

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2013/HP/0593

BETWEEN:

ROSEMARY MUSA PHIRI

(Suing as Administratrix and Beneficiary
of the Estate of the Late Charles David Phiri)

APPLICANT

and

COMFORT LOZILILO PHIRI

1ST RESPONDENT

MIKE MSANIDE PHIRI

2ND RESPONDENT

(Respondents sued respectively as Administratrix and
Administrator of the Estate of the Late Charles David Phiri)

***Before the Hon. Mr. Justice Justin Chashi in Chambers on the 14th
day of February, 2014***

For the Applicant: R. Bwalya (Mrs), National Legal Aid Clinic for Women

For the Respondents: G. D. Chibangula, Messrs GDC Chambers

J U D G M E N T

Cases referred to:

- 1. Kitwe City Council v. William Ng'uni (2005) Z.R. 57*
- 2. David Ojah Malembe v. Thomas Ndonyo (2012) Z.R. 252. Vol. 3*

Legislation referred to

- 3. The High Court Act, Chapter 27 of the Laws of Zambia*
- 4. The intestate Succession Act, Chapter 59 of the Laws of Zambia*

Rosemary Musa Phiri, the Applicant herein commenced these proceedings against the 1st and 2nd Respondents namely **Comfort Lozililo Phiri** and **Mike Msanide Phiri**, respectively on the 17th day of May, 2013 by way of Originating Summons pursuant to **Order 30, Rule 12 of the High Court Rules**³ and **Section 19 (1) (c) i and ii of the Intestate Succession Act**⁴. According to the Originating Summons, the Applicant is seeking the following reliefs:

- 1. A statement of account of the estate of late Charles David Phiri;**
- 2. An account of the share of the benefits from the late father's place of work, Railway Systems Limited;**
- 3. An account of the share of property No. 580, Avondale, Lusaka, a farm in Mpika and a motor vehicle belonging to the deceased;**
- 4. An order that the mother of the late Charles Phiri's late wife is and was not a dependant and as such not entitled to the share of the estate;**
- 5. An interim injunction restraining the 1st and 2nd Respondents from distributing the estate of Charles David Phiri until the matter is determined by the Court; and**
- 6. An order to produce the following documents:**
 - a) Bank Loan Account and statements and distribution percentages of the deceased's estate,**
 - b) Further or other reliefs, and**
 - c) That provision may be made for the costs of this application.**

In support of the application is an affidavit of even date deposed to by the Applicant in which she deposes that on the 9th day of July, 2011 she got married to Charles David Phiri. It is her evidence that the two had no children

together. That the said **Charles David Phiri**, who is now deceased, died on the 26th day of February, 2013 and the 1st and 2nd Respondents herein were appointed by the Local Court to co-administer his estate jointly with the Applicant on the 15th day of April, 2013. Copies of the marriage certificate and order of appointment have been produced and marked **“RMP1” and “RMP2,”** respectively in support of the foregoing.

It is the Applicant's deposition that the order of appointment stipulates that the fifty-five per cent (55%), twenty-five per cent (25%) and twenty per cent (20%) of the deceased's estate should devolve respectively upon the deceased's three children, the Applicant and the dependant. Her assertion is that on the 16th day of April, 2013 after the order of appointment was made, she applied to the Local Court to seek clarification as regards the inclusion of the mother of the deceased's late wife as the dependant entitled to twenty per cent (20%) of the deceased's estate. However, quite contradictory to her own evidence to the effect that the deceased's mother-in-law was included as a dependant by the Local Court, the Applicant asserts that the said inclusion was made by the 1st and 2nd Respondents. It is her further assertion that the deceased mother-in-law is looked after by her children and grandchildren.

According to the Applicant, the 1st and 2nd Respondents decided to “grab” the motor vehicle which was left by the deceased and to remove her from the house she used to live in with the deceased prior to his demise. It is her further deposition that the 1st and 2nd Respondents have taken over the chicken run which was left by the deceased. That on the 16th day of April, 2013, the 1st and 2nd Respondents wrote to the deceased's former employer, Railway Systems of Zambia to demand for the payment of his terminal benefits.

The Applicant asserts that the 1st and 2nd Respondents have taken all the foregoing decisions and steps without her agreement or authorization as co-

administratrix. It is her assertion that the 1st and 2nd Respondents have become uncooperative and hostile towards her and have deprived her of what she ought to have rightly obtained from the deceased's estate.

In opposing the application, the 1st and 2nd Respondents filed a joint affidavit in opposition on the 19th day of July, 2013 in which they assert that the Applicant wants to administer the deceased's estate alone and as such is not happy with the appointment of the Respondents to jointly administer the estate with her.

It is the Respondents' assertion that the deceased's mother-in-law, who is their grandmother, had been financially and materially supported by the deceased since the death of his first wife in May 1999 until his death on 26th February, 2013. That the said support was necessitated by the fact that her children and grandchildren were and are not gainfully employed and as such were and still are incapable of properly supporting her. Further, that the Applicant did not protest to the support that was rendered by the deceased to his mother-in-law throughout the duration of her marriage to the deceased. According to the Respondents, the Applicant did not also protest when the Local Court made the order of appointment in which the deceased's mother-in-law was included as a dependant despite being present at the hearing.

The Respondents deny that they have denied the Applicant access to the motor vehicle in issue but assert that the Applicant wants to use it to their exclusion. It is their assertion that the Applicant owns two other motor vehicles which they have no access to. The Respondents also deny the Applicant's assertion that they have told her to vacate the house situate at Plot No. 580, Old Avondale, Lusaka. Instead, their assertion is that they held a meeting with the Applicant and suggested that the said matrimonial house be rented out so as to generate rental income to be shared by all

beneficiaries of the deceased's estate in the percentages ordered by the Local Court. According to them, the Applicant owns a house in Chilenje Compound, Lusaka from which she receives rental income for her sole use and benefit.

It is the Respondents further deposition that the Applicant is still running the chicken run in issue. The Respondents however admit writing a letter to Railway Systems of Zambia to demand for payment of the deceased's terminal benefits but assert that they availed the Applicant with a copy of the letter. They further add that on the death of the deceased, Railway Systems of Zambia paid K46, 000.00 into the Applicant's bank account as funeral expenses allowance. According to them, a sum of K13, 000.00 remained after the funeral expenses but the Applicant has failed to account for it.

As to the Applicant's evidence to the effect that the Respondents have been taking decisions without involving her as co-administratrix, the Respondents' position is that such decisions can be made by the majority of the co-administrators as required by law. The Respondents deny that they have been uncooperative or hostile towards the Applicant. Instead, they assert that the Applicant is the one who is being hostile towards them by being unresponsive and uncooperative to them in making decisions as to the administration and distribution of the deceased's estate. The Respondents further deny that they have deprived the Applicant of her share of the deceased's estate. Their assertion is that no distribution of the estate has been made thus far.

In her affidavit in reply filed on the 29th day of July, 2013, the Applicant asserts that the Respondents declared from the beginning that they did not want to co-administer the deceased's estate with her although they later decided to include her as co-administratrix at the hearing before the Local Court. That she opposed the inclusion, as dependant, of the deceased's

mother-in-law at the said hearing. According to the Applicant, she did not know that the deceased was supporting his mother in-law as she did not see him do so neither did the deceased mention that during their marriage. She however asserts that she knew that the deceased had built a house for his mother in-law before the death of his first wife in 1999.

The Applicant further asserts that the claim before Court is not about who owns what but that the three administrators should by resolution or agreement give an account of what constitutes the deceased's estate. Further that when an account of the deceased's estate is rendered, the beneficiaries thereof should be known so that the distribution should be done according to the guidelines given by the Local Court as indicated on the order of appointment. According to the Applicant, the deceased's estate consists of a house at Plot No. 580, Avondale, Lusaka, three rooms' extension to the said house, a farm in Mpika, a Motor Vehicle namely Toyota Prado Registration Number No. ABP 997, a chicken run, the deceased's terminal benefits from Railway Systems of Zambia and household goods.

It is the Applicant's assertion that the Respondents felt that she would claim the house at Plot No. 580, Avondale, Lusaka and the farm in Mpika which were acquired before she got married to the deceased. According to her, she only claims entitlement to a share of the three rooms' extension to the main house at Plot No. 580, Avondale, Lusaka, the chicken run and the motor vehicle which assets were acquired during the subsistence her marriage to the deceased. Her assertion is that the said extension was made from the salary advance which the deceased acquired from his former employers, while the chicken run was built from the money which the Applicant received for her repatriation after retirement from her place of work.

The Applicant's further assertion is that the Respondents benefited from the funeral grant and that the balance of K13, 000.00 has been used to pay off monthly obligations such as water and electricity bills, and for house upkeep.

That the Respondents have refused to discuss the distribution of the estate but proceeded to distribute same by getting the motor vehicle aforesaid, a television set and stand, a DSTV dish and decoder, speakers, a coffee table, a carpet, sofas and a matt in the Applicant's absence. It is her assertion that the Respondents also wanted to grab the matrimonial bed which the Applicant uses and that the Respondents have been so hostile that the 2nd Respondent has resorted to using abusive language towards her. Further that the Respondents have been holding meetings in the absence of the Applicant as co-administratrix.

The Respondents filed what they call "an affidavit in rejoinder" on 30th August, 2013. Subsequently, on 13th September, 2013, the Applicant filed a further affidavit in support of the application. Both affidavits were filed without leave of the Court contrary to the rules of practice on applications of this sort that limit the number of affidavits which parties are entitled to put in as a matter of right. I have therefore disregarded the two affidavits for the current purposes.

At the hearing of the application on the 6th day of January, 2014, Counsel for the Applicant wholly relied on the two affidavits which were filed on behalf of the Applicant and later filed written submission on the 30th day of January, 2014. However, neither the Respondents nor their Counsel were in attendance at the hearing.

In her written submissions, Counsel for the Applicant submitted that in order for a person who is not a minor to qualify as a dependant in terms of **Section 3 of the Intestate Succession Act⁴**, he or she ought to have been living with the deceased person. Therefore, it was Counsel's contention that the deceased's mother-in-law herein cannot be said to have been a dependant entitled to benefit from the estate. That the removal of matrimonial property by the Respondents from the matrimonial home and the seizure of the only motor vehicle left by the deceased contravene

Section 8 as read with **Section 3 of the Intestate Succession Act⁴** which stipulates that the deceased's personal chattels ought to be shared between the deceased's children and the surviving spouse.

It was further submitted that, in terms of Section **19 (1) (4) (sic)**, perhaps to mean **Section 19 (1) (c) (ii) of the Intestate Succession Act⁴**, one of the duties of an administrator is to render to the Court an account of the administration of the estate. According to Counsel, this is a good case in which such an order ought to be made because the Respondents performed certain acts for which an account should be rendered to the other beneficiaries.

Counsel for the Applicant also sought to casually give evidence in her written submissions to the effect that the deceased had "other" unnamed dependants. This is not only unsupported by the evidence put forward by the parties herein but is also contrary to the purpose of submissions. As was held by the Supreme Court in the case of **Kitwe City Council v. William Ng'uni¹**, the Court is not even bound to consider counsel's submissions because submissions are only meant to assist the Court in arriving at a judgment and not to introduce fresh evidence on behalf of the parties. I have therefore disregarded the evidence which Counsel sought to adduce for the current purposes.

The foregoing notwithstanding, I have carefully analysed and fully addressed my mind to the application by the Applicant, the affidavit evidence by the parties and the written submissions by Counsel for which I am indebted.

I must mention from the outset that some of the reliefs being sought by the Applicant as set out on the Originating Summons herein are unclear. However, what can be discerned from the record is that the Applicant is basically seeking a statement of account of the deceased's estate and an order that the deceased's mother-in-law should not be considered as a dependant entitled to a share of the deceased's estate. The Applicant is

seeking specific accounts in respect of her share of the deceased's terminal benefits from Railway Systems Limited, the house at Plot No. 580, Avondale, Lusaka, the farm in Mpika and the motor vehicle identified as Toyota Prado Registration Number No. ABP 997. She is also seeking an order for the production of bank statements in relation to a loan account albeit she has not named the holder of the said account neither has she named the bank with which the account is held.

Indeed **Order 30, Rule 12 of the High Court Rules**³ and **Section 19 of the Intestate Succession Act**⁴ *inter alia* confer upon this Court the general power to determine any question arising in the administration of the estate of a deceased person. These provisions also confer specific powers upon the Court to order an administrator or an executor to render to the Court an account of the administration of the estate and to produce on oath in court a full inventory of the estate of the deceased. Further, in the event that any dispute arises in the administration of a deceased person's estate, the High Court has among other powers, the power to decide how the distribution of the property forming part of a deceased person's estate should be carried out. This power is conferred upon the Court by **Section 42** as read with **Section 43 of the Intestate Succession Act**⁴.

In the case in *casu*, it appears to be common cause from the evidence on record that **Charles David Phiri**, the deceased herein died intestate on the 26th day of February, 2013 and was survived *inter alia* by a spouse who is the Applicant and three children, two of whom are the 1st and 2nd Respondents herein. It is also not in dispute that the 1st and 2nd Respondents were on the 15th day of April, 2013 appointed by the Local Court to co-administer the deceased's estate jointly with the Applicant. There is unanimity in terms of the evidence by both parties in respect of the foregoing. I therefore make findings of fact accordingly.

The dispute between the parties emanates from their disagreement over the manner in which the deceased's estate should be handled and distributed to the identified beneficiaries. In particular, the 1st and 2nd Respondents have taken certain decisions and steps which the Applicant does not approve of. The Applicant does not also approve of the inclusion of the deceased's mother-in-law as a dependant entitled to a share of the deceased's estate. In the view I have taken therefore, there are two main issues that fall for this Court's determination namely, whether or not the decisions and steps thus far taken by the Respondents in the administration of the deceased's estate make it appropriate for the Court to exercise its powers aforesaid, and whether the deceased's mother-in-law can be said to be a dependant within the meaning of the law.

Let me begin with the issue of whether or not the deceased's mother-in-law can be considered as a dependent entitled to a share of the deceased's estate. Having already made a finding of fact that the deceased herein died intestate, it follows that the relevant law applicable to this matter is **The Intestate Succession Act**⁴ (hereinafter for convenience's sake referred to as "the Act") in accordance with the provisions of Section 2 thereof.

Section 3 of the Act defines a "**dependant**" as follows:

"dependant" in relation to a deceased person means a person who was maintained by that deceased person immediately prior to his death and who was-

(a) a person living with that deceased person; or

(b) a minor whose education was being provided for by that deceased person; and who is incapable, either wholly or in part of maintaining himself;"

It must be noted that the fact that a deceased person was rendering assistance to his relatives prior to his death does not in itself make such

relatives his dependants. Thus, in the case of **David Ojah Malembe v. Thomas Ndonyo**², the Supreme Court, with reference to the Act, held as follows:

“Under the said Act, there is no provision to the effect that any family member brought up or educated by the deceased person automatically qualifies as a beneficiary of the estate, neither is there any provision that brothers and sisters generally qualify as beneficiaries. In the case of Mwananshiku(1), this Court stated that rendering assistance to the relatives does not place automatic obligations on one after death.”

Apart from the evidence that the deceased built a house for the deceased’s mother-in-law and the assertion that he used to assist her financially and materially, there is no evidence herein to suggest that the deceased’s mother-in-law lived with the deceased immediately prior to his death. On the contrary, the evidence on record is that the deceased never lived with his mother-in-law. Therefore, it is immaterial whether or not the deceased used to render assistance to his mother-in-law prior to his death. The law set out above as I understand it is that in order for a person who is not a minor to be considered as a dependant, he must show not only that he was maintained by the deceased but also that he lived with the deceased immediately prior to his death. I therefore agree with Counsel’s submission in that respect. Further, the mere fact that the deceased may have been rendering assistance to his mother-in-law does not in itself amount to maintenance that would make her a dependant within the meaning of the law. Indeed it would be absurd to argue that every relative whom the deceased assisted financially or materially qualifies as his dependant.

On the issue of whether the decisions and steps thus far taken by the Respondents in the administration of the deceased's estate are legally justifiable, it must first be noted that with the exception of conveying real estate, executors and administrators generally have a joint and separate authority over the whole of the estate of a deceased's person.

Thus, **Section 20 of the Act** states that:

“Where there are several administrators, their powers may, in the absence of any direction to the contrary contained in the letters of administration, be exercised by the majority of them.”

In the case at hand, there is no evidence that the Local Court which made the order of appointment gave any directions as to how the powers of the parties herein should be exercised. It follows therefore that in terms of this provision, the 1st and 2nd Respondents could legally take decisions as co-administrators that would bind the deceased's estate.

However, although the Applicant complains of being sidelined by the Respondents insofar as the administration of the deceased's estate is concerned, the evidence on record and the reliefs being sought by the Applicant show that the Applicant's interest is not necessarily to assert her rights as co-administratrix but rather to assert her rights as a beneficiary of the deceased's estate. A close analysis of this application shows that the Applicant is essentially seeking the assistance of the Court in determining her share of the deceased's estate. The Applicant's contention is that the Respondents have deprived her and/or are seeking to deprive her of her rightful share of the deceased's estate and as such she is seeking an account thereof.

As earlier alluded to, the Applicant is claiming a share in respect of specific assets namely the deceased's terminal benefits from Railway Systems of

Zambia, the house at Plot No. 580, Avondale, Lusaka, the farm in Mpika and the motor vehicle identified as Toyota Prado Registration Number No. ABP 997. However, in her affidavit in reply, the Applicant asserts that she only claims entitlement to a share of the three rooms' extension to the said house, the chicken run and the motor vehicle which assets were acquired during the subsistence of her marriage to the deceased. She therefore abandoned her claim in respect of the main house and the farm in Mpika because, according to her, the said properties were acquired before she got married to the deceased although the reason for abandoning her claim to that extent has no basis at law. The relevant sections of the Act which spell out how the estate of an intestate should devolve upon the beneficiaries do not require the beneficiaries to contribute to the acquisition of the estate for them to be entitled to a share thereof neither do they require that the surviving spouse should have been married to the deceased person before the acquisition of the estate in question.

Thus, Section 5 of the Act provides that:

“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."*

Section 3 of the Act defines the word "**estate**" as follows:

*"**estate**" means all the assets and liabilities of a deceased, including those accruing to him by virtue of death or after his death and for the purposes of administration of the estate under Part III includes personal chattels".*

Therefore, the need to consider how much a deceased's surviving spouse contributed to the acquisition of the assets in question may only arise, where appropriate, for the purpose of determining how the deceased's estate should be shared between or among the deceased's widows in the case of a polygamous marriage. This however does not arise in the case at hand.

It must also be noted that succession under the Act depends on who among the relatives of the intestate has survived him or her.

Therefore, **Section 7 of the Act** provides *inter alia* that:

"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;...."

(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;

There is no evidence in this matter that the deceased was survived by any parent. Thus, having already made a finding that the deceased's mother-in-law is not a dependant within the meaning of the law and there being no evidence on record of any dependant, it follows that the deceased was only survived by a spouse and three children insofar as the beneficiaries of his estate are concerned. As such, the portion of the estate which the parents and dependents would have inherited ought to be shared equally among the surviving spouse on the one hand, and the children on the other in accordance with **Section 7 (e) of the Act**. The implication of this is that the Applicant as surviving spouse is entitled to thirty-five per cent (35%) of the deceased's estate while the three children are entitled to sixty-five per cent (65%) thereof.

Further, as Counsel for the Applicant correctly argued, in terms of *Section 8 of the Act* all personal chattels of an intestate must be shared equally between the surviving spouse and the children. The said section states as follows:

"Notwithstanding section five where the intestate in the case of a monogamous marriage is survived by a spouse or child or both, the spouse or child or both of them, as the case may be, shall be entitled equally and absolutely to the personal chattels of the intestate."

Personal chattels are defined in **Section 3 of the Act** in the following terms:

"personal chattel" means clothing, articles of personal use or adornment, furniture and furnishing, appliances, utensils and all other articles of household use or decoration, simple agricultural equipment, hunting equipment, books, motor vehicles and consumable stores but does not include chattels used for business purposes, money or securities for money".

Therefore, I agree with Counsel for the Applicant that the Respondents contravened the foregoing provisions when they got the deceased's motor vehicle to use to the exclusion of the Applicant. The fact that the Applicant has personal motor vehicles is immaterial. The same can be said in respect of the television set and stand, DSTV dish and decoder, speakers, coffee table, carpet, sofas and the matt which are said to have been collected by the Respondents from the matrimonial house. All these are personal chattels which ought to be shared equally between the surviving spouse and the children. As such, the action taken by the Respondents flies in the teeth of Section 8 as cited above.

The Applicant is also entitled to a life interest in the house at Plot No.580, Avondale, Lusaka and to hold the same as tenant in common with the deceased's children in accordance with **Section 9 of the Act** which provides that:

(1) Notwithstanding section five where the estate includes a house the surviving spouse or child or both, shall be entitled to that house:

Provided that-

- (a) where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and**
- (b) the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage."**

As earlier mentioned it is immaterial whether or not the Applicant contributed to the building of the said house or the extension thereof. The fact that the Applicant has another house of her own is equally immaterial. What is material is the fact that the house in issue forms part of the deceased's estate. The Respondents are not therefore entitled to put the said house on rent without the consent of the Applicant as tenant in common by operation of the law.

All the foregoing and the evidence herein show that the Respondents have abused and/or are seeking to abuse their authority in the performance of their duties as majority administrators to the detriment of the Applicant as a beneficiary of the deceased's estate. However, I must mention that the first duty of an administrator in terms of **Section 19 (1) (a) of the Act** is to pay the debts and funeral expenses of the deceased person. This duty has to be performed before the distribution of the estate to the identified beneficiaries. Failure to perform this duty may render the personal representative personally liable. Since no mention has been made about any liabilities of the deceased, I find it unsafe to order the distribution of the estate herein especially bearing in mind the fact that there is mention of a loan account in respect of which no evidence has been led by the parties. There is need therefore for the parties to produce an inventory of the deceased's estate setting out all the traceable assets and liabilities of the deceased before the estate can be distributed in the manner aforesaid.

In light of the foregoing, the following interlocutory orders are hereby made:

- 1. The Respondents, jointly with the Applicant, to advertise twice in one of the daily newspapers with wide circulation in Zambia requesting persons with any interest in the estate of the deceased, Charles David Phiri, for information regarding any assets or liabilities of the deceased that they may be aware of and thereafter to produce on oath in Court the full inventory of the estate of the deceased clearly setting out all the assets and any liabilities of the deceased within a period of ninety (90) days from the date of the Judgment;***
- 2. The Respondents to refrain from taking any further actions in the administration of the estate of the deceased until the production of the inventory aforesaid and subsequent orders being made by the Court;***

- 3. Having found that the only beneficiaries of the deceased's estate are the Applicant, the two Respondents herein and the other child of the deceased, the deceased's mother-in-law shall not be considered as a dependent entitled to a share of the deceased's estate; and**
- 4. Subject to any debts or other liabilities, thirty-five per cent (35%) and sixty-five per cent (65%) of the estate of the deceased to devolve upon the Applicant and the three Children of the deceased, respectively. The Order of Appointment which was made by the Local Court is hereby amended accordingly.**

Having regard to the facts and circumstances of this case, I make no order as to costs.

Leave to appeal is hereby granted.

Delivered at Lusaka this 14th day of February, 2014.

Justin Chashi
HIGH COURT JUDGE