

IN THE HIGH COURT OF ZAMBIA

2010/HP/0453

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

IN THE MATTER OF THE ESTATE OF THE LATE JONAS KATETE IN
THE MATTER OF SECTIONS 5,8,11,14, AND 19 OF THE INTERSTATE
SUCCESSION ACT, CHAPTER 59 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF KASUBIKA KATETE (MINOR)

**BELINDA KAMANGA (Suing as Mother on
Behalf of Kasubika Katete (Minor)**

APPLICANT

AND

**CHANDA BWALI KATETE (Sued in her
RESPONDENT
Capacity as the Administrator of the late
Jonas Katete).**

1st

**PANWELL KUNDA (Sued in his capacity
RESPONDENT
as the Administrator of the late
Jonas Katete).**

2nd

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 16th day of May, 2011.

For the Plaintiff:

*Mrs. A. N. Sitali, Assistant Senior Legal Aid Counsel, Legal Aid
Board.*

For the defendants:

Mr. E. Banda, SC, of Messrs MNB Legal Practitioners.

R U L I N G

Legislation referred to:

1. *Supreme Court Rules (White Book) Orders 14 A: 80, Rule 6 (c); and 8 (a); 80 Rule 3 (8); 80 /3/ 2; and 80/3/3.*

I was approached in this matter by way of an originating summons dated 7th May, 2010. The originating summons is supported by an affidavit. In the originating summons, the applicant is seeking the following orders and declarations:

1. That the 1st and 2nd respondents be ordered to deliver an inventory of the estate of the deceased to Court;
2. For an order that the 1st and 2nd respondents deliver a share of the deceased estate to the applicant;
3. A declaration that Kasubika Katete being the only issue to the deceased is entitled to 70% of the total estate of the deceased;
4. Delivery to the applicant of one house situated in Kitwe for the benefit of the minor;
5. An order that the estate be sold and the proceeds be shared in accordance to the law;
6. That the applicant be appointed administrator;
7. Costs; and
8. Any other relief the Court may deem fit;

The affidavit in support of the originating summons dated 7th May, 2010, was sworn by Ms. Belinda Kamanga. Ms. Belinda Kamanga is the mother and guardian to the minor Kasubika Katete who is aged 6 years old. I will continue to refer to Ms. Belinda Kamanga as the applicant and Kasubika Katete as the minor. On 28th May, 2010, the 1st respondent filed an affidavit in opposition. And the applicant filed a reply on 22nd November, 2010. In light

of the preliminary issue, it is in my opinion, *otiose* to advert to the contents of the affidavits referred to above.

As already pointed out, on 6th December, 2010, Messrs MNB Legal Practitioners filed a Notice of Intention to Raise a Preliminary issue on a question of law. The notice was issued pursuant to Order 14A of the Rules of the Supreme Court. The question raised in the notice is whether the applicant has *locus standi*, to act as a next friend or guardian *ad litem* of the minor without an Order of Court appointing her as such, having regard to the requirements of Order 80, Rules 6 (c), and 8(a) of the Rules of the Supreme Court (White Book).

On the same day, 6th December, 2010, Mr. Banda, SC, filed submissions on behalf of the respondent in support of the preliminary issue. Mr. Banda, SC, submitted that the question that falls to be determined is whether or not the applicant has *locus standi* to act as next friend or guardian *ad litem* of the minor. Mr. Banda, SC, contends that the applicant does not have *locus standi* to act as next friend or guardian *ad litem* of the minor because there is no Order of Court appointing the applicant to act as next friend or guardian *ad litem*. Mr. Banda, SC further submitted that the applicant ought to have filed a written consent into Court to act as such friend or guardian of the minor. In the absence of such consent, Mr. Banda, SC, argued that the applicant is neither entitled to use her name in the proceedings, nor to represent the minor.

In aid of the preceding submission, Mr. Banda, SC, drew my attention to Order 80, rule 3 of the Rules of the Supreme Court, governing the appointment of a next friend or guardian, *ad litem* Order 80, rule 3 is in the following terms:

"1. [Revoked by R.S.C. Amendment No. 4 1971 (S.I. 1971, No. 1269].

