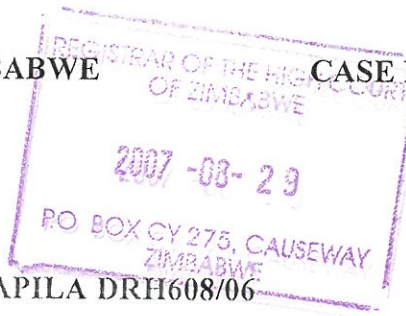


IN THE HIGH COURT OF ZIMBABWE
HELD AT HARARE

CASE No. HC. 1220/07

In the matter between:



ESTATE LATE BRIDGET WAKAPILA DRH608/06

APPLICANT

And

DENNIA MATONGO DR 2262/99

1st RESPONDENT

In her capacity as the Executrix in the Estate of the
Late Pension Wakapila.

And

DIRECTOR OF HOUSING AND COMMUNITY
SERVICES CITY OF HARARE

2nd RESPONDENT

And

THE MASTER OF HIGH COURT
DR 2262/99



3rd RESPONDENT

1ST RESPONDENT'S HEADS OF ARGUMENT

A. SUBMISSIONS IN OUTLINE

1. POINTS IN LIMINE: LOCUS STANDI IN JUDICIO

1.1 It is respectfully submitted that the Applicant in *casu* lacks locus standi in *judicio* to institute the present court application

1.2 The Applicant's founding affidavit deposed by **Remigio Tawanda Chagonda** does not give any legal basis for this application.

1.3 In paragraph 2 of the Applicant's founding affidavit, the deponent clearly states that he was duly authorized by the Applicant to depose to the Affidavit in his capacity as the Executor Dative in the Estate of the late Bridget Wakapila. The deponent further attached a copy of the letter of appointment by the magistrate's court dated 6th March 2007 to support that averment. However it is respectfully submitted that Annexure "A" to the Applicant's founding affidavit is legally defective and consequently of no force and effect

1.4 The submission in the preceding paragraph is supported by the last paragraph of the Master's Report which reads as follows "*it is my further*

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submission that the registration of the estate of Pension Wakapila at the Magistrate court was irregular and falls away in that the Magistrate court has no jurisdiction to administer an estate where there is a will. With this in mind, the purported registration and administration is null and void as reads section 30 subsection 2 of the Administration of Deceased Estates Act [Chapter 6: 01]". Please refer to a copy of the Master's Report attached hereto as Annexure "A"

In the light of the foregoing it is respectfully submitted that this application is misconceived, misconstrued and hopelessly futile.

- 1.5 In paragraph 10 of the Applicants founding affidavit, the deponent correctly states that during the lifetime of **Pension** and **Bridget Wakapila**, the couple was not blessed with any children. The deponent himself is a product of a prior union between **Bridget Wakapila** and an unnamed man. Given this Scenario one then wonders the basis upon which this application is premised because **Remigio Tawanda Chagonda** is unrelated to the late **Pension Wakapila**.
- 1.6 The issue of *Locus Standi in judicio* has been the subject of a spate of judicial decisions. In the case of **Van Niekerk v Van Niekerk and Ors 1999 (1) ZLR 421 (5)** the court ruled that locus standi in deceased estates matters should be given to a person with a genuine grievance and not a mere busy body who is interfering with things that do not concern him. By the same token the Applicant in **casu** is a mere busy body without any legal standing at all.
- 1.7 In a plethora of cases the courts have repeatedly stressed that for a litigant to have locus standi he/she must prove a direct and substantial interest in the matter at hand. See **ZIMTA & ORS V MINISTER of Education and Culture 1990 (2) ZLR 48 (H)**. See also **Sibanda and National Premier Soccer League V Mugabe and Z. IFA HH-102-94**. It is respectfully submitted that the Applicant in **casu** has dismally failed to show any direct and substantial interest in the matter.
- 1.8 Furthermore it is trite law that litigants must not come to court with dirty hands especially when they are guilty of lack of honest or probity with regard to the facts that give rise to the case. See **Deputy Sheriff, Harare V Mahleza and Anor 1997(2) ZLR 425 (H)** the facts contained in the Applicants founding affidavit are clumsy. The law is crystal clear that an applicant's case stands or falls by his founding affidavit and the facts alleged in it. See **Stevenson V Minister of Local Government and Ors 2001 (1) ZLR (H) at 323E**.

