

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



2016/HP/0047

IN THE MATTER OF: **ORDER XXX RULE 11 OF THE RULES
OF THE HIGH COURT CHAPTER 27 OF
THE LAWS OF ZAMBIA**

IN THE MATTER OF: **THE ESTATE OF PARNELL HAJI
KAMWENDO**

AND

IN THE MATTER OF: **AN APPLICATION FOR A GRANT OF
LETTERS OF ADMINISTRATION**

BETWEEN:

JULIET CHENZHA MAFUTA

APPLICANT

AND

MONDAY KAWENDO

RESPONDENT

**BEFORE THE HON. MRS JUSTICE S. M WANJELANI IN CHAMBERS ON
THE 29TH DAY OF MARCH, 2018**

For the Applicant: In person

For the Respondent: In person

JUDGMENT

Legislation referred to:

1. *Will and Administration Taste Estates Act, Cap 60 of the Laws of Zambia*
2. *The Intestate Succession Act, Cap 59 of the Laws of Zambia*
3. *The High Court Rules Cap 27 of the Laws of Zambia*

The Applicant commenced this action pursuant to **Order XXX Rule 11** of the **High Court Act Rules** seeking to be appointed as

Administratrix of the Estate of the **Late Parnell Haji Kamwendo** (hereinafter referred to as the "Deceased"). The Summons were supported by an Affidavit sworn by the Applicant **Juliet Chenzha Mafuta**, in which she avers that the Deceased died intestate on 26th June, 2013 and that he had initially written a Will which he tore up before his death, a copy of which is exhibited and marked "**JCM2**".

The Deponent averred that the Respondent obtained Probate from the High Court on 5th July, 2013 based on a copy of the Will and it was on that basis that she was challenging the Respondent to produce the original Will. She contended that before his death, the Deceased had given her **House No. 13/10, John Howard** as appreciation for the work she had done for him in terms of looking after him as per exhibit "**JCM 4**", a *note* signed by the Deceased.

The Deponent averred that upon the children of the Deceased including the Respondent, discovering that the Deceased had given her the house, they reported her to the Police for forgery but she was cleared after the Police verified the Deceased's thumbprint. She contended that the family then convened a meeting at which it was resolved that the house should be given to her as per the Deceased's wishes, but on 25th November, 2015 the Respondent and 2 of his brothers told the Applicant to vacate the house. She contended that there is no Administrator of the Deceased's Estate because the Respondent's appointment was illegal as it was granted on the basis of a copy of a non-existent Will and she sought to be appointed as Administrator of the Deceased's Estate.

The Respondent filed an Affidavit in Opposition in which he averred that he was the duly appointed Administrator of the Estate of the Deceased, which appointment was registered at the Lusaka Principal Registry. He averred that the property in contention was acquired by the Deceased and after the demise of the Deceased, the family sat to discuss the welfare of the Estate as per the Minutes exhibited as **'MK2'**.

The Deponent contended that when he visited the Deceased, the latter had lamented that he had discovered that the Applicant had misappropriated a sum of K39,000.00. He contended that the Applicant had rushed to change ownership of the subject property on the day that the Deceased died and prior to informing the family members of the death. He added that he then commenced an action to recover the K39,000.00 and vacant possession of the subject house but discontinued the proceedings in order to maintain harmony in the family.

The Deponent further averred that the *note* purporting to give the subject house to the Applicant was not written by the Deceased and that the witnesses to the said *note* were the Applicant's mother and a 17 year old who could have been influenced, and further that the Applicant is in possession of the original Will which she had unlawfully neglected or refused to produce as well as other documents belonging to the Deceased, due to her ill-conceived motives.

He contented further that the young brothers the Applicant claims to be looking after were given a flat each and that was the only form

of income that the Applicant had, as she does not work. He added that even though the Applicant was disputing the Will, she accepted the sewing machine that was given to her in the same Will. In conclusion, the Deponent prayed that the application should be dismissed and that the Applicant be ordered to vacate the subject house.

During the hearing the Applicant restated the contents of her Affidavit and added that the Respondent refused to look after the young children of the Deceased, and that the Deceased proceeded to change the ownership of the house to her shortly before he got ill and passed on. She testified that she was detained for day for allegedly forging the *note* and when the Police called the people from the Council, they confirmed that they had counseled the Deceased about giving away the house and he had explained that he was giving the Applicant the house because she had looked after him and his children, and further that the Deceased's children namely **Sikazwe, Wigan** and **Miriam** confirmed the gift. She added that in 2015, the Respondent and his siblings stated that the house should be sold but she refused as she was looking after the Deceased's children and when she went to concluded the Change of Ownership at the Council, she found that the Respondent had placed a Caveat. She prayed that the Caveat should be removed and that the subject house should be registered in her name.

In cross-examination, she denied that she was trying to sell the property and insisted that the Deceased signed the letter giving her the property using a thumbprint on 24th June, 2013. She stated

that the Deceased had been sick since 2007, but again stated that he got sick the same day he died.

