IN THE HIGH COURT FOR ZAMBIA **2014/HP/0590**
AT THE PRINCIPAL REGISTRY
AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: **THE ORDER OF ADMINISTRATION AND ADMINISTRATION OF THE ESTATE OF THE LATE KILLIAN NKUMBULA**

AND

IN THE MATTER OF: **ORDER 30 RULES 1, 12 (g) AND 13 OF THE HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA**

BETWEEN:

NKUMBULA NKWILIMBA (Suing as Administrator of the estate of the late Killian Nkumbula) **APPLICANT**

AND

HUMPHREY SALWANJA **RESPONDENT**

Before the Hon. Mrs. Justice A. M. Sitali on the 24th day of July, 2014

For the Applicant **:** ***Miss M. Marebesa, Legal Aid Counsel***

For the Respondent **:** ***In Person***

J U D G M E N T

Cases referred to:

1. **Monica Siakondo (suing in her capacity as administrator of the estate of the late Edith Siakondo) v. Fredrick Ndenga (2005) ZR 22**
2. **Lindiwe Kate Chinyanta v. Doreen Chiwele and Judith Tembo (2007) ZR 246**

Legislation referred to:

1. **The Intestate Succession Act, Chapter 59 of the Laws of Zambia, sections 3, 4, 5, 6, 7, 15 (1) and 29 (1).**

The applicant commenced this action against the respondent by originating summons on 17th April, 2014, seeking the following reliefs:

1. an order of interim injunction to restrain the respondent whether by himself, his servants or agents or whomsoever from performing or acting as administrator or in any way intermeddling in the estate of the late Killian Nkumbula pending determination of this matter or until further order of this court.
2. an order that the respondent delivers up all documents obtained from the deceased's home including title deeds, keys and receipts.
3. An order that the respondent renders an account and produce an inventory of all personal property, including money belonging to the deceased.
4. An order that the respondent delivers up all real property comprising a house in form of a block comprising 6 rooms, a house in the form of a block comprising 8 rooms, a plot in garden house and a sewing machine.
5. An order that the respondent pays to the estate of the deceased K147,850.00 which he owed the deceased.
6. An order that the respondent should not have any claim whatsoever on the estate of the deceased.
7. Any other relief the court may deem fit.
8. Costs.

The originating summons is supported by an affidavit sworn by Nkumbula Nkwilimba, the applicant. The facts of the case as stated by the applicant in the affidavit in support of the originating summons are that sometime in 2010 Killian Nkwilimba and the respondent were cohabiting at House No. 327 Makate Road, Matero, Lusaka and that there was neither a customary nor a statutory marriage between them. Killian Nkwilimba (hereinafter referred to as the deceased) died on 12th October, 2013 at Ronald Ross Hospital in

Mufulira. The death certificate for the deceased is exhibited marked “NN1”. Upon the demise of Killian Nkwilimba, the applicant who was the elder brother of the deceased was chosen by the family to be administrator of the estate of the deceased and he obtained letters of administration of the estate at the High Court of Zambia in Lusaka. A copy of the letters of administration is exhibited marked “NN2”. The applicant went on to state that after being granted letters of administration he attempted to take possession of all the real estate but the respondent has denied him access and has instead taken possession of all the real and personal property of the deceased. According to the applicant, the respondent has refused or neglected to hand over the real and personal property of the deceased to him as administrator of the estate. The applicant stated that he has been advised by his advocates that having obtained letters of administration of the estate from the High Court, he is the sole administrator of the estate and all real and personal property of the deceased should vest in him and not in the respondent.

On 22nd May, 2014, the respondent filed an affidavit in opposition to the originating summons in which he deposed that contrary to the applicant’s assertion, the deceased and he were lawfully married under customary law on 9th May, 2009 after he was charged a bride price of K6,000,000.00 in old currency of which he paid K4,000,000.00. He stated that it was further agreed that he would pay the family the money equivalent of the price of a cow in respect of each child born of the said marriage. Following the death of the deceased the family by agreement in writing dated 15th October, 2013 acknowledged his marriage to the deceased and demanded that he pay the balance of K2,000.00 rebased together with K3,000.00 rebased as the equivalent of two cows in respect of the two late children born out of the said marriage. The respondent produced a copy of the said agreement which is exhibited marked “HS1”.

The respondent contended that the alleged appointment of the applicant as administrator of the estate of his late wife by her family based on which the applicant obtained letters of administration from the High Court is illegal and null and void as he, the sole beneficiary of the estate of Killian Nkwilimba, was not consulted and did not give his consent. He further contended that as sole beneficiary of the estate, he has a greater and immediate interest in the said estate to warrant his being appointed as administrator of the estate as required by the law.

The respondent denied that he has refused to hand over all the real and personal property of the estate of the late Killian Nkwilimba to the applicant and stated that he has seen the letters of administration granted to the applicant for the first time in the matter before this court. He further stated that the applicant has never asked him to surrender to him the real property of Killian Nkwilimba. The respondent averred that he handed over the personal property of his late wife to her family shortly after her death and that her family grabbed all the household property although he was entitled to it as surviving spouse according to the law. The respondent alleged that the applicant has intermeddled in the estate of his late wife by embezzling the sum of K11,000.00 from her bank account after her death and the rental payments for the months of November and December 2013 and for January 2014 thereby depriving him of the same as sole beneficiary of the deceased's estate. Regarding the sum of K147,850.00 which the applicant said he owed his late wife and should be paid to the estate of the deceased, the respondent stated that the same was a gift to him from his wife or alternatively, that if it is considered to be a debt owed to the estate, which he denied, then the money should be deducted from his entitlement from the estate as the sole beneficiary of the estate.

The respondent went on to state that he utilised the rentals paid for the real properties for the months of January to April 2014 on constructing toilets for the said properties and for his upkeep. The respondent contended that

contrary to the applicant's misguided belief, neither he nor the other brothers and sisters of the deceased or their families have any beneficial interest in the estate of his wife and that they are not entitled to any share of the same. The respondent further contended that he, as surviving spouse of the deceased, is the sole beneficiary of the estate of the deceased as the deceased had no children, parents or dependants and that he has the greater and immediate interest in the said estate and is, therefore, entitled to be appointed as administrator of the estate of his late wife in accordance with the law as opposed to the applicant who has no interest in the estate at all.

The respondent prayed that the action should be dismissed with costs for being frivolous and for lack of merit and further that the appointment of the applicant as administrator of the estate be revoked and that in his place, the respondent be appointed as administrator of the estate in view of his greater and immediate interest in the estate following which he would render to the court an inventory of the estate and distribute the estate in accordance with the law.

In the his affidavit in reply filed on 28th May, 2014, the applicant admitted that the respondent was lawfully married to the deceased under Tonga customary law but denied that he embezzled K11,000.00 from the deceased's account and stated that he distributed it to the beneficiaries in accordance with a verbal will left by the deceased which was written by the deceased's elder sister at the instance of the deceased. The applicant contended that he made several attempts to recover the deceased's real and personal property which proved futile and stated that the respondent only gave the family a list of the deceased's property in his possession after the burial but did not give them the actual property. The applicant produced a copy of the list of properties made by the respondent marked "NN1". He also produced a copy of the alleged verbal will marked "NN2". The applicant contended that he has been advised by his advocates that since the

deceased left a will, the Intestate Succession Act, Cap. 59 does not apply and that only the Wills and Administration of Testate Estates Act, Cap. 60 applies. The applicant stated that the sum of K147,850.00 was not a gift to the respondent and that he is not entitled to it as expressly stated in the deceased's will. The applicant stated that the respondent acknowledged owing the deceased the said amount of money and to that effect the applicant exhibited a copy of the document executed by the deceased and the respondent in relation to the debt which is marked "NN3".

At the hearing of the matter Miss Marebesa counsel for the applicant relied on the applicant's affidavit in support of the originating summons filed on 17th April, 2014 and on the affidavit in reply filed on 28th May, 2014. Counsel submitted that the applicant heavily relied on exhibit "NN2" to the affidavit in reply which according to paragraphs 8 and 9 of the said affidavit is a verbal will of the deceased Killian Nkwilimba. Counsel submitted that the said exhibit falls within section 6 (4) (c) of the Wills Act, Chapter 60 of the Laws of Zambia. Counsel contended that as there is a verbal will left by the deceased, the deceased's estate qualifies to be administered in accordance with the provisions of the Wills and Administration of Testate Estates Act, Cap. 60. Miss Marebesa prayed that the applicant be granted the orders sought in the originating summons.

In opposing the action, the respondent submitted that he was lawfully married to Killian Nkwilimba the deceased contrary to the applicant's assertions. He referred to the case of *Bonaventure Mutale and Aubie Willy Mubanga (sued as executors of the estate of the late Lagos Nyembele) v. Marjorie Mumbi Nyembele* in which according to the respondent, the Supreme Court held that the parties were lawfully married under customary law and upheld the decision of the High Court which awarded the wife 70% of the deceased's estate.

Regarding the alleged verbal will produced by the applicant and exhibited to his affidavit in reply marked “NN2”, the respondent submitted that the applicant never produced the will after they buried the deceased and that even at the time of obtaining the order of appointment of Administrator at the Matero Local Court on 18th October, 2013 as stated in paragraph 7 of the affidavit in reply, he did not mention the purported will. The respondent submitted that even when he went to the High Court and obtained letters of administration from the Probate Registry he clearly stated that the deceased died intestate. The respondent stated that the verbal will is an afterthought and that it should not be admitted. He, further, submitted that there are procedures to be followed where a person has left a will. The respondent submitted that the Intestate Succession Act, Cap 59 should apply to the administration of the deceased’s estate in the present case.

The applicant filed written submissions on 14th July, 2014 which are on record and the gist of which is that the deceased left a verbal will which was produced by the applicant as exhibit “NN2” to the affidavit in reply. Miss Marebesa contended that the said will qualifies as a verbal will in terms of section 6 (4) (c) of the Wills and Administration of Testate Estates Act, Cap. 60 and that in terms of that will, the deceased did not wish the respondent to benefit from her estate. Counsel contended that at the time the applicant obtained the letters of administration from the Probate Registry, he declared that the deceased died intestate because he did not know that his elder sister had the will in her possession. She urged that this court should view the letters of administration, in the circumstances, as a grant till will be found which is a grant acceptable by law. Counsel prayed that the applicant be granted the reliefs sought.

The respondent did not file written submissions although he was given an opportunity to do so.

I have considered the affidavit evidence as well as the submissions by counsel for the applicant and by the respondent. I note that the proceedings state the deceased's name as Killian Nkumbula which I believe is an error as the documentation exhibited to the applicant's affidavits on record state that she was Killian Nkwilimba. I will, therefore, refer to her as Killian Nkwilimba which was her correct name.

From the evidence on record it is common cause that Killian Nkwilimba died on 12th October, 2013 in Ronald Ross Hospital in Mufulira. On 5th March, 2014 the applicant Nkumbula Nkwilimba who is a brother of the deceased was appointed as administrator of the estate of the late Killian Nkwilimba and obtained letters of administration from the probate registry of the High Court at Lusaka. The respondent Humphrey Salwanja is the surviving spouse of the late Killian Nkwilimba. From the evidence on record the estate of the late Killian Nkwilimba comprises, among other properties, two houses and a plot in Garden House in Lusaka.

It is the applicant's contention that upon being granted letters of administration he attempted to take possession of all the real and personal property that forms part of the estate of the late Killian Nkwilimba but was unable to do so as the respondent has taken possession of the said property and has refused to hand it over to him. It will be observed from the respondent's affidavit evidence that he does not deny that he took possession of the real properties that form a part of the late Killian Nkwilimba's estate. Rather, he states that since the late Killian Nkwilimba left no children, parents or dependants, only he as the surviving spouse of the deceased is the sole beneficiary of the estate. He charges that neither the applicant nor the late Killian Nkwilimba's other brothers and sisters and their families have an interest in the estate of his late wife and are, therefore, not entitled to any share of the estate. Hence this action.

I should state at the outset that although the applicant asserts that the deceased left a verbal will which was written on behalf of the deceased by her elder sister on instructions from the deceased and which purported will is exhibited to the applicant's affidavit in reply marked "NN2", I do not accept the assertion because the letters of administration of the estate which were granted to the applicant by the High Court on 5th March, 2014 which the applicant produced marked "NN2" clearly state that the late Killian Nkwilimba died intestate. The declaration that the deceased died intestate was made by the applicant to the High Court. Had there been a verbal will which was purportedly reduced to writing by the deceased's elder sister as alleged by the applicant, the applicant would have made that declaration to the Court when he applied for the letters of administration. The fact that the applicant obtained letters of administration from the court without any mention of a verbal will is testimony that the said will is a fabrication and was not made by the deceased. Counsel for the applicant submitted that the applicant was not aware of the existence of the verbal will at the time and so he declared to the Court that the deceased had died intestate. It will be noted that the applicant's own evidence is that the will was made to the deceased's elder sister whilst the deceased was in hospital and that the said will was reduced into writing by the said elder sister and that there was another witness present at the time.

It is my considered view that if indeed the verbal will was dictated to the elder sister of the deceased as alleged, the applicant would have been made aware of the existence of such a will at the earliest opportunity. There is no evidence that the said elder sister was not present at the funeral of the deceased or even afterwards at the family gathering after the burial. I take judicial notice of the fact that the words of a dying adult person are taken very seriously in our society so that if the deceased had made a verbal will to her sister as alleged by the applicant, the elder sister would have immediately notified her family of the said will and the will would have been the centre of the family discussions after the burial of the deceased. As this clearly did not happen according to the evidence, I agree with the

respondent that the said will is an afterthought by the applicant as it only surfaced after this action was commenced by the applicant. I am fortified in my observation by the fact that there is no mention of the verbal will in the affidavit in support of the originating summons nor is there any claim made by the applicant relating to the purported will in the originating summons. In the circumstances, Miss Marebesa's submission that the estate of the deceased should be administered in accordance with the Wills and Administration of Testate Estates Act, Cap. 60, is without merit.

I find on the evidence on record that Killian Nkwilimba died intestate and that her estate should, therefore, be administered in accordance with the provisions of the Intestate Succession Act, Cap. 59 of the Laws of Zambia (hereinafter referred to as the Act). Section 4 (1) of the Act provides that a person dies intestate under the Act if he has not made a will disposing off his estate at the time of his death. Further, in the case of *Monica Siakondo (suing in her capacity as administrator of the estate of the late Edith Siakondo) v Fredrick Ndenga* (1), the court held that when the deceased dies intestate, his estate ought to be administered under the provisions of the Intestate Succession Act, Chapter 59 of the Laws of Zambia. According to section 3 of the said Act, an estate comprises all the assets and liabilities of the deceased person and includes his personal chattels for purposes of administration under the Act. The mode of distributing the estate of an intestate is specified in sections 5 to 11 of the Act.

Before considering the applicant's claims which are set out in the originating summons, it is necessary for me to immediately dispel the respondent's misconception that as surviving spouse of the deceased and since the deceased left no children, parents or dependants, he is the sole beneficiary of the estate of the late Killian Nkwilimba and that the applicant and the other brothers and sisters of the deceased have no share in the said estate. The Intestate Succession Act, Cap. 59 was enacted in order to curb the vice of property grabbing where a person died intestate without leaving a will which had become prevalent in Zambia prior to the enactment of the Act.

According to the long title of the Act, the purpose of the Act was to provide a uniform intestate succession law that would apply throughout the country and, more significantly, to make adequate financial and other provision for the surviving spouse, children, dependants and other relatives of an intestate and also to provide for the administration of the estates of persons dying not having made a will. It will be noted from the objective of the said Act that the legislators were mindful of the intricacies of the Zambian society which recognises both the nuclear and the extended family when they sought to make adequate financial and other provision for the immediate and extended family of the intestate.

Part II of the Act provides for succession relating to intestate estates and stipulates the mode of distribution of such estates. Thus, section 5 of the Act provides for how the estate of an intestate should be distributed where there is a surviving spouse, children, parents and dependants of the intestate person. The said section provides as follows:

> *"5. (1) Subject to sections eight, nine, ten and eleven, the estate of an intestate shall be distributed as follows:*
>
> *(a) twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;*
>
> *(b) fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;*
>
> *(c) twenty per cent of the estate shall devolve upon the parents of the deceased;*

(d) ten per cent of the estate shall devolve upon the dependants, in equal shares:

Provided that a priority dependant whose portion of the estate under this section is unreasonably small having regard to his degree of dependence on the deceased shall have the right to apply to a court for adjustment to be made to the portions inherited and in that case, Part III of the Wills and Administration of Testate Estates Act shall apply, with the necessary changes, to the application."

Section 6 of the Act provides for the distribution of the estate where the intestate is survived by no spouse but there are children or other relatives in the following terms:

"6. Where an intestate leaves-

(a) no spouse, the portion of the estate which the spouse would have inherited shall be distributed to the children in such proportions as are commensurate with a child's age or educational needs or both;

(b) no spouse or children; the aggregate portion of the estate which the spouse and children would have inherited shall be distributed equally to the parents of the deceased;

(c) no spouse, children or parents, the estate shall be distributed to dependants in equal shares;

(d) no spouse, children, parents, or dependants, the estate shall be distributed to near relatives in equal shares;

(e) no spouse, children, parents, dependants or near relatives, the estate shall be bona vacantia and shall devolve upon the State."

Section 7 of the Act provides for distribution of the estate where the intestate is survived by a spouse, etc. as follows:

> *"7. Where an intestate leaves-*
>
> *(a) a spouse, children, dependants but no parents, the proportion of the estate which the parents would have inherited shall be shared equally between the surviving spouse and children on the one hand and the dependants on the other;*
>
> *(b) a spouse, parents, dependants but no children, the portion of the estate which the children would have inherited shall be distributed to the surviving spouse, parents and dependants in proportion to their shares of the estate as specified in section five;*
>
> *(c) a spouse, children, parents but no dependants, the portion which the dependants would have inherited shall be distributed equally to the parents;*
>
> *(d) a spouse and dependants but no children or parents, the portion of the estate which the children and parents would have inherited shall be distributed to the surviving spouse and the dependants in proportion to their shares of the estate as specified in section five;*
>
> *(e) a spouse and children but no parents or dependants, the portion of the estate which the parents and dependants would have inherited shall be shared equally among the surviving spouse on the one hand and the children on the other;*
>
> *(f) a spouse but no children, parents or dependants, the portion of the estate which the children, parents and dependants would have inherited shall be distributed equally between the surviving spouse on the one*

hand and the near relatives on the other."

The provisions of section 5, 6 and 7 of the Act which are set out above are clear and unambiguous. In the present case, the evidence is that Killian Nkwilimba the deceased is survived only by the respondent who was her spouse. That being the case, section 7 (f) of the Act is applicable. As the respondent is the surviving spouse and the deceased did not leave any children, parents or dependants, the portion of the estate of the deceased which the children, parents and dependants should have inherited should be distributed equally between the respondent, as surviving spouse on one hand and the near relatives of the deceased on the other hand. According to section 3 of the Act, near relatives are the brothers, sisters, grandparents and other remoter descendants of the deceased. Applying the provisions of section 7 (f) of the Act to the present case, the portion of the estate which should have been inherited by the children, parents and dependants of the deceased, which is 80 per cent of the estate will be shared equally between the respondent on one hand and the near relatives of the deceased on the other hand. In other words, in addition to the 20 per cent share of the estate which the respondent is entitled to under section 5 (1) (a) of the Act, he will get an additional 40 per cent so that he will get in total 60 per cent of the estate. The remaining 40 per cent of the estate will be shared equally among the near relatives of the deceased who include brothers, sisters and grandparents (if any) as defined by section 3 of the Act.

The respondent's assertion that he is the sole beneficiary of the estate of his late wife and that her brothers and sisters and their families have no share in the said estate is not only selfish and mischievous but it has no legal basis given the clear provisions of the law which are set out in section 7 (f) of the Act which is cited above. The case of *Bonaventure Mutale and Aubie Willy Mubanga (sued as executors of the estate of the late Lagos Nyembele) v. Majorie Mumbi Nyembele* which he cited does not in any way support his

claim save to prove that customary marriages are recognised by law and by the courts in Zambia.

Having said that, I now turn to consider the claims set out in the originating summons. In the first claim the applicant seeks an order of interim injunction to restrain the respondent from acting as administrator of the estate of the late Killian Nkumbula or in any way intermeddling in the said estate pending determination of this matter or until further order of this court. I have already granted the applicant the order of injunction which he seeks in my ruling dated 12th June, 2014 pending the determination of this action.

Under the second claim the applicant seeks an order that the respondent deliver up all documents obtained from the deceased's home including title deeds and receipts. Under the third claim the applicant seeks an order that the respondent render an account and produce an inventory of all personal property including money belonging to the deceased. Further, under the fourth claim the applicant seeks an order that the respondent deliver up all real property comprising a house which is a block of 6 rooms and another house comprising a block of 8 rooms and a plot in Garden House area in Lusaka and a sewing machine. I will deal with the second and fourth claims together as they are related.

The applicant's evidence in support of these two claims is to the effect that the late Killian Nkwilimba owned several real properties, namely a house which comprises a block of 6 rooms and another house which comprises a block of 8 rooms and a plot in the Garden House area in Lusaka and that although he had on several occasions requested the respondent who has taken possession of the said property to hand them over to him to enable him distribute them to the beneficiaries, the respondent has refused to do so. The applicant alleged that the respondent only gave the family a list of

the deceased's property in his possession a copy of which is produced marked "NN1" after the burial but did not give them the actual property.

On the other hand, the respondent contended that the applicant has never requested him to surrender the real property to him as administrator of the estate and stated that the personal properties of his late wife were handed over to her family shortly after her death and that her family grabbed the household property although he is entitled to it as surviving spouse according to the law. The respondent further contended that the appointment of the applicant as the administrator of the estate of late Killian Nkwilimba by this Court is illegal and null and void and should be revoked as he was not consulted and did not consent to the appointment of the applicant as administrator. He, further, contended that he had not seen the letters of administration granted to the applicant prior to the commencement of this action and that he, as the sole beneficiary of the late Killian Nkwilimba's estate, should have been appointed as administrator of the estate as he has a greater and immediate interest in the estate.

I have considered the evidence in support of the second and fourth claims. The applicant has produced the letters of administration marked "NN2" which he obtained from the High Court to prove that he was duly appointed as administrator of the estate of the deceased in accordance with section 15 of the Act. The said letters of administration entitle the administrator to all the rights of the deceased as if the administration had been granted at the moment after her death and they have effect over the whole of the estate of the deceased which is in Zambia according to section 24 of the Act which provides as follows:

> *"24. (1) Subject to any limitations and exceptions contained in a grant of letters of administration the grant entitles the administrator to all rights belonging to the deceased as if the administration had been granted at the moment after his death except that letters of*

administration shall not render valid any intermediate acts of the administration tending to the diminution or damage of an intestate's estate.

> *(2) Subject to subsection (1), letters of administration shall have effect over the whole of the estate of the deceased throughout Zambia and shall -*
>
> *(a) be conclusive against all debtors of the deceased and all persons holding any property of the deceased. "*
>
> *(b) afford full indemnity to all debtors paying their debts, and all persons delivering up that property to the administrator."*

It will be observed that the provisions of section 24 (2) (a) and (b) of the Act which are set out above clearly state that the letters of administration are conclusive evidence of the appointment of an individual as administrator of a deceased person's estate and, inter alia, oblige all persons holding any property of the deceased to deliver it up to the administrator. Thus in the present case, the applicant who was duly appointed administrator of the estate by the Court is entitled to take charge of all properties in the estate of the deceased and to effect the distribution of the estate to the persons who have an interest in the said estate in accordance with the provisions of the Act. That being the case, the respondent who does not deny that he holds the property of the deceased is required by law to deliver it up to the applicant as administrator. The respondent as surviving spouse also has an obligation to provide information and any documents relating to the estate of the deceased that may be required by the applicant as administrator in order to perform his duties under the Act.

I, therefore, order that the respondent shall forthwith deliver up to the applicant all the title deeds, keys and other documents relating to the late Killian Nkwilimba's estate and shall at the same time hand over to the

applicant all the real estate that belonged to the late Killian Nkwilimba, namely the two houses comprising 6 and 8 rooms respectively and the plot in Garden House. He shall also hand over to the applicant the sewing machine and any other personal properties of the deceased which he holds and which form part of her estate.

Regarding the plaintiff's claim that the respondent should render an account and produce an inventory of all personal property including money which belonged to the deceased, the applicant's evidence under this claim is to the effect that the respondent had taken possession of the deceased's personal property and had refused to hand it over to him as administrator of the estate. It is also the applicant's evidence that the respondent gave the deceased's family a list of the deceased's personal property which he had in his possession after the burial. The said list is exhibited to the affidavit in reply marked "NN1". The respondent in opposing the claim contended that he handed over the deceased's personal property to her family shortly after her death and that the family subsequently grabbed all the household property from him despite his being entitled to it by law.

I have considered the evidence in support of this claim. In my view, the list of properties exhibited by the applicant to the affidavit in reply marked "NN1" which the applicant says was submitted to the family by the respondent after the burial of the deceased suffices as an inventory of the personal property of the deceased as it comprises both the real and personal property of the deceased. I, therefore, do not consider that it is necessary for me to order the respondent to produce an inventory of the said property when he has already done so and the same is in the applicant's possession. This claim in the circumstances fails and is dismissed.

Under the fifth claim the applicant seeks an order that the respondent pays to the estate of the deceased the sum of K147,850.00, which he owed to the deceased. In support of this claim the Applicant alleges that the respondent owed the late Killian Nkwilimba the sum of K147,850.00 and to that effect

has exhibited a document marked “NN3” which he says was executed between the deceased and the respondent who acknowledged his indebtedness to the late Killian Nkwilimba.

The respondent in paragraph 10 of his affidavit in opposition states that the sum of K147,850.00 was a gift to him from the deceased and, therefore, he is not obliged to pay it back. In the alternative, the respondent stated that if the money is deemed to be a debt to the estate of the deceased, the money should be deducted from his entitlement.

I have considered the affidavit evidence in relation to this claim. I note that the respondent does not deny that he executed the document marked “NN3” or indeed that he got the sum of K147,850.00 from the deceased. Rather he says the money was a gift to him from the deceased. This claim is at variance with the documentary evidence adduced by the Applicant in the form of exhibit “NN3” to the applicant’s affidavit in opposition which states that the said money is a debt to the deceased. I, therefore, accept the Applicant’s claim that the respondent owes the estate of the deceased the sum of K147,850.00 which he should pay to the estate. I order that the respondent should pay the said money to the applicant within 30 days of the date of this judgment failing which the said amount shall be deducted from the respondent’s share of the estate.

The applicant further seeks an order that the respondent should not have any claim whatsoever on the estate of the deceased. This claim, as I see it, is premised on the applicant’s initial claim that his late sister and the respondent were not married. However, in his affidavit in reply he conceded that the deceased and the respondent were married under customary law.

Further, the respondent adduced evidence that he was married to the late Killian Nkwilimba under customary law in the form of exhibit “HS1” to the affidavit in opposition. This is a document relating to the payment of the

balance of dowry for the late Killian Nkwilimba by the respondent. This evidence is not disputed but is admitted by the applicant. In fact the applicant conceded that the respondent paid K3,000.00 rebased to the deceased's family for the purchase of the parents clothes in accordance with Tonga tradition. The respondent being the surviving spouse of the late Killian Nkwilimba is entitled to a share of the estate of the deceased as I stated earlier in this judgment. That being the case, the claim that he should not have any claim on the estate of the deceased has no merit and is dismissed.

Before I conclude my judgment I wish to address the respondent's assertion that the applicant's appointment as administrator is illegal and null and void and should be revoked as he was not consulted and further, that he as surviving spouse should have been appointed as administrator because he has the greater and immediate interest in the estate according to the law. The respondent did not state what provision of the Act requires that he should be consulted over the appointment of the administrator of the estate or indeed which provision of the Act states that as surviving spouse he has priority to be appointed as administrator of his late wife's estate. Section 15 (1) of the Act provides that:

> *"(1) Where the deceased has died intestate, the court may, on the application of <u>any interested person</u> grant letters of administration of the estate to that person." (Emphasis mine)*

It will be observed from the provision set out above that any person who has interest in the estate may apply for letters of administration of the estate. In the present case the undisputed evidence is that the applicant is a brother of the deceased. As such he is a near relative of the deceased and has an interest in the estate of the deceased as the deceased left only a spouse but no children, parents or dependants. As I already stated

in this judgment the near relatives in the present case have an interest in the estate.

Further in the case of *Lindiwe Kate Chinyanta v. Doreen Chiwele and Judith Tembo* (2), the appellant Lindiwe Kate Chinyanta lost her husband and following the death of the deceased, the respondents Doreen Chiwele and Judith Tembo who were younger sisters of the deceased were appointed as joint administrators of the estate. The appellant was not informed or consulted over the said appointments and the appellant expected to be appointed alone or jointly with her husband's brother. She commenced an action in the High Court seeking an order that she be appointed administrator of the estate of her late husband who died intestate or in the alternative that she be appointed as joint administrator with one of the deceased's relatives. The High Court dismissed the action and on appeal to the Supreme Court it was held that *"there is nothing in the Act to suggest that a surviving spouse has priority eligibility for the office of administrator".* The Supreme Court further held that *"it is not obligatory under the law to consult the surviving spouse, although in civilized families, information might be given and consultation may be made but this is not a requirement of the law"*.

From the foregoing authority the respondent's claim that he, as surviving spouse should have been given priority for appointment to the office of administrator has no legal basis. Further, the respondent's assertion that the applicant's appointment as administrator should be revoked because he as surviving spouse was not consulted regarding the appointment in untenable. I say so because section 29 (1) of the Act clearly states the grounds upon which a grant of letters of administration may be revoked. To that effect section 29 (1) of the Act provides as follows:

> *"29 (1) Letters of administration may be revoked or annulled for any of the following reasons –*

(a) that the proceedings to obtain them were defective in substance;

(b) that the grant was obtained fraudulently;

(c) that the grant was obtained by means of an untrue statement of a fact essential in point of law to justify the grant, though that statement was made in ignorance or inadvertently;

(d) that the grant has become of no use or inoperative;

(e) that the person to whom the grant was made has, without reasonable cause failed to furnish an account of his administration after having been lawfully called upon to do so, or has prepared an account which is untrue in a material particular."

The respondent has not demonstrated in his affidavit evidence that grounds exist to warrant the revocation of the applicant's letters of administration in terms of section 29 (1) of the Act. There is, therefore, no basis on which I can order that the applicant's appointment as administrator be revoked as prayed by the respondent because the fact that he was not consulted is clearly not a ground to warrant the revocation of the applicant's letters of administration.

As the applicant has succeeded in his action, I award him costs which are to be taxed in default of agreement. Leave to appeal is hereby granted.

Dated this 24th day of July, 2014.

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A. M. SITALI

JUDGE