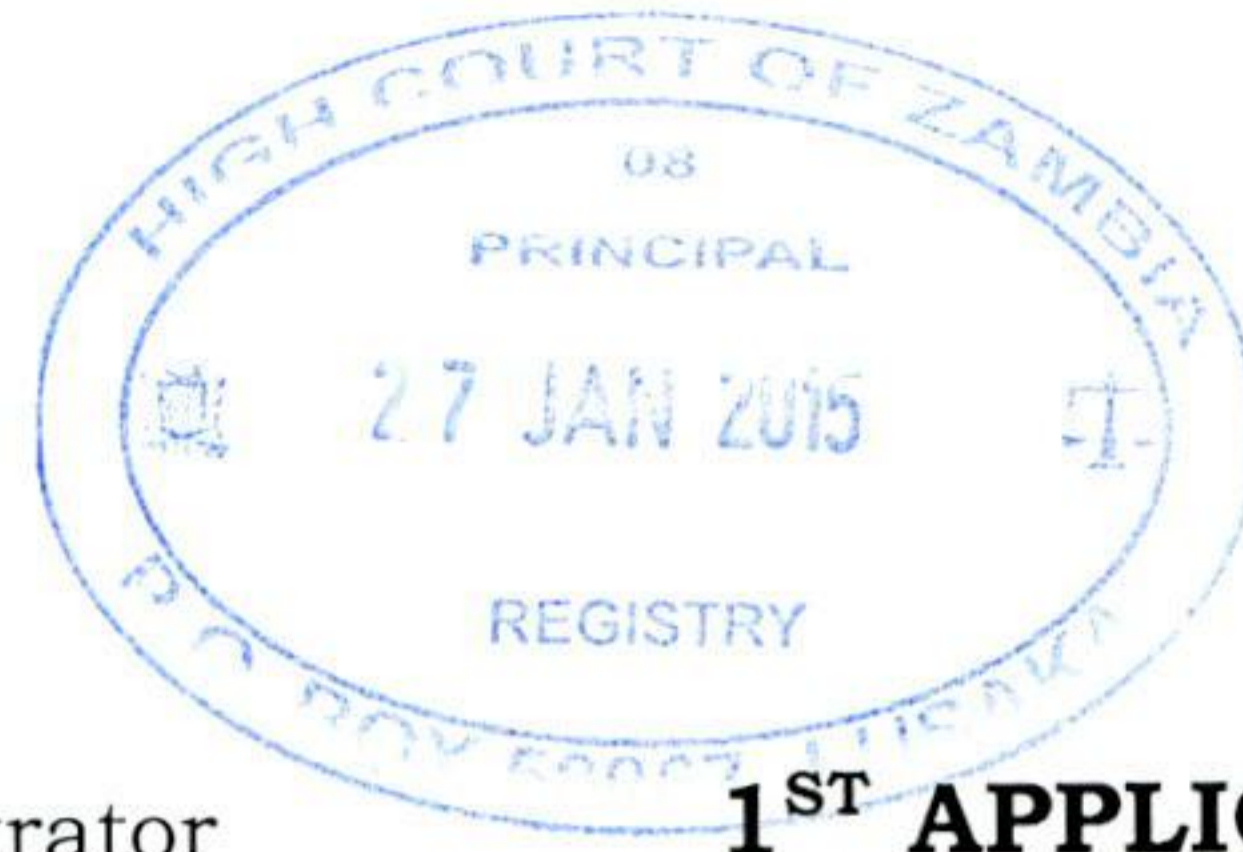


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**2014/HP/1988**



**BETWEEN:**

**MAUREEN KALUBA** (suing as Administrator  
Of the Estate of the late Hellen Kampape)

**1<sup>ST</sup> APPLICANT**

**GLORIA GWEBA CHIWILA** (Suing as  
Co- Administrator of the Estate of the late  
Hellen Kampape)

**2<sup>ND</sup> APPLICANT**

**AND**

**MUSAMBADANA PHIRI MSANIDE**

**RESPONDENT**

(Sued in his capacity as Administrator of the  
the late Cynthia Kampape)

**CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC**

**For the Applicants: Mrs. M. Mwenya – Legal Aid Counsel of  
Messrs Legal Aid Board**

**For the Respondent: Mr. H.A Chizu of Messrs Chanda Chizu  
& Associates**

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**R U L I N G**

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**Legislation Referred to:**

1. *High Court Act chapter 27 of the Laws of Zambia*
2. *Intestate Succession Act cap 59 of the Laws of Zambia*

**Cases Referred to:**

1. *Phyllis Kabanda Bansa v Osmas Kope (2011) 1 ZR 18*
2. *Juliet Chibakale Tembo & another v Steward Tembo & another (2010) ZR 149*

The genesis of this matter is that the Applicant launched proceedings by way of Originating Summons on 15<sup>th</sup> December, 2014 seeking the following reliefs:-

1. *An Order of interim injunction restraining the Respondent whether by himself, servants or agents or whatsoever from performing or acting as the Administrator dealing with plot LUS 11555 and plot No. 1800 or in any way intermeddling in the estate of the late Hellen Kampape until further order of the court.*
2. *That the Respondent delivers up all documents relating to the estate of the late Hellen Kampape.*
3. *That the Respondent renders an account and produces an inventory of all the rentals collected from house number 13680 belonging to the estate of the late Hellen Kampape.*

4. *That the Respondent delivers up all real property comprising a 1 x 2 flats in Libala South plot 1800 and plot LUS 11555 belonging to the estate of Hellen Kampape.*
5. *That the Respondent should not have any claim whatsoever on the estate of Hellen Kampape.*
6. *Any further and other relief the court may deem fit.*
7. *Costs.*

The originating summons was supported by a combined affidavit deposed to by the Applicant Maureen Kaluba in support of application and injunction. In a nutshell she deposed that one Hellen Kampape died on 25<sup>th</sup> September, 2008 and a death notice exhibit "MK1" was exhibited. Cynthia Kampape was appointed administratrix of the estate of Hellen Kampape.

The said Cynthia died on 18<sup>th</sup> September, 2014. At the time of her death she had not distributed the estate. That following the death of Cynthia, Maureen Kaluba and Gloria Gweba Chiwila obtained letters of administration as per exhibit "MK2".

The said Hellen Kampape never had any children but she was survived by one parent and siblings who are the beneficiaries of her estate. At the time of her death Hellen owned plot number 13680 in Chalala, Lusaka which had unfinished house on it and also unpaid

terminal benefits. The said benefits amounting to K1, 015,778.52 was deposited in Cynthia's account on 2<sup>nd</sup> February, 2009.

She deposed that, it was agreed amongst the siblings that the terminal benefits for the late Hellen be used to complete the unfinished building on plot number 13680, Chalala, Lusaka so that the beneficiaries especially the orphans in the family that were Hellen's Dependants could benefit from the rentals for purposes of school fees and other needs.

The Respondent who was Cynthia Kampape's husband was aware of these arrangements. After the completion of the Chalala house it was agreed that the remainder of Hellen's terminal benefits be used to purchase land to build.

She deposed further that plot number 11555 in Lilayi and plot number 1800 Libala were purchased which formed part of Hellen's estate and vested in Cynthia as administrator of the estate. That a sum of K75,000 was spent on the purchase of plot number LUS 11555 from one Gracious Mwenya and paid for from the Standard Chartered Bank Arcades Branch on 6<sup>th</sup> November, 2009 vide exhibit "MK3".

On 6<sup>th</sup> October, 2010 Cynthia's house was gutted down by fire see exhibit 4 and the family allowed her to move into plot 1800 Libala

South, Lusaka. Initial arrangements were that a block of flats would be built on that plot.

She further deposed that after the demise of Cynthia the Respondent who is the administrator of the late Cynthia has failed or refused to yield up real estate and documents relating to the estate of the late Hellen to the co-administrators of Hellen's estate. She referred to exhibit "MK5" a letter dated 30<sup>th</sup> November, 2013 addressed to the Respondent.

She finally prayed for an order of injunction directed against the Respondent. She also filed in a certificate of urgency.

I declined to grant an ex parte injunction since in my view there was no urgency to the application. The action relate to an estate of the late Hellen Kampape who died on 25<sup>th</sup> September, 2008 and it has not been shown when Cynthia now deceased commenced administering the estate of the deceased Hellen.

On 8<sup>th</sup> January, 2015 both parties appeared by Advocate. Mrs. Mwenya for the Applicants appeared whilst Mr. Chizu appeared for the Respondent.

Mr. Chizu informed the court that the Respondent had filed a notice to raise a preliminary legal issue supported by an affidavit deposed

to by the Respondent under the name of Msanide Phiri. The Respondent raised points to be determined by the court.

- (1) That the Respondent is wrongly sued or described or wrongly served with court process as he has never ever been called Musambadana Phiri Msanide and hence he should be struck out from the these proceedings.
- (2) That the originating process used to commence these proceedings is wrong in law, the issues to be adjudicated upon are very contentious and the Respondent has never ever been a co-administrator with the Applicants neither does he have anything to do with the administration of the estate of the late Hellen Kampape.
- (3) The claim by the Applicants is statute barred as it refers from the issue of appointment of administratorship that occurred in 2008 which is more than 6 years ago.

In support of the notice to raise preliminary issue in a nutshell, he protested that he is Musambadana Phiri Msanide but Msanide Phiri. He admitted that he was until her death the husband to Cynthia Kampape who died on 18<sup>th</sup> September, 2014 and he is the administrator of the late Cynthia as shown by exhibit M1.

He deposed that his connection to the estate of the late Hellen Kampape is very remote and infact he has nothing to do with the

estate. He stated that the issues raised are contentious and ought to be dealt through summons and statement of claim.

He concluded by deposing that the action is statute barred as six (6) elapsed as at 15<sup>th</sup> December, 2014 and prayed that these proceedings be struck out.

The Applicant filed in an opposing affidavit on 14<sup>th</sup> January, 2014 to the Respondents affidavit. She deposed that Musambandana Phiri Msanide is the one and same person as Msanide who has answered to the court process served therein.

She produced exhibit MK1 where the Defendant signed as Msambadana Phiri Msanide and endorsed his National Registration Card 124599/51/1. She deposed that the proceedings were properly commenced by originating summons.

She stated that the action was not statute barred as Cynthia only died in September, 2014. She has since obtained letters of probate dated 29<sup>th</sup> December, 2014. She urged the court to dismiss the preliminary issues.

The Respondents filed in written submissions. In a nutshell it was submitted that the court had jurisdiction under Order 14 (A) Rule 1 of the White Book 1999 edition to entertain the application to dispose of application on a point of law.

On the issue of mode of commencement of action, it was submitted that the right mode of commencement of proceedings is by Writ of

Summons and Statement of claim. It was stated that while it is trite law that the mode of commencement of any action is generally provided by relevant statute as stated in the case of ***New Plastic Industries v Commissioner of Lands and Attorney General (2001) ZR 51*** it was wrong to resort to order 30 of cap 28.

It was submitted that there are two distinct estates which are combined in this action. It was pointed out that there are many contentious issues which cannot be determined on affidavit evidence.

Further the Respondent it is very difficult for the Respondent to make a proper pleading or meaningful defence. On the issue of the claim being statute barred, it was submitted that the administration of the estate should be done within 1 year and that Administratorship is not perpetual, neither is it for the rest of the life of the Administrator.

It was further submitted that the Administrator of the estate of the late Kampape who was appointed in 2008 ought to have dealt with that administration and wound up the same at least by the year 2009. It was argued that the Applicant should have brought out this action within 6 years.

It was submitted that no action was taken against Cynthia Kampape as administratrix of the estate of Hellen Kampape until she died and as such it should be deemed to have properly administered the said estate. "It follows" they argued "no claim can



now be raised against the Respondent as administrator of another estate”.

It was further submitted that section 3 (2) of the Law Reform (Limitations of Action) Act cap 72 of the Laws of Zambia limits the period of bringing action to 3 years having amended the (six) years Limitation period. I must point out that counsel did not elaborate on this submission.

Counsel then called in aid the case of **Stephen Daka v Railway Workers Union of Zambia Appeal No. 52/2003 (unreported)** where the Supreme Court is reported to have said

*“We are satisfied that the court below was on firm ground in holding that the Appellant had slept on their rights by not instituting proceedings within the statutory period of six years from the time the cause of action arose. We find that the Appellant’s action was statute barred and find no merit in the appeal”.*

It was finally submitted that the preliminary objection was well timed and it must be upheld. Reference was then lastly made to the case of **Kona v Rukom Industries Limited (1973) ZR 194** where it was held that where a Writ has been improperly issued the matter should be dealt with as a preliminary paid.

I am indebted on the researchful industry of both counsel for the parties. The Respondent has challenged the Applicant on the first ground that he is not infact the person named in the originating

summons because the person cited therein is one Musambadana Phiri Msanide whereas his true and correct names are Msanide Phiri.

The Applicant has countered this averment and produced evidence in the affidavit in opposition to affidavit in support of notice to raise preliminary issue filed on 14<sup>th</sup> January, 2015 exhibit "MK1" where the Respondent had indicated his name as **Msambadana Phiri Msanide** and endorsed his National Registration Card number 112499/56/1.

This evidence has not been controverted by the Respondent. The Respondent also does not deny that he is the administrator of the estate of the deceased Cynthia Kampape who died on 18<sup>th</sup> September, 2014.

The said Cynthia was the administrator of the estate of the late Hellen Kampape. In his affidavit dated 7<sup>th</sup> January, 2015 the Respondent has answered to some allegations being made against him and has some knowledge touching on the estate of the late Hellen Kampape.

I am therefore satisfied and hold that the person known, called and passing under the style and name of Msambadana Phiri Msanide is the same person known as Msanide Phiri and he is the correct Respondent cited and served with the proceedings in this matter whose service was accepted.

Since the Respondent prefers to be identified, called and be known as Msanide Phiri I order that the Respondents name be amended to read and reflect that Msanide Phiri as the Respondent. The first preliminary issue accordingly fails.

The second preliminary issue relates to the mode of commencement of the action. It was argued and submitted by the Learned Counsel for the Respondent that the action herein discloses that it relates to two estates of one Hellen Kampape and Cynthia Kampape. That the issues raised are contentious and cannot be adequately dealt with on affidavit evidence.

In the interest of time economy, I will dispose of this by referring to the case of **Phyllis Kapansa Bansa v Osmas Kope** where my brother Mutuna J, had occasion to rule on a mode of commencement of proceedings or actions brought under the Interstate Act<sup>2</sup>.

He held in Ruling number 1 as follows:-

*“The appropriate mode of commencement under interstate Act is Originating summons”*

I respectfully adopt the ruling of my brother as the correct statement of law. The fact that contentious issues are issued which cannot be determined or resolved by conflicting affidavits or affidavit evidence indeed cannot be a reason to circumvent a statutory provision which prescribes the mode of commencement.

The second preliminary issue therefore collapses. The Applicant was on firm ground to launch the proceedings by way of originating summons in a matter premised on the Interstate Act<sup>2</sup>.

The third preliminary issue relates to the limitation of the action, that it is statute barred.

It was submitted that the action arose in 2008 when Hellen Kampape died. It was the Respondents argument that the administrator ought to have concluded administering or distributing the estate within 1 year by the year 2009.

It was submitted that the law provides under section 3 (2) of the Law Reform (Limitation of actions) Act in which period the action is to be brought which according to him was 3 years.

In sum it was submitted the action herein was statute barred. The affidavit evidence of the Applicant is that following the death of Hellen Kampape, Cynthia was appointed administrator of the estate of the deceased Hellen Kampape. It is not clear when she obtained letters of administration.

Following her death on 18<sup>th</sup> September, 2014 the Applicants were appointed co-administrators on 26<sup>th</sup> December, 2014. In the meantime, the Respondent was on 31<sup>st</sup> December, 2014 appointed as administrator of the estate of his late wife Cynthia.

The Applicants claim that the matrimonial property Cynthia and the Respondent were in occupation at the time of Cynthia's death

form part of the estate of the late Hellen which was being administered by Cynthia, and it goes without saying that it was Cynthia who had in her possession all the documents relating to the estate of the late Hellen.

The argument is the Respondent having been appointed administrator of Cynthia must be accountable for all the documents that were in the possession of Cynthia.

At no time did anyone complain about the administration of the estate of Hellen nor was she asked to account.

I therefore accept the position taken by the Respondent that the estate of Hellen was properly administered. The claim against the Respondent came up after he was appointed administrator of the estate of his wife. The insinuation is that part or all of the estate of the late Hellen has been taken over by the administrator of the late Cynthia (the Respondent).

In my view, though Hellen died in 2008, the estate as at 18<sup>th</sup> September, 2014 was being handled by Cynthia. The cause of action then arose after 26<sup>th</sup> December, 2014 when the Respondent was appointed Administrator or after the 30<sup>th</sup> November, 2014 when a letter of demand was written to the Respondent in respect of the estate of the late Hellen.

The position is then that following the death of Hellen in 2008 and until the death of Cynthia on 18<sup>th</sup> September, 2014 there was no dispute or cause of action or perceived cause of action against the

Respondent. Therefore time did not start running from 2008 when Hellen died but after 18<sup>th</sup> September, 2014 or thereafter after the Respondent took over the running of the affairs of the wife as administrator.

It follows that the third preliminary issue fails too.

Taking into account that the dispute relates to estates involving members of the family, I will use my discretion to make no order as to costs.

The parties are informed of their rights of appeal to the Supreme Court.

Dated this *27<sup>th</sup>* ..... day of January, 2015



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**Mwila Chitabo, SC  
Judge**