

BERNARD MUPANDAWANA  
versus  
PRECIOUS JUWARA  
and  
DIRECTOR OF HOUSING AND COMMUNITY SERVICES  
— CITY OF HARARE N.O  
and  
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
**MHURI J**  
HARARE; 19 June 2024 & 19 August 2024

### **Opposed Application**

Mr *W Chishiri*, for the applicant  
Ms *P Nkomo*, for the 2<sup>nd</sup> respondent  
No appearance for the 1<sup>st</sup> and 3<sup>rd</sup> respondent

**MHURI J:** This is an application for review brought in terms of s 4(1) of the Administrative Justice Act [*Chapter 10:28*] AJA. The applicant is challenging the second respondent 's decision to terminate the applicant's right of occupation of Stand Number 8A Captain Tapfumanei, Mbare before conferring same to the first respondent's now deceased husband, Peter Baipai. It is the applicant's contention that the decision by the second respondent must be set aside on the basis that it was irregular, unlawful and procedurally unfair. The application is opposed by the second respondent only. First and third respondents did not file any opposing papers. In its opposing papers, the second respondent raised five preliminary points. These are they, that: -

1. Second respondent is incorrectly cited.
2. First respondent has no *locus standi* and is incorrectly cited.
3. Applicant has no *locus standi*.
4. Non-joinder of Estate Late Baipai and improper relief sought.
5. There are material disputes of fact.

To substantiate the points, second respondent's submissions were: -

Firstly, that there is no natural or legal person with the name of the second respondent as cited in this application. Second respondent is wrongly cited as the Director of Housing and Community services. Director of Housing and Community services is an office under City of Harare that is held by different individuals in the Department of Housing. Thus, the second respondent has no legal personality as it is not a legal entity or natural person but is merely an office. Reliance was made on the case of *K & G Mining Syndicate v Mugangavari & 2 Ors* (HB 159 of 2020) wherein the court held:

“Whether the citation of the Ministry of Mines and Mining Development instead of the Minister of Mines and Mining Development was a typographical mistake makes no difference. The point is that applicant cited a non-existent third respondent. That non-existent third respondent cannot be substituted for a legal persona”

To buttress their argument second respondent cited *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H) wherein it was stated as follows:

“A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void ab initio.”

Secondly, second respondent submits that there is no express authority giving first respondent locus standi to act on behalf of the estate. Therefore, she has no locus standi and is incorrectly cited. Further, until a deceased estate is registered with the office of the Master of the High Court, it has no capacity to sue or be sued until an executor/executrix dative is appointed. Thus, an executor is the one with the *locus standi* to act on behalf of the estate. This was aptly stated in the case of *Nyandoro and Ors v Nyandoro and Ors* HH 89/08 by KUDYA J (as he then was) who emphasised that when bringing an action on behalf of an estate, it must be through the duly appointed executor.

Since the Estate Late Peter Baipai remains unregistered, the first respondent has not yet been appointed executrix dative. Reference is also be made to the case of *Mhlanga v Ndlovu* HB 54/2004 wherein the Honourable Judge NDOU (as he then was) underscored the rights and powers of an executor and set out the following,

“A deceased estate can be briefly described as an aggregate of assets and liability of the deceased. The totality of the rights, obligations and powers of dealing therewith vests in the executor, so that he alone can deal with them. Only the executor can sue and be sued for and on behalf of a deceased estate.”

Thirdly, it is submitted that because the certificate of occupation was issued in favour of the late Mr Muvhuro Nenzou with regards to the property in dispute, upon cancellation of the same, a recommendation was made to regularize either of his children as tenants. However,

this regularization did not take place, hence the present application ought to have been brought on behalf of the Estate Muvhuro. Reliance was made on the case of *Stevenson v Minister of Local Government and National Housing* and Ors SC 38-02, the court in outlining *locus standi in judicio* stated that *in many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as “a real and substantial interest” or as a direct and substantial interest.*”

The Administration of Estates Act [*Chapter 6:01*] allows for an appointed executor to the estate to act on behalf of deceased person or the deceased estate, however, the applicant has not provided evidence through letters of administration from the Master of the High Court to show that he is authorised to act on behalf of the deceased and bring this application before this Honourable Court. *In Ndlovu v Marufu* HH-480-15, the court held,

“It is trite that locus standi exists when there is direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has locus standi has a right to sue which is derived from the legal interest recognised by the law.”

It was argued that applicant is asking the Court to resurrect the certificate of occupation issued on behalf of his father and if the certificate is resurrected the rights will revert to the estate of the late Nenzou. It was further contended that applicant is just a sibling (like the other three) and is not an executor of the estate of the Late Nenzou hence he has no *locus standi* to bring the present application before the court. It was argued that applicant is seeking the Court to direct second respondent to draft a lease agreement with applicant. It also submitted that the executor of the estate Late Baipai is not before the Court, which executor has authority to speak on behalf of the estate and not solely applicant since he has siblings who are beneficiaries to the Nenzou estate.

Fourthly, point *in limine* raised by second respondent is that there is non-joinder of Estate Late Baipai and an improper relief sought. It was argued that the certificate of occupation was issued on behalf of applicant’s late father who acquired personal rights, which are terminated through death. Since the certificate of occupation terminated through death it cannot be resurrected and therefore is an improper relief is being sought. It further submitted that only the executor can speak on behalf of an estate, hence without the executor of the estate late Baipai being part of these proceedings applicant cannot pray that the court cancel the lease agreement and evict first respondent.

Fifthly, that there are material disputes of fact which are triable issues, second respondent argued that the Certificate of Occupation issued to the late Nenzou was terminated

upon his death because it brought with it, personal rights. It further argued that even if the Certificate of Occupation is resurrected it will be in the name of the Estate Nenzou and not applicant's name.

It is second respondent's submission that applicant sublet the premises to first respondent. Acting on that, second respondent then cancelled the Certificate of Occupation entered into with the Late Nenzou resultantly, entering into a lease agreement with first respondent's spouse. It is second respondent's argument that its officials visited the house in question and found that the applicant was not residing on the premises.

In response, applicant's submissions were that: -

Second respondent is an administrative functionary of the City of Harare. It is an administrative authority who made the decision that forms the basis of the present application. The second respondent made that particular decision in his/her official capacity as the Director of Housing and Community Services. Applicant further argued that, second respondent has been cited in his official capacity and not in his personal capacity. The Director of Housing is not an office. He is a person and an administrative functionary who made the offensive decision that is sought to be set aside in the present application. His decisions are open to challenge by way of review if they fall short of procedural and substantive justice. Reliance was made on s 2 of the Administrative Justice Act which defines an administrative authority. Section 2 of the Administrative Justice Act defines an administrative authority as any person who is:

- (a) an officer, employee, member, committee, council or board of the State or a local authority or parastatal;
- (b) a committee or board appointed by or in terms of any enactment; or
- (c) a Minister or Deputy Minister of the State, or
- (d) any other person or body authorised by every enactment to exercise or perform any administrative power or duty; and who has lawful authority to carry out the administrative action.

It is submitted that Second Respondent is an officer of the Municipality of Harare. He exercised administrative functions in arriving at the decision that forms the subject of the present proceedings.

Applicant's response to the second point *in limine* is that, first respondent is cited in various capacities. She is cited as the surviving spouse of the late Peter Baipai. She is cited in her capacity as a beneficiary of the estate of the late Peter Baipai. She is also cited as a representative of the estate of the late Peter Baipai. She is also cited as the current occupant of Stand Number 8A Captain Tapfumanei, Mbare, Harare. It was submitted that a beneficiary of an estate has locus standi to defend the estate. She therefore has a right to be cited in the present proceeding as the outcome of the present proceedings has the potential to affect her continued occupation of the property.

Relating to the third point *in limine* raised applicant argued that apart from him being a beneficiary of the estate of the late Muvhuro Nenzou, the applicant is making the application in his own right because the second respondent made a clear and unequivocal representation that following the death of Muvhuro Nenzou, the applicant and/or one of his siblings were to be given a certificate of occupation in lieu of their father.

Applicant's response to the fourth point *in limine* is that they are seeking the setting aside of the lease agreement that was improperly entered into. It was argued that the eviction of the first respondent is a consequential relief tied to the substantial relief. Once the lease is cancelled, the right of occupation falls away hence there is no need to cite the executor.

