REPORTABLE ZLR (65)

Judgment No. SC 80/06
Civil Appeal No. 144/06

KENIAS MUTYASIRA v

(1) BARBRA GONYORA (2) THE MASTER OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 11, 2006 & MAY 28, 2007

I E G Musimbe, for the appellant

G C Chikumbirike, for the first respondent

No appearance for the second respondent

SANDURA JA: This is an appeal against a judgment of the High Court which nullified the appointment of the appellant ("Kenias") as the executor dative of the estate of the late Muchineripi Rishon Gonyora ("the deceased"), and confirmed the appointment of the first respondent ("Barbra") as the executrix dative.

The factual background is as follows. In 1976 the deceased married Barbra in terms of the African Marriages Act, *Chapter 238* (now the Customary Marriages Act [*Cap. 5:07*]). Three children, Roy, Yvone and Sandra, were born of the marriage. The deceased had two other children from a previous marriage.

The deceased died in Harare on 13 August 2002 and Barbra had the deceased's estate registered at the Harare Magistrates Civil and Customary Law Courts.

On 17 October 2002 an edict meeting was held and was presided over by the provincial magistrate, Mr V Ruombwa ("the magistrate"). The meeting was attended by Barbra and two of her children, and by the deceased's brother.

At the end of that meeting Barbra was appointed the executrix dative and a document to that effect was issued to her by the magistrate, setting out her duties, which included ascertaining and verifying the assets and liabilities of the deceased, preparing a plan of how the deceased's estate was going to be distributed among the beneficiaries, and presenting that plan to a magistrate for approval.

Also issued to Barbra on 17 October 2002 was a letter addressed to Barclays Bank, where the deceased had an account, stating that Barbra had been appointed the executrix dative of the deceased's estate, and requesting the bank to furnish her with a bank statement showing the balance on the deceased's account in order to facilitate the administration of the estate.

Subsequently, on 25 August 2005, when no distribution plan had been presented to a magistrate, the second respondent wrote to Barbra requesting her to attend a special meeting on 30 August 2005 to discuss all matters concerning the estate. She

and the other beneficiaries of the estate attended the meeting. At the end of that meeting the second respondent appointed Kenias as a *curator bonis* in the estate.

Thereafter, on 28 September 2005 the second respondent, purportedly acting in terms of s 25(1) of the Administration of Estates Act [*Cap. 6:01*] ("the Act"), gave notice of an edict meeting to be held at his office in Harare on 5 October 2005. The notice, which was supposed to be gazetted before 5 October 2005, was gazetted on 7 October 2005, two days after the meeting was held. Nevertheless, Barbra and the other beneficiaries of the estate attended the meeting as they had been notified of the meeting by other means.

However, what happened at that meeting is not common cause, although it is common cause that at the end of the meeting Kenias was appointed executor dative. Thereafter, Kenias embarked upon his duties.

About three weeks later, on 28 October 2005, Barbra filed a court application in the High Court (Case No. HC 5567/05) against Kenias and the second respondent, seeking the nullification of the appointment of Kenias as the executor dative of the deceased's estate, and the confirmation of her own appointment as the executrix dative.

Thereafter, Kenias attempted to sell some of the assets of the estate, with the second respondent's concurrence, in order to meet certain financial obligations of the

estate. That prompted Barbra to file an urgent chamber application in the High Court on 16 January 2006 (Case No. HC 221/06) against Kenias and the second respondent, seeking a provisional order, with the final relief sought being the same as that sought in Case No. HC 5567/05, and interim relief in the form of an interdict restraining Kenias from disposing of any of the assets belonging to the estate.

The urgent chamber application was heard on 25 January 2006, and an order was granted with the consent of the parties. The order, *inter alia*, consolidated Case No. HC 5567/05 and Case No. HC 221/06, and interdicted Kenias from winding up the estate pending the determination of Case No. HC 5567/05.

The two consolidated cases subsequently came before the learned Judge in the court *a quo* on 19 May 2006. Kenias' appointment as the executor dative was declared null and void, whilst Barbra's was declared valid. Aggrieved by that result, Kenias appealed to this Court.

There are three main issues to determine in this appeal. The first is whether the court application, i.e. Case No. HC 5567/05, was a review application disguised as an application for a declaratory order. The second is whether Barbra's appointment as the executrix dative of the deceased's estate was valid. And the third is whether the appointment of Kenias as the executor dative of the estate was valid. I shall deal with the issues in turn –

WHETHER THE COURT APPLICATION WAS A REVIEW APPLICATION

This issue is important because if the answer is in the affirmative then, in terms of r 259 of the High Court Rules, 1971, the application should have been instituted within eight weeks after the appointment of Kenias as the executor dative of the estate.

The learned Judge in the court *a quo* came to the conclusion that the court application was not a review application disguised as an application for a declaratory order. In his judgment he said the following:

> "It is clear to me that it is not a review; she has not sought to impugn the procedural steps that the first respondent took to appoint the second respondent. She simply says that she had been appointed and had not been removed. Therefore the latter appointment should be declared a nullity, her appointment be confirmed and consequential relief that flows from that declaration be granted in her favour."

I entirely agree with the learned Judge. The application was not concerned with the decision-making process which led to the appointment of Kenias as the executor dative. Instead, it was concerned with the appointment itself which was allegedly null and void, and Barbra sought a declaratory order to that effect, as well as consequential relief flowing from that declaration.

