MARY PHIRI

Versus

HENRY PHIRI N.O
(In his capacity as the Executor Dative
In the Estate Late Elmie Ebrahim)

And

ESTATE LATE ELMIE EBRAHIM

And

ISMA'IL ELMIE

And

MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 7 AND 21 OCTOBER 2021

Opposed Application

Advocate S Siziba, for the applicant
No appearance for the 1st respondent
No appearance for the 2nd respondent
Advocate L. Nkomo, with Mr Z Ncube, for the 3rd respondent
No appearance for the 4th respondent

KABASA J: This is an application to review the 4th respondent's decision wherein she accepted a document by Elmie Ebrahim as the deceased's last Will and Testament notwithstanding the non-compliance with the provisions of section 8(1) of the Wills Act, Chapter 6:06.

It is important to set out the background to this matter. It is this:-

The deceased, Elmie Ebrahim died on 6th May 2014. The estate was registered with the 4th respondent in 2016. An edict meeting was subsequently convened where the 3rd respondent, a son to the deceased, was appointed as the Executor Dative. Following some discord between the 3rd respondent and the applicant, who was declared the deceased's surviving spouse, the 3rd respondent was removed from the executorship and replaced by the 1st respondent, an independent professional Executor. The 1st respondent was appointed on

10th October 2016 and on 29th August 2019 a first and final liquidation and distribution account was finalised and duly advertised as lying for inspection. The estate comprised of an immovable property, being subdivision A of Stand 672 Bulawayo Township also known as No. 121 A Josiah Tongogara Way Bulawayo. This property was awarded to the applicant in terms of section 68 of the Administration of Estates Act, Chapter 6:01.

In a letter dated 31 October 2019 the 3rd respondent's lawyers wrote to the 4th respondent enquiring about the fate of an affidavit which was part of the record in DRB 990/15 and appeared to have been intended to be the deceased's Will. The import of the letter was to the effect that that document had not been addressed throughout the proceedings leading up to the advertising of the first and final distribution account. The 4th respondent responded to this letter and acknowledged that the document had not been addressed. The only issue that had been addressed and resolved related to whether the applicant was the surviving spouse. A request was then made for the lodging of the original copy of that document. This was done and the 4th respondent, in a determination handed down on 11 March 2020 held that:-

> "It is very clear from the facts above that the Will under scrutiny does not subscribe to the provisions of section 8(1) in particular subsection (b) and (c) in that it was not witnessed. While it does not comply with the formalities, I am satisfied that it was meant to be the deceased's last Will and Testament. In the premises the document is accepted as a Will, in terms of section 8 subsection (5) of the Wills Act."

Aggrieved by this decision, the applicant filed the application for review I am now seized with. The grounds upon which the application is premised are as follows:-

1. Gross irregularity by the 4th respondent by re-opening an Estate, where the final liquidation account had been advertised and no objections raised within the 21 days and where there are submissions before a different officer that there was no Will.

2. Gross irregularity in arriving at a decision by the 4th respondent. The 4th respondent did not take into consideration submissions by the applicant in particular the history of the matter. The desperation of the 3rd respondent to cling on to anything to disinherit the applicant. Further the 4th respondent did not consider the issue of the validity of a "Will" when it disinherits the surviving spouse.

3. Gross irrationality and unreasonableness by the 4th respondent in arriving at a decision which is not supported by facts and exercising a discretion which is not based on any facts. The facts submitted and appearing on the record point to a concocted "document". The 4th respondent does not say why the document should be accepted. Was it signed by the late, how was his signature verified? At the time of signing the said document was he of sound mind?

The application is opposed. The 3rd respondent raised 2 points *in limine*. The first related to the citation of the 2nd respondent. The second attacked the procedure used in impugning the 4th respondent's determination. The applicant ought to have appealed in terms of section 8(6) of the Wills Act as she is aggrieved by the correctness of the 4th respondent's decision, so argued the 3rd respondent.

At the hearing of the application, *Advocate Nkomo* submitted that these points were to be argued as part of the argument on merits.

