JULIET DHLONONO

Versus

ANNA SIBANDA

And

THE MASTER OF THE HIGH COURT

And

ZVISHAVANE TOWN COUNCIL

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 30 SEPTEMBER & 4 NOVEMBER 2021

Court application

Ms. C. Madzudzu, for the applicant
1st respondent in person

DUBE-BANDA J: This is a court application to set aside the Additional Master's decision. Applicant seeks an order couched in the following terms:

1. The award of house number 340 Mandava Township, Zvishavane by the Additional Master sitting at Zvishavane in case number DRB Z 1135/03 on the 9th September 2003, is hereby set aside.
2. The applicant is declared the sole heir to the Estate Late Davison Dhlonono in case number DRBZ 135/03.
3. The applicant is awarded house number 340 Mandava Township Zvishavane as her sole and exclusive property.
4. The 3rd respondent is directed to cede house number 340 Mandava Township to the applicant as her sole and exclusive property.
5. The 1st respondent shall pay the applicant's costs of this application.

The application is opposed by the 1st respondent. The 2nd and 3rd respondents are cited in their official capacities because the implementation of the order sought by the applicant, if granted may require their services.

This application will be better understood against the background that follows. The late Davison Dhlonono (Dhlonono) died on the 13th April 2003. At the time of his death he was not married. Applicant is a daughter of the late Dhlonono. She was nineteen years old at the of her father's death. 1st respondent is a sister of the late Dhlonono. The estate of the late Dhlonono was registered with the office of the Additional Assistant Master at Zvishavane. An edict meeting was held, applicant and the 1st respondent attended such meeting. 1st respondent was appointed Executrix Dative. The estate property being house number 340 Mandava Township Zvishavane (the property) was awarded to 1st respondent. The property has not been ceded or transferred into the name of the 1st respondent. Applicant resides at the property. She is aggrieved that the property was awarded to 1st respondent, a sister to the deceased. It is against this background that applicant on the 26 July 2019, launched this application seeking the relief mentioned above.

In her notice of opposition 1st respondent took a preliminary point. The point taken is that this application is fatally defective. It is contended that a decision of another tribunal can only be set aside on review or appeal. It is argued that this application is neither a review nor an appeal against the decision of the Additional Assistant Master, it is therefore fatally defective. *Ms. Madzudzu* counsel for the applicant argued that this application is not fatally defective, in that in terms of section 13 of the High Court Act [Chapter 7:06] this court has original jurisdiction over all persons and over all matters in this country. It was further argued that this is an application for a *declaratur* filed in terms of section 14 of the High Court Act, and that it is competent to seek the relief mentioned above by means of such an application. Counsel contended that in terms rule 4C of the High Court Rules, 1971 this court may at its discretion condone the use of a court application rather than an application for a review.

The net effect of this application is that applicant is aggrieved by the decision of the Additional Assistant Master, and seeks to have it vacated. Section 52(9) (ii) of the Administration of Estates Act [Chapter 6:01] says:

> The Master shall consider such account, together with any objections that may have been duly lodged, and shall give such directions thereon as he may deem fit:
> Provided that—
> (i) any person aggrieved by any such direction of the Master may, within thirty days after the date of the Master's direction, and after giving notice to the executor and to any person affected by the direction, apply by motion to the

> High Court for an order to set aside the direction and the High Court may make such order as it may think fit.

The decision of the Additional Assistant Master that is sought to be set aside was made on the 9 September 2003. This application was filed approximately sixteen years later. Section 52(9)(i) of the Administration of Estates Act is clear that once dissatisfied with the Master's decision regarding a final distribution account, one has to approach this court through motion proceedings within 30 days after the date of the Master's decision. Applicant did not approach the court within the thirty (30) days so provided to challenge the Master's decision.

Applicant did not comply with section 52(9) (ii) of the Administration of Estates Act. She argues that this is an application for a *declaratur,* which argument connotes that it can be filed outside the provisions of section 52(9) (ii) of the Administration of Estates Act. My view is that marking this application as a *declaratur* is an attempt to circumvent the provisions of section 52(9) (ii) of the Administration of Estates Act. Notwithstanding what she marks her application, the net effect of it all is that she is, in the reading of section 52(9) (ii) of the Administration of Estates Act a "person aggrieved by any such direction of the Master." The law has provided an avenue for redress for persons who find themselves in her situation. She cannot, because it is convenient to her circumvent and invent her own procedure outside the legislative provisions provided by law. This is impermissible. See: *Madondo N.O v Cecilia Vimbainashe Dauramanzi & Ors* HH 214/17; *Kwete* v *Africa Community Publishing and Development Trust* HH 216/98 and *Marashu* v *Old Mutual Life Insurance Co Ltd* 2000 (2) ZLR 197 (H); *Ex-Constable Stanley* v *The Commission General of Police and Others* HB 288/17; *Geddes* v *Tawonezvi* 2002(1) ZLR 479 (S).

Applicant argues that this is a court of inherent jurisdiction, i.e. it can invoke such powers and set aside the decision of the Additional Assistant Master notwithstanding the incorrect procedure. I do not agree. It seems to me that the notion of inherent or original jurisdiction does not permit this court to run amok and start doing things that are outside the law. This court has inherent jurisdiction to act within the parameters of the law. It cannot condone a circumvention of clear provisions of a statute under the pretext of the principle of inherent jurisdiction. Such is impermissible. Again, rule 4C of the High Court Rules, 1971

cannot rescue this application. This rule speaks to this court's jurisdiction to authorize or condone a departure from any provisions of the rules including an extension of any period specified therein, but it does not permit this court to authorize or condone a circumvention of another statute. It seems to me that a failure to comply with section 52(9) (ii) of the Administration of Estates Act cannot be rescued by rule 4C.

The court has to be wary of applications that may appear as seeking declaratory orders, when in fact designed to circumvent provisions of the law. I find merit in the 1st respondent's preliminary point that this application is fatally defective. The entire application is fatally defective. In my view the appropriate order would therefore, be to strike out the entire application without any further ado.

The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the applicant.

Disposition.

On this facts of this matter, I come to the conclusion that this application is fatally defective, and in the result, I order as follows:

1. The preliminary point that this application is fatally defective is upheld.
2. This application is struck off the roll with costs of suit.

Mhaka Attorneys, applicant's legal practitioners