ATHOS PROESTOS
versus
CHRISTALLENI PROESTOS
and
CHRISTALLENI PROESTOS
(*In Her Capacity As Executrix Dative For Estate Late Dinos Erotokritou Constantinos DR 4429/21*)
and
CHRISTALLENI PROESTOS
(*In Her Capacity As Executrix Dative For Estate Late Eleni Dinou Proestos DR 4428/21*)
and
PRATIBHA PATEL
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 8 June & 24 August 2023

Opposed Application

V Vera, for the applicant
SM Hashiti & V Dzingirai, for the 1st to 3rd respondents
E Mubaiwa, for the 4th Respondent
No appearance for 5th & 6th respondents

TSANGA J:

The background facts

The applicant Athos Proestos and the first respondent Christalleni Proestos are brother and sister. Their dispute lies in the validity of their mother's will which accorded Christalleni Proestos property known as known as stand 12895 Salisbury Township also known as number

94 Churchill Avenue, Gun Hill, Harare, Zimbabwe. The will also made her an executor of the estate.

Applicant's complaint is that their parents' estates were fraudulently registered by Christalleni on the strength of that fraudulent will, having torn up their mother's will of 2000 which granted the property equally to both of them. In her capacity as executor, Christalleni Proestos had then sold the property to the fourth respondent, Pratibha Patel, (the purchaser) who took transfer and commenced renovations of the property.

On the strength of a filed action by the applicant under **HC 2528/22** against the respondents claiming revocation of letters of administration and the setting aside agreement of sale to the purchaser, the applicant had then brought an urgent chamber application seeking an interdict. The provisional order granted required the purchaser to immediately cease construction works, destruction of any walls, cutting down of trees, trenching, and excavation or developing in any way or making physical changes to the property. Before me is therefore sought confirmation of the provisional order.

The final order now sought is that the purchaser be interdicted from selling or alienating the property or in any way or disposing of it until the hearing of the matter under **HC 2528/22**. It is also sought that she does not make any changes to that property. The Registrar of Deeds is sought to be prevented from signing any transfer papers in respect of that property also pending the hearing of the matter mentioned. Costs of suit are sought against both Christalleni and the purchaser on a higher scale.

Preliminary points raised

The confirmation is resisted on several preliminary points. Relying on the principle that a point of law can be raised at any time, the first point raised by Mr Hashiti on behalf of the first three respondents cited in in this matter is that the founding affidavit defectively references the estates as the respondent in its paragraphs two and three. The point being that the estate cannot be sued as it is a mere aggregate of assets and liabilities and not person at law. As such, it is the estate's representative that ought to be sued. He argues that there is therefore no second or third respondent in this matter since a matter stands or falls on its founding affidavit. He places reliance on *Nyandoro* v *Nyandoro HH 89/08* for the principle that it is the estate's representative who ought to be cited and that the citation of an estate in the absence of an executor is improper. Mr *Hashiti* also relies on the case of *Estate late Ngavaite Jack Chikuni Aka Ngavayite Jack Chikuni & 2 Ors* v *James Chikuni* HB 143/21 where the court held that

there was no first applicant before the court as it was the estate that had been cited as the first applicant.

Whilst the cover to the application references the second respondent as Christalleni Proestos *in her capacity as Executrix for Estate late* Dinos Erotkritou Constantinos Proestos, this is said to be no cure in the absence of the letters N.O (*Nominee Officii*) after Christalleni's name, indicating that she acts in an official representative capacity. Mr *Hashiti* also says that in a case where the headings to an application say one thing and the founding affidavit says another, it is to the founding affidavit that one should concentrate on and not the cover of the application. In response to applicant's attempt to amend the citation in view of the preliminary point raised, Mr *Hashiti* argues that the citation of a non-existent party cannot be amended as the proceedings themselves are a nullity. He highlights the case of *Commissioner General - Zimbabwe Revenue Authority* v *Benchman Investments (Private) Limited SC* 88/21 for the principle that courts are required to follow precedent.