Lastly, it was applicant's submission that the Certificate of Occupation of the late Nenzou was terminated after he informed the City of Harare of the death of his father. He denies that he sublet the premises to first respondent and or his spouse. Applicant submitted that he was verbally promised that second respondent will recommend him or his siblings for the certificate of occupation. To that end, he had a legitimate expectation that the certificate of occupation will be given to him in lieu of his father.

### **The Law**

The law relating to the first point *in limine* is as follows:

The issue of citation of parties is important as it provides for the standing or falling of an application. In *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H) it was stated as follows:

"A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void ab initio."  
(underlining for emphasis)

In *Marange Resources (Pvt) Ltd. v Core Mining & Minerals (Pvt) Ltd. (IN LIQUIDATION) & Others* SC 37 of 2016), citing the case *Mudzengi & Others v Hungwe & Another* 2001 (2) ZLR 179 (H) at 182 D-E, thus:

“Rather, if the applicant knowingly cites a party lacking in locus standi, then the matter will not be properly before the court and it must be dismissed with costs on a higher scale. Ordinarily it would be the Respondents who would raise their own lack of capacity, or indeed applicant’s lack of capacity, as a defence in limine.”

The need for the proper citation of parties is highlighted in, Cilliers, A.C. et al in Herbstein & van Winsen’s *The Civil Practice of the High Courts of South Africa*, 5<sup>th</sup> ed, vol.1 page 143 as follows:

“Before one cites a party in a summons or in application proceedings, it is important to consider whether the party has locus standi to sue or be sued (legitima persona standi in iudicio) and to ascertain what the correct citation of the party is.” (*emphasis added*)

When it comes to the second point raised *in limine* the law is clear on who can sue and be sued when it comes to a deceased estate. It provides for the registration of an estate and its administration. Section 25 Administration of Estates Act [*Chapter 6:01*] provides that, until a deceased estate is registered with the office of the Master of the High Court, it has no capacity to sue or be sued until an executor/executrix dative is appointed. Thus, it is an executor who has *locus standi* to act on behalf of the estate. In the case of *Mhlanga v Ndlovu* HB 54/2004 NDOU J (as he then was) held,

“A deceased estate can be briefly described as an aggregate of assets and liability of the deceased. The totality of the rights, obligations and powers of dealing therewith vests in the executor, so that he alone can deal with them”.

Applicant argued that first respondent is cited as a spouse, beneficiary of the estate and occupant of the property in question. It is trite that it is the executor that can sue and be sued on behalf of a deceased estate. In the present case there is absence of express authority to first respondent which allows her to act for and on behalf of the estate late Peter Baipai. It is agreed that she is a spouse, an occupant and beneficiary of the estate albeit without legal authority to act on behalf of the estate.

The arguments relating to the third point in limine were that:- applicant has no *locus standi* since he is not an executor of the Estate of the late Nenzou. The question that this Court is tasked to answer is, who has locus standi in the circumstances? In *Ndlovu v Marufu* HH-480-15, the court held, *it is trite that locus standi exists when there is direct and substantial*

*interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has locus standi has a right to sue which is derived from the legal interest recognised by the law.* Applicant contended that he brought this application in his capacity as a beneficiary of the estate and in his right since second respondent averred that he would transfer the certificate of occupation to the siblings. It is not in dispute that applicant has a direct interest in the outcome of the subject matter, he however, has no legal authority to sue on behalf of the estate since he is not duly appointed the executor of same. As pointed out by second respondent, in the event that the lease agreement is cancelled, the property reverts to the Nenzou estate.

Fourthly, the relief that applicant seeks is to direct the Court to cancel the lease agreement between second respondent and first respondent. This will result in the eviction of first respondent. Applicant is seeking the resurrection the Certificate of Occupation between second respondent and the Late Nenzou and since he is not the executor, he cannot pursue this application.

Lastly, there are material disputes of fact in this application which raises triable issues that cannot be dealt with in the manner this application was brought before the Court. This is noted from the differences of facts narration and sequence of events as submitted by the applicant and second respondent. It is only in a trial that these material disputes of fact can be ironed out.

