ELPHAS MAVUNE MAPHISA

Versus

THE EXECUTOR DATIVE

And

NQOBILE MLOYI

And

THE DEPUTY MASTER OF THE HIGH COURT

And

THE REGISTRAR OF DEEDS

And

ETTTAH SIBANDA

And

JOYCE SIBANDA

And

ELPHINA SIBANDA

And

KHEFENI SIBANDA

And

MAXWELL SIBANDA

And

SILOYISIWE SIBANDA

And

SIBUSISIWE SIBANDA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 12 NOVEMBER 2021 & 6 JANUARY 2022

Opposed court application

Applicant in person
T. Ndlovu, for the 2nd respondent

DUBE-BANDA J: This application is titled "court application for unlawful disposal of deceased's immovable property." The 1st, 5th, 6th, 7th, 8th, 9th, 10th and 11th respondents neither filed opposing papers, nor participated in these proceedings. The 3rd and 4th respondents are cited in their official capacities because the implementation of the order sought by the applicant, if granted may require their services. This application is opposed by the 2nd respondent. The applicant seeks relief couched in the following terms:

i. The certificate issued by the Deputy Master under section 120 of the Administration of Estates Act be and is hereby set aside.
ii. The disposal of the house number 501 Nkulumane, Bulawayo be and is hereby set-aside.
iii. The caveat be and is hereby placed on the said house number 501 Nkulumane, Bulawayo with immediate effect.
iv. The Deputy Master of the High Court be and is hereby directed to ensure that all beneficiaries consented to the disposal of the said house number 501 Nkulumane, Bulawayo, before giving authorization to the transfer said property (sic) and / or reverse any authorization that may have been given.
v. The Registrar of Deeds be and is hereby prohibited forthwith from transferring the said house number 501 Nkulumane to anyone without an order of this court and / or directed to reverse the transfer that may have been done.
vi. The costs of suit by beneficiary respondents.

Factual background

This application will be better understood against the background that follows. Melusi Sibanda (deceased) died on the 5th September 2005. Clever Sibanda was by Letters of Administration issued on the 7 May 2009 appointed the executor dative of the estate of Melusi

Sibanda. The inventory filed with the Master shows that the estate had one asset, house number 501 Nkulumane, Bulawayo (property) valued at USD$15 000.00. A meeting was held at the Master's office and it was agreed that "the house would be sold by consent of all beneficiaries." On the 12 March 2020, the Master in terms of section 120 of the Administration of Estates Act [Chapter 6:01] authorized the Executor to sell the property otherwise than by public auction. On the 1st September 2020, the Executor signed an agreement of sale with the 2nd respondent in respect of the property. The property was sold for USD$14 000.00, and the Executor received the payment of purchase price. He acknowledged in writing the receipt of such purchase price.

Applicant and the 1st, 5th, 6th, 7th, 8th, 9th, 10th and 11th are the children of the deceased and hence beneficiaries in his estate. There are other children of the deceased who have since died. Applicant contends that he and the children of the deceased siblings were not consulted and did not consent to the sale of the property. He says he and such children did not receive a share from the proceeds of the sale of the property.

It is alleged that the Master did not conduct a due inquiry before issuing a section 120 authority, it is contended that if she had done so he would have realized that not all beneficiaries had been consulted and consented to the sale, and that the value of the property was not established on the date the certificate was issued. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary points

Each side made every effort to outdo the other side on the basis of preliminary points. At the commencement of the hearing I informed the parties that I shall adopt a holistic approach. This approach avoids a piece-meal treatment of the matter, and the preliminary points are argued together with the merits, but when the court retires to consider the matter it may dispose of the matter solely on the basis of the preliminary points despite that they were argued together with the merits. I now turn to consider the preliminary points taken by the parties.

Preliminary points taken by the applicant

Applicant raised two preliminary points *viz* first that there is no notice of opposition filed by the 2nd respondent, and the matter must be considered on the basis that it is not opposed. Second that 2nd respondent's heads of argument were not filed in compliance with the rules of court, and therefore they are not properly before court.

Applicant contends that the notice of opposition filed by 2nd respondent is not in compliance with rule 233(1) of the High Court Rules, 1971, it is invalid.[1] It is argued that the notice of opposition being invalid there is no opposition and the 2nd respondent in barred in terms of rule 233(3) of the rules. It is contended that there being no notice of opposition the application is unopposed.