WHETHER BARBRA'S APPOITMENT WAS VALID

This question was answered by the learned Judge in the affirmative. In my view, the learned judge was correct.

The argument that was advanced on behalf of Kenias was that ss 23 and 25 of the Act apply to the estates of all persons, including persons subject to customary law, and that as Barbra was not issued with letters of administration in terms of s 23 of the Act her appointment was invalid.

I shall set out the relevant provisions of both sections –

Section 23 of the Act reads as follows:

> "The estates of all persons dying either testate or intestate shall be administered and distributed according to law under letters of administration to be granted in the form B in the Second Schedule by the Master to the testamentary executors duly appointed by such deceased persons, or to such persons as shall, in default of testamentary executors, be appointed executors dative to such deceased persons in manner hereinafter mentioned."

And s 25(1) reads as follows:

> "When any person has died without having by any valid will or codicil appointed any person to be his executor, or where any person duly appointed to be the executor of any deceased person has predeceased him or refuses or becomes incapacitated to act as such, or within such reasonable time as the Master considers sufficient, neglects or fails to obtain letters of administration, then and in every such case the Master shall cause to be published in the *Gazette*, and in such other manner as to him seems fit, a notice calling upon the surviving spouse, if any, and the next of kin, legatees and creditors of the deceased to attend at his Office, at the time therein specified, to see letters of administration granted to such person or persons as may then be appointed by him executor or executors, to the estate of such deceased person."

It is pertinent to note that ss 23 and 25 are in Part III of the Act, which is headed "Estates of Deceased Persons". It is also pertinent to note that Part III A of the Act is headed "Estates of Persons Subject to Customary Law". What this means is that

Part III of the Act governs the estates of persons who are not subject to customary law, i.e. those governed by the general law of the land; whilst Part III A governs the estates of persons subject to customary law.

It was common cause that the deceased's estate was governed by customary law. That being the case, it follows that the deceased's estate is governed by Part III A and not by Part III of the Act.

As ss 23 and 25 of the Act are in Part III, which does not govern the estates of persons subject to customary law, the provisions of both sections do not apply to the deceased's estate. No letters of administration were, therefore, required in respect of Barbra's appointment, which was made in terms of s 68B of the Act.

Section 68A, which is in Part III A of the Act, reads as follows:

> "(1) Subject to subsection (2), this Part (i.e. Part III A) shall apply to the estate of any person to whom customary law applied at the date of his death.
>
> (2) This Part, other than section sixty-eight C, shall not apply to any part of an estate that is disposed of by will."

And s 68B, which is in the same Part of the Act as s 68A, in relevant part reads as follows:

> "(1) Upon the death of a person referred to in subsection (1) of section sixty-eight A, the Master shall summon the deceased person's family, or such members of the family as are readily available, for the purpose of appointing a person to be the executor of the deceased person's estate.

(2) The Master, with the concurrence of the relatives present at a meeting summoned in terms of subsection (1), shall appoint a person to be the executor of the estate of the deceased person referred to in that subsection:

Provided that –

(i) if the relatives are unable to agree upon a person to be appointed as executor, the Master shall appoint a person as provided in section twenty-six, which section shall apply, *mutatis mutandis*, in relation to any such appointment;

(ii) no person shall be appointed as executor under this subsection unless he is -

(a) registered under the Estate Administrators Act [*Chapter 27:20*]; or

(b) a member of the deceased person's family."

In terms of s 68(1), the definition section in Part III A of the Act, "Master" includes a magistrate or other person designated by the Minister of Justice, Legal and Parliamentary Affairs in terms of s 68I; and "executor" means a person appointed as executor of an estate in terms of s 68B.

In the circumstances, bearing in mind the factual background in this matter, and the provisions of ss 68(1), 68A and 68B, already set out in this judgment, there can be no doubt that Barbra's appointment was valid.

I say so for the following reasons –

At the time of his death the deceased, who died without leaving a will, was a person to whom customary law applied. In terms of s 68A(1) his estate was governed by Part III A of the Act.

After the deceased's death the Master, as defined in s 68(1), summoned the deceased's family to a meeting for the purpose of appointing an executor dative for the deceased's estate, as he was obliged to do in terms of s 68B(1).

Thereafter, at the meeting held on 17 October 2002, the Master, with the concurrence of the deceased's family, appointed Barbra the executrix of the deceased's estate, and issued to her a document stating that fact, and setting out her duties. In addition, she was given a letter addressed to the deceased's bank which I have already mentioned in this judgment.

Finally, as already stated, Barbra did not require letters of administration before she administered and distributed the deceased's estate, because the estate was governed by Part III A of the Act.

WHETHER KENIAS' APPOINTMENT WAS VALID

I have no doubt in my mind that it was not. That is so because Barbra's appointment was valid, and she had not been removed from her office in terms of s 117(1) of the Act, which in relevant part reads as follows:

> "The Master may apply to a Judge in Chambers for the removal of an executor … from his office … and the Judge may, upon such application, remove the executor … concerned from his office or make such other order as he sees fit."

As Barbra had not been removed from her office, there was no vacancy, and Kenias' appointment was incompetent.

Finally, as far as the costs of this appeal are concerned, I see no reason for departing from the principle that as a general rule the successful party is entitled to his costs.

In the circumstances, the appeal is devoid of merit, and is dismissed with costs.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

I E G Musimbe & Partners, appellant's legal practitioners

Chikumbirike & Associates, first respondent's legal practitioners