

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

19 DEC 2017

2017/HPF/0046

IN THE MATTER OF:

SECTION 11 OF THE HIGH COURT ACT,
CAP 27 OF THE LAWS OF ZAMBIA AS
READ TOGETHER WITH RULE 53 OF
THE NON CONTENTIOUS PROBATE
RULES 1987

IN THE ESTATE OF:

WEBBY CHILULU MUTAKWA

AND

RUTH DAKA MUTAKWA

APPLICANT

*Before the Hon. Mrs. Justice N.A. Sharpe-Phiri on the 19th
December 2017*

For the Applicant

Mrs A. Mumba of Messrs CKM Associates

JUDGMENT

Authorities referred to:

1. *The High Court Act, CAP 27 of the Laws of Zambia*
2. *The Non-Contentious Probate Rules 1987 of the Supreme Court of England and Wales*
3. *Chard v Chard (1955) 3 All ER 721*
4. *Halsbury's Laws of England, Volume 17*

This action was commenced the Applicant on the 18th August 2017 by Originating Summons. By this application, the Applicant seeks for an order of presumption of death of her husband Webby Chilulu Mutakwa.

In support of the application, the Applicant filed an affidavit in which she contends that she was lawfully married to Webby Chilulu Mutakwa on the 23rd October 2002 in Kitwe, in the Copperbelt Province of the Republic of Zambia. She states that at the time of their marriage her husband was a police officer by profession and they last cohabited at M.U. Police Training School in Kamfinsa, Kitwe District of the Copperbelt Province of the Republic of Zambia. She also contends that they had 3 children of the family. She states further that during their marriage her husband was unwell and had been undergoing medical treatment. That on the 3rd June 2006 whilst resting with her newly born infant, she heard her husband tell their children that he was going out for a walk. He was at the time not in a condition to go out on his own, so she tried to follow him but he had already left the house and could not trace him. She sought the help of her neighbours to look for him as he did not return home. She also reported his disappearance to the police. The family also placed an advert in the Post Newspaper of 20th May 2014 in a final attempt to determine his whereabouts.

Despite all this effort, he has not been seen by anyone and it has been 11 years since he was seen alive. There is no indication whatsoever that her husband is still alive. She said further that the police authorities have decided to pay his salary to her. However, she was advised to seek an order declaring her husband dead in order to facilitate the release of

his pension. She urged the Court to grant an order for presumption of death.

The matter came up for hearing on the 28th September, 2017. Counsel for the Applicant, Mrs A. Mumba relied on the affidavit in support. She requested that the Applicant be given more time to file a further affidavit by the sister of the said Webby Chilulu Mutakwa. The Court directed that the further affidavit be filed no later than the 29th September 2017. However, at the time of writing this judgment the Court had not had sight of the further affidavit.

I have considered the affidavit evidence of the Applicant and the submissions of counsel. The issue for my determination is whether to grant an Order of presumption of death of one Webby Chilulu Mutakwa.

This application was made pursuant to **Section 11 of the High Court Act, Chapter 27 of the Laws of Zambia** as read together with **The Non-Contentious Probate Rules 1987. Rule 53 of the Non-Contentious Probate Rules 1987** provides that:

“An application for leave to swear the death of a person in whose estate a grant is sought may be made to a registrar, and shall be supported by an affidavit setting out the grounds of the application and containing particulars of any policies of insurance effected on the life of the presumed deceased together

with such further evidence as the registrar may require.”

The above provision refers to an application for leave to swear the death of a person in whose estate a grant is sought. However this is not the application before the Court. The application is for the Court to presume one Webby Chilulu Matakwa as having died.

It is trite law that the High Court has inherent and original jurisdiction to hear and determine any matter subject to law. In the case of **Chard v Chard** the court held as follows:

‘...where no statute lays down an applicable rule, the issue whether a person is, or is not, to be presumed dead is, generally speaking, one of fact and not subject to a presumption of law. To that there is an exception which can be assumed without affecting the present case. By virtue of a long sequence of judicial statements, which either assert or assume such a rule, it appears accepted that there is a convenient presumption of law applicable to certain cases of seven years’ absence where no statute applies. That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows: Where as regards “A B” there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, then if it can be proved first, that there are persons who would be likely to have heard of him over that period, secondly, that those persons have not

heard of him, and thirdly, that all due inquiries have been made appropriate to the circumstances, "A B" will be presumed to have died at some time within that period. (Such a presumption would, of course, be one of law and could not be one of fact, because there can hardly be a logical inference from any particular set of facts...'

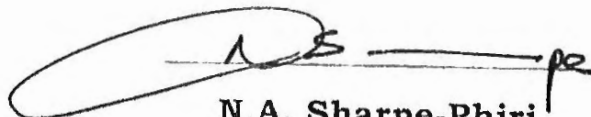
The learned authors of **Halsbury's Laws of England** also state on presumption of death at paragraph 115 of Volume 17 at page 85 state:

'Certain exceptions to this general rule are provided by statute and in addition, where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more and it is proved that there are persons who would be likely to have heard of him over that period, that those persons have not heard of him and that all due inquiries have been made appropriate to the circumstances, there arises a rebuttable presumption of law that he died sometime during that period'

The foregoing authority is clear that where there is no evidence that an individual is alive at sometime during a continuous period of seven years and such persons who are likely to have heard from him and have not heard from him and that all due inquiries have been made, then a presumption of death of such a person arises at law.

In the present case, the Applicant has shown that she last saw her husband alive on 3rd June 2006 and that he has not been seen by any relatives or colleagues since 2006. Further, that she reported his disappearance to the police and several inquiries as to his whereabouts have been made without success. The family also placed an advert in the Post Newspaper in 2014 in a final attempt to trace the said Webby Chilulu Mutakwa but all their efforts have yielded no results. From the foregoing, I am satisfied that there is no evidence that the said Webby Chilulu Mutakwa has been seen alive since 2006. That a period of over 11 years has passed and all due efforts to prove whether the said Webby Chilulu Mutakwa is alive have been made without success. I am therefore of the view that this is a proper case in which a presumption could be made that the said Webby Chilulu Mutakwa died sometime during the period of 2006 to date. I accordingly order that the said Webby Chilulu Mutakwa be and is hereby presumed dead. The Applicant is therefore at liberty to apply for a grant of letters of administration for the estate of the late Webby Chilulu Mutakwa.

Delivered at Lusaka this 19th day of December 2017


N.A. Sharpe-Phiri
High Court Judge