

**IN THE HIGH COURT FOR ZAMBIA
2012/HP/1521
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

BETWEEN:

SYDNEY CHIBWE APPLICANT	1ST
MOFYA GLADYS CHIBWE CHRISTOPHER CHIBWE APPLICANT	2ND APPLICANT 3RD
COLLINS CHIBWE APPLICANT	4TH
MWAPE CHIBWE APPLICANT	5TH

AND

GIFT MUSHINGE CHAPA RESPONDENT	1ST
CHUNGU CHIBWE RESPONDENT	2ND

Before Hon. Mrs. Justice M.S. Mulenga this 28th day of March, 2013.

For the Applicants : Mr. O Ngoma - Messrs Lungu Simwanza & Company

For the Respondents : Mr. D. Mulenga - Messrs Derrick Mulenga & Company

R U L I N G

CASES CITED:

1. **Development Bank of Zambia and Another v Sunset and Another (1995-1997) ZR 187.**
2. **Afro Butcheries Limited v Evans Limited (1987) ZR 39.**
3. **Jacks Stanely Thornicroft v Murray Evans and Ivan Mckilop (1985) ZR 172.**
4. **Kabwe Transport Limited v Press Transport (1984) ZR 51 (SC).**
5. **Hollington v F. Hewthorn and Company Limited (1943) 2 All ER 34.**

This Ruling is on the three preliminary issues raised by the Respondents. These were supported by Skeleton Heads of Arguments dated 26th December, 2012 and viva voce submissions. The Applicants also filed arguments and authorities dated 8th February, 2013. At the hearing, the Respondents were given opportunity to file additional documents by 18th February, 2013 but did not do so. The first preliminary issue was that ***“the action herein is irregular and an abuse of court process for multiplicity or duplicity of actions.”***

The Respondents argument was that since the mother to all the Applicants, Rosemary Bwalya Chibwe, had in an action in the Ndola High Court Registry under Cause No. **1994/HN/CA4** joined the Respondents as executors of the Will of the late Austin Musubila Chibwe, the current action by her children amounted to multiplicity of actions. That in addition, there was an action by AMC contractors Ltd against Rosemary Bwalya Chibwe under Cause No. **2011/HN/140**. That the proper course was for the Applicants to be joined to the Ndola High Court action since their action involved the same Will and its provisions. Further that under Cause No. **2011/HN/140**, there was an injunction against the Applicants’ mother from interfering with the operations of the company and the Applicants were also seeking to restrain the company and to make it account before the matter can be heard.

The Supreme Court case of **Development Bank of Zambia and Another v Sunset and Another (1995-1997) ZR 187** and **Afro**

Butcheries Limited v Evans Limited (1987) ZR 39 were among the cases cited in support.

The Applicants' response was that the Ndola action under cause No. **1994/HN/CA4** was for property settlement and maintenance awards and the Respondents were joined in order to restrain them from executing the Will pending disposal of her application for property settlement. On the other hand, the current application was for nullification of the Will. That there was therefore no duplicity or multiplicity of actions contrary to the arguments by the Respondents.

I have considered the submissions by both parties and authorities cited. I have also considered the court documents under cause No. **1994/HN/CA4** and **2011/HN/140** exhibited by the parties and the Respondents submission that it would be in the interest of justice for the Applicants to be joined to cause no. **2011/HN/140.**

In the case cited by the Respondents, **Development Bank of Zambia and Another v Sunset and Another;** the Supreme Court held that;

“We disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter.”

This current action is for nullification of Will brought by some children of the deceased Austin Musubila Chibwe. The action under cause No. **1994/HN/CA4** Ndola was by Rosemary Bwalya Chibwe against the late Austin Musubila Chibwe for property settlement and maintenance following the grant of divorce. The matter went as far as the Supreme Court where it was referred back to the High Court for the determination of property adjustment. After the demise of Austin

Musubila Chibwe, the Respondents were joined to the proceedings as executors of his Will. Rosemary Bwalya Chibwe was then granted an injunction restraining the Respondents as executors from executing the Will pending the determination of the property adjustment assessment.

The action under cause No. **2011/HP/140** is not clear as the originating process was not exhibited. What was exhibited was an ex-parte injunction taken out by AMC Contractors Limited, the company in which the deceased Austin Musubila Chibwe had majority shares, restraining Rosemary Bwalya Chisenga (Chibwe) from trespassing on plot no. 1081 Buntungwa Street Mufulira. As submitted by the Applicants, I find that the parties in this Ndola case are totally different in that neither the Applicants nor Respondents are parties.

It is hence apparent that these actions are for specific subject matter and involve Rosemary Bwalya Chibwe by virtue of the fact that her case for property adjustment or settlement against the estate of the late Austin Musubila Chibwe is yet to be concluded. This cannot be stretched to cover the distinct application by the Applicants as interested beneficiaries of the estate of the late Austin Musubila Chibwe for nullification of the Will. The Applicants are not part of the actions involving Rosemary Bwalya Chibwe and their status and interest is different with regard to the deceased's estate.

I thus find that the current action does not amount to multiplicity or duplicity of actions. The two Ndola actions are not challenging the validity of the of the Will and their reference to the Will is only to ensure that the prior right of Rosemary Bwalya Chibwe to property settlement or adjustment as ordered by the Supreme Court is effected.

This is not dependant on the sought decision on validity or otherwise of the Will. The fear that there might be conflicting decisions by the courts does not therefore arise.

This first preliminary issue accordingly fails.

The second preliminary was that the application by the Applicants be dismissed for being statute barred. It was submitted that by virtue of paragraph 17 of the affidavit in support of Originating Summons, which stated that the Applicants as children of the deceased born within wedlock were left out of the Will, the understanding was that the Applicants were raising the issue of unreasonable provision on the Will. Therefore, by virtue of section 22 (1) of the Wills and Administration of Testate Estates Act Cap 60 (hereinafter referred to as the Act) the action was statute barred as it was not brought within the time limitation of six (6) months.

The Applicants' response was that in the absence of evidence that the Will was presented to all beneficiaries at a meeting held on a specified date, the provisions of section 22 (1) could not be invoked or relied upon. That the Applicants only had sight of the Will in the month of December, 2012 after which they filed process. It was argued that in these circumstances, the limitation period under section 22 (1) only began to run from December 2012 and the Applicants were therefore within time. The court was urged to invoke the provisions of section 24 (1) (a) and vary the Will on the basis of unreasonableness.

The Respondents replied that in the affidavits in support of Originating Summons, particularly paragraphs 13, the Applicants acknowledged that the Will was presented to the family a week after the death of the deceased, which meant April, 2011, further, that their mother

Rosemary Bwalya Chibwe obtained an injunction based on the Will in April, 2011. This showed that the Applicants, particularly the first two, also had knowledge of the same and its contents, being part of the family.

Section 22 (1) of the Act, cap 60 provides;

“22.(1) except as provided by section twenty-four an order under this part shall not be made except on an application made within six months from the date on which representation in regard to the testator’s estate for general purposes is first taken out.”

This section is under part three of the Act which is headed ***“family provisions in will”***. The time limitation of six (6) months relate to applications under that part of the Act comprising sections 20 to 24 and majorly deals with variation of wills and for making reasonable provisions for beneficiaries. If the Applicants action had been for variation of will to make reasonable provisions for themselves as beneficiaries, the application and arguments by the Respondents would have been valid in that the application would have been statute barred.

This is in line with the holding in ***Jacks Stanely Thornicroft v Murray Evans and Ivan Mckilop (1985) ZR 172*** that the six months period generally begins to run from the date of grant of letters of administration or probate. This is nevertheless subject to the provisions of section 24.

Contrary to the argument by the Applicants, the Act does not prescribe the manner in which the Will has to be presented to the beneficiaries

and thus the onus would be on the Applicants to show that they got to know of the Will and its provisions within the limitation period. Section 22 suggests that time would ordinarily begin to run after representation is first taken out. This would refer to the time from which the letters of administration or probate is taken out. In this case, this was done in May 2011.

Despite what I have highlighted above, I find that the Originating Summons state that the Applicants action is for nullification of the Will and not variation of Will. This action therefore falls under section 64 (a) which is under part seven of the Act headed 'general' and not part three for which section 22 provides the time limitation of six months. It therefore follows that this application for nullification of a Will is not subject to section 22 and is therefore not statute barred. Section 20 of the Limitation of Actions Act 1939 provides for a twelve (12) year period of Limitation for actions where one is claiming personal estate of a deceased person whether under a Will or intestacy.

I therefore find no merit in the second preliminary issue. The issue also fails and is dismissed.

The third preliminary issue was that the Applicants reference to the criminal matter before the Ndola Subordinate Court under cause no **SSN/38/12** was irregular and an unacceptable pleading which should be expunged from the affidavit. This was premised on the authorities of **Kabwe Transport Limited v Press Transport (1984) ZR 51 (SC)** and **Hollington v F. Hewthorn and Company Limited (1943) 2 All ER 34** that evidence from criminal proceedings is not admissible in civil proceedings. The Applicants response was that they had

referred to the criminal proceedings for the court to take judicial notice of the criminal proceedings for forgery.

I have considered the parties submissions and the ***Kabwe Transport Limited***⁴ case which in effect stated that the *ratio decidendi* in the ***Hollington***⁵ case was not applicable to Zambia in view of the specific provisions in the Evidence Act Cap 43 of the Laws of Zambia. The Supreme Court went on to state *obiter* that our legislation has no provisions for convictions in criminal proceedings to be referred to or taken note of in civil proceedings. The effect is that the criminal and civil proceedings are independent of each other and in each case, evidence must be adduced as required and not by reference to the other proceedings.

The third preliminary issue is thus valid and succeeds. The offending reference to the criminal proceedings under cause no. ***SSN/38/12***, in particular, paragraph 23 of the affidavit in support of Originating Summons dated 11th December, 2012 is therefore expunged from the record.

The Respondents having succeeded in one preliminary issue out of the three which were raised, I order that each party bears its own costs.

Datedday of2013.

M. S. MULENGA
HIGH COURT JUDGE

