

RENEE JUANITA HITEN
versus
STEVEN BARRY N.O
and
THE MASTER OF HIGH COURT
and
THE SHERIFF OF HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 10 & 23 November 2022

Opposed Application

S M Hashiti, for applicant
E Donzwambeva, for 1st respondent

TAGU J: This is a court application for an order *Actio Communi Divendo*. Put simply, any party with an interest in jointly owned property can claim the division of the joint property according to that joint owner's share in the property. It is a requirement for the division of the joint property that the parties need to try to divide the property among themselves first, before approaching the Court for an action to divide the property, which action is called the *actio communi dividendo*. See *Robson v Theron* 1978 (1) SA 841 (A).

BACKGROUND FACTS

The first respondent was appointed a testamentary executor to the estate late Denise Marlene Barry by virtue of a Will. In terms of the aforesaid Will, the applicant and the first respondent were bequeathed in equal shares land known as Lot 30 of Glen Lorne situate in the district of Salisbury measuring 21,2552 hectares held under Title Deed No. 1484/85. In the

execution of his statutory duties as executor, the first respondent lodged and advertised a first and final liquidation and distribution account in the aforesaid late estate. In terms of the aforesaid first and final liquidation and distribution account, the first respondent intends to register Lot 30 of Glen Lorne situate in the district of Salisbury measuring 21,2552 hectares held under Deed No. 1484/85 into both their names, as co-owners. Having had sight of the Liquidation and distribution account, the applicant advised the first respondent that he does not want to be co-owner with first respondent but would rather own half of the portion of the land separately. The applicant's request is premised on the fact that applicant no longer stays in Zimbabwe and would want to dispose of her half share of the land and utilize the funds where she resides. However, the first respondent is not keen to this arrangement, meaning due to their differences in the land use, they cannot be amicable co-owners of the land. This prompted the present application.

The application is opposed. The basis of the opposition being that the applicant, being a *peregrinus* did not pay security for costs. That the applicant does not have *locus standi* in *judicio* to institute present proceedings and seek the present relief. That applicant can sell her share as and when the transfer has been done. That applicant's application cannot be supported by law because she is a mere beneficiary and as things stand she has no share in the property. Lastly, the estate will not be able to meet the costs of the subdivision.

FACTS THAT ARE COMMON CAUSE

It is common cause that the applicant and the first respondent hold equal shares in the estate of the late Alfred James Barry, being Remainder of Lot 30 of Glen Lorne held under deed of transfer 1434/85 (hereinafter referred to as the property), both having been awarded equal shares through a Will. It is not in dispute that the first respondent, as the executor dative to the estate of the late Alfred James Barry intends to register the property in the names of the applicant and first respondent equally, each holding 50% shares. On the other hand the applicant does not want the property to be registered in their joint names because she no longer resides in Zimbabwe and intends to use the funds where she is now residing. The first respondent is against the idea of having the property subdivided.

ISSUES FOR DETERMINATION

There are several issues that arise for determination both on the preliminary and merits of this matter. On the preliminary the issues for determination are as follows;

- a. Whether or not the applicant should pay security for costs?
- b. Whether or not there is a proper application before the court? This preliminary point was firstly raised in the heads of argument and not in the Opposing Affidavit.

On the merits the issues for determination are as follows;

- a. Whether or not there is a basis for granting an order *actio communi dividendo* in the circumstances?
- b. Whether or not the court can grant an order for the subdivision of the property contrary to the provisions of the Will?
- c. Whether it is fair, just and equitable for the applicant to be forced to be a joint owner with the first respondent in respect of remainder of Lot 30 of Glen Lorne held under deed of transfer 1434/85.

The first respondent did not pursue the preliminary point on security for costs, the reason being that the parties managed to find each other and resolved the issue.

IS THERE A PROPER APPLICATION BEFORE THE COURT?

The first respondent pursued the issue that there is no proper application before the court. First and foremost, the first respondent submitted that the founding affidavit is irregular and cannot be upheld in the present circumstances. He said although the founding affidavit shows that it was signed in Harare, it is notarized in South Africa. He argued that at law, only an affidavit signed outside Zimbabwe must be notarized. For this contention I was referred to the case of *Stand Five Four Nought (Pvt) Ltd v Salzman ET CIE SA SC 30/16*.

The fact that this point of law was raised in the heads of argument filed on 26 September 2022, when applicant had already filed her answering affidavit on 15 September 2022, means this issue was not addressed in the Answering Affidavit. Neither was it addressed in the applicant's heads of argument which had already been filed earlier on 23 September 2022. Also at the hearing of the matter the first respondent did not make oral submissions *vis-a vis* this point *in limine*. Surprisingly, the applicant's counsel did not make oral submissions on the point *in limine*.

The law is clear. It is permissible for a party to raise any point of law at any stage of the proceedings as long as it is not prejudicial to the other party. In the present case the first respondent's Heads of Argument were served on the applicant's legal practitioners on or about the 26th of September 2022 at 3:29 hours if regard is had to the Sheriff's date stamp. The applicant was therefore aware of the preliminary issue. By failing to address the court on this

preliminary issue can only be taken as a sign of acquiescence on the party of the applicant. It cannot be said that the applicant was ambushed. If the first respondent had raised the issue in the Opposing Affidavit but failed to raise it in the Heads of argument, the first respondent would have been taken to have abandoned the issue. The law is clear, that which is not denied or traversed is taken to have been admitted.

What the Applicant's Founding Affidavit shows is that it was signed on 10 August, 2022 as evidenced by the words:

"THUS, DONE AND SWORN TO AT HARARE THIS 10TH DAY OF AUGUST, 2022.
SIGNED:
RENEE JUANITA HITEN"

Further, it is clear that this Same Affidavit was notarized in South Africa on the same day, the 10th of August 2022 at Somerset West As evidenced by the following:
BEFORE ME,
NOTARY PUBLIC

Signed before me G. J. SMIT
On 10/08/2022
At Somerset West
RSA"

The Notary Public Seal indicates "NOTARY PUBLIC SOUTH AFRICA".

The law is that an affidavit must be sworn to before a Commissioner of Oaths, or in this case before a Notary Public. The two must sign in the presence of the other. The fact that the affidavit states that it was signed in Harare, Zimbabwe and notarized outside the country (in South Africa) puts in issue the authenticity and veracity of the founding affidavit. The deponent could not have been in Zimbabwe at the time of signing the founding affidavit. If she was, she could not have been in South Africa on the same day and time when the affidavit was notarized. The court therefore, cannot rely on such founding affidavit, it ought to be expunged from the record. Citing with approval the case of C.H. Van Zyl in his work "The Notarial Practice of South Africa" at page 81 says:

"The object of authentication is to ensure the genuineness of the signatures to deeds. Prima facie this authentication is a guarantee that all the required solemnities or requisites of the law in due execution of a deed have been complied with and that the parties therein named have duly signed it in the presence of the witnesses and that the notary in whose presence it was signed was qualified to act as such."

In this case I am dealing with a document authenticated in South Africa at Somerset West and was signed in Zimbabwe at Harare on the same date and time. This Founding Affidavit is defective and must be expunged from the record.

Once the founding affidavit is expunged from the record, it follows that there is no application before the court and the matter ends there. There is no more reason to deal with the rest of the preliminary points as well as the merits of the case.

IT IS ORDERED THAT

1. The application is dismissed
2. Applicant to pay costs on a legal practitioner and client scale.

Chasi Maguwudze, applicant's legal practitioners
Honey & Blankenberg, first respondent's legal practitioners