I will quickly dispose of the issue regarding the citation of the 2nd respondent. *Advocate Siziba* conceded the error and moved that such be struck out. He however contended that this did not go to the root of the application as the 1st, 3rd and 4th respondents were properly cited.

The concession was properly made. A deceased estate is represented by the Executor and there is no entity that answers to the name "Estate Late Elmie Ebrahim." (See *Nyandoro and Another v Nyandoro and Others* 2008 (2) ZLR 219)

However the citation of the 2nd respondent's incompetency does not deal a fatal blow to the application. This point *in limine* is therefore not dispositive of the matter. *Advocate Siziba* correctly pointed out that the 1st, 3rd and 4th respondents were properly cited and so there are respondents before the court.

The second point really goes to the merits. I say so because this court has to decide whether a case for review has been made. In doing so the court will inevitably consider what it is the applicant is unhappy with and whether the matter ought to have come as a review or an appeal. This issue is what the opposition to the application is hinged on.

Section 27 of the High Court Act, Chapter 7:06 sets out the grounds upon which a matter may be brought on review to the High Court. Section 27 (1) (c) provides that:-

(1) "Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be -

(a) …

(b) …

(c) gross irregularity in the proceedings or the decision."

The applicant has therefore brought this application in terms of section 27 (1) (c) of the High Court Act.

Has the applicant made a case for review is the next question. In an endeavour to answer this question, I propose to look at the grounds of review in turn. In looking at these grounds of review I am alive to what G. Feltoe in "*A Guide to Administrative and Local Government Law in Zimbabwe (4th Edition)* said as regards the difference between review and appeal. He had this to say at p 44 thereof:-

> "The remedy of review must not be confused with that of appeal. The main difference between these two remedies is that in an appeal what is in question is the substantive correctness of the original decision whereas on review the High Court is not delving into the substantive correctness of the decision, but is only determining whether there were any reviewable procedural irregularities or any action which was reviewable because it was *ultra vires* the powers allocated to the tribunal, see *Tselentis v Salisbury City Council* (1965)".

In *Liberty Life Association of Africa* v *Kachelhoffer* 2001 (3) SA 1094 the dichotomy between the 2 procedures was put as follows: -

> "A review is concerned with the regularity and validity of the proceedings whilst an appeal is concerned with the correctness or otherwise of the decision that is being assailed on appeal."

With that said, I turn now to consider the grounds of review.

1. Gross irregularity in re-opening the Estate when there were submissions before a different officer that there was no Will

Advocate Siziba accepted that the contentious document which is in the form of an affidavit was submitted to the Master's office from the outset. There is nothing on record to show that a determination was made regarding this document.

The letter of 31st October 2019 by the 3rd respondent's lawyers clearly stated that on record was an affidavit but nothing had been said as regards its acceptance or rejection as a

Will. The 4th respondent's response acknowledged that no determination had been made on the issue of this document. The only determination on record is this determination which has now been brought on review.

The applicant has not furnished the court with a prior determination relating to the acceptance or rejection of this document. Can it be said the lack of "adjudication" over the acceptability or otherwise of this affidavit meant that it was not accepted as a Will? To suggest so, will in my view, be reading more into the contents of the record filed under DRB 990/15. It would have been different had the 4th respondent acknowledged that such document was not accepted as a Will by her predecessor as that would have militated against the incumbent re-visiting the same issue. The principle of *functus officio* would preclude the determination of the same issue.

> "The law does not ordinarily allow a judicial officer to preside over the same case more than once. The *functus officio* principle simply means after hearing a case for the first time the judicial officer will have completed his functions over that case, and cannot hear it again. This rule is of universal application and ensures that justice is seen to be done. Allowing a judicial officer to preside over the same case more than once opens him to giving conflicting decisions, as happened in this case." (per UCHENA J (as he then was) in *Madyauta* v *Madziva* HH 22-15).

Whilst the 4th respondent is not a judicial officer, in discharging the duties reposed in him or her as the Additional Master, he/she exercises quasi-judicial functions and can therefore not determine a matter already determined for the very same reason that such would open him or her to giving conflicting decisions.

The estate had not been closed for it to have to be "re-opened" for purposes of determining the issue of this contentious document. It is therefore factually and legally incorrect to talk of the re-opening of the estate. *Advocate Siziba* did not pursue this argument in his oral submissions and this must have been as a result of the appreciation that it was an incorrect exposition of the factual reality.

In *Mugugu* v *Police Service Commission and Another* 2010 (2) ZLR 185 (H), (a case cited in the 3rd respondent's heads of argument) GOWORA J (as she then was) had this to say:-

> "The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. It is not within the ambit of the reviewing court's power to substitute its own opinion for that of the administrative body. The function of the court is to ensure that the administrative body

> does not abuse the lawful authority entrusted to it, by treating the individual subjected to it under that lawful authority unfairly. If the circumstances show that the decision was reached fairly and in a reasonable manner then the court would not have the power to intervene."

In casu it has not been shown to be factually correct that the 4th respondent re-opened an estate that had been closed and proceeded to re-determine the issue of a Will that had already been determined.

2. Gross irregularity in arriving at a decision by 4th respondent by not taking the applicant's submissions into consideration in light of 3rd respondent's desperation to cling on to anything to disinherit the applicant. The 4th respondent did not consider the validity of a Will when it disinherits the surviving spouse

Advocate Siziba correctly abandoned the issue of the disinheriting of a surviving spouse in a Will as a basis of impugning the 4th respondent's decision.

In *Chigwada* v *Chigwada and 2 Others* SC 188-2020 the Supreme Court laid this matter to rest. It held that High Court judgments to the effect that a testator is bound to leave his/her property to the husband or wife and declaring testamentary disposition to the contrary to be void are inconsistent with the law. The law guarantees freedom of testation and so a spouse who owns property is free to bequeath it to whomsoever they choose.

The 4th respondent's determination can therefore not be regarded as grossly irregular in light of the decision in *Chigwada (supra)*

In *Makwara and 2 Others* v *Chitura and 2 Others* HH 122-18, MWAYERA J (as she then was) held that the applicants were not given a chance to argue and present their case as provided for in section 68 F (1) (b) of the Administration of Estates Act (Chapter 6:01) and that amounted to procedural irregularity which fell for redress by way of review.

The *Makwara* case is distinguishable from the facts *in casu*. The applicant's issue is not that she was not given a chance to present her case but that the 4th respondent did not consider the submissions.

The background applicant refers to relates to the fact that the 3rd respondent had initially been appointed Executor Dative but was removed following his unsatisfactory conduct in

discharging the duties reposed in him as an Executor. He had tried to resist the appointment of an independent Executor without success and only brought up the issue of the "Will" after his removal as an Executor.

Had the facts shown that this document had not been in existence until the 3rd respondent's removal, the applicant's contention would hold water. As alluded to earlier on in this judgment, it was accepted that this document was in existence all along and had been submitted to the 4th respondent from the outset. The 3rd respondent's lawyers only sought to find out what had become of that document but did not seek to introduce it 3 years after the registration of the Estate.

There was no legal impediment against the 4th respondent determining the issue which ought to have been determined as early as 2016 when the document was submitted to the 4th respondent's office. *Advocate Siziba* contended that there was prevarication on the part of the 4th respondent and 3rd respondent on the issue of the Will. This argument does not address the fact that such document was not 'unearthed" only after the 3rd respondent's removal as an Executor. The fact therefore remains that this document had always been there and it cannot be said its presence was due to the 3rd respondent's shenanigans.

It cannot therefore be said the 4th respondent's decision was so outrageous on its defiance of logic that no reasonable person properly applying their mind to the facts would have arrived at such a decision. Only then can it be said the decision is reviewable and not appealable.

The 4th respondent exercised the discretion reposed in him by section 8 (5) of the Wills Act. The applicant is aggrieved by the decision the 4th respondent arrived at and section 8 (6) of the Wills Act, provides that:-

> "Any person who is aggrieved by a decision of the Master may appeal to an appropriate court within thirty days of being notified of the decision of the Master."

