

IN RE THE WILL OF HWALIMA HWALIMA v HWALIMA AND HWALIMA (1968) ZR 164 (HC)

HIGH COURT

WHELAN J

12th NOVEMBER 1968

Flynote and Headnote

[1] Succession - Testamentary capacity.

An adult African has testamentary capacity to make a will under Wills Act, 1837.

[2] Conflict of laws - Succession - Customary law.

A will made by an African under the Wills Act, 1837, has effect though contrary to customary law.

[3] Succession - Wills by African - Supremacy over customary law:

See [2] above.

[4] Succession - Administration of estates - Appointment of administratrix.

Applicant may be appointed joint administrator after bank has renounced executorship.

Statutes construed:

Wills Act, 1837 (England 7 Will iv & 1 Vict. Cap. 26).

High Court Ordinance (1960, Cap. 3), ss. 9, 11.

WHELAN J

Judgment

Whelan J: The questions posed by this originating summons are:

1. Whether an adult African is capable of disposing of his estate by means of a will executed and attested in accordance with the requirements of the Wills Act, 1837.
2. If the answer to question 1 is yes, are the terms of the will to have effect despite the fact that they are contrary to the provisions of African customary law?
3. Whether the said Peggy Hwalima should be appointed administratrix of the deceased's estate under sections 9 and 11 of Cap. 3 of the Laws of Zambia, in view of the renunciation of executorship by Barclays Bank DCO, the executor named in the said will.

[1] [2] [3] As to questions 1 and 2, I do not see why an African of full age cannot dispose of his property by means of a will. There is no written law and, as far as can be ascertained, no customary law to the contrary. I consider that an African may accept the jurisdiction of an authority other than his customary authority, just as at common law a person is entitled to subject himself to any jurisdiction and law of his choosing - subject to certain conditions as to the disposition of land. I take the view that in this case the testator has contracted out of the African customary law applicable to him, whatever that may be, that the answer to question 1 is "yes" and that, as the will in question has been drawn and executed in accordance with the Wills Act, 1837, as in my view it must be, the answer to question 2 is also "yes".

[4] As to question 3. The bank has renounced executorship and, considering the appointment in the will of the first respondent as guardian of the infant beneficiaries and the now willingness of the applicant to associate with the first respondent in administering this estate and the first respondent's willingness so to do, I consider that it is in the best interest of all concerned that the applicant, Peggy Hwalima, and the first respondent, Legintion Hwalima, be appointed joint administrators of the deceased's estate and I so order.

Order accordingly.