Mr Mubaiwa on behalf of the purchaser, the fourth respondent in the matter, also raised two preliminary points. The first was that the application is defective because the wrong form was used, his point being Form 23 should have been used in the application as it spells out the other party's procedural rights. His second point was that the application could not have relied on the affidavit of a deponent who litigates on a general power of attorney which is executed extra judicially and not authenticated before a notary public but had instead been stamped by a certifying officer who did not claim to be a notary public.

Addressing the preliminary points raised

On whether the second and third respondents are not before the court, the crisp issue before me is whether on the totality of the facts in this case, it can be said that the estate was cited without a representative in the founding affidavit. To the extent that the heading to the application dearly references the executor, the issue is whether the omission of the letters N.O in the headings are fatal as Mr *Hashiti* argues.

It is trite and accepted that a deceased person's estate of necessity needs to be represented by an executor. After all the deceased will no longer there and therefore there is no way a deceased estate can be cited without mentioning its representative. That is common sense as the deceased cannot speak and neither can the estate speak on its own behalf. There must be a person to do so on behalf of the deceased's estate.

If one zeroes in on the argument that it is to the founding affidavit itself to which one must turn, then of course that affidavit must be read as a whole rather than piece meal for self-serving purposes. A founding affidavit is not just part of it but the whole of it that must be examined. A reading of the founding affidavit beyond the limited paragraphs which Mr *Hashiti* zeroes on shows that the preliminary point is without merit and ought to be dismissed. It is evident in paragraph 19 and 20 of the founding affidavit that Christalleni was appointed executrix and that she was granted letters of administration. The point is here is that the founding affidavit absolutely and undoubtedly averred to the crucial fact that Christalleni was appointed as executor and holds letters of administration. Furthermore, and more significantly, the specific paragraphs in question even if couched by mentioning the estate first, make immediate reference to the fact that the estates are being represented by Christalleni. In other words, the framing is a matter of semantics, or of form rather than substance. For the avoidance of doubt the paragraphs read as follows:

> "The second respondent is ESTATE LATE DINOS EROTKRITOU CONSTANTINOS PROESTOS which is the registered estate of the Applicant and First Respondent's late father, ***and is being represented by the first respondent***….(My emphasis)

Paragraph 3 also reads as follows with regards to the third respondent:

> "The third respondent is ESTATE LATE ELENI DINOU PROESTOS which is the registered estate of the Applicant and first respondent's late mother, ***and is being represented by the first respondent***….." (Again, my emphasis)

Nothing could therefore be further from the truth to try and pretend that this was a case without an executor. Whilst the affidavit as a whole elucidates the capacity in which she represents those estates, that is, as an executor, the application headings of the parties also positively leave no doubt that both parents' estates are represented by the executor even if the words N.O are not included next to Christalleni's name. The fact that the words N.O. indicating an official capacity are missing, is not fatal. The abbreviation stands for the Latin words *nominee officii* or *officio*. Latin is not taught in our schools and it is not even a requirement for admission to legal studies. What is taught is the English language. To argue that a citation lacking the abbreviation of those Latin terms, when the capacity of that person is already captured in simple English (executor), is to slavishly insist on colonial hang-ups which serve no useful purpose other than to try to hamper access to justice on the flimsiest of technicalities.

This approach to litigation more often than not puts parties to unnecessary expense on account of grand standing antics by lawyers.

Further, despite Mr *Hashiti* seeking to down play the significance of the headings, all the cases he referred to for the argument that there is no legal persona cited referred to the citation of the parties in the heading. (See *Zimbabwe Bata Shoe Company Ltd* v *Bata Shoe Company Middle Management* SC 30/12; *Amos Makondo & 32 Ors* v *Freda Rebecca Mine Limited* HH 400/18; *Stewart Scott Kennedy* v *Mazongororo Syringes (Pvt Ltd*) 1996 (2) ZLR 565. Also, virtually all the cases referred to by Mr *Hashiti* on the issue of the executor are distinguishable in the factual circumstances from the case before me. Thus in the *Chikuni* which Mr *Hashiti* relied on, suffice it to point out that the court in holding that there was no first applicant before it, did so on the basis that as first applicant, it was just the estate cited without mention of a representative. However, the court duly recognised the executor of that estate who had been duly cited on the face of the application as the second applicant. The important point therefore is that the executor must be cited if the estate is to be represented and that an estate cannot simply stand alone.

