

IN THE HIGH COURT FOR ZAMBIA  
AT THE KITWE DISTRICT REGISTRY  
(PROBATE JURISDICTION)

2007/HK/299

BETWEEN

IN THE MATTER OF: THE ESTATE OF THE LATE FELIX TEMBO  
DECEASED

AND

IN THE MATTER OF: THE WILLS AND ADMINISTRATION OF TESTATE  
ESTATES ACT CHAPTER 60 OF THE LAWS OF  
ZAMBIA

BETWEEN:

PAULINOS TEMBO - 1<sup>ST</sup> PLAINTIFF

ANNIE TEMBO - 2<sup>ND</sup> PLAINTIFF

NGOZA NANGOMA TEMBO - 3<sup>RD</sup> PLAINTIFF

AND

JOHN TEMBO - DEFENDANT

GERALD MPANDE - INTERVENER

Before the Hon. Mr. Justice I.C.T. Chali in Chambers on the 13<sup>th</sup> day of April,  
2012

For the Plaintiffs: Mr. W. Forrest – Messrs Forrest Price and Company

For the Defendant: Messrs Katongo and Company

For the Intervener: Mr. C. Magubbwi – Messrs Magubbwi and Associates

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**RULING**

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**Case referred to:**

1. Borniface Kafula and Others v. Billings Choonga Mudenda Supreme Court Appeal No. 202 of 2003

**Legislation referred to:**

1. High Court Rules, Chapter 27 of the Laws of Zambia
2. Supreme Court Rules (White Book) 1999
3. Intestate Succession Act No. 59 of the Laws of Zambia
4. Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia

On 17<sup>th</sup> July, 2007 the Plaintiffs took out an originating summons under the Wills and Administration of Testate Estates Act Chapter 60 of the Laws of Zambia for the following orders, among others;

1. That the 1<sup>st</sup> Plaintiff be granted probate of the will of Felix Tembo deceased dated 8<sup>th</sup> June, 1998;
2. That the Defendant be restrained from intermeddling in the said deceased's estate;
3. That the Defendant do give an account of his dealings with the deceased's estate; and
4. That any appointment by any court of the Defendant as administrator of the deceased's estate be revoked.

The application was supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff, the deceased's father, who deposed that the deceased had, prior to his death on 12<sup>th</sup> November, 1998, executed a will dated 8<sup>th</sup> June, 1998 in which the 1<sup>st</sup> Plaintiff was appointed executor of the said will. However, following the deceased's death the Defendant, who was the younger brother to the deceased, had taken control of the estate, received terminal benefits from the deceased's employer, collected money from the deceased's bank account, and disposed of the money so received as well as other properties including a residential property at number 18 Milemba Avenue being Plot No. 987 Mufulira.

On 24<sup>th</sup> September, 2007 the court granted leave to the 1<sup>st</sup> Plaintiff to apply for a grant of probate out of time and adjourned the hearing of the matter to another date. However, despite notice of hearing dates having been served on the Defendant and/or his Advocates, the Defendant did not file any opposing affidavit or appear at the hearing of the case. Consequently on 28<sup>th</sup> February, 2008 my learned Brother Mr. Justice L.V. Siame passed judgment in which he upheld the Plaintiffs' claims. In particular, and of interest to the present situation, the learned Judge ordered the revocation of the sale of house number 18 Milemba Avenue Mufulira and ordered that same do vest jointly in the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs who were found to be the only surviving beneficiaries under the will. It was ordered that the house in issue be vacated forthwith.

It appears from the record that it was only after the writ of possession over the house was issued that the Defendant on 17<sup>th</sup> April, 2008 made an application to set aside the judgment of the court dated 28<sup>th</sup> February, 2008. However, by his ruling dated 9<sup>th</sup> October, 2009 the learned Judge dismissed that application for want of merit.

Now, again apparently after an attempt at execution of the judgment by writ of possession, GERALD MPANDE has applied to be joined to the proceedings as intervener and to set aside the said judgment, and for an interim order of stay of execution thereof. The said application was said to be made pursuant to Order 15 Rule 6/8 of the Supreme Court Rules (White Book) 1999, and Order 35 Rule 5 of the High Court Rules Chapter 27 of the Laws of Zambia. In fact the correct citation under the High Court Rules is Order 14 Rule 5.

I have no difficulty in joining Mr. Mpande to the proceedings as an Intervener. This is because he claims to have bought the house in issue from the Defendant who purported to be the administrator of the deceased's estate, the Defendant having been so appointed by the Mufulira Local Court on 14<sup>th</sup> June, 1999.

To that extent Mr. Mpande has shown interest in the proceedings in so far as they relate to the house.

Order 14 Rule 5 of the High Court Rules provides:

***“(1). If it shall appear to the court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject matter of the suit, or who may be likely to be affected by the result, have not been made parties, the court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in that suit, as the case may be .....”***

The view I take of the words **“at or before the hearing of a suit”** in Order 14 Rule 5 is that same are applicable before the final determination of or judgment in the suit. The order is not, therefore, suited to the instant case. I would therefore have recourse to the White Book in respect of the present application.

The relevant part of Order 15 Rule 6 provides thus:

- “(2). Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application.**
- (a). .....**
- (b). Order any of the following persons to be added as a party, namely-**
- (i). any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the case or matter may be effectually and completely determined and adjudicated upon”.**

Generally under common law a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone. He cannot be compelled to proceed against other persons whom he has no desire to sue. However, under order 15 Rule 6/8 a person who is not a party may be added as defendant against the wishes of the plaintiff either on the application of the defendant or on his own intervention, or by the court of its own motion.

Under this rule the court has power to add a person as a party where a question or issue arising out of or relating to or connected with any relief or remedy claimed in the action may exist between him and a party to the action which the court thinks it would be just and convenient to determine between him and that party as well as between parties to the action.

Under Order 15/6/9, to entitle a person not a party to an action to intervene and to be joined as a party, it is a pre-requisite that the would-be intervener should have some interest which is directly related or connected with the subject matter of the action.

This I find to the case with Mr. Mpande’s application.

I accordingly order that Mr. Mpande be and is hereby joined to the proceedings as intervener.

As earlier stated herein, Mr. Mpande in his affidavit in support of his application to set aside the judgment of Mr. Justice Siame claims to have bought the house on 7<sup>th</sup> December, 2002 from the Defendant who was the Administrator of the deceased's estate. Indeed the contract of sale exhibited to his affidavit shows the Defendant as vendor in the capacity of administrator. However, the 1<sup>st</sup> Plaintiff in his opposing affidavit deposed that the appointment of the Defendant by the Local Court was fraudulently obtained as the Defendant knew that the 1<sup>st</sup> Plaintiff was the duly appointed executor according to the will of the deceased. Further, the 1<sup>st</sup> Plaintiff deposed, the Defendant obtained the said appointment without the concurrence of the deceased's family.

In my view the 1<sup>st</sup> Plaintiff has good reason to challenge the purported sale of the house by the Defendant to a third party.

I do not find any evidence on the record to show that at the time the Defendant sold the house he did not know about the existence of the will. To the contrary, in the draft affidavit exhibited to his amended affidavit filed in court on 5<sup>th</sup> August, 2008, the Defendant shows that he knew of the existence of the said will, save that the 1<sup>st</sup> Plaintiff "**took no interest in executing the said will**". That cannot be a justification for the unilateral usurpation thereof. In fact the Defendant's conduct is specifically prohibited under section 65 of the Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia thus:

***"(1). When a person dies, within or outside Zambia leaving property within Zambia, any person who without being duly authorized by law, takes possession of, causes to be moved or otherwise intermeddles with any such property.....shall be guilty of an offence...."***

***(2). Any person who-***

***(a). unlawfully deprives any person of the use of any part of the property of the deceased to which that person is entitled under this Act; or***

***(b). otherwise unlawfully interferes with the use by any person of any property referred to in paragraph (a);***

***Shall be guilty of an offence...."***

The house in issue is property which was the subject in the will and is therefore covered by this Act.

Further, I do agree with the 1<sup>st</sup> Plaintiff's submission that the purported sale by the Defendant to the intervener is ineffectual as it was not approved by the court and leave given to the Defendant to make the contract of sale. Intestate Succession Act Chapter 59 of the Laws of Zambia provides under section 19(2) as follows:

***“Where an administrator considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property”.***

Therefore, even assuming that the Defendant was exercising the powers under the order of appointment from the local court, he failed to observe this cardinal provision in the Act and the sale would still be void for that reason.

In the case of **Borniface Kafula and Others v. Billings Choonga Mudenda (Appeal No. 2002 of 2003)** the Supreme Court said that **“the provision in section 19(2) of the Intestate Succession Act was well intended..... The said section places the burden on the administrator to show to the court that the sale of any of the property forming part of the estate of a deceased person is, in his or her considered view, necessary or desirable in order for him to carry out his duties”.**

The transfer to the Intervener and any subsequent sale by him are therefore a nullity.

The Defendant knew about these proceedings a very long time ago and ought to have informed the Intervener and any other person that was to be affected by the proceedings. It is not the Plaintiffs' fault if the Defendant chose not to inform such people. Those people, including the Intervener, will have to pursue the Defendant for any loss they may have suffered by reason of the judgment herein.

In the circumstances, I find no merit in the application and I accordingly dismiss it, with costs to the Plaintiffs.

The order staying execution which I signed on 2<sup>nd</sup> February, 2012 is hereby discharged.

Leave to appeal is granted.

Delivered at Kitwe in Chambers this 13<sup>th</sup> day of April, 2012

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I.C.T. Chali  
**JUDGE**