

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



2017/HP/F005

IN THE MATTER OF: THE ESTATE OF THE LATE SYDNEY CHILWANA

AND

**IN THE MATTER OF: SECTIONS 4, 5, 9, 42 AND 43 OF THE INTESTATE
SUCCESSION ACT, CHAPTER 59 OF THE LAWS OF
ZAMBIA**

BETWEEN:

NSOKOLA CHILWANA
LINDA CHILWANA
SYDNEY CHILWANA JR
JANETY CHILWANA
FACKSON CHILWANA
SHOBA SYDNEY CHILWANA
MUYANJE CHILWANA
MUSENGE CHILWANA
MUKAMAMBO CHILWANA (*suing through her
Next friend SYNDEY CHILWANA JR*)

1st APPLICANT
2nd APPLICANT
3rd APPLICANT
4th APPLICANT
5th APPLICANT
6th APPLICANT
7th APPLICANT
8th APPLICANT
9th APPLICANT

EMMA CHILWANA (*suing through her next
Friend SYDNEY CHILWANA JR*)

10th APPLICANT

AND

BESTINA NACHAAMA CHILWANA
(*Sued in her personal capacity as surviving spouse*)

RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 21st DAY OF JUNE,
2017**

For the Applicants : In person

For the Respondent : In person

J U D G M E N T

LEGISLATION REFERRED TO:

- 1. The Intestate Succession Act, Chapter 59 of the Laws of Zambia**
- 2. The Rules of the Supreme Court, 1999 edition**

The Applicants on 5th May, 2017 commenced this action by way of Originating Summons claiming the following reliefs;

- i. A declaration that the applicants being biological children of the late Sydney Chilwana are entitled to and are beneficiaries of the estate of the late Sydney Chilwana, of Plot No 124/48, Off Mumbwa Road, Lusaka.*
- ii. An order directing the surviving spouse to reveal the full extent of the estate of the late Sydney Chilwana.*
- iii. A mandatory order directing the Respondent as surviving spouse to provide and furnish all the documents relating to the said estate.*
- iv. An order directing the Respondent that the Applicants be awarded their share from the deceased's estate as biological children of the deceased.*
- v. An order that all the monies for rentals at K1, 850.00 per month starting from 31st July, 2015 up to the date of the injunction order be paid back by the Respondent in the sum of K40, 700.00, and be shared by all the beneficiaries.*
- vi. Any other relief that the court may deem fit*
- vii. costs*

The Originating Summons was amended on 10th May, 2017, and is supported by an affidavit of even date. The said affidavit in support of the Originating Summons states in paragraph 4 that the late Sydney Chilwana died on 7th July, 2015, and was buried on 11th July, 2015, as

shown on the death certificate and burial permit, collectively marked as 'CN1'.

That all the ten applicants were biological children of late Sydney Chilwana, and that the respondent is the applicants step mother. Paragraph 7 of the affidavit states that the respondent's daughter Grace Chilwana is recognized as a beneficiary of the estate of the late Sydney Chilwana.

The claim in paragraph 8 of the affidavit is that all the ten applicants including the respondent's child Grace, are entitled to the estate of the late Sydney Chilwana, being Plot 124/48 off Mumbwa road, Lusaka, and not only Grace as alleged by the respondent. The documents pertaining to the plot in the form of an application for installation of electricity is exhibited as 'CN2'.

It is averred in paragraph 9 of the affidavit that on or about 15th August, 2015 they met as a family, at the matrimonial home, to finalise the funeral as per tradition at which the respondent was present, and it was resolved at that meeting that the 1st, 3rd, and 6th applicants as well as the respondent were to be the administrators of the estate. However the same was not confirmed by the court, as the respondent opposed the resolution.

Further that at that meeting it was agreed that the applicants and the respondent would hold a meeting on 27th September, 2015, so that they could find the best way of sharing the estate. That the respondent when they met offered the applicants a one by two roomed flat from a block of flats, as well as one shop, while the respondent was to get a one by three roomed flat, a one by two roomed flat, and the stand alone three bedroomed house as well as two shops.

It is stated in paragraph 14 of the affidavit that the applicants disagreed with the respondent's offer, as it was not fair, resulting in the respondent asking for more time to think, and stated that she would call the applicants to another meeting. However she did not call another meeting, and on 22nd May, 2016, the applicants followed her up, but she still asked for more time. Thereafter when the applicants followed up with the respondent, she declined to meet them, and ran away to unknown places.

The allegation in paragraph 20 of the affidavit is that the respondent has failed or neglected to contribute towards the school fees of the 9th and 10th applicants, who are both in grade five at Tulibantu Primary school, and the 8th applicant who completed his grade twelve in 2016 at Shifwankula Secondary School, from the money she gets as rentals from the estate.

In paragraph 22 of the affidavit it is prayed that all the property of the late Sydney Chilwana be sold, and proceeds shared in accordance with the provisions of the Intestate Succession Act, Chapter 59 of the Laws of Zambia.

At the hearing of the matter the respondent was not before court, and she did not file an affidavit in opposition to the originating summons.

The 1st applicant in his submissions told the court that he relied on the affidavit filed in support of the application on 10th May, 2017, as well as the supplementary affidavit filed 26th May, 2017. It was stated that the supplementary affidavit shows that the Respondent who is the step mother to the applicants no longer resides in the matrimonial home, having left it on rent to her elder brother who is paying K700.00 a month as rentals. He added that this is surprising as the house has three bedrooms.

As regards the death of their father, the 1st applicant told the court that he died on 7th July, 2015, as shown on the death certificate, and burial permit attached to the affidavit in support of the application. The 1st applicant submitted that as far as they knew their late father had left two properties, the first being a three bedroomed house, and secondly a block of flats comprising two flats which have two rooms each, and one flat which is three roomed. That attached to the flats is a block of three shops. He further stated that the properties are on a joint plot known as Plot No 124/48.

The submission by the 1st applicant was that their late father built the properties as shown on the bundle of documents filed on 1st June, 2017, especially pages 9 and 10 of the said bundles, which are receipts for various building materials that were bought.

With regard to the capacity of his late father to construct the properties, it was stated by the 1st applicant that on page 1 of the bundle of documents is an acceptance letter to sell 13 hectares of the 39 hectares that he owned, as shown on the location map 1528A1. That Daniel Sichela was sold the land at ZMW1, 000.00 per hectare. That on page 2 is another sale agreement between their late father and Mr Wighton Ngulube for the sale of 85 hectares, and that he paid ZMW50, 000.00 with a balance of ZMW25, 000.00 remaining, as evidenced on page 6 of the bundle of documents.

It was also submitted that the late Sydney Chilwana further sold land to Duncan Lungu and Eurid Hangoma his brothers, being 26 hectares at ZMW1000.00 per hectare, as seen on the letter on page 4 of the bundle of documents. That the document on page 5 of the said bundle of documents is a confirmation of the sale agreements with the two buyers, and that ZMW8, 000.00 was paid on 8th April, 2010. The 1st applicant also told the court that his late father had been in formal employment,

having worked for various companies, the last being Lusaka Bakery before he died.

That the late was also a plumber who had obtained several contracts from which he raised income. He submitted that as children they also helped their father. The 1st applicant went on to further submit that their late father had been ill for a number of years, leading to memory loss, and that his memory only returned in 2015, and he had asked for his driver's licence, national registration card and documents for his properties.

He stated that to date the documents for the properties, and the national registration card had not been seen, although the driver's licence was given to him by the respondent. That the late Sydney Chilwana obtained another national registration card on 19th June, 2015, and he died on 7th July, 2015. Thus because the documents for the properties had not been found, the only document that the applicants had was the application that the late had made for installation of the electricity at the premises.

On the status of the properties, the 1st applicant submitted that they are on rent with the total amount of rentals realized at K1, 800.00 every month. That K40, 000.00 is due to be accounted for by the respondent. He also stated that when they had sat down with the respondent to share the properties, she had offered the children one flat which is two roomed, and a shop, while she was to retain the rest of the properties.

It was submitted that the family meeting had agreed that 1st, 3rd and 6th applicants together with the respondent would be the administrators of the estate, but they had not confirmed that appointment by way of obtaining letters of administration.

The 2nd applicant added that there are four school going children, including Musenge and Emma who were born from another mother. That the 3rd applicant has taken up responsibility for them.

The 6th applicant told the court that he had helped with the construction of the flat that it is separate, as he had built it up to window level, and thereafter their late father had completed it. He reiterated the need for the school going children to be assisted.

The 3rd applicant on the other hand took the court through how the property that the late Sydney Chilwana owned was developed, stating that when he started constructing it, their late father was living in a rented property in Kanyama Site and Service, and that he had first constructed the three bedroomed house, and he would go and sell portions of his land in the village, where the 3rd applicant lives. That after the three bedroomed house was constructed, the flats and the shops were put up, and the 3rd and 6th applicants had helped with the construction.

Further that after the late Sydney Chilwana stopped working the 3rd and 6th applicants would help him to survive, and once the flats and shops were completed, they were put on rent, as is the position today. He confirmed that their late father fell ill in 2013, and lost his memory, but that upon regaining his memory in 2015, he had asked for his documents. That only his driver's licence was availed by the respondent, and the 3rd applicant had escorted the late to obtain another national registration card, just about a month before he died. Further that the 3rd applicant had been taking him to the hospital when he was unwell.

He also confirmed that the respondent had offered the applicants one shop and a two roomed flat, as their share of the estate.

I have considered the matter. The main claim in this matter is for a declaration that the applicants being biological children of the late Sydney Chilwana are entitled to benefit from his estate, being plot number 124/48 off Mumbwa Road in Lusaka. The other reliefs sought are for orders directing the respondent as surviving spouse to reveal the full extent of the estate of the late Sydney Chilwana, to furnish all the documents relating to the estate, and that the applicants be awarded their share of the estate as biological children of the late Sydney Chilwana.

This matter has been brought pursuant to the provisions of the Intestate Succession Act, Chapter 59 of the Laws of Zambia, which I will in this matter refer to, as the Act.

Section 2 of that Act provides for its application. It states that;

“2. (1) Except to the extent specifically provided in this Act, this Act shall apply to all persons who are at their death domiciled in Zambia, and shall apply only to a member of a community to which customary law would have applied if this Act had not been passed”.

In terms of succession when a person dies the Act in Section 4 states that;

“4. (1) A person dies intestate under this Act if at the time of his death he has not made a will disposing of his estate.

(2) Any person who dies leaving a will disposing of part of his estate has died intestate under this Act in respect of that part of his estate which is not disposed of in the will”.

There is nothing in the documents on record to suggest that customary law would not have applied to the late Sydney Chilwana, if the Intestate

Succession Act had not been passed. Further there is no evidence on record to the effect that the late Sydney Chilwana left a will, disposing of his estate. Therefore the matter has been properly brought before the court, pursuant to the provisions of the Intestate Succession Act.

However the question is where the applicants have locus standi to commence this action in the absence of an administrator for the estate, as it is on record that no administrators for the estate have been appointed by the court?

Order 85/3 of the Rules of the Supreme Court, 1999 edition provides that;

***“(1) All the executors or administrators of the estate or trustees of the trust, as the case may be, to which an administration action or such an action as is referred to in rule 2 relates must be parties to the action, and where the action is brought by executors, administrators or trustees, any of them who does not consent to being joined as a plaintiff must be made a defendant.*”**

Further Halsbury's Laws of England Volume 17, 4th edition at paragraph 1457 on page 754 states that administration proceedings may be commenced by either the personal representative, the creditors, or the beneficiaries. In my view it is envisioned in this provision that the beneficiaries such as the applicants in this matter, may sue to claim their benefit under an estate or where they claim that the personal representative has wasted the estate, among others.

From the evidence on record it is clear that the applicants are claiming shares in the estate. This action has not been brought against the personal representative or administrator who by law steps into the deceased's shoes, but against the respondent on the basis that she is

administering the estate, and has deprived the beneficiaries of their share in the estate.

Section 19 of the Act stipulates the duties and powers of the administrator. It provides that;

“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 respondent as already seen, is alleged to be administering the estate without having obtained letters of administration, and has deprived the beneficiaries of their shares under the estate. By doing so she has contravened the law, and her acts are punishable as provided in Section 14 of the Act, and this is an avenue that can be explored to remedy the

situation. The applicants claim reliefs against the respondent, which can only be effected by an administrator of the estate, according to the law. It would therefore be prudent to have an administrator appointed for the estate who can lawfully claim from the respondent to produce the documents and avail information as to the extent of the estate, and share the estate to the beneficiaries, after paying off any creditors of the estate. The applicants did not advance any reason why there has been failure to obtain the letters of administration, except to state that the respondent opposed it, and in order that the estate will be administered according to the law, this must be done.

I therefore find that the reliefs sought cannot be enforced against the respondent, as she is not the administrator of the estate, and the claims will fail on that basis. The injunction earlier granted is discharged. Each party shall bear their own costs of the proceedings. Leave to appeal is granted.

DATED THE 21st DAY OF JUNE, 2017.

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**