TERESIAH MKUDU
versus
RUVIMBO MANYONDA
and
ESTATE LATE LAZARUS MKUDU
and
REGISTRAR GENERAL OF BIRTHS AND DEATHS N.O
and
MASTER OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE 18 March 2025, & 17 April 2025.

Opposed Matter

F Mahere, for the Applicant

TA Mandi, for the 1st Respondent

NL Mabasa, for the 2nd Respondent

MAXWELL J:

At the hearing of this matter, preliminary points that were raised by the parties were abandoned and are not the subject of this judgment. The crisp question for determination by this honorable court is whether or not the 3rd Respondent can re-register a birth of a child born out of wedlock and ascribe paternity of that child to a dead person.

BACKGROUND FACTS

On 7 May 2024, the Applicant filed the present application seeking a declarator. The Applicant stated that the application is in terms of section 14 of the High Court Act [*Chapter 7:06*]. The Applicant narrated the background of the matter in her Founding Affidavit as follows. The Applicant was born on the 19 October 1995 to the late Lazarus Stephen Mkudu and the late Beatrice Mangwiro. On the 17th of April 1996, the Applicant's father registered the Applicant's birth with the 3rd Respondent. A copy of the birth certificate was procured by the Applicant's father, who is recorded as the informant. On the 22nd of April 2000, the Applicant's father passed away. Approximately three years later, on the 19th of June 2003, the Applicant's mother passed away. The Applicant was about 8 years old. When the Applicant's mother passed away, she was taken into the custody of her maternal grandmother who raised her until she became a major. Sometime after she turned 18, the Applicant was contacted by her deceased father's relatives (siblings), namely, Gordon Mkudu, Sylvia Tereka and Cecilia

Chibuba. The said relatives requested to meet her in town. The Applicant's late father's relatives indicated to her that they wanted her to benefit from the rentals being collected from her late father's estate.

After consultations were made with the Applicant's grandmother and her aunt, Rosemary Mapunde, it was agreed that the Applicant could receive the contributions. Pursuant to this arrangement, a contribution of about US$200 per month was sent to the Applicant from a trust fund that was used to collect the rentals from the Applicant's father's immovable property. In or about 2016, the Applicant decided that she was old enough to register her late father's estate and arrange for the registration of her late father's property in her name. The Applicant approached her father's relatives with this proposal and they refused.

The Applicant approached the 4th Respondent, whereupon she discovered that the estate had been registered around the time of her father's death. The relatives contended that the property was a family home despite it being registered in the name of the Applicant's late father. On the 20th of June 2016, the 4th Respondent wrote to the Applicant advising that the estate had been finalized on the 28th of September 2000. The 4th Respondent failed to resolve the dispute and advised the Applicant to approach the courts. The Applicant approached this honourable court, seeking to set aside the final liquidation and distribution account that the 4th Respondent had previously prepared on the instructions of her late father's relatives.

The High Court handed down an order by consent on the 7th of January 2019. The effect of the order was to recognize the Applicant's status as a surviving child of Lazarus Mkudu and to nullify the distribution that had been improperly done under DR 1540/00. A new executor, Mr Mhishi, from Mhishi Nkomo Legal Practice was appointed to administer the estate that had been re-opened. After the High Court proceedings were concluded, the Applicant's father's relatives came up with a fresh story to the effect that the Applicant was not the only surviving child of Lazarus Mkudu. They claimed that there was another child by the name Ruvimbo, the 1st Respondent, who was also entitled to claim a share in the estate.

On 30 September 2020, the Applicant's lawyers at the time, Gonese and Ndlovu Legal Practitioners, wrote to the executor querying the veracity of the claim that the 1st Respondent was a child of the Applicant's late father. The letter further queried why the existence of the 1st Respondent had been hidden from the Applicant, only to come out after legal proceedings to challenge the unlawful registration of the Applicant's late father's estate. A demand was made to see the 1st Respondent's birth certificate. On the 6th of October 2020, Mhishi Nkomo Legal Practice wrote back to the Applicant's lawyers, advising them that they were in possession of

Ruvimbo's birth certificate. They contended that the birth certificate showed that the 1st Respondent was the Applicant's late father's child. In the same letter, the executor indicated that he was not able to comment on why the existence of the 1st Respondent had been hidden from the consultant. The alleged birth certificate was attached to the executor's letter.

