

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 43 of 2022

IN THE MATTER OF: ORDER XXX RULE 12 OF THE HIGH
COURT RULES, OF THE HIGH COURT ACT,
CHAPTER 27, VOLUME 3 OF THE LAWS OF
ZAMBIA

IN THE MATTER OF: THE INTESTATE SUCCESSION ACT,
CHAPTER 59, VOLUME 5 OF THE LAWS OF
ZAMBIA

IN THE MATTER OF: THE ESTATE OF KANYUKA ZIMBA

BETWEEN:

YAMMIE ZIMBA (Sued in her capacity as ^{15 FEB 2024}
Administratrix of the estate of the late Kanyuka Zimba) 1st Appellant

MARGARET ZIMBA (Sued in her capacity as
Administratrix of the estate of the late Kanyuka Zimba) 2nd Appellant

AND

CYNTHIA ZIMBA (suing in her capacity as
Surviving spouse of the late Kanyuka Zimba and
Guardian of Niza Zimba) Respondent

CORAM: Makungu, Sichinga and Sharpe-Phiri, JJA
on 17 January and 16 February 2024

For the Appellants: Mr. Simunyola and Mr. Silwamba of
Eric Silwamba, Jalasi & Linyama Legal Practitioners
For the Respondent: Mrs. R.P Bwalya of Messrs Amani Legal Practitioners

J U D G M E N T

SHARPE-PHIRI, JA, delivered the judgment of the Court.

Legislation referred to:

1. *The Matrimonial Causes Act, No. 20 of 2007*
2. *The Intestate Succession Act, Chapter 59 of the Laws of Zambia*
3. *The Matrimonial Causes Act of England, 1973*
4. *The Intestate Succession Rules, SI No. 38 of 2023*
5. *The Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia*

Cases referred to:

1. *Unger and another (in substitution for Hasan) v Ul-Hasan (deceased) and another* [2023] 3 WLR 189
2. *Agro Fuel Investments Limited v Zambia Revenue Authority (Appeal 187 of 2008)* [2012] ZMSC 18
3. *Lindiwe Kate Chinyanta v Doreen Chiwele & Judith Tembo* (2007) ZR 246
4. *Wilson Masauso Zulu v Avondale Housing Project* (1982) ZR 172

Other authorities:

1. *Halsbury's Laws of England, Butterworths, 4th Edition, Volume 13*
2. *Rayden's Law and Practice in Divorce and Family Law Matters, 14th Edition, Volume 1 text, 1983 at page 316, paragraph 133; Effect of Decree of Judicial Separation*

1.0 INTRODUCTION

1.1 This appeal challenges the judgment made by Chibbabbuka J of the High Court in Lusaka on 29 November 2021.

1.2 In the aforementioned judgment, the trial Judge determined that the applicant, Cynthia Zimba (now referred to as 'the respondent') and Niza Zimba ('minor') were beneficiaries entitled to the estate of the late Kanyuka Zimba ('the deceased'). The Judge ruled that they should be given their entitlements as the surviving spouse and dependant, respectively.

1.3 In the initial segment of this judgment, the parties will be identified as they were in the lower Court, with Cynthia Zimba as the applicant and Yammie Zimba and Margaret Zimba as the 1st and 2nd respondents respectively.

2.0 **BACKGROUND**

2.1 On 15 December 2016, the applicant initiated legal proceedings in the High Court against the 1st and 2nd respondents.

2.2 After a Court ruling on 23 December 2019, the applicant submitted an amended originating summons to the Court on 6 January 2020. The amended summons sought the following reliefs against the 1st and 2nd respondents:

- i) *An Order that the applicant and Niza Zimba (minor) are beneficiaries of the estate of the late Kanyuka Zimba.*
- ii) *That the respondents produce an inventory and account of the estate of the late Kanyuka Zimba as was distributed to the beneficiaries.*
- iii) *That the applicant be given her entitlements as surviving spouse under the estate as provided by law.*
- iv) *That Niza Zimba be given her entitlements as a dependant under the estate as provided by law.*
- v) *That the Letters of Administration be revoked if it is found that the applicants misappropriated the funds belonging to the estate of the late Kanyuka Zimba.*
- vi) *That the applicant be appointed Administrative / Co. Administratrix of the estate of the late Kanyuka Zimba.*
- vii) *Interest on amount claimed.*
- viii) *Any other reliefs the court deems fit.*
- ix) *Costs be borne by respondents.*

2.3 The applicant submitted an affidavit in support of the originating summons asserting that she legally married the deceased on 23 April 1994 at

Kansenshi Chapel in Ndola. They lived together as a married couple from 23 April 1994 until 8 May 2014 when a decree of judicial separation was issued by the Court, lasting for one year.