The facts in the *Nyandoro* case are also immediately distinguishable from this case in that no executor at all had been appointed in that case, which then led the court to the conclusion that there was no representative of the estate before it. This leads me to comment on the issue of following precedent as raised by Mr *Hashiti*. Judicial decisions are indeed influenced by prior case law for reasons such as certainty, predictability, and, ensuring that litigants are treated equally, hence the reason why courts cite precedents. However, following precedents is not a slavish endeavour because it is also a fact that cases will generally differ in some respects meaning that equal treatment cannot be expected in all cases. Blindly applying precedence in the name of speed or efficiency is not always appropriate because treating cases alike, when there are in fact factual variations, may not yield just outcomes. Therefore in applying principles as hard and fast, they must be applied to similar fact circumstances. It thus remains the duty of a judge to look at likeness and decide whether a precedent is most nearly like the case at hand or it calls for distinction.

Having done just that, the distinguishing elements in the cases drawn to by Mr *Hashiti*, lead me to the conclusion that the preliminary point he raised is frivolous. There is no need for the applicant to apply for any amendment on the basis of the point raised as the executor was

cited and the estates had a representative even in the founding affidavit. The preliminary point raised is therefore dismissed.

Turning to Mr *Mubaiwa's* objection to the form used, there was zero prejudice suffered from the use of the wrong form. As stated in *CBZ Bank Limited* v *Home Sweet Home (Pvt) Ltd* 2019 (2) ZLR 541 (H) as long as the factor of giving notice to the respondents has been complied with and the respondents have not been prejudiced by the failure to reproduce the correct form, no useful purpose would be served by rejecting the application on that technicality. As also emphasised in the same case, it is not the purpose of the rules to stand in the path of access to justice. His preliminary point is accordingly dismissed. On the issue of the power of attorney certification, indeed r 85 (2) of the High Court Rules, 2021 indicates what is required by way of authentication. The applicant's response to the objection raised is that in Cyprus, notarial work is done by certifying officers. Mr Mubaiwa says that is matter of evidence. However, Rule 85 (6) also provides as follows:

> (6) Nothing contained in this rule shall prevent the acceptance as sufficiently authenticated by any court, tribunal or public office of any document which is shown, to the satisfaction of such court, tribunal or public office, to have been actually signed by the person purporting to have signed the same.

I am satisfied with the explanation given and that the power of attorney was signed by the applicant and that in terms of the explanation rendered it was sufficiently authenticated. This preliminary point is therefore also dismissed.

Addressing the merits

On the merits, in seeking to confirm the provisional order, the applicant's lawyer, Ms *Vera* zeroed in on applicant having a clear right, the irreparable harm to him if the interdict is not confirmed, and, him having no other remedy. In arguing that he has a clear right, she emphasized that he is the son of the late Eleni and is naturally entitled to inherit. Furthermore, there was a will which had (allegedly) been destroyed by Christalleni. She further argued that applicant has prospects of success in the main matter as Christalleni benefitted from a will which she wrote herself and that she caused her late mother, who suffered from dementia, to sign the will under duress. As for the purchaser, the argument on merits was that her title had been acquired through unlawful means and therefore she could not enjoy any lawful rights as her acquisition of title was a nullity. Applicant also argued that the institution of summons rendered the property subject to litigation and therefore none of the parties should be dealing with property in any way.

Regarding irreparable harm, Ms Vera emphasized that the property in question has always been applicant's home. He has memories there and the purchaser was already making permanent changes with the risk that the property would diminish in value from her interventions. If permitted to proceed, she further argued that there is no way that the applicant can recover. Irreparable harm was also said to arise if the purchaser is not barred, given the likely prospects of success in the main matter regarding the will's invalidity. Ms *Vera*, however, acknowledged that there are hiccups with the main matter in that the second and third respondents are said to have been improperly cited. She was, however, confident that an amendment would be allowed. As for having no other remedy, she argued that the applicant had tried to communicate with the purchaser on the matter but she had remained stubborn thus leaving this court to intervene.