- 1.9 It is respectfully submitted that this Honourable Court may be guided by the Master's Report in making an informed decision in this matter. In particular paragraph 4 of the master's report reads as follows "*I do not support the relief sought by the Applicant in that, suppose the deceased died interstate which is what Applicant is advocating for, the estate should devolve upon the two wives and children only as provided for in the Act that govern the Administration of Estates Chapter 6 : 02 (emphasis added)*"

In the present case **Tawanda Remigio Chagonda** is neither a child nor a wife of late **Pension Wakapila** and is not a legal beneficiary to the estate late **Pension Wakapila**.

WHEREFORE in view of the fore- going submissions the respondent humbly prays that this Application be dismissed with costs on a legal practitioner client scale without delving into the merits. However if this Honourable Court declines to uphold the points in limine the merits of this matter shall be addressed in detail.

B DETAILED SUBMISSIONS

2. Strictly speaking the Applicant in this matter is one **Remigio Tawanda Chagonda** albeit camouflaged by the name Estate late **Bridget Wakapila**.
3. The Applicant is seeking an order for the nullification of the Will validly executed by the late **Pension Wakapila** coupled with a declaration that house No. 22 Muridzanhara Street, Mufakose belong to the Estate late **Bridget Wakapila**.
4. The uncontroverted facts of the matter are that **Pension Wakapila** died on 28th May 1999.
5. Before his death, **Pension Wakapila** executed a Will on 24th December 1998. A copy of the said Will was lodged with and accepted by the Master of the High Court, the 2nd Respondent in **casu**, sometime in 1999.
6. In terms of the a aforementioned will, the late Pension Wakapila bequeathed his movable and immovable assets to Mrs. D Matongo, Lazarus Wakapila Jane Wakapila, Livingstone Wakapila and Ruth Wakapila.
7. A clear perusal of the will clearly shows that the property in dispute stand No. 22 **Muridzanhara Street, Mufakose**, Harare was awarded to Tafadzwa Wakapila as the sole beneficiary.

8. It must be stressed from the onset that the property mentioned in the preceding paragraph was solely registered in the name of **Pension Wakapila** and not jointly registered with **Bridget Wakapila** as purported by the Applicant.
9. Mindful of the validity of the late **Pension Wakapila's** Will, on 28th May 1999, the 2nd respondent duly appointed **Dennia Matongo** as the Executor Dative in the Estate late **Pension Wakapila**.
10. This was so because since there was a valid Will, the estate of the late Pension Wakapila could only be registered in the High Court.
11. Unbeknown to the rest of the beneficiaries in the Estate late Pension Wakapila the late Bridget Wakapila registered the estate in the Magistrates Court. However it is submitted that the purported registration of that estate was legally defective.
12. It is respectfully submitted that the validity of the late Pension Wakapila's will cannot be impugned. During his life time Pension Wakapila exercised his legal right to execute a will wherein he bequeathed his movable and immovable assets to the beneficiaries contained in the will. The marriage contracted between Pension Wakapila was out of community of property.
13. Furthermore, there was never any ante-nuptial contract between the late Pension Wakapila and Bridget Wakapila. To suggest otherwise would be a complete fabrication.
14. The property in question cannot be included in Bridget Wakapila's estate. It was solely registered in the name of late Pension Wakapila and he had vested powers to bequeath it as he wished.
15. In seeking to challenge the validity of the late Pension Wakapila's will, the Applicant is merely clutching at the straws. The validity of the will is a **fiat accompli and hence cadeat questio**.
16. It is crystal clear that Remigio Tawanda Chagonda is harbouring covert motives to benefit from the property, which solely belonged to his late mother's former husband. Such a desire is far-fetched and legally untenable and remains a pie in the sky.