- 2.4 Throughout their marriage, the applicant and the deceased did not have biological children together. However, they acted as co-guardians for Niza Zimba (formerly known as Favour Mubanga) from when she was six months old. On 1 July 2011, they were granted a committal order by the Magistrates Court in Kabwe and plans were underway for them to formally adopt the minor at a later stage.
- 2.5 On the 26 April 2015, while the judicial separation decree was still in effect, the deceased died intestate. The sisters of the deceased, now the 1st and 2nd appellants, were granted Letters of Administration on 20 May 2015 to administer the estate of the deceased.
- 2.6 The applicant further asserted that the respondents, who had already distributed the estate of the deceased, refused to recognize her as the surviving spouse and neglected to acknowledge the minor as a dependant of the deceased. Additionally, she claimed that the respondents failed to allocate their entitled shares to them. The applicant sought an order for a comprehensive inventory and an account of the deceased's estate.
- 2.7 The respondents countered by filing an affidavit in opposition on 24 November 2021, sworn by the 2nd respondent as the administratrix of the deceased's estate. In substance, she reiterated the details provided in the affidavit in support regarding the marriage, judicial separation and the subsequent demise of the deceased while separated from the applicant.

4.8 The deponent further stated that after the death of the deceased, they were appointed as administratrix of his estate. Subsequent to their appointment, they identified the properties comprising the estate of the deceased, which included:

- i) Incomplete residential house situated at Stand No. 8533/34, Off Munkoyo Street, Nkrumah Residential in Kabwe.
- ii) Commercial Plot No. 3018, Kapiri Mposhi
- iii) Motor Vehicle Toyota Noah registration number ABT 957.
- iv) Terminal benefits from ZESCO Limited; and
- v) Death benefits from Local Authority Superannuation Fund.

4.9 Regarding the incomplete residential house situated at Stand No. 8533/34, Off Munkoyo Street, Kabwe, the 1st respondent stated that they enlisted the services of Sandridge Associates, registered valuation surveyors, to assess the value of the house in its incomplete state. Subsequently, they finished the construction and furnishing of the house and then requested the valuers to reassess value the property in its completed state. Two valuation reports dated 16 October 2015 and 28 July 2021 respectively were presented as exhibits, demonstraing the respective valuations of the property.

4.10 As for the commercial Stand no. 3018 in Kapiri Mposhi, the 1st respondent indicated that they covered all the expenses related to the offer letter, surveyor's costs, and transportation costs to and from Kapiri Mposhi. They also facilitated the issuance of the certificate of title for the plot, which was granted on 10 March 2021 in the name of the deceased, and was exhibited as such.

- 4.11 Concerning the motor vehicle Toyota Noah with registration number ABT 957, the 1st respondent explained that before the deceased's passing, he had acquired a loan of K24,000 from a money lender named Catherine Namumba. To secure repayment of the debt, he had pledged the aforementioned motor vehicle to her.
- 4.12 Regarding the terminal benefits, the 1st respondent specified that they had received amounts of K271,302.14 and K1,085,208.54 from ZESCO Limited as terminal benefits for the deceased. Additionally, they had received death benefits from Local Authorities Superannuation Fund.
- 4.13 The 1st respondent asserted that the applicant and the deceased did not have any biological children together. At the time of the deceased's demise, he was survived only by a mother, Rhyness Zimba, and two dependants, namely Lauren Zimba and Niza Zimba.
- 4.14 The 1st respondent further mentioned that they had sought legal advice on the laws on distribution of the deceased's estate. Subsequently, they proceeded to distribute a portion of the estate of the deceased to the beneficiaries. Exhibits of the inventory and account of the deceased's estate were presented. The 1st respondent also noted that they were awaiting the outcome of the Court proceedings to distribute the remaining portion of the estate.
- 4.15 In relation to their administration of the estate, the 1st respondent provided a detailed account of the entire estate as follows:
- i) That the real property namely Stand No. 8533/34, Kabwe and Plot No. 3018, Kapiri Mposhi remain part of the estate.