### **Analysis and Disposition**

1. Applicant cited the Director of Housing and Community Services as the respondent. There is no legal person answering to that name, the application would have been proper if the City of Harare was cited as a respondent, because as it stands it is unclear whom the applicant is suing. In *Gariya Safaris (Pvt) Ltd v van Wyk* 1996 (2) ZLR 246 (H) it was stated that:

“A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void ab initio.”(underlining for emphasis).

Reference to the precedent of *Mudzengi & Others v Hungwe & Another* 2001 (2) ZLR 179 (H) at 182 D-E, where it was held that”

“Rather, if the applicant knowingly cites a party lacking in locus standi, then the matter will not be properly before the court and it must be dismissed with costs on a higher scale...”

Shows that citing of a party lacking standing may result in the dismissal of the application. Further, as submitted on behalf of second respondent the letters by the Director were done on behalf of the City of Harare. It therefore follows that the second respondent is an office which cannot perform on its own but is under the City of Harare. It is for these reasons that the point *in limine* raised by second respondent finds favour, and I uphold it.

2. The first respondent is incorrectly cited as the “surviving spouse, beneficiary and representative of the unregistered Estate Late Peter Baipai”. Applicant argued that first respondent is cited as a spouse, beneficiary of the estate and occupant of the property in question. The law provides for the registration of an estate and its administration. Section 25 Administration of Estates Act [*Chapter 6:01*] provides that, until a deceased estate is registered with the office of the Master of the High Court, it has no capacity to sue or be sued until an executor/executrix dative is appointed. Thus, it is an executor who has *locus standi* to act on behalf of the estate. As held in the case of *Mhlanga v Ndlovu* HB 54/2004, *a deceased estate can be briefly described as an aggregate of assets and liability of the deceased. The totality of the rights, obligations and powers of dealing therewith vests in the executor, so that he alone can deal with them.* Only the executor can sue and be sued on behalf of a deceased estate. In the present case there is absence of express authority to first respondent which allows her to act for and on behalf of the estate late Peter Baipai. It is agreed that she is a spouse, an occupant and beneficiary of the estate, albeit, without legal authority to act on behalf of the estate. Therefore, I uphold the point *in limine* that first respondent has no *locus standi* to act on behalf of the estate late Peter Baipai and is incorrectly cited.

3. The question that this Court is tasked to answer is: who has *locus standi* in the circumstances? In *Ndlovu v Marufu* HH-480-15, the court held,

“It is trite that locus standi exists when there is direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has locus standi has a right to sue which is derived from the legal interest recognised by the law.”

Applicant is a beneficiary of the estate, and therefore has a legitimate interest in this present application. However, he does not have a right to sue on behalf of that estate as he has not been appointed as such. There is no mention of the “views” of the other children on the matter, hence applicant’s impartiality and genuineness in bringing this application is questionable. It is my considered view that applicant has no locus standi to bring this application. The point *in limine* is upheld.



4. Applicant seeks the cancellation of lease agreement entered into between first and second respondents which would result in the eviction of first respondent. Applicant seeks the resurrection of the certificate of occupation between second respondent and the Late Nenzou. Further, the estate of the Late Baibai should have been joined since applicant has a legal interest in that estate. Therefore, granting the order prayed for by applicant would be improper as it affects the estate late Baipai which is not before this Court. In the circumstances I uphold the fourth point *in limine* raised.

5. As regards the last point *in limine*, that there are material disputes of fact, there are divergent submissions on the facts narration and sequence of events as submitted by applicant and second respondent. It is my considered view that those material disputes of fact can only be ventilated and disposed of in a trial as there is need for oral and written evidence. Second respondent submitted that applicant sublet the property in question yet applicant denies the same. There may be need adduce *viva voce* evidence from the City of Harare officials who attended the premises and wrote a report that applicant was subletting the premises to first respondent and from first respondent. It is for the foregoing that I uphold the point *in limine* raised by second respondent and find that the issues raised are triable and cannot be disposed of through this application.

Having upheld the points raised *in limine*, I find it unnecessary to delve into the merits of the matter. In the result, it is ordered that:

**The application be and is hereby dismissed with costs.**

**MHURI J:** .....

*Saunyama Dondo Legal Practitioners*, applicant's legal practitioners  
*Gambe Law Group*, second respondent's legal practitioners