Applicant averred that the birth certificate of the 1st Respondent was issued almost thirty years after the Applicant's father passed away. The Applicant's late father is reflected as the father of the 1st Respondent. An addendum from the Registrar of Births and Deaths dated 17 March 2020 certifies that Ruvimbo Manyonda's birth record was re-registered for legitimation purposes to Ruvimbo Mkudu in terms of Section 19 (1) and (2) of the Births and Deaths Registration Act. The letter further states that Ruvimbo's 2020 birth certificate is authentic for all intents and purposes. The Applicant stated that the 1st Respondent's birth certificate was irregularly and unlawfully obtained in circumstances that violate the Births and Deaths Registration Act [*Chapter5:02*].

According to the Applicant section 19 of the Births and Deaths Registration Act [*Chapter5:02*] only allows for the re-registration of a child's birth where that child has previously been registered as having been born out of wedlock, but because the parents have since married, the child will be recorded as being born in wedlock. Further, the Applicant stated that there was never any wedlock for the first Respondent to be received into. Applicant averred that section 19 of the Birth and Deaths Registration Act does not provide for the legitimation of a child born out of wedlock whose parents never married and whose father is late. Applicant further stated that the purported legitimation of a child referred to in the 3rd Respondent's letter of 17 March 2020 is not provided for in Zimbabwean law. She stated that the law does not permit the re-registration of a birth out of wedlock, particularly where the father never acknowledged that he was the father when the birth was first registered. As a result, she stated that the 3rd Respondent's re-registration of the 1st Respondent's birth was irregular, invalid and unlawful thus it must be set aside.

In response first Respondent stated that the Applicant has failed to satisfy the requirements for a declaratory order it seeks. She averred that there is no basis for the granting of the relief sought and this is only exacerbated by the fact that the application is a nullity. In addition, she stated that the background as articulated by the Applicant is of no use as it unrelated to the relief sought. The 1st Respondent further asserts that the application lacks merit and it ought to fall on the wayside with an order of costs on a higher scale. She further stated that the Applicant did not establish the interest she has in the matter.

The third Respondent filed its notice of opposition stating that, the registration was done in terms section 12(2) (c) of the Births and Deaths Registration Act [*Chapter5:02*]. It was further averred that this section allows the registration of a person as the father of a child born out of wedlock if the alleged father of the child is dead, and upon the joint request of the child's mother and a parent or near relative of the alleged father. The 3rd Respondent pointed out that the error mentioned by the Applicant does not in any way render the registration null and void. The third Respondent opposed the relief sought by the Applicant.

The Applicant filed its Answering Affidavit on 5 June 2024. The Applicant maintained that the birth certificate held by the first Respondent is a nullity and must be set aside. The Applicant stated that a valid and sustainable cause of action has been pleaded in the Founding Affidavit and the requirements of a declaratory order have been satisfied in accordance with the law.

ANALYSIS

The application is brought under section 14 of the High court Act [*Chapter 7:06*] and the relief sought is in the nature of a declarator. Section 14 of the High Court Act gives this court power to enquire and determine at the instance of any interested person, any existing, future or contingent right or obligation, notwithstanding that such a person cannot claim any relief consequent to such a determination. The submissions by the 1st Respondent that the Applicant did not satisfy the requirements of a declarator are fatal.

In *Estate Elias Jonathan Kanengoni and Anor v Manyika and Ors* HH 160/17 the court articulated that;

> "…the application before me remains an application for a declaratory order where the court is requested to declare a birth certificate invalid. The Respondents are aware of the case they are required to answer. They are aware of the arguments advanced for the relief sought and have been able to respond to the arguments. All the issues have been adequately ventilated and the Respondents and the minor child do not stand to suffer any prejudice if this court rules on the matter in the form in which it is."