- ii) That the Toyota Noah Motor Vehicle was sold for K15,000 and the funds were distributed as follows: K12,000 was paid to Catherine Namumba, the money lender in settlement of the debt of the deceased; and K2,400 as 3 month's salary paid to the maid.
- iii) That the death benefits from the Local Superannuation Fund in the sum of K278,111.61 had not been distributed.
- iv) The terminal benefits from ZESCO had been distributed as follows:
 - K100,050 to Lauren Zimba as tuition fees payable to the University of Zambia (representing 5% of her entitlement of monies available).
 - K931,410 distributed to Rhyness Zimba, the deceased's mother.
 - K22,450 paid as legal fees.
 - K6,000 paid as valuation fees.
 - K20,400 paid for memorial luncheon and tomb stone.
 - K3,500 paid to Niza Zimba for school fees.

4.16 The 1st respondent additionally stated that in the course of administering the estate, they had rented out the fully constructed house located on Stand no. 833/3 in Kabwe for a monthly fee of K2,000.

4.17 In summary, the 1st respondent claimed that the applicant was not a beneficiary of the estate. They argued that the applicant's status as surviving spouse was negated by the existing judicial separation at the time of the deceased's death, preventing her from asserting a right and entitlement as a surviving spouse of the deceased.

3.0 DECISION OF THE LOWER COURT

- 3.1 After assessing the evidence presented by both parties, the learned trial Judge acknowledged that the applicant was legally married to the deceased on 23 April 1994, and they were granted a judicial separation on 8 May 2014. The deceased passed away while separated from the applicant. Upon reviewing the provisions of *Section 35 of the Matrimonial Causes Act*, the Judge concluded that this section explicitly states that a judicial separation does not impact the rights of the parties in their marriage; they remain married for all intents and purposes. Consequently, the Judge determined that there was no doubt that the applicant was the surviving spouse of the late Kanyukaimba and, therefore, entitled to a share of his estate.
- 3.2 In relation to the child Nizaimba, the Judge determined from the evidence on record, that it was clear that Niza was been cared for by both the applicant and the deceased before the latter's demise. Consequently, the Judge ruled that Nizaimba qualified as a dependant of the deceased and, therefore, was entitled to a share of his estate.
- 3.3 The Judge went on to affirm that the applicant had successfully substantiated her claims as outlined in the amended originating summons, establishing her entitlement to participate in the estate of the late Kanyukaimba. As a result, the Judge concluded by issuing the following orders:
- i) *An order that the applicant and Nizaimba are beneficiaries of the estate of the late Kanyukaimba as surviving spouse and dependant respectively.*
 - ii) *That the respondents produce an inventory and account of the estate of the late Kanyukaimba as was distributed to the beneficiaries which is to be filed before this Court within 30 days of this judgment.*

- iii) *That the applicant be given her entitlements as a surviving spouse under the estate as provided by law which entitlements are to be assessed by the Deputy Registrar.*
- iv) *That Niza Zimba be given her entitlements as a dependant under the estate as provided by law which entitlements are to be assessed by the Deputy Registrar.*
- v) *That the letters of administration be revoked if it is found that the applicants misappropriated the funds belonging to the estate of the late Kanyuka Zimba.*
- vi) *That in the event that the letters of administration are revoked the applicant be appointed as administrator of the estate of the late Kanyuka Zimba and in the event that the letters of administration are not revoked then the applicant be appointed as Co-Administratrix.*
- vii) *Interest on the amount claimed at the average Bank of Zambia short term deposit rate from the commencement of this action to the date of this judgment, and thereafter at the current commercial bank lending rate till the date of full payment.*
- viii) *Costs of this application to be borne by the respondents and to be taxed in default of agreement.*

4.0 **APPEAL**

4.1 Expressing dissatisfaction with the judgment delivered by Chibbabbuka, J on 29 November 2021, the 1st and 2nd respondents (now referred to as ‘the 1st and 2nd appellants’) initiated an appeal on 17 December 2021. This appeal was filed by way of notice and memorandum of appeal against the applicant, hereinafter referred to as ‘the respondent’.