17. The late Pension Wakapila's Will is valid and competent in terms of the provisions of **section 8 of the Wills Act [Chapter 6: 06]**
18. The main basis of the application is hinged on the interpretation of **section 5 (3) (a) of the wills Act.**
19. It is crucial to note that the 2nd respondent wrongly concedes that the will contravened section 5 (3) (a) of the Wills Act. However there are no cogent reasons to justify that submission and it remains shrouded in obscurity.
20. It is respectfully that both the Applicant and the master of the High Court's interpretation of section 5 (3) (a) of the Will's Act is faulty and wrong at law that provision is only violated when the deceased person alters an exsisting lawful matrimonial property arrangement in which;
- (i) Out of community of property-the deceased bequeaths property owned by his spouse to somebody else. For instance if the house in dispute was registered in the Applicant's name, married out of community of property, then the late Pension Wakapila would not have had the right to bequeath it to Tafadzwa Wakapila as he rightly did in the will.
 - (ii) In Community of property – the deceased can only lawfully bequeath half of the total matrimonial property, which lawfully would be his share. He cannot bequeath the whole matrimonial property as that will run foul to section 5 (3) (a) of the Will's Act.
21. In this case, the marriage was solemnised under the African Marriages Act (Chapter 238), a **fortiori** neither the issue of out of community of property nor in community of property regime arises. Under customary law all matrimonial property belonged to the husband. By exercising his freedom of testation, the deceased did not violate either the applicant's entitlement or **section 5 (3) (a) of the will's Act.**
22. If the surviving spouse was hurt by the contents of the will, (of which no evidence has been property placed before this Honourable Court to support that inference) she could have applied for maintenance under **section 3 of the Deceased Persons Family Maintenance Act [Chapter 6: 03]** which accords protection of surviving spouses. However in the present case it is actually the late Bridget Wakapila's out of Wedlock son who is waging a futile battle to inherit from his stepfather, the late Pension Wakapila.

23. It is grossly unfortunate that both the Applicant and the 2nd respondent erred and misconstrued the meaning of **section 5(3) (a) of the Will's Act**.

24. However a holistic reading of the Master's report clearly shows that he does not support the Application save for the slight misdirection as to the interpretation of **section 5 (3) (a) of the Will's Act** revolving on the validity of the late Pension Wakapila's will.

25. Even assuming that the will was invalid for any other reason (of which it was not), the **Deceased Estates Secession Act** would not have applied to this set of facts. The conflict of law question in **section 68(A) (1) of the Administration of Estates Amendment Act No. 6 of 1997** would demand that the Administration of Estates Act be applied **prima facie**, because of the Customary Marriage regime *in casu*.

26. It is respectfully submitted that the point made in paragraph 8 .6 of the Applicant's Heads of Contention that the will is invalid is erroneous at law. Besides that, the quotation cited was regrettably made before the enactment of the **Administration of Estates Amendment Act No. 6 of 1997** and hence inapplicable.

27. The Applicant's interpretation of **section 5 (3) (a) of the Will's Act** is wholly inconsistent with the ordinary, grammatical meaning used in the statute. See **SAVANHU V HEIRS ESTATE SAVANHU 1991 (2) ZLR 19 (SC) at 23G-H**.

28. In a nutshell the present application is devoid of any merit and nipped in the bud.

WHEREFORE, the 1st Respondent humbly prays that the application be dismissed with costs on a Legal Practitioner - Client scale.

Dated at Harare on this 28th day of August 2007

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 1st Respondent's Legal Practitioners
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TO: **THE REGISTRAR**
High Court of Zimbabwe
HARARE

AND TO: MATIMBA & MUCHENGETI
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