MAXWELL MUTOKO
versus
CHARITY MUKURO
(In her capacity of executor in the estate late Jayison Mukuro DR1746/2000)
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, July 06, 2010 and 30 September, 2010

Family Law Court- Opposed Matter

R. Chivaura, for applicant
D. Muzawazi, for 1st respondent.

CHITAKUNYE J. The applicant is a son to the late Jayison Mukuro. He is however not born of first respondent. The first respondent is a surviving spouse of the late Jayison Mukuro. She was duly appointed executor of the Estate late Jayison Mukuro.

The second respondent was cited in his official capacity. Applicant as son to the late Jayison Mukuro is a beneficiary in the estate.

The first respondent upon being appointed executor proceeded with her duties in that regard. On 11 November 2002 she filed a First and final Liquidation account of the estate late Jayison Mukuro DR 1746/00. In her distribution plan, in terms of the Administration of Estates Act [*Cap 6:01*], she distributed the balance of the estate to herself and nine children. The nine children included the applicant. Each of the children was allocated a ninth share of the balance whilst she allocated herself stand no. 596 Section 2, Kambuzuma, household goods and effects and the first sum of 200 000 Zimbabwe dollars. The applicant was apparently not amused with the manner in which first responded made the distribution. The applicant objected to the confirmation of the distribution account on the basis that his mother had not been included. A dispute thus arose which required resolution.

Section 68E (1) of the Administration of Estates Act [*Cap 6: 01*], hereinafter referred to as the Act, states that- "As soon as possible after drawing up a plan in terms of section sixty-eight, an executor shall submit it to the Master for approval."

Section 68E (3) (c) of the Act provides that:-

> "If the Master has reason to believe that one or more of the beneficiaries concerned have not agreed to a plan submitted to him in terms of subsection (1), the Master shall proceed to determine, in accordance with section *sixty-eight* F, any issues in dispute

> between the executor and the beneficiary or beneficiaries, and shall direct the executor to distribute or administer the estate in accordance with his determination."

Section 68 F deals essentially with the manner the Master is expected to proceed in resolving the dispute.

In *casu* applicant said his objection was premised on s 68F (2) (c) (i) of the Act as amended by s 3 of the Administration of Estates Act No. 6/97. That section states that-:

> "The Master shall be guided by the following principles, to the extent that they are applicable, when determining any issue between an executor and a beneficiary in terms of paragraph (c) of subsection (3) of section *sixty-eight* E-
>
> (c) where the deceased person was a man and is survived by two or more wives, whether or not there are any surviving children, the wives should receive the following property, in addition to anything they are entitled to under paragraph (b)-
>
> (i) where they live in separate houses, each wife should get ownership of or , if that is impracticable, a usufruct over, the house she lived in at the time of the deceased person's death, together with all the household goods in that house;….."

Applicant stated that on 25 July 2007 he requested the first respondent, through second respondent, to amend the First and Final Liquidation Account so as to award stand 596 Section 2 Kambuzuma to Virginia Phiri, but the first respondent has not done so. It is apparently upon realizing that the second respondent had failed to get the first respondent to amend the distribution account that applicant opted to approach this court for relief.

On 12 November 2009, the applicant filed the present application seeking an order that:-

1. the first respondent be ordered to amend the First and Final Liquidation Account dated 11 November 2002 filed with second respondent DR 1746/2000 by including Virginia Phiri and allocating to her stand no. 596 Section 2, Kambuzuma, Harare;

2. That the first respondent pays the costs of this application.

In his application the applicant stated that his mother Virginia Phiri was at all material times living at 596 Section 2, Kambuzuma, Harare up to the time of deceased's death. The first respondent as the second wife was at all material times living at 6 Mahwemashava, Zengeza 3, Chitungwiza. He therefore argued that in terms of s 68F.his mother should be awarded the Kambuzuma house as the Late Jayison Mukuro's first wife.

The first respondent opposed the application. In her opposition the first respondent raised two points *in limine*. The first pertained to applicant's *locus standi* to bring such an application

on behalf of his mother. The second point was that the applicant has adopted the wrong procedure as it must have been evident that there were disputes of fact that needed the calling of *viva voce* evidence. She contended that the matter can not be resolved on the papers only. The factual disputes she pointed out included her denial that Virginia Phiri is a surviving spouse. She contended that she was the only spouse to the late Jayison Mukuro. She denied that Virginia. Phiri was staying at house no, 596 Section 2, Kambuzuma. She instead said she is the one who is residing at that house and she has been so resident there since 1966 when she got married to the late Jayison Mukuro. She went on to say that she had never stayed at No. 6 Mahwemashava Zengeza 3 Chitungwiza. From the time they bought that residence it is their nephew who has been residing at that residence. The first respondent went on to say that these are disputes of fact that are well known to applicant.

In his answering affidavit applicant maintained his stance and insisted that an order be granted in terms of the draft. He attached an affidavit purportedly from his mother and a letter from the City of Harare (as annexure E and F) all in an effort to show that Virginia Phiri was a surviving spouse to the late Jayison Mukuro.

Locus standi

Locus standi may be defined as the right to be heard in court or other proceedings. It is a right dependant on the interest one has. If one is to represent another the basis for the representation must be made clear from the founding papers.

In *Stevenson v Ministry of Local Government and Others* 2002 (1) ZLR 498 (S) at 500 C-D SANDURA JA stated that:

> "Whilst it is well established that a party who initiates legal proceedings, whether by application or summons, should indicate in the commencing papers that he has the *locus standi* to bring such proceedings, what he has to show in order to satisfy that requirement is that he has an interest or special reason which entitles him to bring such proceedings."

In *ZIMTA and Others v Ministry of Education* 1990 (2) ZLR 48 court considered a number of case authorities on the issue of *locus standi*. One of the cases was S.A. *Optometric Association v Frames Distributors (pty) ltd t/a Frames Unlimited* 1985 (3) SA 100 (O) wherein at 103 I to 104F LICHTENBERG J said that-:

> "To justify its participation in a suit or to bring proceedings for relief, a party must show that it has a direct and substantial interest in the right which is the subject matter of the litigation and in the outcome of the litigation and not merely a financial interest which is only an indirect interest in such litigation."

After a consideration of the cases the learned judge in *ZIMTA and Others v Ministry of Education* (*supra*) at 57 B-C concluded that-

> "From these authorities it is apparent what the legal approach to the issue of *locus standi* should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action."

In *casu* the applicant was required to clearly state the basis upon which he brought this application on behalf of his mother.

A reading of the applicant's founding affidavit does not reveal the basis of his authority to seek the relief on behalf of his mother. The section he cited does not cloth him with the authority to sue or make an application for any relief on behalf of his mother. If anything it is the aggrieved spouse who should seek the relief in question. As a beneficiary, applicant is not complaining that he has not been adequately catered for. It is his representative capacity that in my view has not been justified. It was only after the issue of *locus standi* was raised in first respondent's opposing affidavit that applicant attached his supposed mother's supporting affidavit. But again there is no where stated either in the answering affidavit or in the mother's supporting affidavit authority for applicant to act on behalf of his mother. For instance in paragraph 4.4 of her opposing affidavit, first respondent stated that: -

> "It is surprising that the applicant is bringing this application on behalf of his mother Virginia Phiri when in fact the application should have been brought by the mother. I am advised by my legal practitioners, which advise I take, that the Applicant has no legal standing to institute these proceedings on behalf of his mother. He has not demonstrated the authority he is using to make this application."

Instead of stating precisely his *locus standi* as challenged by 1st respondent, applicant in response to that paragraph stated in his answering affidavit that-:

> "Ad para 4.4
> This is denied. Applicant and Virginia Phiri who is his mother are the first family to the late Jayison Mukuro such that no. 596 Section 2, Kambuzuma, Harare, is a family home to applicant and his mother. First respondent left out Virginia Phiri on the First and Final Liquidation Account annexure A to undermine the family status which has existed between applicant, Virginia Phiri and the late Jayison Mukuro."

It is apparent that applicant did not address the issue of his *locus standi*. As if that was not enough, in his heads of argument applicant never addressed the issue at all. It was only in his *viva voce* submissions in court that counsel for applicant referred to the issue of first family as the basis for the *locus standi*. But surely being a son or daughter to another does not on its

own cloth the son or daughter with legal capacity to act for and on behalf of the parent in legal proceedings. No effort was made for the mother to be a party to the proceedings or to purport to be giving applicant authority to act on her behalf.

I am of the view that applicant has lamentably failed to show that he has any direct or substantial interest or legal interest to act for his mother as he purported to do. The mother in her affidavit in support of applicant's assertion that she was married to the late Jayison Mukuro did not state that she had authorized applicant to act for her or even that she suffers from any legal incapacity such that she could not act on her own and needed applicant to act for her.

I am of the view that applicant has not shown that he has *locus standi* to seek the relief he is seeking on behalf of his mother. The application can thus be dismissed on that basis.

The second *point in limine* on material disputes of fact.

I will proceed to deal with it for completeness sake on the points in limine.

