



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.1995/2013

In the matter between:

MBONGISENI SIHLONGONYANE

Applicant

vs

THE MASTER OF THE HIGH COURT

Respondent

Neutral citation: *Mbongiseni Sihlongonyane vs Master of the High Court (1995 /2013) [2014] [SZHC 381] (26th September 2014)*

Coram: **MAPHALALA PJ**

Heard: 30th June 2014

Delivered: 26th September 2014

For Applicant: Mr. M. Mzizi

For Respondent: Mr. D.M. Jele

Summary: (i) *Before court is an Application under a Certificate of Urgency for **inter alia** reviewing a decision of the Master of the High Court to direct that the estate of the late*

Sibonangaye Sihlongonyane Langwenya (Master's Reference Number E271/2007) be liquidated and distributed in terms of the copy of a purported Will be set aside.

- (ii) *The 3rd Respondent opposes the Application and has advanced arguments **inter alia** citing the provisions of section 5 of the Administrative of Estates Act, 1905. That the Master only accepts an original will which has to be accompanied by copies. That the Master has no right to accept copies unless there is a court order citing the High Court case of **Ex parte Alerne Karamitsos Case No.4124/2005.***
- (iii) *The 3rd Respondent further contends that Applicant had not appealed the judgment of the High Court where **Agyemang J** ruled on validity of the Will.*
- (iv) *In the result, the court finds in favour of the arguments of the 3rd Respondent as stated above in paragraph (ii) and (iii) above and dismiss the Application with costs at a punitive scale.*

Legal authorities cited

- (a) **Ex parte Alerne Blance Karamitsos (supra);**
- (b) **Raymond Carmichael vs Rosemary Carmichael and 2 Others High Court Case No.2066/2010;**
- (c) **The decided cases cited in paragraph [26] infra.**

JUDGMENT

Application

[1] Serving before this court are review proceedings wherein the Applicants seek the following relief:

- “1. Dispensing with the normal rules of court as relates to service and time limits and hearing this matter as an urgent one.**
- 2. Condoning Applicant’s non-compliance with the Rules of Court.**
- 3. That pending the finalization of this application, liquidation and distribution of the estate of the Late Sibonangaye Sihlongonyane Langwenya (Master’s Reference No.EM 271/2007) be hereby stayed.**
- 4. A rule nisi do hereby issue calling upon the Respondent to show cause why on the date and time to be determined by the Honourable Court why an order in the following terms should not be made final:**
 - 4.1 Interdicting and prohibiting the Master of the High Court or any individual acting under her instruction from proceeding with liquidation and distribution of the estate of the Late Sibonangaye Sihlongonyane Langwenya (Master’s Reference No. EM 271/2007) pending the furnishing to Applicants of the original purported will allegedly prepared by the deceased.**

4.2 That the decision of the Master of the High Court to direct that the estate of the Late Sibonangaye Sihlongonyane Langwenya (Master's Reference No. EM 271/2007) be liquidated and distributed in terms of a copy of a purported will be and is hereby reviewed and set aside.

5. Costs of suit.

6. Such further and alternative relief as the Honourable Court deems fit.”

[2] The Founding Affidavit of one Leon Mbongiseni Sihlongonyane in respect of himself and the other 20 (twenty) Applicants stating the material facts in this dispute is filed. Various annexures are also filed in support thereto.

[3] The Respondent oppose this Application and has filed an Answering Affidavit deposed to by the 3rd Respondent cited as Minah Sihlongonyane against the averments of the Applicants including the Master's report. The 3rd Respondent further filed a copy of a judgment by **Agyemang J** of the 28th July, 2010 pertinent to this case and I shall revert to this aspect of the matter later on as I proceed with my analysis in this judgment.

The background

[4] The background facts of the dispute between the parties are summarized by the attorney for the Applicants in his Heads of Arguments which I reproduce **in extenso** from paragraph 1.2 to 1.8 as follows:

- “1.2 The Applicant and 2nd to 7th Respondents are the next of kin of the deceased. They comprise of the deceased’s wives and children.**
- 1.3 The court did grant the interim relief relating to the stay of liquidation of the deceased’s estate pending finalization of the present proceedings. What remains is the review application.**
- 1.4 The Applicants seek an order for the review and setting aside of the decision of the Master of the High Court made on or about the 3rd December, 2013 where the Master ordered that the estate of the deceased be liquidated and distributed using a copy of what purports to be the deceased’s will.**
- 1.5 The Applicants submit that the decision by the Master is irregular and unlawful because it is contrary to the dictates of the law that a copy of a will be used without that copy being declared a true copy of the deceased will through a court order.**
- 1.6 The Applicants submit that they have been requesting to be furnished with the original will of the deceased so that they could verify its authenticity through the appropriate professionals in the Republic of South Africa.**

1.7 It is submitted that in essence the court has to determine whether it was irregular for the Master of the High Court to decide that the estate of the deceased be liquidated using a copy of what purports to be the deceased's will without first ordering that any interested party should make an application before the High Court declaring the purported copy to be a true copy of the original will of the deceased.

1.8 It is only the 3rd Respondent who has opposed the review proceedings. The Master of the High Court has only filed a report in the matter.”

The arguments of the parties

(i) For the Applicant

[5] The attorney for the Applicant Mr. Mzizi filed comprehensive Heads of Arguments for which I am grateful. I shall revert to pertinent submissions of the attorney for the Applicant later on as I proceed with the judgment in my analysis of the parties' arguments. The said arguments are outlined in paragraphs 1.2 to 1.21 and on paragraphs 2 to 3.3 dealt with the law and cited the South African case of **Ex parte Ntuli 1970 (2) SA 278 (W)** and also the legal textbook by the learned authors **M.M. Corbert et al, Law of Succession in South Africa (2nd edition)** page 117 to the following legal proposition:

“In the event of an original will being lost or destroyed, and if there is no duplicate original, it will, therefore, be necessary for interested parties to apply to court to obtain an order declaring a copy of the will (where such copy is in existence) to be the will of the deceased and authorizing the Master to accept the copy...”

[6] The Applicant contends that in terms of the law for a copy of a Will to be used in the liquidation of the estate of a deceased person there is need that the due process of the law be followed. That in this case there is no order of court authorizing the Master of the High Court to liquidate the estate of the deceased using what purports to be a copy of the deceased Will. That the Master is not allowed to put the cart before the horse and is expected to act impartially and not to take sides in this matter.

[7] On the issues of law to the facts it is the Applicant’s contention that the law stipulates that there has to be first an Application in court for an order declaring the copy of the purported Will to be a true copy of the Will of the deceased before the Master can order that the liquidation of the deceased’s estate be liquidated using a copy of the Will. That accordingly, the Master’s decision is irregular and ought to be set aside. Further, that presently no other Application to have the copy to be a true copy of the deceased Will.

[8] Finally the attorney for the Applicant sought that the Application be granted with costs.

(ii) The 3rd Respondent's arguments

[9] The attorney for the 3rd Respondent Mr. Jele filed brief Heads of Arguments on behalf of his client and I shall outline in brief the salient features of these Heads of Argument for the better understanding of the issue for decision by this court.

[10] It is contended for the 3rd Respondent **inter alia** that the Applicant approached the High Court under case No.4005/2007 seeking an order declaring the original Will kept by the 1st Respondent invalid and unfortunately the Applicants were not successful as their Application was dismissed. That it was not the case of the Applicants at that stage that the Will in the 1st Respondent's office was a copy. That the Applicant accepted that the Will was an original. That the Applicant never appealed the decision of the High Court declaring the Will valid and therefore stand even today.

[11] Further arguments are advanced in paragraphs 5, 6, 7 and 8 of the Heads of Arguments of the attorney for the 3rd Respondent citing a number of decided cases on the subject including that **Ex parte Alerne Blance Karamitsos High Court Case No.4124/2005** where the original Will of the deceased was lost and the beneficiary made an Application to court seeking an order that a copy thereof be accepted as correct on the basis that the Master had refused to accept.

[12] The attorney for the 3rd Respondent then advanced arguments on the scale of costs to be levied in this case to be on the punitive scale at paragraphs 12 to 15 of the Heads of Arguments.

[13] Finally, the attorney for the 3rd Respondent advanced arguments that the Application be dismissed with costs at a punitive scale.

The court analysis and conclusions thereof

[14] Having considered all the arguments of the attorneys of the parties and the papers filed of record it appears to me that the 3rd Respondent's contentions are correct on all accounts. I say so for the reasons I shall outline hereunder.

[15] Firstly, I am in agreement with the 3rd Respondent's arguments that in terms of the law the 1st Respondent only accepts original Wills which has to be accompanied by a duplicate as provided by section 5 of the Administration of Estates Act of 1908. In this case the 1st Respondent submitted the original will and these copies as per the report of the 1st Respondent. The deceased thereafter passed away, a next of kin meeting was held on the 4th October, 2007 and the 1st Respondent has alleged on her report that the original Will was read in the meeting and the present Applicants indicated that they were still to challenge the contents of the original Will and the 1st Respondent advised them to approach the High Court for redress.

[16] It is also clear in the papers that at that time the present Applicants then approached the High Court under Case No.4005/2007 seeking an order declaring the original Will kept by the 1st Respondent invalid and that case was dismissed by the High Court. Before that court it was not the case of the Applicants that at that stage that the Will in the 1st Respondent's office was a copy. That Applicants accepted then that the Will was an original. It is very clear on these facts that the Applicants' actions are duplicity. It is also to be noted that Applicants never challenged the judgment of the High Court on appeal.

[17] Secondly, the next chain of events is that the 1st Respondent then called the next of kin meeting where she informed the beneficiaries in that meeting that the original Will had been lost and/or misplaced that the true copies of the Will in her possession which were stamped should be used to liquidate and distribute the estate. The Applicants were unhappy with the 1st Respondent's decision hence the present Application for the review and setting aside of her decision.

[18] Thirdly, I agree **in toto** with the arguments of the attorney for the 3rd Respondent that in determining whether the Applicants are entitled to the order they seek, it is necessary to have regard to the law relating to deposit of Wills with the Master of the High Court.

[19] In terms of section 5 of the Administration of Estates Act, 1905 the 1st Respondent only accepts an original Will which has to be accompanied by copies. The 1st Respondent had no right to accept copies unless there is a court order. In this regard I find the **dictum** in the case of **ex parte Alerne Blance Karamitsos High Court Case No.4124/2005** apposite.

[20] Fourthly, it appears to me that on the pleadings of the parties before this court the Respondents' contentions are correct. I say so because of the averments in the following paragraphs.

[21] The 1st Respondent herein stated in paragraph 4 of her report on page 52 of the Book of Pleadings:

“In any event, the office of the Master does not accept copies of the Wills for registration unless accompanied by the original”.

[22] The Applicants have elected not to file a Replying Affidavit to dispel this damning piece of evidence and therefore in law the allegations contained in the Answering Affidavit of the 3rd Respondent should be accepted as correct. In this regard the **dictum** in the High Court case of **Raymond Carmichael vs Rosemary Carmichael and 2 Others Case No.2060/2010** at paragraph 22 thereof is apposite.

[23] For the above reasons therefore I find in favour of the 3rd Respondent as stated above and on the question of costs I have considered the arguments of the attorney for the 3rd Respondent at paragraph 11 to 15 that costs ought to be levied at a punitive scale.

[24] The most important point that has led this court to this conclusion on costs is that it appears to me on the totality of the facts that the Application is **mala fide**. That the Applicants accepted at first that there was an original Will. It was not the case for the Applicants in that court that there was no original will in the Master's file. The Applicant filed an Application to set aside the Will and unfortunately they failed. That judgment was never taken on appeal and therefore was accepted by the Applicants.

[25] In this regard I agree with the submissions of the 3rd Respondent that Applicant cannot try twice to set aside the same document when there is a ruling on the same matter. This is clearly an abuse of the process of this court.

[26] For the above position, I refer to the cases of **Jomas Construction (Pty) Ltd v Kukhanya (Pty) Ltd, Civil Appeal No.48/2011; Philani Clinic Services (Pty) Ltd v Swaziland Revenue Authority & Another, Civil Appeal No.36/2012; Silence Gamedze & Others v Thabiso Fakudze, Civil Appeal No.14/2012.**

[27] In the result, for the foregoing reasons the Application is dismissed with costs at attorney and own client scale.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE