

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

2015/HP/0804

**IN THE MATTER OF: THE INTESTATE SUCCESSION ACT OF THE  
LAWS OF ZAMBIA**  
**AND IN THE MATTER OF: THE ESTATE OF THE LATE MCPHERSON  
MBULO WHO DIED ON 8<sup>TH</sup> MARCH 2013,  
INTESTATE**

**BETWEEN:**

**CHAMA MBULO**

**AND**

**JULIET MOFYA MBULO**

**JIMMY MTAMIRA (both administrators of the  
Estate of the Late Major Mcpherson Mutupa Mbulo)**



**APPLICANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

*Before the Hon. Mrs. Justice F. M. Chisanga, this .....day of .....2016.*

*For the Applicant: In Person*

*For the Respondents: G. Pindani, Messrs Chonta, Musaila & Pindani Advocates*

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## **JUDGMENT**

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**Cases referred to:**

- 1. Re tankard, Tankard vs Midland Bank Executor and Trustee Co. Ltd*
- 2. Hall vs Hallet ER Vol 29 at page 1096*

**Works referred to:**

- 1. The Law of Real Property by R E Megarry Q.C.*
- 2. H. W. R. Wade Third, Stevens & Sons Limited 1966 page 408.*
- 3. The law of Real Property, R. E. Megarry and H. W. R. Wade, 3<sup>rd</sup> Edition at page 408.*

On the 8th of October, 2015, I ordered the 1st Respondent to render an account of the late Macpherson Mutupa Mbulo's estate. The said account was filed into court on the 7th of December, 2015. According to the account there are two landed properties; Subdivision No. 26 of Farm No.441a Roma, Lusaka and Subdivision No. 57 of Subdivision 'E' of Farm No. 609 Chamba Valley, Lusaka. The deceased had a Toyota Carina Registration No. ABT 6429 and a Toyota Ipsum registration No. ALE 3124 a runner, as well as two guns.

Page four of the account is headed "Roma House Income and Expenditure for the year 2013 to 2014". The income and expenditure from the Roma House is indicated in handwriting for the months of March to December, 2013. Pages 16 to 55 contain receipts, bank deposit slips and hand-written acknowledgments of services. Pages 55 to 66 show the income and expenditure from January to December, 2014, followed by receipts and bank deposit slips from pages 67 to 78. Pages 79 to 84 contain hand-written records of the expenses for the renovations of the properties mentioned therein. Pages 85 to 143 contains a combination of receipts, deposit slips, acknowledgements of services provided and monies receipted by the service providers. Page 144 is the income in terms of rentals collected for January 2015 and the shares given to the beneficiaries. Pages 145 to 147 contain receipts and at page 148 is a hand-written record of monies given to the applicant for his house rent. Pages 149 to 152 contain receipts. Pages 153 to 154 and 173 to 174 indicate the

income and expenditure for February and March, 2015 respectively followed by receipts from pages 155 to 164. Pages 165 to 170 include hand-written acknowledgements of monies paid to Global Property Consultants, the Roma House care-taker and also to the Applicant and Majorie for the months of December, 2014 to March, 2015. Pages 175 to 179 contain receipts and at pages 180 to 182 are handwritten acknowledgements. Pages 183 to 187 contain receipts and at pages 188 to 189 is a financial report of the estate from April 2015. Pages 190 to 205 contain receipts and acknowledgements of works done and money spent. Pages 206 to 213 show the Applicant's monthly share of the estate for the months of April to November, 2015. The Valuation report on Subdivision 26 of Farm No. 441a, Roma by Global Property Consultants appears on pages 214 to 253. Pages 254 to 303 contain receipts for different services rendered for the benefit of the estate and the beneficiaries.

On 7th December, 2015, the Applicant, by affidavit, objected to the said Account. He deposes therein that the respondents availed what they presumed to be an account of the administration showing hand-written figures. That the said account was contradictory to the Respondents' statements in their affidavit of the availed record of account. It is deposed further that the account is false, untrue and a mere speculation. That the Respondent has abused the estate in the manner she distributes the funds to the beneficiaries as she has continued to neglect the applicant by paying him a thousand kwacha only, while her children get K3 000. It is further deposed that this is a proper case

for the Court to invoke Section 29(1) (2) (a), (b) and (c) of the Intestate Succession Act Chapter 59 of the Laws of Zambia.

In reply, the 1st Respondent has deposed that the rentals collected from farm No.441a/26 Roma were used to pay off some estate debts. From July 2014 to January 2015, the Roma house was not occupied and no income was realised. When it was occupied, part of the rentals were used to renovate the house which had become dilapidated. The money from the deceased's account was distributed among the beneficiaries according to percentages in the Intestate Succession Act. The monies realized from the sale of farm produce was used to partly pay for electricity bills and workers' salaries. Her own resources were also used as she is a civil servant.

It is further deposed that the Respondent has not abused the estate in any way and has never neglected the Applicant at all. That the Applicant is an able bodied adult, who was sponsored by the deceased to go to school but failed. In an effort to empower him, he was also sponsored to take a driving course which he completed. When a family meeting was called to discuss the estate, the applicant was offered a motor vehicle, registration number ABT 6729, which is a runner, but he refused to take it, claiming that it was damaged. He has been insulting the 1<sup>st</sup> Respondent over the rentals and properties and has taken the Respondents to Court and to the Administrator General for intervention.

The 1<sup>st</sup> Respondent states that the Applicant has been a big bother even to his late father who wrote a strong letter explaining about the Applicant's

behaviour. That initially, when the 1st Respondent was appointed as Co-Administrator together with the deceased's brother, Ronald Mutupa in 2013, they were strongly advised by the Local Court to prioritise estate debts and the needs of school going children. Family meetings have been called three (3) times in order to sort out the distribution of the estate amicably but the Applicant has never been satisfied and prefers the Court to resolve the issues.

The Applicant has been given monies from the estate for his own use. Initially the sum of K1,500 was being given to him monthly and when debts of the estate, school fees and other requirements for school going children became payable, it was reduced to K1,000. With effect from January 2016, the Applicant has been receiving K1,500 per month. No child receives K3,000 per month. The monies go towards school fees which are mandatory as the properties were acquired so that the children could be educated. That the distribution of the estate would have been concluded by now and the Applicant given his share but he has taken the administrators to the Local Court, Administrator General and Zambia Police Victim Support Unit several times and now the High Court. It is deposed further that the family is not in favour of selling off the properties but that the Applicant has proved difficult as he rejects all proposals of property sharing and makes unreasonable demands to the disadvantage of other beneficiaries. The deponent seeks the court's help to solve the issue amicably and fairly as she is tired of being tossed from one place to another by the Applicant who has no respect for anybody.

The Applicant swore a further affidavit in which he deposed that the account rendered by the Respondents is fake and false as it is hand-written from page 4 to page 15. That a perusal of the said account shows no official receipts and is therefore false and untrue and a mere speculation. That the respondent has failed to give a proper certified account with all the necessary receipts and documents required by law. She has further neglected to give the Applicant and other beneficiaries their share from the rentals collected from the estate. It is for this reason that the Applicant had earlier petitioned the court below to revoke the Respondents as Administrators of the estate and that judgment be given in his favour. The respondent thereafter begged the Applicant to have her restored as administrator for the sake of the school going children and on the premise that she had changed. That after her re-appointment, she continued abusing the estate and stopped giving the Applicant his share. He therefore seeks this Court's indulgence to revoke the appointment of the Respondents as administrators and appoint a person who the court may wish to appoint because the Respondents have failed to run the affairs of the estate. And that if the Respondents wish to sale the estate, the court should not order that the whole of the property be sold, but that the Applicant's share be preserved.

In response, the 1st Respondent has asserted that the account rendered is not fake and false as receipts are attached to the account. That people who were hired to do the maintenance and renovation works and could not issue receipts were asked to sign and indicate their contact details, thus the hand-written acknowledgments. The hand-written work was for her own record keeping.

It is also deposed that the Applicant has always received a share from the rentals collected which was increased in January 2016 from K1,000 to K1,500, the same as the deceased's first born daughter, Majorie Mbulo. The other children receive their shares by paying their school fees and other logistics needed for their education.

It is stated that on 14th October, 2014, the Local Court official from Chelstone Local Court inspected the estate assets and advised that the value of the estate was beyond their powers and advised the representatives to obtain a Grant of Probate from the High Court. The Letters of Administration issued by the said Court were thereafter revoked. That the Applicant and the Respondent have never cordially spoken, the 2nd Respondent being their go between, except for the Applicant sending insulting text messages. The 1st Respondent has never begged the Applicant to restore her as co-administrator; the 1st and 2nd Respondents were appointed by the family as no one is in support of the Applicant administering the estate.

It is further deposed that the Applicant has never lived with the Respondent and never collaborated with his late father regarding the properties acquired and developed by the deceased. Most of the children are still minors pursuing their education and presently three of the flats on the farm have been vacant for two months. The said houses are dilapidated and in need of a lot of repairs to attract tenants; as a consequence the estate income has reduced.

The Respondent has never abused the estate and has never stopped giving the Applicant his share. It is suggested that if the applicant does not wish for the properties to be sold then every beneficiary should receive equal shares in the landed properties.

On their part, the Respondents sought the authority of the Court to dispose of property forming part of the estate, whilst the account was pending. The said application is supported by an affidavit sworn by both the 1st and 2nd Respondents. It is deposed therein that Major Mcpherson Mutupa Mbulo died intestate on 8th March, 2013, leaving property wherever situate. The Respondents were appointed as joint administrators of the estate of the deceased on 15th April, 2015 with the consent of all the beneficiaries of the said estate. An inventory of the assets of the estate of the deceased was compiled. It includes two properties, Subdivision No. 26 of Farm No. 441a Roma, Lusaka and Subdivision No. 57 of Subdivision 'E' of Farm No. 609 Chamba Valley.

Regarding the first property, it is deposed that the property is developed with a four (4) bedroomed house which is on rent. The deceased had subdivided it and sold a subdivision before he died. The buyer of the subdivision has since built on it. The administrators' task is to complete the transaction by paying the surveyor to complete the survey and obtain survey diagrams and eventually change ownership of the subdivision into the purchaser's name.



It is deposed that approval for the subdivision was obtained from Lusaka City Council and the site plan lodged for numbering at Ministry of Lands. Funds need to be raised to pay the surveyor, stamp duty at Ministry of Lands, ground rent, consent application fees, property transfer tax, marking off fees and legal fees for the conveyance of the subdivision.

It is stated that there is a remaining extent of Subdivision No. 26 of Farm No. 441a Roma, with a four bedroomed house. According to the valuation report, the value of this remaining extent is K2, 480, 000.00.

Subdivision No. 57 of Subdivision 'E' of Farm No. 609 Chamba Valley is a farm on which there is a four (4) bedroomed matrimonial house occupied by the 1st Respondent and the young beneficiaries namely; Mwila, a girl (twin) aged 20, Mutale Mbulo, a girl (twin) aged 20, Chola Mbulo, a boy aged 18, Mpande Mbulo, a girl aged 16 and Kangwa Mbulo aged 14 years. It is surrounded by a sizeable piece of bare land. Additionally there are four separate two bedroomed houses on the land which are rented out. Each is valued at K177, 000.00. There is also a separate 3 bedroomed house which is on rent.

It is deposed that the deceased had made a number of subdivisions on Subdivision No. 57 of Subdivision 'E' of Farm No. 609. The purchasers have since built on their respective plots but Certificates of Title have not been processed and issued. Change of use of the property was made from agriculture small holding to multiple residential and the site plan submitted at Lusaka City Council.

It is deposed further that there are two motor vehicles forming part of the estate namely a Toyota Carina registration number ABT 6429, a runner which is parked and a Toyota Ipsum registration number ALE 3124, also a runner.

The deceased also left two guns. It has been stated that the administrators held meetings with the beneficiaries and it was agreed that the guns, the motor vehicles and the remaining extent of Farm No. 441a/26 Roma and Farm No. 609/E/57 excluding the matrimonial house be sold and that the net proceeds after paying all the estates debts and liabilities be shared among the beneficiaries in accordance with the Intestate Succession Act. That the agreement to sale was reached after consulting the beneficiaries namely the children, Majory Mbulo aged 44 years, Chama Mbulo ages 32 years, Mwila Mbulo and Mutale Mbulo (Twins) aged 20 and in second year at the University of Zambia, Chola Mbulo aged 18 and in first year at Mulungushi University, Mphande Mbulo aged 16 schooling at Fatima Girls and Kangwa Mbulo aged 14 also at Fatima Girls, Juliet Mofya Mbulo, the surviving spouse and Ronald Kaluba Mutupa representing the mother of the deceased, the mother of the deceased having died months after the deceased's demise.

It is deposed that Majory Mbulo and the Applicant herein have different mothers while the rest of the childrens' mother is the 1st Respondent. There are constant disagreements among the beneficiaries whenever part of the income is distributed. It would be in the best interest of all the beneficiaries to sell part of the estate excluding the matrimonial home so as to avoid future

animosity. The sale will also be a way of raising adequate funds to pay for processing of separate titles, Property Transfer Tax, legal fees and many other incidental expenses in the estate.

The application is opposed by an affidavit sworn by the Applicant. He has deposed therein that he has two biological children and one dependant, and that if the properties are sold, he will have nowhere to depend on and live with his children. That if the estate is sold, he may lose suitable land to raise his family and it may be difficult to buy such good land within Lusaka taking into account the current economic hardship. The Applicant has deposed that he has been neglected and forsaken by the other members of the family. Selling the properties would therefore affect his siblings and other dependants who are in school. He has countered that if the other beneficiaries wish to sell the estate, his share of the property should not be sold.

At the hearing, both parties relied on their affidavits and learned counsel for the Respondents submitted largely as stated in the relevant affidavits.

I decided to deal with both applications together. I will thus render a judgment, as determination of the applications before me will ultimately decide the main application for removal of the Administrator/Administratrix.

Before I proceed to examine the account so rendered, it is necessary that I outline the duties of an administrator/administratrix of the estate of a deceased person.

Section 19 of the Intestate Succession Act CAP 59 of the Laws of Zambia which I shall refer to in short as the 'Act' enacts the duties of an administrator:

19. (1) The duties and powers of an administrator shall be –

- (a) *to pay the debts and funeral expenses of the deceased and pay estate duty if estate duty is payable*
- (b) *to effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act*
- (c) *when required to do so by the court, either on the application of an interested party or on its own motion -*
  - (i) *to produce on oath in court the full inventory of the estate of the deceased; and*
  - (ii) *to render to the court an account of the administration of the estate*

(2) *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.*

The duties of an administrator of an estate where the testator has died intestate is analogous to that of a personal representative of a testate estate in

some respects. The duty to pay debts and funeral expenses is the same. Administration of an estate demands the settlement of the liabilities of an intestate. The case of **Re tankard, Tankard vs Midland Bank Executor and Trustee Co. Ltd**<sup>1</sup> articulates the said duty.

In that case, the testator appointed the defendants his executors and trustees and gave them power to regain investments in their absolute discretion. The defendants failed to pay an interest-bearing debt within one year from the testator's death. In consequence thereof loss was caused to the estate owing to the fall in value of assets which had to be sold to discharge the debt. The beneficiaries claimed damages from the executors for maladministration.

It was held inter alia that the question whether or not damage has resulted from non-payment of a particular debt is independent of the question of the non-payment involving maladministration. There is no rule of law that executors must pay debts within the year, but, if they fail to do so, the onus is on them to justify the delay. The executor's duty is to pay with due diligence. This duty extends to all debts, whether interest-bearing or not, and is owed to beneficiaries and creditors alike, but it does not arise from a duty to prevent a voidable loss, but from the duty to administer the estate.

In my considered opinion, the due diligence with which an executor is required to pay debts is equally applicable to an administrator of an estate. An administrator owes a duty, both to creditors and the beneficiaries, to clear the debts of an estate. The object of the administration of an estate is to place the

beneficiaries in possession of their interest. That object can only be fully achieved once all the debts are cleared. This intention is clearly expressed in Section 19 of the Act, which places the duty to pay the debts, funeral expenses and estate duty where payable above all other duties.

An example of gross delay in paying the debts of the estate is found in **Hall vs Hallet ER VOL 29 at page 1096.**<sup>2</sup>

In that case, the executor delayed to settle the debts of the estate, among other wrongs. The Court had this to say about his conduct, at page 1098:

*“.....with regard to his conduct in getting in the debts due to Hall’s estate, it appears he did not get them in the manner he did, for the purpose of paying the debts due from the estate, for what he did get he did not apply in that manner. He sold many of the ships before their arrival before he could possibly know the most advantageous method of disposing of them. This could not be justified but upon a very pressing occasion. He was himself a ship’s husband, and therefore conversant in the business; and yet he permitted some of the ships to remain 18, and 20 and 25 months in port unemployed after their arrival. Several of them were under mortgage but yet he continued to pay interest on debts after the pledge was in his hands. This conduct is so gross that if it were recent I should send it to the master to enquire how much the estate was dammified by it; but in this case the length of time which has elapsed has made it impossible....”*

The decision in that case leaves no doubt that a personal representative who neglects to settle debts due from an estate timeously stands in peril of making good the loss that would have been incurred by the estate as a result of gross neglect to settle debts.

In the present case, it appears the administrators have settled some debts. I will revert to this issue later on.

According to Section 19 of the Act supra, the duty is to effect distribution of the estate in accordance with the rights of the persons interested in the estate under the Act. These rights are conferred by Section 5 of the Act. The section stipulates:

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 portions 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.*

(2) *In respect of a minor, the mother, father or guardian shall hold his share of the estate in trust until he ceases to be a minor.*

Part III of the Wills and Administration of Testate Estates Act CAP 60 of the Laws of Zambia (hereinafter referred to as CAP 60) is in the following terms:

*20(1) if upon application by or on behalf of a dependant of the testator, the court is of the opinion that a testator has not made reasonable provision whether during his left time or by his will, for the maintenance of the dependent, and that hardship will thereby be caused, the court may, taking account of all relevant circumstances and subject to such conditions and restrictions as the court may impose, notwithstanding the provisions of the will, order that such reasonable provision as the court thinks fit*



shall be made out of the testator's estate for the maintenance of that dependant.

(2) The provisions for maintenance to be made by an order may include –

(a) payment of a lump sum, whether immediate or deferred or grant of an annuity or a series of payments:

(b) grant of an interest in immovable property for life or any lesser period:

And where the order provides for periodical payments, it shall provide for their termination not later than –

(i) In the case of a husband or wife, his or her remarriage;

(ii) In the case of a child, his attaining the age of eighteen years or upon leaving secondary school or under graduate university, whichever is the later;

(iii) In the case of a child under disability, the cesser of the disability; or

(iv) The death of the dependant.

(3) In determining whether, and in what manner, and as from what date, provision for maintenance ought to be made by an order, the court shall have regard to the nature of the property representing the testator's estate and shall not order any such provision to be

*made as would necessitate a realization that would be unwise having regard to the interests of the testator's dependants and of any person who, apart from the order, would be entitled to that property.*

*21. (1) The court shall, on any application made under this Part, have regard to the testator's reasons for making the dispositions made by his will or for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence as it considers sufficient, including any statement in writing signed by the testator and dated; so however that in estimating the weight, if any, to be attached to any such statement, the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.*

*(2) The court shall also, upon any application made under this part, have regard to any past, present or future capital or income from any source of the dependant to whom the application relates, to the conduct of that dependant in relation to the testator and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to the dependant and to the beneficiaries under the will.*

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

(2) *For the purpose of the exercise by the court of its discretion as to the persons to whom letters of administration are to be granted, a dependant of the testator by whom or on whose behalf an application under this Part is proposed to be made shall be deemed to be a person interested in the estate.*

23. (1) *Where an order is made under this Part, the will shall for all purposes, including the purposes of the enactment relating to death duties, be deemed to have had effect, as from the testator's death, as if it had been executed with such variation as specified in the order for the purposes of giving effect to the provision for maintenance made by it.*

(2) *The court may give such consequential directions as it thinks fit for the purposes of giving effect to an order made under this Part, but no larger part of the estate shall be set aside or appropriated to answer by its income the provision for maintenance made by the order than such part as, at the date of the order, is sufficient to produce by its income the amount of that provision.*

(3) *An office copy of every order made under this Part shall be sent to the principal probate registry for entry and filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the probate of the will of the testator or the letters of administration, as the case may be.*

24. (1) *On an application made on a date after the expiration of the period specified in section twenty-two, the court may make, only as respects property the income of which is at that date applicable for the maintenance of a dependant of the testator.*

(a) *an order for varying a previous order on the ground that any material fact was not disclosed to the court when the order was made, or that any substantial change has taken place in the circumstances of the dependant or a person beneficially interested under the will in the property; or*

(b) *an order for making provision for the maintenance of another dependant of the testator.*

(2) *An application to the court for an order under subsection (1) may be made by or on behalf of a dependant of the testator by the trustee of the property or by or on behalf of a person beneficially interested in it under the will.*

Turning to the instant case, it is common cause that the applicant is a beneficiary of the estate of the deceased. In recognition of that status, he is paid an amount as his entitlement periodically. He is entitled to a share of the 50% of the estate, assigned to the children of the deceased. In distributing the estate, the administrators are to have regard to the child's age or educational needs, or both.

The Inventory filed by the respondents indicates that the estate consists of real property, motor vehicles and guns. Subdivision 26 of Farm No. 441a Roma in Lusaka is a four bedroomed house, on what appears to have been a sizeable piece of land. The deceased, it is indicated, sold subdivisions of the said land, and the purchaser has since developed it. The survey has not yet been done to facilitate change of the subdivision into the purchaser's name. The Administrators have obtained approval for subdivision from Lusaka City Council and numbering of the site plan by Ministry department. The liabilities arising on the uncompleted sale are that the Surveyor will have to be paid, payment of all requisite land and other charges, Consent Fees, Property Transfer Tax as well as Legal Fees for conveyance of the subdivision will have to be made. These liabilities should have been accorded priority even before the beneficiaries were paid their dues.

The other property is Subdivision No. 57 of subdivision 'E' of Farm No. 609 Chamba Valley. Sitting on this subdivision is a four bedroomed matrimonial house occupied by the 1<sup>st</sup> Respondent and her children, Mwila and Mutale

Mbulo, female twins aged 20, Chola Mbulo a boy aged 18, Mphande Mbulo, a girl aged 16 and Kangwa Mbulo, a girl aged 14. Separate two bedroomed houses, four in number are on the same piece of land, are on rent. There is also a separate one three bedroomed house, equally on rent. A number of subdivisions were effected on Farm No. 609/E/57, and sold. Certificates of title were not processed into the names of the purchasers though they have since built on the subdivisions so sold.

The administrators have since engaged a surveyor and procured a site plan which they have submitted to the Lusaka City Council for approval of change and use from farming to multiple residential, to facilitate a subsequent application for subdivision, which will be followed by numbering and survey. The administrators will be required to pay for the survey, duties and other land charges. They will have to pay property transfer tax, consent application fees, marking off fees, as well as legal fees for the conveyance of the subdivision.

Two motor vehicles, namely a Toyota Carina registration No. ABT 6429, and a Toyota Ipsum registration No. ALE 3124 form part of the estate, as well as two guns. The extent of the estate appears to be common cause, as no dispute has been raised by the applicant. His main contention is that the account is false, untrue and speculative. He further asserts that the respondents have failed to give a proper certified account with all the necessary receipts and documents required by law.

I have scrutinized the account rendered. It will be observed that the respondents have indicated that they received rental income for the Roma house for the year 2013 to 2014 in the sum of K66,790.58. I note that in paragraph 15 of the affidavit in opposition to the originating summons, the applicant states that the monthly rentals collected from the rented houses amounts to K17,700.00, out of which the expenses require to be sorted out. Whereas the said affidavit states, in paragraphs 7 and 8 that subdivision No. 26 of Farm No. 441a Roma is on rent, and that 4X2 bedroomed houses and 1X3 bedroomed houses on subdivision No. 57 of subdivision 'E' of Farm No. 609 Chamba Valley are also on rent, page 4 of the bundle of account states that the rental income is from the Roma house alone. It is not indicated how much the monthly rental is. That manner of accounting is certainly wanting. It is not indicated for how long a period the stated rentals are. I must remind the respondents that they have a duty to maintain proper accounts, and necessarily, they are required to back an account with documentary evidence where necessary. I realize that some arrangements are oral, but even then, an indication to that effect should be made to the Court.

Page 7 of the account indicates that rentals in the sum of K5,700 were collected in the month of April. The year is not indicated, neither are the properties from which these rentals were collected. It appears that the houses in question were not big, going by the rentals indicated. It appears these units are those on subdivision 57. This equally applies to page 8. Page 9 includes another tenant, who paid a considerably bigger amount than the rest. Pages

10, 11, 12, 13, 14, 15 all seem to relate to subdivision 57 of subdivision 'E' of Farm No. 609 Chamba Valley. Page 55 of the account equally appears to relate to subdivision No. 57. So do pages 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66. The rentals are for a period of one year, from January to December 2014. Page 144 is a schedule of rentals for the month of February 2015. Rentals for the Roma house are included on that schedule. Page 173 is another schedule indicating rental income for the month of March. Page 188 is a financial report on the Estate of McPherson Mutupa Mbulo from April 2015 to the date the account was lodged in. The income received amounted to K100,000.00 while the expenditure came to K101,797.00.

The estate of the deceased included monies in Investrust Bank and Barclays Bank. These were distributed to the various beneficiaries, and workers' salaries paid. In my considered view, the expenses tabulated on pages 4 and 5 are legitimate. The schedule on page 7 indicates that three beneficiaries were paid their share, while three of the children had education expenses fully met. Page 8 reveals that the applicant and Marjorie were paid a share of the income, while two of the children of the deceased had fees and boarding grocery paid for respectively. Plumbing was done on the main house, and workers paid their salaries. This expenditure too is legitimate. Page 9 shows that the applicant was paid part of the rentals, with two other beneficiaries, while the rest was spent on educational needs for Mwila and Chola. Page 10 indicates that the applicant was paid part of the income while the rest of the income was spent on legal fees, education expenses and workers' salaries. All these are legitimate



expenses. In short, the expenses indicated on pages 12, 13, 14 and 15 are all expenses that properly arise on the distribution of an estate.

This holding is premised on Section 5 of the Act which states that fifty percent of the estate is to devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both. This provision does not confer a discretion in the matter on the administrators. They are to consider the age of a child, as well as his educational needs in effecting distribution of the estate. Thus, educational needs cannot be ignored when distributing the estate. An adult beneficiary who is not in school, cannot, in my considered view get the same amount as one in school or college. The reason for this is obvious. Education is not to be abandoned on the death of the person responsible for educational expenses. Where these expenses can be met by the state, the status quo is to continue. This intention is made clear by the objective of the Intestate Act. It is an Act to inter alia, *'make adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an Intestate.'*

This objective is clearly expressed by the requirement that distribution be effected in proportions that are commensurate with a child's age or educational needs or both.

The deceased employed workers during his lifetime. The estate is thus obliged to pay them for their services. If their services are terminated, they will require to be paid their dues. This is a liability to the estate of the deceased.

Necessarily therefore, their salaries must be met from the income derived from the properties forming part of the estate. Page 18 of the account reveals that one Jack Njobvu was paid his terminal dues on 19<sup>th</sup> December 2013.

The respondents have produced receipts for School fees paid to Fatima Girls Secondary School on behalf of Mpande Mbulo, receipts for legal fees, receipts for plumbing materials, receipts for education expenses paid to Don Gordon School on behalf of Chola Mbulo and receipts for education expenses for Mwila Mbulo at Lusaka Learning Centre. I have seen GRZ receipts for application forms for A levels for Mbulo Mutale, and receipts from Mary Queen of Peace Girls School relating to Mbulo Kangwa.

The respondents have also produced Ministry of Lands receipts for charges relating to property No. F/441a/26/. I have also seen a receipt for settlement of the debt owed by the deceased to the Chamba Valley Multi-purpose Agricultural Society Limited.

The respondents have produced deposit slips for tuition fees paid to the University of Zambia for Mutale Mbulo, repairs to the structures forming part of the estate have been effected, and this is evidenced by the purchase of building materials, and the various acknowledgements signed by workmen. It is a notorious fact that not all workmen issue receipts for work done. It is quite common to see acknowledgements written on plain paper.

I should remark here that the respondent has not raised particular issues with specific receipts. He asserts that the account is false, untrue and speculative

as it is hand-written. He asserts further that the account is false merely because it is hand-written. It cannot be said an account is false merely because it is hand-written. I do agree however that the monthly rentals from the properties should have been stated with more particularity than was done.

The receipts for payments to Fatima Girls School for school fees for Mpande and Kangwa reveal that a sum of K42,500 was paid to that school. The sum of K6,945 was paid to Don Gordon School, while K9,200 was paid to Mary Queen of Peace School. Total sum of K1,030 was paid to St Mary's Secondary School for tuition. K21,474.40 was paid to the University of Zambia. K8,885 was paid to Mulungushi University while K5,587.39 was spent on groceries. The sum of K24,100 was spent on building, hardware and electricals. Messrs Lewis Nathan advocates were paid the sum of K2,500. Miscellaneous expenses amount to K9,036.

The expenses largely relate to school fees. This is a legitimate expense, as the Intestate Succession Act allows for payments commensurate to a child's educational needs. As earlier observed, particular issue is not taken with specific payments. Rather, the plaintiff disputes the account in general terms. Upon considering the account, I am satisfied that the respondents have complied with the Order of the Court. Clearly, income from the estate has been distributed in accordance with the law. Thus, I am not persuaded that I should revoke the appointment of the respondents as joint administrators/administratrix. The Application in that regard is dismissed.

I have considered the arguments for and against the proposed sale of the Remaining Extents of Farm No. 441 a/26 Roma and Farm No. 609/E/57, excluding the matrimonial home.

Devolution of houses upon the demise of an Intestate is prescribed in the Intestate Succession Act. Section 9 of that Act stipulates as follows:

*9(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.*

*(2) Where the estate includes more than one house the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate.*

Section 19(2) of the Intestate Succession Act is the provision pursuant to which an application for authority to sell property that forms part of an estate is made. It stipulates –

*19(2) Where an administrator considers that a sale of any of the property forming part of the estate of a deceased 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.*

It is undisputed in this matter that the applicant, Chama Mbulo, is a child of the deceased. The word '*child*' is defined as a child born in or out of marriage, an adopted child, a child who is conceived but not yet born.

According to the affidavit in support of summons for authority to sale part of the estate, the beneficiaries, are Marjory Mbulo, Chama Mbulo, Mwila Mbulo, Mutale Mbulo, Chola Mbulo, Mpande Mbulo and Kangwa Mbulo. The other beneficiary is Juliet Mofya Mbulo. It is indicted that Ronald Kaluba Mutupa represents the mother of the deceased, who has also passed away.

In terms of section 9 of the Intestate Succession Act, the surviving spouse and children hold the house or houses that devolve on them as the case may be, as tenants in common. Tenants in common hold the land in undivided shares, and each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. See **The law of Real Property, R. E. Megarry and H. W. R. Wade, 3<sup>rd</sup> Edition at page 408.**

Thus, tenancies in common have quite separate interests, the only fact which brings them into co-ownership is that they have shares in a single property which has not yet been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of piece.

Under the Tenancy in Common, the size of each tenant's share is fixed once and for all and is not affected by the death of one of his companions. When a

tenant in common dies, his interest passes under his will or intestacy, for his undivided share is his to dispose of as he wishes: See **The Law of Real Property by R E Megarry Q.C. and H. W. R. Wade Third, Stevens & Sons Limited 1966 page 408.**

It should be kept in view that the primary duty of an administrator is to pay the debts and funeral expenses of the deceased, as well as estate duty where payable. According to the affidavit in support, the estate is liable for completion of several contracts of sale of land entered into by the deceased and several buyers. Property Transfer Tax will have to be paid to the Zambia Revenue Authority, legal fees for those conveyances will have to be paid as well, including expenses incidental to completion of the contracts of sale.

As can be seen from section 9 of the Act supra, the surviving spouse and children are required to select which house or houses will devolve upon them and which ones will form part of the estate. The beneficiaries have not selected the house they prefer. The surviving spouse and her children occupy the matrimonial house, and it is proposed that the said home remains. Therefore, that is the house that will devolve upon the surviving spouse and the children of the deceased. Subdivision No. 26 of Farm No. 441a Roma will form part of the estate of the deceased. This is necessary because the debts of the estate require to be settled, before any distribution to the beneficiaries is made. The beneficiary's interest in the estate is secondary to the interest of the creditors. It is thus untenable to maintain subdivision No. 26 of Farm No. 441a in its

present state, as then settlement of the debts of the estate will be hampered, and the rest of the estate will not be distributed. The applicant objects to the proposed sale because according to him, he will have nowhere to live with his children. That view is misplaced, because the law does not look to engender the comfort of the beneficiary to the detriment of creditors. To the contrary, an administrator is required to settle the debts of an estate with dispatch, so as to avoid escalation of debts through interest and other factors. I take cognizance of the fact that Property Transfer Tax is bound to escalate due to the passage of time, if not settled timeously. In my considered view, this is a proper case in which sale of the proposed property should be authorised to enable settlement of outstanding debts as well as distribution to the beneficiaries.

Similarly, the 4x2 bedroomed houses and the 1x 3 bedroomed houses should be sold, to enable the administrator and administratrix distribute the proceeds. Clearly, there is bad blood between the applicant, and the surviving spouse. Disputes arise whenever distribution of the income of the estate is effected. That situation cannot be allowed to continue indefinitely. It is more appropriate to distribute the proceeds of the houses to the beneficiaries than to allow a situation that would foster animosity, more so that the five units have always been treated as forming part of the estate of the deceased. It will be recalled that section 19 of the Act alludes to an instance where an administrator considers it '*desirable*' to the carrying out of his duties, as a ground on which the authority of the court may be sought, for the sale of any property forming part of the estate. In this case, I am persuaded that it is

desirable that the stated property be sold so that the debts of the estate are settled, and the balance distributed to the beneficiaries.

I therefore grant authority to the administrator and administratrix to dispose of the Remaining Extent of Farm No. 441a/26 Roma, as well as Farm No. 609/E/57 excluding the matrimonial home as prayed. To secure the best price possible, the properties will be advertised. All necessary consents and authorisations must be obtained from the relevant authorities as the case may be. The proceeds of the properties will be utilized to settle all the liabilities of the estate. I equally authorize the sale of the two motor vehicles as well as fire arms. Distribution of the balance will only be effected after all liabilities have been settled. In that connection, I direct the Administrator and Administratrix to file a list of all liabilities and creditors before disposing of any properties in question and in any event, not later than four weeks from date hereof. The costs of the administrator and administratrix will be borne by the estate of the deceased while the applicant will bear his own costs.

Dated the 26<sup>th</sup> day of September 2015

  
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**F. M. CHISANGA**  
**HIGH COURT JUDGE**