The Applicant has a right to administrative justice. Section 3 (1) of the Administrative Act [*Chapter 10:28*] provides that:

"3 **Duty of administrative authority**

(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—

(a) act lawfully, reasonably and in a fair manner;"

The importance of this right was set out in the case of *Paridzira v Minister of Lands and Rural Settlement and Anor* HH 376/15 where the learned judge stated the following:

> "The entrenchment of a comprehensive and justiciable fundamental right to lawful, efficient, reasonable, proportionate, impartial and fair administrative conduct in the Constitution is a celebrated device to control abuse of governmental power in order to guard against executive autocracy."

The first Respondent's conduct of issuing an irregular birth certificate to the 1st Respondent violates the Applicant's right to administrative justice. The Applicant stated in her Founding Affidavit that the illegality can result in irreparable harm where the first Respondent is attempting to claim benefits form the Applicant's deceased father's estate on the basis of the illegality procured birth certificate. It is of paramount importance to note that the dispute in this matter is not about the paternity of the first Respondent. The Applicant's contention is that the re-registration of the first Respondent's birth certificate was not done according to the procedures laid down in the Birth and Death Registration Act [*Chapter5:02*]. Registration of children born out of wedlock is provided for in terms of Section 12 of the Act. Section 12 provides as follows,

> "12 **Registration of birth of a child born out of wedlock**
>
> 1)Notwithstanding section eleven, no person shall be required to give information acknowledging himself to be the father of a child born out of wedlock
>
> 2) A registrar shall not enter in the register the name of any person as the father of a child born out of wedlock, except—
>
> (a) upon the joint request of the mother and the person acknowledging himself to be the father of the child; or
>
> (b) if the mother of the child is dead or has abandoned or deserted the child, upon the request of the person acknowledging himself to be the father of the child; or
>
> (c) if the alleged father of the child is dead, upon the joint request of the child's mother and a parent or near relative of the alleged father.
>
> (3) A request in terms of subsection (2) shall be made in the form and manner prescribed.''

Section 12(c) of the Births and Deaths Registration Act [*Chapter5:02*] provides for the registration procedure to be followed where the father of a child born out of wedlock is dead. The mother and a close relative of the father can make a joint request for such registration to be done. However, it is evident that this process only applies to registration of a birth in the first instance. This procedure cannot be invoked when a child was previously registered. Section 12 does not provide for a re-registration of birth of a child born out of wedlock,

specifically in circumstances where the father never acknowledged that he was the father when the birth was first registered.

There is nothing in the law that suggests that, when a father denying paternity of a child dies, his near relatives can come forward to acknowledge paternity on his behalf and re-register the child's birth. The conduct of the 3rd Respondent was illegal. It is an established principle that "re-registration" or second registration of a birth does not apply when registering the birth of a child born out of wedlock. The High Court interpreted the provisions of section 12 in the case of *Estate Elias Jonathan Kanengoni and Anor v Manyika and Ors* HH160/2017 wherein the learned Judge President of the High Court articulates that:

> "Section 12 lays down three scenarios where births of children born out of wedlock may be registered under the name of the father. Section 12 (2) (c) in particular, permits the mother jointly with a parent or near relative of the alleged father, where the father is deceased, to request the Registrar to register a child in the name of the father. A child registered in terms of s 12 (2)(c) remains a child born out of wedlock and is not legitimized by such a registration. The procedure provided for in this section is akin to legitimation except that the father is not involved in the registration and the registration has no consequence of legitimizing the child. The Registrar submitted that the word ''legitimation'' is an internal administrative term used at the Registrar's offices. The Registrar has imported the concept of legitimation and improperly so. The registrar purported to be acting under s12 and yet the section does not provide for legitimation. The difficulty is that the concept is not supported by any provisions of the Act. The procedure in s12 can only be invoked upon initial registration of the minor child. Because s 12 provides for an initial registration only, a relative can only be involved in a registration of a birth at the outset. It was never the intention of the legislature that when a father denying paternity of a child dies, his near relatives come forward acknowledge paternity on his behalf and legitimize the child and re-register the child's birth."

