contained or implied the Donors may at any time by written instruction address to the Trustees, determine the date on which The Trust shall terminate (hereinafter referred to as "the termination date").
>
> Should the Donor not determine the termination date the Trustees may in their sole and absolute discretion, consider that it shall be in the interests of the beneficiary and/or beneficiaries to determine the termination date in which case the date that the Trustees shall decide upon shall be regarded as the termination date of the Trust and upon which date the beneficiary and/or beneficiaries shall become entitled to receive her or their share as the case may be determined by the Trustees of the capital and interest of the Trust Fund."

She also emphasised the point that since in any event the deceased died before the Trust was cancelled, he ceased to have dominion on the Trust and the property passed to the intended beneficiaries upon his death as per Trust Deed. Therefore she argued that there was no basis for the transfer of the property to the applicant when the beneficiaries where clearly

identifiable. In addition, she argued that if it had been the deceased's intention to bequeath real rights to the applicant, he would have done so. In particular, he would have stated so in the letter to the Deeds Registry at the time he wrote purporting to cancel the Trust. As such, she submitted that it would to be improper to try and read the intention of the testator to say he then intended to bequeath the property to the applicant when he did not. Since his reasons for cancellation were numerous, she argued that it could not be said that the reason he cancelled was because he intended to bequeath the property to the applicant. She maintained that no amount of chicanery could change the fact that what was bequeathed was a usufruct as nowhere could the court find that he intended to give her the property. In addition, extraneous evidence was said to be only necessary where there is ambiguity which in this case there was said to be none. For these reasons she sought a dismissal of the application.

Analysis

The fact that the Trust document clearly provided a method for the cancellation of the trust is important. This is because where a Trust document has procedures for its termination or revocation, it is vital that the processes and procedures for doing so should be followed otherwise it will not have been property terminated. There is no doubt that in terms of clause 17 of the Trust document, the Donor could by written instruction addressed to the Trustees, determine the date on which the Trust shall terminate. This was clearly not the procedure he followed. It is manifest therefore that the Trust was not cancelled procedurally. The method adopted by the Donor to the Trust was to write to the Registrar of Deeds to cancel the Trust. That un-procedural cancellation as stated was only effected four days after he died. The argument that the Trust fell away and that the property should be transferred to the applicant cannot hold. The Trust remained in existence. The net effect is that upon his death, without the Trust being cancelled, the property in fact vested in the Trust.

It is necessary to draw a distinction between what a will intends and what a Trust intends. The deceased's Will simply indicated his wishes regarding his wife's stay in the property. Suffice it to point out that it was never the intention of the testator when he wrote the Will to deal with the Trust property itself nor could he have done so since the details of dealing with that property were in the Trust itself. The Trust, as stated, notably canvassed what would happen to the Trust property upon its dissolution, given that it was for the benefit of identified individuals. It would be manifestly irregular therefore to try to read into the Will what he never his intended.

The amendment to the Will itself is clear that what she was to have was a usufruct. What was bequeathed were personal rights to a usufruct over the property till her death or remarriage. That does not change. Her rights to shelter are in fact protected as per intention of s 26 (d) of the Constitution which applicant invokes.

The application lacks merit and is dismissed with costs.

Nyama Law Chambers, applicant's legal practitioners
Kantor & Immerman, first respondent's legal practitioners