- 2. Except as provided by paragraph (4) or (5) or by rule 6, an order appointing a person next friend or guardian ad litem of a person under disability is not necessary.*
- 3. Where a person authorized under part VII of the Act to conduct legal proceedings in the name of a patient or on his behalf, that person shall be entitled to be next friend or guardian ad litem, as the case may be, of the patient in any proceedings to which his authority extends, unless, in a case to which paragraph (4) or (6), or rule 6 applies some other person is appointed by the Court under that paragraph, or rule to be next friend or guardian ad litem, as the case may be, of the patient in those proceedings.*
- 4. Where a person has been or is next friend or guardian ad litem of a person under disability in any proceedings, no other person shall be entitled to act as such friend or guardian, as the case may be of the person under disability in those proceedings unless the Court makes an order appointing him such friend or guardian in substitution for the person previously acting in that capacity.*
- 5. Where, after any proceedings have begun a party to the proceedings becomes a patient, an application must be made to the Court for the appointment of a person to be next friend as the case may be, of that party.*
- 6. Except where the next friend or guardian ad litem, as the case may be, of a person under disability has been appointed by the Court:*
 - (a) The name of any person shall not be used in a cause or matter as next friend of a person under disability;*
 - (b) Service shall not be acknowledged in a cause or matter for a person under disability; and*
 - (c) A person under disability shall not be entitled to appear by his guardian ad litem on the hearing of a petition, summons or motion which, or notice of which has been served on him, unless and until the documents listed in paragraph (8) have been filed in the appropriate office.*
- 7. The appropriate office for the purpose of paragraph (6) is the office of the Supreme Court which has the conduct of the business of the division or Court in which the cause or matter is proceeding or, if it is proceeding in a district registry, that registry.*
- 8. The documents referred to in paragraph (6) are the following:*
 - (a) A written consent to be next friend or guardian ad litem, as the case may be, of the person under disability in the cause or matter in question;*
 - (b) Where the person proposing to be such friend or guardian of the person under disability, being a patient, is authorized under part VII of the Act to conduct the proceedings in the cause or matter in question in the name of the patient or on his behalf, an office copy, sealed with*

the official seal of the Court protection of the Order or other organisation made or given under the said part VII by virtue of which he is so authorised; and

- (c) *Except where the person proposing to be such friend or guardian of the person under disability, being a patient, is authorized as mentioned in sub-paragraph (b) a certificate made by the solicitor for the person under disability certifying:-*
- (i) *That he knows or believes, as the case may be, that the person to whom an infant or a patient, giving (in the case of a patient) the grounds of his knowledge or belief; and*
 - (ii) *Where the person under disability is a patient, that there is no person authorized as aforesaid; and*
 - (iii) *Except where the person named in the certificate as next friend or guardian ad litem, as the case may be, is the official solicitor, that the person so named has not interest in the cause or matter in question adverse to that under disability.*

Mr. Banda, SC, after citing the preceding provisions submitted that as a general rule no Order appointing a next friend or guardian *ad litem*, is necessary save as provided in Order 80, rule 3, (4) (5), and (6). Further, Mr. Banda, SC, submitted that Order 80/3/2 is in the following terms:

“No order is necessary for the appointment of a next friend, or a guardian ad litem of an infant or a patient, except in the following three cases, namely (a) where a person already acting as a next friend or guardian ad litem is removed and another person is substituted for him in that capacity, see r 3 (4); (b) where after proceedings have been begun, a party becomes a patient; and (c) where there is a default on the part of the infant or patient in acknowledging service or attending, see r. 6. On the other hand, apart from the same there exceptions where a next friend or guardian ad litem is appointed by an order of the Court, no step can be taken to initiate any proceedings by any person as next friend, nor can any person acknowledge service or attend as guardian ad litem unless and until the requisite documents under r 3 (8) have been duly filed.”

Mr. Banda, SC, pointed out that of particular interest in the present matter is sub Rule 6 (a) which provides that where a next friend or guardian *ad litem* as the case may be, of a person under disability has not been appointed by the Court, the name of that person shall not be used in a cause of a person

under disability unless and until the documents listed in paragraph (8) have been filed in the appropriate office.

Mr. Banda, SC, went on to submit that Order 80, Rule 3 (8) states that the person intending to act as a next friend or guardian *ad litem* must file a written consent to be such friend or guardian. Failing which shall not be used in cause or matter as next friend or guardian *ad litem*. Order 80/3/3 is expressed in the following terms:

“Except in cases where a next friend or guardian ad litem is appointed by order of the Court under r 3 (4), r 3 (5) and r. 6, every next friend or guardian ad litem, must give his written consent to be such next friend or guardian ad litem or an infant or patient in the cause or matter in question, and such consent must be duly filed. A next friend or guardian ad litem can only act by a solicitor.”

Mr. Banda, SC argued that the applicant was not appointed by order of the Court to act as next friend or guardian *ad litem* of the minor. Mr. Banda, SC, further, argued, that the applicant has not filed a written consent to act as the next friend or guardian *ad litem* of the minor. And therefore has failed to comply with the requirement of Order 80, rule 6 (a) and (8) referred to above.

In view of the foregoing, Mr. Banda, SC, submitted that the applicant’s name cannot be used in this matter either as a next friend, nor can the minor be represented by the applicant because no Court order to act as next friend or guardian *ad litem* of the minor was obtained. Further, Mr. Banda, SC, submitted that the requirement of Order 80 rule 6 (a) and (8) were not complied with. In the circumstances, Mr. Banda, SC, argued that the

applicant has no *locus standi* to act as a next friend or guardian *ad litem* of the minor.

On 27th December, 2010, Mrs. Sitali filed written submissions on behalf of the applicant. Mrs Sitali contends that no order of appointment to act as next friend or written consent is necessary in the instant case. Mrs. Sitali maintains that the applicant is the biological mother of the minor. And is therefore responsible for his general welfare. That being the case, Mrs. Sitali argued that the applicant is the rightful person to commence this action on behalf of the minor.

Mrs. Sitali further argued that the heading of this action clearly shows that the applicant has commenced this action in a representative character. As such, the action is in general conformity with the rules of civil procedure. Mrs. Sitali submitted that in substance, the applicant has consented to bringing this action on behalf of the minor. Thus, Mr. Sitali contends that in the circumstances the written consent is unnecessary. Mrs. Sitali pressed that the fact that the applicant is the biological mother of the minor, consent to act for the minor is deemed to be implied. Further, Mrs. Sitali submitted that the provisions of Order 80, rule 3 and 8 relied upon by the respondents, do not affect the position of the applicant, in relation to the question of *locus standi*. Lastly, Mrs. Sitali reiterated the point that since the applicant is the biological mother of the minor, the consent for the applicant to act as the next friend or guardian *ad litem* of the minor is implied. Since the consent is implied, Mrs. Sitali urged me to hold that the applicant has *locus standi*.

I am indebted to counsel for the submissions and arguments in this matter. The question raised in the notice to raise preliminary issue relates to the capacity of certain parties to an action to institute or defend legal

proceedings. This subject is covered by Order 80 of the Rules of Supreme Court under the rubric, "Disability." Typically, the disability relates to minors and persons suffering from mental disorder or otherwise known as "patients."

Order 80, rule 2 lays down two fundamental and related propositions. First, that a person under disability may not bring or make a claim by his next friend. Secondly, that he may not acknowledge service, defend, make a counter claim, or intervene in any proceedings under a judgment or order notice of which he has been served on except by his guardian *ad litem*. Simply stated, an infant or patient will sue by his next friend and will defend an action by his guardian *ad litem*.

The question presented by the application under discussion is whether or not the applicant in this matter has *locus standi* having regard to the requirements of Order 80, Rule 6 (c) and 8 (a) of the Supreme Court Rules. However before I answer the preceding question, it is instructive to note that in terms of Order 80, rule 3 (2) no order is necessary for the appointment of a next friend or guardian *ad litem* of an infant or patient except in the following cases:

- (a) Where a person already acting as next friend or guardian *ad litem* is removed and another person is substituted to him in that capacity (see Order 80 rule 3 (4));
- (b) Where after proceedings having been begun, a party becomes a patient; and
- (c) Where there is default on the part of the minor or patient in acknowledging service or attending. (See Order 80, rule 3 (6)).

Apart from the exceptions outlined above, no step can be taken to initiate any proceedings by any person as next friend nor can any person acknowledge service or attend as guardian *ad litem* unless and until the documents set out in Order 80, rule 3 (8) have been duly filed. Thus, every next friend or guardian *ad litem* must give his written consent to be such next friend or guardian *ad litem* of a minor or patient in the cause or matter in question. And such consent must be duly filed. It is also noteworthy that a next friend or guardian *ad litem* can only act by a legal practitioner (see Order 80, rule 2 (3)).

Order 80 rule 6 goes on to provide that except where the next friend or guardian *ad litem* as the case may be of a person under disability has been appointed by the Court__.

- (a) the name of any person shall not be used in a cause or matter as next friend or person under disability;
- (b) service shall not be acknowledged in a cause or matter of a person under a disability; and
- (c) a person under disability shall not be entitled to appear by his guardian of a petition, summons or motion which or notice has been served on him. Unless and until the documents listed in paragraph 8 have been filed in the appropriate office.

The documents referred to in Order 80, rule 8 (a) is the written consent to be next friend or guardian *ad litem* as the case may be of the person under disability in the cause or matter in question given by the person proposing to be such friend or guardian.

As I see it the issue is not so much whether or not the applicant has *locus standi* as such, but rather whether or not Order 80, rule 6 (c) and 8 (a) of the

Rules of the Supreme Court have been complied with. And what are the consequences of not complying with the rules. It is common ground that no Order appointing a next friend or guardian *ad litem* is necessary save as provided in Order 80, rule 3 (4) (5), and (6).

Be that as it may, except in cases where a next friend or guardian *ad litem* is appointed by Order of the Court as outlined above, every next friend or guardian *ad litem* must give his written consent to be such next friend or guardian *ad litem* of a minor or patient in the cause or matter in question, and such consent must be duly filed.

In the instant case there is no evidence on record that the applicant in this matter consented to act as the next friend for the minor. The applicant in this matter has not filed a written consent to act as the next friend for the minor. Since Order 80, rule 6 (c) and 8 (a) have not been complied with, I hold that this action is not properly before me, and I accordingly dismiss it. Costs follow the event.

Leave to apply granted.

**Dr. P. Matibini SC,
HIGH COURT JUDGE**