4.2 The appellants advanced three grounds of appeal as follows:

- i) *The learned Puisne Judge erred in law when she held that the applicant Cynthia Zimba who was on Judicial Separation at the time of Kanyuka Zimba's death was a surviving spouse and therefore entitled to the estate of Kanyuka Zimba (deceased).*
- ii) *The learned Puisne Judge erred in law when she ordered the appointment of the applicant as administratrix or co-administratrix without examining her eligibility solely on the basis that she was the surviving spouse of Kanyuka Zimba; and*
- iii) *The learned Puisne Judge erred in law and fact when she pronounced on the revocation of the appellant's Letters of Administration of the Joint Administratrix and the possible appointment of the respondent as Administratrix or Co-Administratrix before adjudicating on the administration of the estate therein i.e. the inventory and distribution of the estate.*

5.0 ARGUMENTS OF THE PARTIES

- 5.1 The 1st and 2nd appellants filed their heads of arguments on 24 February 2022. The Respondent's arguments arguments were filed on 9 November 2022.

6.0 HEARING OF THE APPEAL

- 6.1 The appeal was heard before us on 17 January 2024. Both parties were represented by their respective counsel, as previously mentioned. Both counsel on record relied on their respective as filed herein. Same will only be referred to where necessary in our decision section.

7.0 OUR DECISION ON THE APPEAL

- 7.1 We have thoroughly reviewed the judgment of the learned trial Judge, taking into account her considerations, findings, and the evidence presented on record, along with the arguments of the parties.
- 7.2 In their first ground of appeal, the appellants assert that the learned Puisne Judge erred in law by determining that the applicant, Cynthia Zimba, who was on judicial separation at the time of the deceased Kanyuka Zimba's death, qualifies as a surviving spouse and is consequently entitled to the estate of the deceased.
- 7.3 The appellants contend that the trial Court's interpretation of *Section 36 of the Matrimonial Causes Act* was flawed. They argue that the Legislature's intention in formulating *Section 36* was to establish a legal fiction of the death of the other spouse concerning devolution of property when one party to a marriage or former marriage dies during the continuance of a decree of judicial separation.
- 7.4 The appellants argued that the law safeguards the rights, obligations, and benefits of married individuals during the subsistence of the marriage. However, they contend that this protection does not extend to situations where either party to a marriage dies intestate while a decree of judicial separation is in effect. They stressed that, in such cases, the property of the deceased person devolves as if the deceased had outlived the other party.
- 7.5 The appellants further emphasized that this legal stance finds support in *Halsbury's Laws of England, 4th edition, volume 13, page 326 at*

paragraph 649, and is also re-enforced by the learned authors of *Rayden's Law and Practice in Divorce and Family Law Matters, 14th edition, volume 1, text, 1983 at page 316, paragraph 133, Effect of Decree of Judicial Separation.*

- 7.6 The respondent, in her heads of argument, contended that the trial Court was justified in concluding that she was the surviving spouse of the deceased Kanyukaimba. This determination was based on the fact that their marriage had not been dissolved, and she was encompassed as a surviving spouse and beneficiary by the definition of 'marriage' under *Section 3 of the Intestate Succession Act*. The respondent argued that *Section 35 of the Matrimonial Causes Act* only suspends the obligation to cohabit while the decree of judicial separation is in effect but does not impact the continuation of the marriage, status, rights, and obligations of the parties involved.
- 7.7 Regarding the provisions of *Section 36(1) of the Matrimonial Causes Act*, the respondent supported the trial Judge's conclusion that she qualified as a surviving spouse in the eyes of the law. As such, she asserted her entitlement under the deceased's estate, regardless of the ongoing decree of judicial separation at the time of the deceased's death.
- 7.8 It is undisputed that Kanyukaimba passed away intestate while a decree of judicial separation from the respondent, granted by the High Court, was in effect.

- 7.9 The resolution of the primary issue raised in the first ground centers on the interpretation of the provisions of *Sections 35 and 36(1) of the Matrimonial Causes Act*, which are restated below for reference:

“35. A decree of judicial separation relieves the petitioner from the obligation to cohabit with the other party to the marriage while the decree remains in operation, but except as provided by this Part, does not otherwise affect the marriage or the status, rights and obligations of the parties to the marriage.

36. (1) Where a party to a marriage dies intestate as to any property while a decree of judicial separation is in operation that property shall devolve as if that party had survived the other party to the marriage.”

- 7.10 A preliminary analysis of these provisions collectively indicates that *Section 35* relieves the parties to a marriage of their duty to cohabit as man and wife during the continuance of a decree for judicial separation. However, the marriage itself persists for all practical purposes, and the status, rights and obligations of the parties remain unaltered, except as specifically outlined in the relevant section of *the Matrimonial Causes Act (Part VI of the Act)*.