The basis of this preliminary point is that the notice of opposition is not in compliance with rule 233(1) of the rules, which provides that the respondent shall be entitled, within the time given in the court application in accordance with rule 232, to file a notice of opposition in Form No. 29A, together with one or more opposing affidavits. In terms of Form 29A a notice of opposition must be signed by the respondent or his legal practitioner and addressed to the Registrar of this court and copied to the applicant or his legal practitioner. Applicant's complaint is that 2nd respondent's notice of opposition was not addressed to him as the applicant.

Mr *Ndlovu* counsel for the 2nd respondent argued that applicant's address was hand written in the notice of opposition. It is contended that applicant was served with the notice of opposition twice, in the first instance i.e. on the 13 May 2021 a person at his residence refused to accept a copy and it was then put in the letter box, in the second instance i.e. on the 5 November 2021 he was served with a copy. It is argued that he suffered no prejudice arising from the omission he is complaining about.

Applicant by his own version first found the first copy of a notice of opposition in the letter box, and was again on the 5th November 2021 served with a second copy of the notice.

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[1] This application was filed before the enactment of the High Court Rules, 2021.

Again, the copy of a notice of opposition in the court file is copied to the applicant. However applicant's name and address is in long-hand. The notice is clearly copied to the applicant. This is what the rules require. The only infraction I observed was that applicant's name and address are written in long-hand. I take the view that these are some of the infractions of the rules that this court may condone in terms of rule 4C of the High Court Rules, 1971. Applicant has not suffered any prejudice at all by the notice of opposition having his name and address hand-written. The interests of justice require that such infractions be condoned. I take the view that this court must be astute in considering these preliminary points to avoid elevating form over substance. This preliminary point has no merit and is refused.

The second preliminary point taken by applicant is that the 2nd respondent's heads of argument was not filed in terms of the rules of court. He relies on rule 59(20) of the High Court Rules, 2021, which says where an application has been set-down for hearing in terms of rule 65 and any respondent is to be represented at the hearing by a legal practitioner the legal practitioner shall file with the registrar heads of argument. Applicant's interpretation of this rule is that a set-down date must precede the filing of heads of argument, put differently that heads of argument cannot be filed before a matter has been provided with a set-down date.

Applicant's complaint is that 2nd respondent's heads of argument were filed before this matter was provided with a set-down date. I take the view that this is a flimsy and meritless preliminary point. Rule 59(60) cannot be interpreted to mean that heads of argument cannot be filed before an application has been provided with a set-down date. In fact rule 65(10) is clear that a matter cannot be set-down if the papers are incomplete, and my view is that if heads of argument have not been filed the papers would be incomplete and the matter would not be ripe to be provided with a set-down date. This preliminary point has no merit and is refused.

Preliminary points taken by the respondent

2nd respondent raised two preliminary points *viz* the first that this is an application for a review and is not in compliance with rule 259 of the High Court Rules, 1971. The second is that applicant failed to follow the procedures provided for in section 52 (9) (i) of the Administration of Estates Act [Chapter 6:01). It is contended that the preliminary points must be upheld and the application dismissed without a consideration of the merits.

In respect of the first preliminary point, that this is an application for review which falls foul of rule 259 of the rules, it is contended that applicant seeks a review of the Master's decision to grant a section 120 authority. It is argued that the grounds anchoring applicant's complaints are grounds for review. It is contended that applicant is aggrieved and in his view the Master departed from the agreement that all beneficiaries should consent to the sale of the property, and that she did not carry out a due diligence inquiry before issuing the section 120 authority. It is argued that these are grounds for review.

Indeed some of applicant's complaints are akin to grounds for review. However on the overall facts of this case I find that this is not an application for review. It is on this basis that I take the view that this preliminary point has no merit and must fail.

Regarding the second preliminary point, it is contended that this application was filed more than a year after the Master made a decision to grant a section 120 authority. It is argued that applicant should have filed this application within thirty days of the Master's decision as provided in section 52(9) (i) of the Act. It is contended that applicant should not be permitted to side-step the clear provisions of section 52(9) (i) of the Act. In answer to this preliminary objection applicant contended that there is no need to comply with section 52(9) (i) of the Act.

Section 52(9) (i) provides thus:

> The Master shall consider such account, together with any objections that may have been duly lodged, and shall give such directions thereon as he may deem fit:
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> Provided that—
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> (i) any person aggrieved by any such direction of the Master may, within thirty days after the date of the Master's direction, and after giving notice to the executor and to any person affected by the direction, apply by motion to the High Court for an order to set aside the direction and the High Court may make such order as it may think fit.

I take the view that section 52(9) (i) of the Administration of Estates Act deals with a person aggrieved by the decision of the Master concerning a distribution account. Such person may, within thirty days after the date of the Master's decision, and after giving notice to the executor and to any person affected by the direction, apply by motion to the High Court for an order to set aside the decision.

In *casu* the Master did not make a decision in respect of a distribution account, he issued a section 120 authority which is issued before the filing of a final distribution account. My view is that the procedure set out in section 52(9) (i) of the Act is not applicable to a person aggrieved by the issuing of a section 120 authority. The section applies to a person aggrieved by the decision of the Master concerning a distribution account. Therefore this preliminary objection has no merit and is refused.

Merits

Applicant seeks that the sale of the property to the 2nd respondent to be set aside. The grounds upon which this order is sought is that the issuing of the section 120 authority was irregular and unlawful. It is contended that at a meeting held on the 25th June 2019 before the Master it was resolved that "the house would be sold by consent of all beneficiaries." It is argued that the Master did not carry out a due inquiry prior to the issuing of the section 120 authority. It is said had the Master conducted a due inquiry she would have established that not all beneficiaries had been contacted and consented to the sale of the property, and that the value of the property had not been established as of 20 March 2020 when the section 120 certificate was issued. Applicant contends that he and the children of the deceased siblings as beneficiaries were not consulted about the sale of the property and did not receive any shares from such sale.

Applicant argues that the resolution of the 25th June 2019 is binding on the Master and the Executor in terms of section 5(1) (a) of the Deceased Estates Succession Act [Chapter 6:02]. The section provides thus:

> Where as a result of a distribution in intestacy any property devolves upon any heirs in undivided shares the heirs may agree upon an alternative division of the property, and such agreement shall be binding on the executor.

First applicant cannot complain on behalf of the children of the deceased siblings, such children are not before court, and there is no indication that he has authority from such children to complain on their behalf. He can only anchor his application on the basis of his allegation that he was not consulted and did not consent to the sale of the property.

Applicant's contention that he did not consent to sale of the property cannot withstand scrutiny. Applicant attended a meeting held on the 25th June 2019.[2] At the meeting he unequivocally agreed that the house be sold. Applicant cannot be permitted to play double standards, that when it suits him he agrees to the sale of the property, and when it does not suit to make a turn and allege that he did not consent to such sale. This is impermissible.

My understanding of the resolution that "the house would be sold by consent of all the beneficiaries" applied to those beneficiaries who did not attend the meeting and consent thereat. It did not apply to the applicant. Again the beneficiaries who did not attend the meeting deposed to affidavits consenting to the sale of the property. Copies of such affidavits are before court.

Applicant complains that the value of the property had not been established as of 20 March 2020 when the section 120 certificate was issued. This ground of complaint is convoluted and incomprehensible. The simple point though is that the Inventory prepared by the Executor in terms of the provisions of the Administration of Estates Act put the value of the property at USD15 000.00. The Master accepted the Inventory. This is a court of law, and whatever decision it makes must be grounded on the law. This court cannot unnecessarily interfere with the processes and decisions of the Master. It is for these reasons that this application must fail.

The general rule in matters of costs is that the successful party should be given its costs, and this rule should not be departed from except where there are good grounds for doing so. I can think of no reason why I should deviate from this general rule. I therefore intend awarding costs against the applicant.

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[2] In the minutes of the meeting he is cited as Elphas Sibanda, and he explained during the hearing of this application that the Elphas Sibanda referred to in the minutes is himself, he used to use such name and has now changed to Maphisa, which is his ancestral surname.

Disposition

In the premises, I find that applicant has not made a case for the relief he is seeking. In the result, this application be and is hereby dismissed with costs of suit.

Sansole and Senda, 2nd respondent's legal practitioners