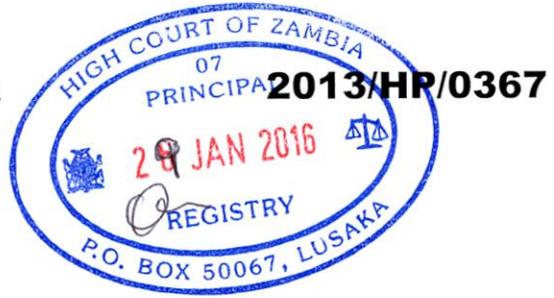


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)**



IN THE MATTER OF: SECTION 3 AND 5 (1)(d) OF THE
INTESTATE SUCCESSION ACT CAP 59
OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTION 19(1)(b) AND (c) OF THE
INTESTATE SUCCESSION ACT CAP 59
OF THE LAWS OF ZAMBIA

AND

IN AN APPLICATION FOR THE ACCOUNT AND DISTRIBUTION OF THE INTESTATE
OF THE LATE ROSEMARY RACHEAL KANYANTA COMPRISING INTER ALIAS LOT
NO. 2751/M LEOPARDS HILL

BETWEEN:

BRIAN MUBANGA KANYANTA

PLAINTIFF

AND

ANDREW MULENGA KANYANTA

DEFENDANT

(In his capacity as Administrator of the
Estate of the Late Rosemary Rachael Kanyanta)

Before Hon. Mrs. Justice M.S. Mulenga this 29th day of January 2016.

For the Plaintiff : Mr. Mando of Messrs M.L. Mukande and Company
For the Defendant : Mr. S.S. Zulu, SC of Messrs Zulu and Company

R U L I N G

This Ruling is on the preliminary issue raised by the Defendant pursuant to Order 18/11/2 Rules of the Supreme Court of England 1999 Edition (RSC) and Order 30 rule 12 High Court Rules Cap 27. The point of law raised is that:

“The Plaintiff is incompetent at law to make an interlocutory application by ordinary summons as an application for an order to revoke letters of administration ought to be made by way of Originating Summons under Order 30 rule 12 High Court Rules.

The Plaintiff should have applied for leave to amend the originating summons in these proceedings to include an order for revocation of letters of administration.”

At the hearing of his preliminary issue, Mr. Zulu SC, counsel for the Defendant stated that the Plaintiff’s application for revocation of letters of administration by way of interlocutory summons is incompetent as Order 30 rule 12 High Court Rules provides that such should be done by originating summons. That the Plaintiff should have applied for leave to amend his originating summons. That the said application is irregular and should be dismissed with costs.

Mr. Mando, the Plaintiff’s counsel advanced five reasons as warranting dismissal of the preliminary issue. Firstly, that Order 30 rule 12 High Court Rules does not provide that applications for removal of an administrator should be by originating summons. Secondly, Order 30 rules 1 to 3 is clear that every application in chambers should be by way of summons. Thirdly, that the record shows that an action was commenced for purported removal of administrator but was discontinued so that all issues should be handled under this cause. Fourthly that commencing by originating summons would mean commencing a fresh action which will amount to multiplicity of actions as stated in the case of Development **Bank of Zambia v Sunvest (1987) ZR 187** and fifthly, that the issues that arise from the application for removal arise from these proceedings and it would thus not be prudent for the Plaintiff to commence another action before another court. That Order 3 rule 2 High Court Rules gives general jurisdiction to this court to make such interlocutory orders for justice to be done.

Mr. Zulu SC replied that to avoid multiplicity of actions, the removal of the administrator should be included in the originating process by amendment. That order 30 rule 12 clearly indicates that the application be made by originating summons. That the reliefs sought under this current cause do not include the removal of administrator.

I have considered the application and the submissions by both parties. The brief history of his case is that the Plaintiff commenced the same by originating summons dated 25th March, 2014 for an order that the Defendant should render an account of the estate of the late Rosemary Racheal Kanyanta comprising lot No. 2751/m Leopards Hill and to distribute the estate as well as other reliefs. The matter was heard and Judgment delivered on 2nd August, 2013. Since that time there have been applications for committal proceedings for failure by the Defendant to file a complete inventory or account and for extension on time within to comply with the order to render an account. The account or inventory was subsequently done and filed and the Defendant is in the process of finalizing the distribution of the estate to the remaining beneficiaries. The Plaintiff then filed an application for revocation of letters of administration on 21st October, 2015 and the Defendant has subsequently raised this preliminary issue. I must add that the Plaintiff had taken out another action under cause No. 2013/HP/1351 for removal of the administrator and the action was discontinued in order that all the claims or reliefs sought should be made under this current cause which was commenced earlier.

Order 30 rule 12 High Court Rules provides as follows:

“(12). The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested under the trust of any deed or instrument in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law of a deceased person or as *cestui que* trust or as claiming by assignment or

otherwise under any such creditor or other person as aforesaid may take out an originating summons for such relief of the nature or kind following, as may be specified in the summons and as the circumstances may require, that is to say, the determination, without an administration by the court of the estate or trust, of any of the following questions or matters so far as the same arise in the course of the administration or performance of such estate or trust:

- (a) any question affecting the rights or interests of the person claiming to be creditor, devise, legatee, next of kin, or heir-at-law, or cestui que trust;**
- (b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others;**
- (c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;**
- (d) the payment into Court of any money in the hands of the executors or administrators or trustees;**
- (e) directing the executors or administrators or trustees to do or obtain from doing any particular act in their character as such executors or administrators or trustees;**
- (f) the approval of any sale, purchase, compromise, or other transaction;**
- (g) the determination of any question arising in the administration of the estate or trust.**

This order is in line with the Defendant's submissions that such an application for removal of an administrator should be made by way of originating summons and not interlocutory summons as sought to be made in this case. The application made by way of interlocutory summons is thus irregular and incompetent.

The Defendant has further argued that for the application to be made under this cause, the Plaintiff must first apply for leave to amend the originating summons herein. However, the application to amend originating summons cannot be competently made at this time when the final Judgment in this matter based on the originating summons was already delivered in August 2013. An amendment to that effect could have been properly sought and made before the final Judgment was delivered.

I further note that there was another action before this court under cause number 2013/HP/1351 seeking for the removal of the Defendant

as administrator and a number of other claims arising from this instant cause and for which a couple of consequent applications including one for committal proceedings were pending. The advocates for both parties then agreed to consider the possibility of streamlining the issues and see how to resolve the issues of concern under this cause. The matter was then discontinued.

The proper course therefore at this stage would be to commence a fresh action seeking the said relief. That will not amount to multiplicity of actions as this current action is practically closed for all intents and purposes apart from issues surrounding the enforcing of the Judgment.

The preliminary issue succeeds and I hereby dismiss the Plaintiff's application for revocation of letters of administration with respect to the Defendant. Considering the conduct of the parties in this matter and the issues raised, I make no order as to costs.

Leave to appeal is granted.

Dated this 29th day of January 2016



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M. S. MULENGA
HIGH COURT JUDGE