- 7.11 *Section 36(1) of the said Act*, incorporated with Part VI, outlines the procedures for the devolution of property when a party to a marriage dies intestate during the existence of a decree of judicial separation. This section explicitly dictates that ‘*that property shall devolve as if that party [deceased] had survived the other party [respondent] to the marriage*’.

- 7.12 In the hierarchy of provisions, Section 35 is subordinate to *Section 36(1)* since *Section 35* expressly subjects its stipulations to other provisions within *Part VI of the Matrimonial Causes Act*. Notably, *Section 36(1)* is highly specific and intentional in delineating the legislative intentions concerning the devolution of property during the continuance of a decree of judicial separation.
- 7.13 Our interpretation of *Section 36(1) of Act* is that if one of the parties to a marriage dies intestate while a judicial separation is in effect, the distribution of the estate of that deceased party will occur as if the surviving spouse had predeceased them. Consequently, the estate of the deceased will be allocated among the remaining relatives of the deceased, adhering to the Intestacy Laws of the country.
- 7.14 Despite its seeming inequity, the legislation underscores the repercussions on the distribution of the estate when a judicially separated person dies intestate. The provision finds its origins and foundations in the English Common Law. The learned authors of the *Halsbury's Laws of England, 4th Edition, volume 17*, state in relation to the issue of surviving spouse *at paragraph 943* that: *'In the case of deaths on or after 1st August 1970 the effect of a decree of judicial separation is the same as that of divorce: the surviving spouse is excluded from all interest in the other's property, and grants ...'*
- 7.15 Likewise, *Section 18(2) of the Matrimonial Causes Act of England, 1973* (from which our Act has drawn extensively) stipulates that:

“If while a decree of judicial separation is in force and the separation is continuing either of the parties to the marriage dies intestate as respects all or any of his or her real or personal property, that property devolves as if the other party had then been dead.”

- 7.16 More recently, in the English Courts, Lord Leggatt, concurring with the majority decision in the U.K. Supreme Court case of **Unger and another (in substitution for Hasan) v Ul-Hasan (deceased) and another**¹ expressed his opinion on this provision as follows:

‘The complex interplay between Part III (and the 1973 Act) on the one hand and the Inheritance Act on the other also means that reform aimed at remedying the injustice that results from the limited ability to make a financial order after either party to the marriage has died would require an overall view to be taken of both legislative regimes and of how they do, and should, interact. Only Parliament is competent to undertake that task and to make and implement the policy choices that would be involved. It is not open to this court to cut the Gordian knot and achieve a solution by interpretation of the existing statutory provisions.’

- 7.17 While this provision may appear inequitable, courts are not empowered to interpret it differently from what has been explicitly legislated. Regarding the role of courts in statutory interpretation, the Supreme Court, in the context of this case, affirmed the primary role of the courts in the case of **Agro Fuel Investments Limited v Zambia Revenue Authority**². In that case, the apex court held that:

“According to decided cases, the duty of the Courts in the interpretation of statutes is to give effect to the intention of the Legislature. And the primary rule of interpretation of statutes is that the meaning of any enactment is to be found in the literal and plain meaning of the words used, unless this would result in absurdity, in which case the Court's authority to cure the absurdity is limited...”

7.18 Our interpretation is that **Section 36(1) of the Matrimonial Causes Act** is plain, clear and unambiguous regarding the legislature's intention on the course of action concerning the property of a party who dies during the continuance of a decree of judicial separation. Until legislation changes to stipulate otherwise, the Courts are bound to interpret the provision according to its plain meaning.

7.19 Based on the above analysis, we conclude that the trial Judge's interpretation of the provisions of **Section 35 and 36(1) of the Matrimonial Causes Act**, and her subsequent determination regarding the devolution of the deceased's assets, asserting that the respondent was the deceased's surviving spouse, while the decree of judicial separation was in effect, lacks legal foundation. Ground 1 of appeal is therefore successful.

7.20 Accordingly, in addressing ground 2 of the appeal, the appellants argue that the learned Puisne Judge erred in law by directing the appointment of the respondent as administratrix or co-administratrix without scrutinizing her eligibility solely on the grounds that she was the surviving spouse of Kanyukaimba.

- 7.21 Counsel for the appellants contended under this ground that, while **Section 15 of the Intestate Succession Act** allows a Court to issue letters of administration to a person with an interest in an intestate estate, the trial Judge was obligated to consider the criteria and qualification for appointing the respondent as personal representative of the deceased estate in this case. Counsel argued that the trial Judge's decision to appoint the respondent as a co-administratrix was erroneous and lacked legal support, as a spouse does not take precedence over other interested parties in the estate.
- 7.22 Reference was made to the case of **Lindiwe Kate Chinyanta v Doreen Chiwele Judith Tembo**³, where Mumba, JS (as she was then) expressed her opinion that, although in some cases widows or widowers may be appointed as administrators, there is nothing in the Act to suggest that a surviving spouse has priority eligibility for the position of an administrator.
- 7.23 The respondent argued in response to this ground that the trial Court having correctly determined that the respondent was a beneficiary under the deceased's estate, appropriately appointed her as co-administrator of the estate. The respondent further asserted that the criteria for appointment as administrator are stipulated by law, noting that **Section 15(2) of the Intestate Succession Act** specifies that the Court should consider greater and immediate interests in the deceased's estate as a priority over lesser or remote interests. The appointment of the respondent as co-administrator, according to the respondent, safeguards her interest in the estate as a surviving spouse.
- 7.24 In our opinion, Courts have the responsibility to assess the suitability of a personal representative appointed to administer the estate of a deceased

person. Some key factors to consider include trustworthiness, good standing, integrity, honesty, and accountability of the person chosen as a personal representative. Additionally, the availability to discharge and oversee the functions of the office of the administrator should be taken into account. These considerations should exist independently of the legal qualifications for one to be appointed as administrator of the estate. This is the rationale for requiring an intending administrator to provide guarantees, typically in the form of a bond, so that they can be held accountable for their actions as administrators of the estate. For this reason, **Section 50(10) of the Wills and Administration of Testate Estates Act** provides that:

“As a condition of granting letters of administration to any person, a court may, subject to subsection (4), require one or more sureties to guarantee, within any limit imposed by a court, any loss which any person interested in the administration of an estate may incur in consequence of a breach by the administrator of his duties as such.”

- 7.25 Although the *Wills Act* does not apply to intestate estate, the rationale for considering the personal attributes of an intending administrator applies mutatis mutandis to intestate estates as it does to testate estate.
- 7.26 A review of judgment of the lower Court indicates that the trial Court referred to the provisions of **Sections 35 and 36(1) of the Matrimonial Causes Act**. After reproducing the said provisions as shown at page 21 of the record of appeal (page J10 of the Judgment) the trial Court concluded as follows:

“There is no doubt therefore that the applicant in this case is entitled to her share in the case of the late Kanyuka Zimba as she is the surviving spouse and as such I agree with Counsel for the applicant’s argument on this score.”

7.27 From the above, it is evident that the only basis for the Court’s order to appoint the respondent as a co-administrator is the court’s mistaken conclusion that the respondent was the deceased’s surviving spouse, and nothing more. This position is flawed as the court should consider more factors than just the legal attributes and interests of a potential administrator in the estate, as outlined in the Act. This seems to align with the reasoning of the Supreme Court in the **Lindiwe Kate Chinyanta** case cited above. The court must ensure that an applicant, upon being granted letters of administration, has the ability to carry out the functions of that office prudently, diligently, effectively and efficiently.

7.28 In light of our decision in ground 1, we believe that the respondent, in any case, does not have an interest in the property of the deceased’s estate to warrant her consideration for appointment as administratrix in the said estate. This is because she is not a surviving spouse for the purposes of **Section 36(1)** as discussed earlier. Therefore, this ground of appeal succeeds based on the fact that the trial Court failed to make other considerations on the suitability of the respondent as co-administrator of the deceased’s estate.

7.29 The appellants, under the third ground of appeal, contend that the lower Court erred by pronouncing on the revocation of the appellant’s letters of administration and possible appointment of the respondent as co-

administratrix before adjudicating on the administration of the estate, specifically the inventory and distribution thereof. The appellants argued that the trial Judge's order regarding the revocation of the letter of administration was inconclusive and transient, as it did not address all the issues in controversy. They claim that the trial Court, despite finding that the deceased died while the decree of judicial separation between him and the respondent was subsisting, misinterpreted **Section 36 of the Matrimonial Causes Act** by concluding that the respondent was the deceased's surviving spouse and entitled to share in his estate. The appellant asserts that if the trial Court had considered their arguments before it, it would not have arrived at the conclusion it did. They contend that the primary function of the courts is to adjudicate on all issues in controversy to bring finality to disputes between parties.

- 7.30 In response to the appellant's argument under the third ground of appeal, the respondent contends that the trial Court properly adjudicated the matter when it pronounced itself on the revocation of the appellant's letters of administration. The respondent refers to **Section 29(1) of the Intestate Succession Act**, which provides for circumstances under which letters of administration may be revoked. It is argued that the appellants improperly administered the deceased's estate by omitting to consider the respondent as surviving spouse, thus violating the provisions of **Section 5 of the Intestate Succession Act** and depriving her of her rightful share in the estate. The respondent asserts that the trial Court was well within its powers to order the revocation of the appellants' letters of administration.

7.31 For this ground of appeal, the Court references respondent's claim, as outlined in the originating summons filed in the lower court and recast in the judgment of the trial court at page 14 of the record. The claim was

“(v) That the Letter of Administration be revoked if it is found that the applicants misappropriated the funds belonging to the estate of the late Kanyuka Zimba”

7.32 By that claim, the trial Court went on as shown at page 15 of the record of appeal, to consider the respondent's evidence, which suggested that the appellants had neglected to recognize respondent and the minor (Niza) as the beneficiaries of the estate. The Court thus went on to determine that the appellants had mal-administered the deceased's estate. The respondent's Counsel suggested that there were no children or parents of the deceased under the estate in issue, this is as contained at page 17 of the record of appeal and J6 of the judgment of the trial Court.

7.33 A perusal of the record, particularly starting with the judgment of trial Court as shown at page J20 of the record of appeal, the Court stated as follows:

“The respondents have not filed an affidavit in opposition neither has their Counsel filed into Court heads of arguments and submissions despite being given an opportunity to do so. At the last sitting on the 3rd June 2021 the respondent's Counsel was given up to the 24th June 2021 to file in their affidavit in opposition and submissions while the applicant's counsel was given up to the 8th July 2021. Leave was granted to the applicant to file their reply

to the respondent's submissions. Both parties indicated that the matter could be resolved on affidavit evidence. In view of this position taken by the parties, I shall proceed to render a Judgment based on the documents before this Court."

7.34 The trial court issued a judgment on 29th November 2021, without taking into consideration the appellant's response, which included an affidavit in opposition and heads of arguments. This decision seems to be based on the appellant's failure to submit the said documents by the specified deadline of 24th June 2021, as directed by the Court's order on 3rd June 2021.

7.35 Despite the Court proceeding in that manner, the record also shows that the appellants had filed their affidavit in opposition to the originating summons and skeleton arguments on 24th November 2021. Given that the appellants had been allowed to file the same before Court, whether erroneously or otherwise, the trial Judge should not have proceeded on the premise that the appellants had failed to file their affidavit in opposition and heads of arguments. The trial Court should have first addressed the issue of the appellant filing the affidavit in opposition late, either by striking it off the record, reprimanding the appellants with costs, or addressing any inconvenience caused by the late filing of the documents. However, the court proceeded swiftly as though the documents had not been filed before it. We, therefore, assume that these documents were not placed before the trial Judge at the time she was rendering her decision.

7.36 Furthermore, upon reviewing the claim under (v) in the originating summons below, it appears that the respondent was seeking the revocation of the letters of administration granted to the appellants, specifically if it

was determined that the appellants had misappropriated the funds of the estate. This implied that revocation was to be considered only after the trial Court had made a determination on the propriety of the administration of the estate's fund.

7.37 A careful examination of the record, especially pages 149 to 152 containing the extract of the appellant's affidavit in opposition, confirms the detailed account provided by the appellants regarding the distribution of the estate. According to the affidavit, the estate remained largely undistributed, with the appellants making payments for essential expenses such as salaries, school fees, and professional fees. Additionally, the affidavit includes a comprehensive inventory outlining how the appellants have managed the assets of the estates under their administration. The inventory, along with supporting documents where applicable, is presented on pages 222 to 224 of the record of appeal.

7.38 In spite of the foregoing account, the trial Court at page 24 of the record of appeal adjudged at page J13 of its Judgment as follows:

“Having so found, I am satisfied that the applicant has not only proved her claims as outlined in the originating summons as amended on the 6th January 2020 but is also entitled to participate in the administration of the estate of the late Kanyukaimba and hereby order and grant as follows:

- i) An order that the applicant and Nizaimba are beneficiaries of the estate of the Kanyukaimba as surviving spouse and dependant respectively.*

- ii) *That the respondents produce an inventory and account of the estate of the late Kanyuka Zimba as was distributed to the beneficiaries which is to be filed before this Court within 30 days of this judgment.*
- iii) *That the applicant be given her entitlements as a surviving spouse under the estate as provided by law which entitlements are to be assessed by the Deputy Registrar.*
- iv) *That Niza Zimba be given her entitlements as a dependant under the estate as provided by law which entitlements are to be assessed by the Deputy Registrar.*
- v) *That the letters of administration be revoked if it is found that the applicants misappropriated the funds belonging to the estate of the late Kanyuka Zimba.*
- vi) *That in the event that the letters of administration are revoked the applicant be appointed as administrator of the estate of the late Kanyuka Zimba and in the event that the letters of administration are not revoked then the applicant be appointed as Co-Administratrix.*
- vii) *Interest on the amount claimed at the average Bank of Zambia short term deposit rate from the commencement of this action to the date of this judgment, and thereafter at the current commercial bank lending rate till the date of full payment.*

viii) Costs of this application to be borne by the respondents and to be taxed in default of agreement.”

7.39 Based on the analysis, we concur with the appellant’s argument that the trial Judge made an inconclusive and unclear order regarding the revocation of the appellant’s letters of administration as she merely reproduced the reliefs that were being sought by the respondent in her originating summons in the Court below. The trial Judge seems to have replicated the reliefs sought by the respondent in her originating summons. However, we do not fully align with the appellants’ assertion that the trial Court would have arrived at a different conclusion had it considered the documents filed by the appellants. It must be mentioned that the appellants had in fact filed the same documents in breach of the Court’s order requiring the same to have been filed by 3 June 2022, the appellants instead filed the said documents 5 months after due date without leave of the Court. This may have been the reason the trial Judge proceeded without taking the appellants’ documents into account.

7.40 Given the considerations outlined above, we conclude our assessment of this ground by referring to the well-established principle raised by the Supreme Court in the case of **Wilson Masauso Zulu v Avondale Housing Project⁴**, which emphasized that:

“I would express the hope that trial Courts will always bear in mind that it is their duty to to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined.”

7.41 This ground of appeal, therefore, does not succeed due to the fact that the trial Judge issued unclear orders regarding the appellants' letters of administration and the appointment of the respondent, as co-administratrix of the estate without considering the evidence and arguments of the appellants filed on 24th June 2021. Furthermore, the trial Court pronounced its unclear decision without determining the fate of the appellants' evidence in relation to its late filing into Court. Justice must not only be done, but must be seen to be done.

8.0 CONCLUSION

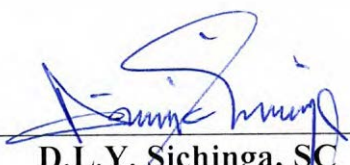
8.1 In conclusion, the 1st and 2nd appellants having succeeded in 2 out of the 3 grounds of appeal raised, we accordingly allow the appeal and make the following orders:

- i) The decision of the Court below that the respondent is a beneficiary of the estate of the late Kanyukaimba as a surviving spouse, and that she be given her entitlement as a surviving spouse, as provided by law, to be assessed by the Deputy Registrar, is hereby set aside.
- ii) The decision of the trial Court below, stating that the minor Nizaimba is a beneficiary of the estate of the late Kanyukaimba as a dependant, and that she should be given her entitlement as a dependant under the estate, as provided by law, to be assessed by the Deputy Registrar, is upheld. This should be done considering that the minor has a long-life dependence on the assets of the deceased, owing to her age and educational needs.

- iii) The Order appointing the respondent as co-administratrix of the deceased's estate on the premise that she is the surviving spouse is also set aside. However, by order of this Court, she is re-appointed as co-administratrix of the estate together with the appellants and the Administrator General on account of her being the next friend and guardian to the minor beneficiary, Niza Zimba.
- iv) That the order of the lower Court awarding interest on amounts claimed be and is hereby set aside.
- v) The appellants are directed to produce an up-to-date account of their administration of the estate. This account should be availed to all beneficiaries, co-administrators and the Deputy Registrar within 60 days from date of this judgment.
- vi) That despite the appeal being largely successful, each party will bear its own costs as the appellants failed to disclose that the affidavit in opposition and skeleton arguments were not filed into the lower Court within the prescribed timeframe contrary to the directive of that Court.


C.K. Makungu

COURT OF APPEAL JUDGE


D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE


N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE