

SILAYSE USENI
versus
ESNATH NYAMUPINGIDZA
and
THE MASTER OF HIGH COURT
and
ASSISTANT MASTER OF HIGH COURT
and
KADOMA CITY COUNCIL

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 8 May 2024 & 2 August 2024

Opposed Matter

P Nhokwara, for the applicant
N Chioka, for the respondent

MAXWELL J: On the 29 May 2024 I dismissed the application for leave to appeal. The following are the reasons for that decision. In the matter under judgment HH 415/23 Applicant had approached the Court seeking the setting aside of the appointment of the first Respondent as the Executor of the Estate late Leah Nyamazana, DR KM 24/22. She also sought the setting aside of the award of a property in Kadoma to the first Respondent. Applicant was married to the first Respondent's brother, Wellington Dube, who passed away in 2018. She had been staying at the property at the centre of the dispute, house number 22 Chiverenga Street Rimuka, Kadoma. The property forms part of her late mother in law's estate, the late Leah Nyamazana. First Respondent is Leah Nyamazana's daughter who was appointed executor of her mother's estate. She inherited the property in terms of the first and final distribution account filed with and approved by the third Respondent.

I struck off the matter from the roll on the basis that Applicant had no *Locus Standi*. Applicant filed an application seeking leave to appeal to the Supreme Court. I dismissed the application as I was of the view that Applicant had no prospects of success.

Applicant intends to appeal on two grounds. Firstly, Applicant argues that the matter ought not to have been struck off the roll on the basis of the limited letters of administration as applicant was also a creditor to the Estate of late Leah Nyamazana. It was argued for the Applicant that she had made improvements to the house in dispute and that first Respondent ought to have included Applicant on the list of creditors in terms of section 45(1) of the Administration of Estates Act [*Chapter 6:10*].

Counsel for the first Respondent pointed out that it was submitted for Applicant that the application was in terms of the Common Law and that under the Common Law, the right to challenge the appointment of an executor is available exclusively to beneficiaries. He pointed out that the Applicant did not allege that she was a beneficiary either in the founding affidavit or in the answering affidavit. That fact was not in the leads of argument. These submissions from Counsel for the first Respondent were not disputed. Applicant sought to rely on the case of *Katirawu v Katirawu & Ors* 2007 (2) ZLR 64 and argued that the application was based on the fact that first Respondent had committed a fraud. Nowhere in the founding affidavit were the particulars of fraud alleged. No misrepresentations were particularized. I was not persuaded that the Appellate court would find that Applicant had *Locus Standi* in the matter. A creditor to an estate does not have the same rights as a beneficiary. In any event, Applicant's emphasis during the proceedings was that she was approaching the court in her capacity as the executor of her husband's estate.

The second ground Applicant is approaching the Supreme Court on is that there was an error of interpretation of s 32 (2) (b) of the Administration of Estates Act [*Chapter 6:01*]. She argues that the section ought not to have been interpreted in isolation and that s 32 (2) (a) ought to have been considered. The authority given to the Applicant was specific. It spelt out what the Applicant was to do. There was no question of extending the authority to issues that were not spelt out. Applicant has no prospects of success on that issue. As stated in *Madamombe v The State SC* 117/21 the "prospects of success" was defined in *Essop v S* (2016) ZASCA 114 as:-

"What the test for reasonable prospects of success postulates is dispassionate decision, based on the facts and the law that a court of appeal could reasonably conclude differently to that of the trial Court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

I did not find a sound and rational basis for concluding that Applicant has prospects of success on appeal. For that reason I dismissed the application on the day of the hearing.

A handwritten signature in black ink, appearing to read "D & M Attorneys". The signature is stylized and cursive.

Madzingira & Nhokwara Applicant's Legal Practitioners
D & M Attorneys first Respondent's Legal Practitioners