The first respondent contended that there are material disputes of facts that are apparent and as such applicant should have proceeded by action and not by application. The applicant's response to this point was unclear as in his answering affidavit he did not dispute that there were indeed disputes of fact. In his submissions to court applicant's counsel urged court to take a robust approach and decide the application on the papers as filed of record. The first respondent's counsel on the other hand maintained the stance that the application cannot be resolved on the papers as the disputes of fact are material.

It is trite that where there are disputes of fact the motion procedure should not be adopted. Where disputes of fact become apparent a court may take a robust approach to the conflicts of facts and decide the case where it thinks that it can solve the issue despite the apparent conflict. In *Masukusa v National Foods Limited and Another* 1983(1) ZLR 232(H) MCNALLY J, as he then was, had occasion to deal with circumstances court may take a robust approach as advocated by applicant's counsel. At p 235 he stated that: -

> "A court will take a robust view of conflicts of fact where it thinks it can solve the issue despite the apparent conflicts."

The question that arises is whether this is a case where court can resolve the matter without the need for resolution of the conflict in the facts. I am of the view that the disputes of fact as pointed out by first respondent are fundamental to the relief applicant is seeking. The applicant's case is based on his assertion that Virginia Phiri is a surviving spouse of the late

Jayison Mukuro and was the one residing at no. 596 Section 2, Kambuzuma at the time of Jayison Mukuro's demise. The first respondent disputes that. She indicated that she was the only spouse of the late Jayison Mukuro and she is the one who has been staying at no. 596 Section 2 Kambuzuma since her marriage to the late Jayison Mukuro in 1966.

It is not disputed that the question of whether or not Virginia Phiri is a surviving spouse of the late Jayison Mukuro has been known to applicant for a long time. Indeed applicant has been before these courts in HC 9730/02 and SC.54/05. He knew from the opposition of first respondent to his application in those cases that first respondent was disputing that Virginia Phiri was a surviving spouse of the late Jayison Mukuro.

In *Musukusa v National Foods Limited and another (supra*) at p 236C-D the judge quoted with approval the words of CENTLIVRES CJ in *Adbro Investment Co. Ltd* v *Minister of the Interior* 1956 (3) SA 345 (AD) at 350A wherein the learned judge said that-

> "Where the facts are in dispute the court has a discretion as to the future course of the proceedings. It may dismiss the application with costs or order oral evidence in terms of any Rule of court. The first course maybe adopted when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop."

At p 236E-G MCNALLY went on to say that-

> "Now, in the present case I have not the slightest doubt that the applicant should have realized that a serious dispute of fact was bound to develop as between himself and both respondents. Should I, nevertheless, in the interest of saving costs and generally getting on with the matter condone the wrong approach? In my view it would be wrong to do so. There are a number of reasons. In the first place this is a very clear example of the wrong use of the procedure. The conflicts of fact were glaring and obvious and were in fact referred to in the applicant's affidavit….."

The above statement by the learned judge in that case equally applies to the circumstances of this case. It was obvious from the onset that the issue of Virginia Phiri's status was disputed and the contention that she was the one residing at no. 596 Section 2 Kambuzuma was disputed. The applicant in fact mentioned those aspects in his founding affidavit. These are also disputes that had been evident from the prior court cases between applicant and first respondent. The applicant knew that he would be required to prove that his mother was a surviving spouse of the late Jayison Mukuro and that she was the one residing at the house in dispute at the time of Jayison Mukuro's death. The letter from the City of Harare the applicant tendered was highly inadequate to prove the contentious facts. Not only was the

letter not specific as to its point in time, but it did not identify the subject of its application. That letter reads as follows –

> "RE: CHARITY MUKURO- V- MAXWELL MUTOKO.
>
> I refer to your letter referenced DE/MM/2000 dated 26th October 2000.
> Virginia Phiri was registered in our records, but she was later cancelled."

If any one were to use such a letter as evidence that Virginia Phiri was a surviving spouse of the late Jayson Mukuro and that at the time of his demise she was the one living at house no. 596, Section 2, Kambuzuma they would certainly need to call *viva voce* evidence as the letter is bereft of such information.

I am of the view that from the above this is not one of the cases were a robust approach would do justice to the case. It is a case deserving of dismissal. This is a case where court must show its displeasure at the procedure adopted by applicant more so at his insistence on the procedure even when from his own papers it was clear that he knew there were disputes of fact that needed to be resolved before the order he sought could be granted.

Accordingly the applicant's application is hereby dismissed with costs.

Chivaura & Associates, plaintiff's legal practitioners.
Bachi- Muzawazi & Associates, first respondent's legal practitioners.