On costs the applicant seeks to be compensated for these proceedings on a higher scale and says Christalleni must be punished for destroying the will. The purchaser too, took transfer despite having been warned and applicant says that both have caused this litigation and should be mulcted with costs on a higher scale.

Akin to arguing a preliminary point, Mr *Hashiti* focused on applicant's affidavit which he said constituted hearsay evidence as it had been deposed to by applicant's son. However, the applicant's response was that the facts were within his knowledge and that he fits within the purview of r 58 (4) of the High Court Rules, 2021. That response has merit. The provision provides as follows:

> (4) An affidavit filed with a written application—
> (a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein.

The rule therefore permits an affidavit to be deposed to by a person who can swear to the facts. The deponent being the applicant's son, there is indeed no basis for assuming that he had no knowledge of the facts he swore to.

Mr *Hashiti's* more crucial point was that there is no pending main matter on the will as the applicant is also barred for failure to file a replication. He highlighted that the interdict was therefore sought pending irregular proceedings.

What emerged on the merits, from the heads of argument as well as oral submissions by both Mr *Hashiti* and Mr *Mubaiwa*, can be crystallised as follows: The facts as stated by the respondents, together with those admitted by the applicant, do not prove any clear right. If applicant has a claim to a share, that share is not physical as is it to a share of the net proceeds

of the joint estate. Applicant's share is half of the net proceeds and he therefore only has at most, personal rights to a 50% share rather than real rights with respect to the property and yet he is seeking to exercise his personal rights over the purchaser's real rights. The purchaser, having title is on the other hand entitled to alienate or improve upon the property without question. See *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S).

Moreover, their argument goes, the applicant has another remedy since the procedure for realizing his share is by lodging a claim with the Master. Their emphasis, therefore, is that an interdict should not be granted as the applicant can still claim value if he is so inclined as the court cannot force heirs to co –own. It is also pointed out that he did not indicate anywhere that it is his desire to buy out his sister's half share. Having said applicant has no clear right, it follows, they argue, that there is no interference of a right.

Additionally, the will which was accepted by the Master is said to be still extant. The decision by the Master to accept the will is also said to have been had been made on the presumption of regularity, which decision still stands. The allegations that the will was torn up are said to be bald averments with no supporting evidence of witnesses and has not been tested at trial. Christalleni's explanation, in essence, is that their mother changed her will because the applicant sold a house in Cyprus which belonged to her and failed to remit the proceeds as per agreement which resulted in her living in poverty. Also, since Christalleni denies destroying the will, this is said to raise a dispute of facts which cannot find easy resolution through these application proceedings. The case of *Supa Plant Invstmsts* v *Chidavaenzi* 2009 (2) ZLR 132 (H) is highlighted for this principle.

As for costs sought on a higher scale by the applicant, they argue that no basis has been laid out for such costs. Instead, costs on a higher scale are sought from the applicant because the applicant is said to be pursuing vexatious proceedings well aware that he does not have recognised rights.

Additionally, being barred in the matter, the applicant is not entitled to do anything. They therefore seek for the provisional order to be discharged and that the application for a final order be dismissed with costs on a higher scale.

The argument that the will which the applicant seeks to impugn remains valid is correct, particularly in the face of the applicant being barred. Even if an amendment were to be granted on the simple issue of citation of the parties as I have done herein, there are other infractions which are not before me that will have to be decided by the court hearing the matter for uplifting

of the bar. What is crucial to the confirmation of the order is that there are compelling arguments that have been made which illustrate that the applicant does not have real rights even if the will is declared invalid. His rights are personal and to the extent that he has any claim were the will to be found invalid, such claim would only be to a half share of the property as per the will he seeks to have reinstated. Costs have been sought on a higher scale but it is not before me to speculate on the validity of the will, or improprieties on the sale procedures or whether the bar will be uplifted. What is clear is that the final order sought before me cannot be granted as no real right has been established justifying the grant of a final order. Accordingly:

The provisional order is discharged and the application for a final order of confirmation is dismissed with costs.

Tamuka Moyo Attorneys, applicant's legal practitioners
Chivore Dzingirayi Attorney, first to third respondents' legal practitioners
Chimhonga Legal Practice, fourth respondent's legal practitioners