Applying the principles in *Estate Elias Jonathan Kanengoni and Anor v Manyika and Ors* supra, Iam of the view that the registration of a birth certificate number 6266368 by the first Respondent in 2020 was a re-registration of birth of a child born out of wedlock. There can be no doubt that the procedure invoked by the third Respondent to re-register the first Respondent's birth was done in violation of section 12 of the Births and Deaths Registration Act. The third Respondent purported to do that which the law does not entitle it to do, thus the re-registration was ultra vires the law, invalid and should be set aside.

The records further show that the third Respondent based the decision to re-register the first Respondent's birth on the grounds of legitimation. In the case of *Estate Elias Jonathan Kanengoni and Anor v Manyika and Ors* supra the court held that:

> "The Registrar submitted that the word ''legitimation'' is an internal administrative term used at the Registrar's offices. The Registrar has imported the concept of legitimation and improperly so. The registrar purported to be acting under s12 and yet the section does not provide for legitimation. The difficulty is that the concept is not supported by any provisions of the Act. The procedure in s12 can only be invoked upon initial registration of the minor child. Because s 12 provides for an initial registration only, a relative can only be involved in a registration of a birth at the outset. It was never the intention of the legislature that when a father denying paternity of a child dies, his near relatives come forward acknowledge paternity on his behalf and legitimize the child and re-register the child's birth. There is no suggestion in the provision that it applies to a re-registration of the birth of a child born out of wedlock. Re-registration of births is only permissible under s 19 of the Act"

The court further reiterated that:

> "The concept of legitimation of a child is not provided in our law. It is not defined in the Act. It is a concept foreign to our jurisdiction and is not legally recognized. A re-registration of a birth done for legitimation purposes is tainted with irregularity and is not procedurally and legally conducted. Such a registration does not render a child born out of wedlock whose parents have not subsequently married legitimate and is null and void. A birth certificate taken for legitimation purposes is not a valid birth certificate."

Applying the above principles to the present matter, it shows that the purported legitimation attempted by the Registrar of Births and Deaths is not provided for in our law, hence it is therefore irregular, unlawful and invalid. It is pertinent to note that re-registration of birth is governed by section 19 of the Births and Deaths Registration Act. Section 19 provides as follows:

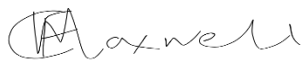
> "19. **Re-registration of births of persons born out of wedlock.**
>
> (1)Where any person has been registered as born out of wedlock and evidence is presented to the Registrar-General satisfying him that, by operation of any law, the person must be regarded as born in wedlock, the Registrar-General may on application authorize the re-registration of the person's birth, and such re-registration shall be effective as though the person had been born in wedlock at the time of the initial registration.
>
> (2)An application for re-registration in terms of subsection (1) may be made by either of the parents of the person concerned, whether or not he has attained the age of eighteen years, or, if either or both of his parents are dead, by his nearest relative or legal guardian."

Section 19 has the effect of recognizing children born out of wedlock as being in wedlock where the child's parents subsequently marry. The re-registration of a birth in terms of this section can only be conducted where the status of the child is to be changed from being born out of wedlock to born in wedlock. The parents of the child approach the court for re-registration of the birth which will result in another birth certificate being taken in the father's

name. Section 19 does not allow re-registration of a birth of a child born out of wedlock whose parents never married and whose father is late. In the matter in *casu* the first Respondent's mother never married the late Lazarus Mkudu, thus there was never any wedlock for the first Respondent to be received into.

Accordingly, it is ordered as follows:

a) The birth certificate issued by the 3rd Respondent in favour of "Ruvimbo Mukudu", the 1st Respondent, under Birth Certificate number 6266368 on the 16th of March 2020 was irregularly obtained and is declared null and void.
b) The 3rd Respondent is ordered to strike Birth Certificate number 6266368 out of its records.
c) The 1st Respondent is to pay costs of suit.



Madotsa and Partners, Applicant's legal practitioners
Masiye-Sheshe and Associates, first Respondent's legal practitioners
Civil Division of the Attorney General's Office, third Respondent's legal practitioners