In *Mujuru N.O and Others* v *The Master and Another* 2008 (2) ZLR 308 (H) GUVAVA J (as she then was) had this to say:-

> "The provision (section 8 (5)) in my view, envisages the exercise of this discretion by the Master, with this court determining the matter on appeal in the event that one of the parties is dissatisfied with his decision."

A distinction ought to be made between seeking to vacate a decision because of its irrationality and seeking to vacate it because the litigant deems it incorrect. Where there is irrationality a litigant takes the review route but where the correctness is the issue, then the appeal route is the recourse available to an aggrieved party.

In Krumm v *The Master* 1989 (3) SA 944 at 951 BOOYSEN J had this to say:-

> "This being in essence a review and not an appeal, I am not entitled to set aside the 1st respondent's decision merely because I believe it to be wrong. Judicial review is in essence concerned with the decision-making process."

The fact that the applicant is of the view that the 4th respondent did not consider her submissions, without more, appears to me to attack the correctness of the decision arrived at. In other words the contention is that the 4th respondent ought to have arrived at a different decision regard being had to what the applicant submitted. Where a decision is being impugned by way of review and not appeal, a litigant must show that there is something grossly unreasonable in the decision that it does not accord with the evidence upon which such decision is based.

This was the finding of MWAYERA J (as she then was) in the *Makwara* case (*supra)* where she held that the Master's decision to award the immovable property to the first respondent who was the deceased's 8th wife and who only became such after the immovable property was already in the family, without considering the practicality or otherwise of awarding such to her as the sole beneficiary to the exclusion of the other wives and children was outrageous in its defiance of logic and therefore irrational. The same cannot be said *in casu* and therein lies the difference between the legitimacy of the review procedure adopted in the *Makwara* case (*supra*) and the lack of such legitimacy in bringing on review the decision *in casu*.

I turn now to the 3rd ground of review.

3. Gross irrationality and unreasonableness by 4th respondent in arriving at a decision not supported by facts.

The applicant contends that the decision was based on a "concocted document."

In her determination the 4th respondent referred to the case of *Mujuru* v *The Master* (*supra*) and considered the 2 pronged approach in applying section 8(5) of the Wills Act, i.e.,

(a) The Master must satisfy herself that the document before her does not comply with the provisions of section 8(1) and

(b) The Master must satisfy herself that the document was indeed intended to be the testator's last Will and Testament

The determination shows that the 4th respondent was alive to the issues surrounding the drafting of the affidavit and its commissioning. She was equally alive to the fact that there were no signatures.

The assertion that the document was "concocted" cannot be said was clearly evident such that a failure to acknowledge that was irrational and unreasonable. *Advocate Siziba* correctly conceded that it is only a competent court which can pronounce on the validity of a Will and nullify same where such is called for. The 4th respondent was called upon to exercise a discretion in terms of section 8(5) of the Wills Act and there was no irrationality in such exercise of discretion for the decision to be reviewable.

If the applicant is of the view that the 4th respondent erred in the exercise of such discretion, she ought to have appealed.

The issue is on the order made by the 4th respondent (*Kingstons Ltd* v *LD Ineson (Pvt) Ltd* 2006 (1) ZLR 451 (S) and the applicant has the right of appeal in seeking to vacate the determination.

I am consequently of the view that the grounds of review have no merit. The applicant ought to have appealed against the 4th respondent's decision to accept the document in issue as the deceased's last Will and Testament.

This judgment considered the grounds of review which the applicant set out and which the respondents were expected to meet. *Advocate Siziba* sought to introduce and argue on a matter that was at variance with the set grounds of review. The applicant's case stands or falls on the founding affidavit.

The 3rd respondent asked for punitive costs. Costs are in the discretion of the court. I find nothing deserving of censure in the applicant's conduct in bringing this application. The fact that the court decided that the matter ought to have come by way of an appeal and not a review is no reason to mulct the applicant with punitive costs.

In the result, I make the following order:-

The application for review be and is hereby dismissed, with costs.

Mlweli Ndlovu & Associates, applicant's legal practitioners
Ncube and Partners, 3rd respondent's legal practitioners