

IN THE HIGH COURT OF NAMIBIA

CECILIE NDJOZE

FIRST APPLICANT

MENASON MARENGA

SECOND APPLICANT

and

ADELHEID KAHEE (born HUAMBI)

RESPONDENT

CORAM: UNENGU, AJ

Heard on: 01 February 2011

Delivered: 10 February 2011

RULING

UNENGU, AJ: [1] The parties in the matter appeared before me in an application by the two Applicants lodged against Respondent. It is an application in terms of Rule 30(1) of the Rules of the High Court of Namibia, to have the Notice in terms of Rule 15(3) dated 4 August 2010 filed by Mbaeva & Associates declared to constitute an irregular step or proceeding and have it set aside together with costs.

[2] Ms Van der Merwe appeared for the Applicants/Defendants while Mr Mbaeva appeared for the Respondent/Plaintiff. The application is flowing from the main action which Adelheid Kahee brought against the 1st and 2nd Respondents for an order in the following terms:

"1. Setting aside the sale of the dwelling situated at Erf 6611, Traugoth Handura Street, Katutura, Windhoek by Cecilie Ndjoze to Menason Marenga and Rebekka Marenga.

2. Declaring the transfer of ownership of the dwelling to Menason Marenga and Rebekka Marenga to be of no legal effect.

3. Directing the parties opposing this Application to pay the cost of this Application.

4. Further/or alternative relief."

[3] While the proceedings in the main action were still ongoing, Plaintiff (Adelheid Kahee) passed away. The passing away of Plaintiff in the matter prompted Mr Mbaeva who was acting on her behalf to give Notice in terms of Rule 15(3) to the Respondents. But before this application, Mr Mbaeva had previously attempted to have the following persons added as 2nd, 3rd, 4th and 5th Applicants to the proceedings namely; Martha Mbaeva, Rachel Kahee, Constancia Kahee and Flora Kahee. This was done in terms of Rule 15(2). Applicants applied in terms of Rule 30 for an order to declare the Rule 15(2) to constitute an irregular step or proceeding, to set aside the Notice and to order Mbaeva & Associates to pay the costs of the application on an attorney and own client scale, including the costs of one instructing and one instructed counsel.

[4] Mr Mbaeva, after exchanging correspondence with the legal practitioner of the Respondents, decided to withdraw the Rule 15(2) application but lodged Rule 15(3) instead. That application served before Parker, J on 13 August 2010 who declared the Rule 15(2) Notice to have constituted an irregular step or proceeding as envisaged in Rule 30 of the High Court of Namibia. Judge Parker also set aside the said notice and ordered Mbaeva & Associates to pay the costs of that application on party and party scale, including one instructing counsel. This step, however, did not deter Mr Mbaeva from lodging another application in terms of Rule 15(3). In this present application, he applied in his capacity as the Legal Representative for the deceased Applicant to be substituted for the deceased. Defendants/Respondents once again are bringing an application in terms of Rule 30 for an order to declare Mr Mbaeva's Notice in terms of Rule 15(3) to constitute an irregular step or proceeding, setting aside the said Notice and to order Mbaeva & Associates to pay the costs of the application on an attorney and own client scale, including the costs of one instructing counsel.

[5] Mr Mbaeva is opposing the Rule 30 application and it came before me for hearing. Both counsel submitted Heads of Argument which they amplified with oral arguments in support of their case.

[6] The borne of contention between the parties in this application is whether or not Mr Mbaeva who acted as a legal practitioner of the late Adelheid Kahee, still has the mandate to act as such after the said Adelheid Kahee had passed away on 15 June 2010. Further, as whether Mr Mbaeva in his capacity as the late Adelheid Kahee's lawyer has authority to bring this application in terms of Rule 15(3) before Court to be substituted for the deceased.

[7] Rule 15(3) provides that "*Whenever a party to any proceedings dies or ceases, to be capable of acting as such, his or her executor, curator, trustee or similar legal representative, may by notice to all other parties and to the Registrar intimate that he or she desires in his or her capacity as such thereby to be substituted for such party, and unless the Court otherwise order, he or she shall thereafter for all purposes be deemed to have been so substituted*". For Mr Mbaeva to succeed in his application, he must show proof that he is either the executor of the estate of the deceased or he falls under the category of **similar legal representative**. It is clear from the Heads of Argument of Mr Mbaeva that he did not apply to be substituted for the deceased in his capacity as an executor but as a similar legal representative. In fact, in his oral submissions Mr Mbaeva informed the Court that no executor was appointed to administer the estate of the late Adelheid Kahee, because, according to him, the deceased Kahee did not leave any estate. He said, the only asset that could be listed in the estate is the house which is the subject of the main application. Therefore, as I understand his arguments, in his capacity as the legal practitioner of the late Kahee, without any administrative appointment from a court of law or the Master of the High Court, could handle the estate of the deceased further and that he qualifies to bring this application to court, to be substituted for the deceased. This is totally wrong in my view.

[8] This wrong approach was brought about by the wrong interpretation of the phrase "*or similar legal representative*" in sub-rule (3) of Rule 15 by Mr Mbaeva. Mr Mbaeva completely misunderstood this phrase and attached to it a different meaning. On page 3 of his Heads of Argument he argues that sub-rule (3) expressly refers to "a Legal Representative for the deceased." He further submitted that the sub-rule further makes it very clear that unless the

Court orders otherwise, the person who desires to be substituted for the deceased person shall be deemed to have been so substituted. He says that because this Honourable court did not order otherwise he (Respondent) is deemed to have been so substituted. This submission again is not correct and is rejected. Mr Mbaeva was never deemed to have been substituted for the deceased.

[9] He argued further that the application of Applicants in terms of Rule 30 is misplaced and irrelevant. According to him, the Rule 30 application brought against him by Applicants does not request the court to set aside the substitution for the deceased by him, but merely requests the court to set aside the Rule 15(3) notice which he filed. In view of what I have said above, this submission is irrelevant and does not need further discussion. Mr Mbaeva was never substituted for the deceased. I have already indicated that he did not have any administrative appointment authorising him as an executor of the estate of the deceased or as one having an authority under similar legal representative.

[10] The other issue which was argued before me is the point raised by counsel for the Applicant that Mr Mbaeva's mandate to act as the legal representative for the deceased terminated on 15 June 2010, the day when she passed away. According to counsel, only the executor of the estate would have the power to bring this application to be substituted for the deceased. She said that the Power of Attorney granted to Mr Mbaeva by the deceased when she was still alive, did not expand beyond her death. The only person then who can give instruction to an attorney hereafter, is the executor.

[11] With regard to termination of mandate upon death of instructing party, Ms Van der Merwe referred the Court to the following authorities:

(i) ***Krige and others v Schoble and Others*** 1912 TPD 814, the Headnote of which states as follows: "*Under Law 12 of 1870, as under proclamation 28 of 1902 by which it is repealed, a deceased's estate is vested in an executor testamentary or dative, and therefore such*

executor is the only person who has a locus standi to bring a vindicatory action relative to property alleged to form part of the estate. Such action cannot be instituted by heirs ab intestate where no executor has been appointed." Ms Van der Merwe also referred to ***Meort No v Henry Shields-Chat*** 2001(1) SA 464 at 469, the relevant part of which reads as follows:

"Validity of mandate

It is trite law that the relationship of attorney to a client is based on a mandatum, with some features which re peculiar to this particular type of agency. See *Goodricke and Son v Auto Protection Insurance Co Ltd (in Liquidation)* 1968 (1) SA 717 (A) at 722H. An attorney's authority come to an end in a number of ways including death, change of status of the client and revocation."

Armed with this authority, counsel submitted that Mr Mbaeva's mandate to act on behalf of the deceased Applicant came to an end on 15 June 2010, the day when Applicant in the main action, passed away. Accordingly, according to her, the step or proceeding taken by Mr Mbeava is irregular and should be set aside in terms of Rule 30.

[12] Ms Van der Merwe further referred the Court to a Namibian High Court Case No 1668/2004 ***Namibia Development Corporation and Aussenkehr Frams (Pty) Ltd*** (Unreported) by then Heathcote, AJ delivered on 06 November 2009 at paragraph 33 where he, while dealing with an application in terms of Rule 30 has this to say:

"A defendant must file a notice to defend within 10 days, but if the person acting for the defendant has no authority to do so, the "Notice of intention to defend" although filed within 10 days, remains a nullity and no further step taken by any party can cure the nullity."

With this argument Ms Van der Merwe was making a point that the step or proceeding taken by Mr Mbaeva in terms of Rule 15(3) is a nullity due to lack of authority.

[13] I have already dealt with Mr Mbaeva's submissions. Therefore, no longer necessary to deal with them again. Suffice to say that I agree with the submission by Ms Van der Merwe acting on behalf of the Respondents. Mr Mbaeva or family members of the deceased were supposed to approach the Magistrate of the district, wherein the deceased died to obtain a

letter of administration of her estate. The deceased died intestate and as Mr Mbaeva indicated in his submissions, that the estate has a zero balance. In my view, a letter from the Magistrate's court appointing someone to handle the estate could have been the right step to follow.

[14] As a legal practitioner, Mr Mbaeva must have known that his mandate to act as a legal practitioner for the deceased terminated on 15 June 2010, the day the deceased passed away. Therefore, for him to take any further step or proceeding in connection with the matter is irregular due to lack of authority to take such step or proceeding.

[15] Consequently Applicants/Defendants succeed in their application in terms of Rule 30.

[16] Applicants/Defendants requested costs to be awarded against Mr Mbaeva of Mbaeva & Associates on an attorney and own client scale, including costs of one instructing and one instructed counsel. The reason being that the estate does not have any assets according to Mr Mbaeva himself.

[17] In the result I make the following orders:

- (i) That Applicants' Rule 30 application succeeds; and
 - a) that the notice in terms of Rule 15(3) dated 04 August 2010 filed by Mbaeva & Associates and served on the Applicants on 12 August 2010 is hereby declared to constitute an irregular step or proceeding as envisaged in Rule 30 of the Rules of this Honourable Court.
 - b) that the said notice is set aside.
- (ii) Mr Mbaeva of Mbaeva & Associates is ordered to pay the costs of the application on an attorney and own client scale, including costs of one instructing and one instructed counsel.

UNENGU, AJ

ON BEHALF OF THE APPLICANTS

Adv. Van der Merwe

Instructed by:

Van der Merwe-Greeff Inc.

ON BEHALF OF THE RESPONDENT

Mr Mbaeva