The Applicant contended that she did not know why the Deceased did not tell everyone about the house except those that he called.

PW2 was **Manuel Dulu Kamwendo**, aged 73 years who stated that he was the Deceased's son and confirmed that the Applicant had been brought in to look after the Deceased in 2012. He added that the Deceased told them that the house they were living in was for the Applicant, but the Respondent was not present at that time. He added that when the Deceased died, they sat as a family and requested for the documents which could not be found and it was decided that the Applicant be reported to the Police over the letter that the property was hers, but she was subsequently cleared.

PW2 stated that the family members were upset as the Deceased had given the house to the Applicant and nothing to his children and it was suggested that the house should be sold and the proceeds shared. It was contended that the Applicant had tried to sale the house but could not do so due to the caveat being put on the property by the Respondent, hence she commenced the action herein.

In cross examination, he contended that the Will had stated that the house was a family house but the Deceased had torn up the Will while in hospital.

The Respondent opted not to testify and informed the Court that he would not rely on the Affidavit in Opposition.

I have carefully considered the Affidavit evidence before me and the oral evidence.

It has been contended by both PW1 and PW2 that the Deceased tore his Will, but that the Respondent was granted probate based on the copy of the same Will and that the Estate was distributed according to that copy of the Will.

As regards validity of the Will pursuant to which the Respondent was granted probate, the **Wills and Administration of Testate Act** states in **Section 13 (1)(c)** that:

“A Will or any part of it may be revoked by...

c) burning, tearing or otherwise destroying the Will by the testator or someone in his presence and by his direction with the intention of revoking it.

Thus, it is evident that the Deceased revoked his Will by tearing it up as testified by both PW1 and PW2. From the forgoing facts and the law, it means that the Deceased died intestate as there was no valid Will at the time of his death. Thus the probate obtained by the Respondent based on the copy of the Will which the Deceased tore up is null and void. Consequently, the provisions of the **Intestate Succession Act** are applicable to the Deceased's Estate and consequently, there is no appointed Administrator of the Estate. It is therefore necessary for the family to appoint an Administrator to take stock of the Deceased's Estate and administer it according to the provisions of the **Intestate Succession Act**.

The Applicant seeks this Court to appoint her as the Administrator of the Deceased's Estate and make an appropriate order regarding the house which the Deceased gave her as per exhibit "**JCM 4**".

A perusal of "**JC4**" shows that it was written on 24th June 2013 and according to the Respondent, it was witnessed by the Applicant's mother and 17 year old **Samuel Kamwendo**, who according to the copy of the Will is one of the 2 young people the Applicant contends she is looking after.

It is worth noting that according to the copy of the "*Brought in Dead Certificate*", the Deceased was aged 95 and died 2 days after purportedly giving the Applicant the house. The Applicant has not disputed that the Deceased sold some of his properties as evidenced by Respondent's exhibit '**MK**' to '**MK9**' while she was living with him and according to the Respondent, she was a beneficiary of these proceeds.

In my view, the Deceased was sickly as alluded to by the Respondent and acknowledged by the Applicant and that he had been unwell since 2007. In addition, the witnesses to the *note* giving the Applicant the house were her mother and the 17 year old being looked after by the Applicant, and 2 days after this action the Deceased died. The Applicant contended that the Police had called witnesses from the Council who and confirmed that they had counseled the Deceased and he had explained why he was giving the house to the Applicant. However, these witnesses were not called nor were the witnesses to the *note* itself called to give evidence on behalf of the Applicant. PW2 had testified that he had

heard the Deceased state that the Applicant was to take the house without indicating when this was done and further complained that the children of the Deceased did not benefit anything.

In my view, the *note* which would be tantamount to a will does not qualify as a Will to dispose of the house to the Applicant given the facts of this case and the evidence before me, that at the time of writing the *note* purportedly giving the Applicant the subject house, Deceased was obviously unwell and aged 95 and the Applicant testified that she went with the Deceased to change ownership of the house with the Deceased on the same day that the *note* was written. Further, he was being looked after by the Applicant and the witnesses to the *note* were the Applicant's mother and the young boy being looked after by the Applicant. There is also no indication as to whether the Applicant was present or not at the time the *note* was being written in order for it to comply with the provisions of **sections 6 and 8 of Wills and Administration of Testate Act**, regarding the execution of Wills and gifts to beneficiaries. In addition, the Deceased died two days later and PW2 complained that the Deceased did not give anything to his children, which fact the Applicant did not contest.

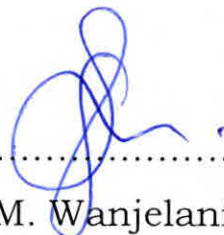
I further noted the demeanor of the Applicant who appeared to argumentative and defensive in responding during cross-examination, while the Respondent was calm and consistent to the extent that he opted not to give any evidence, although he had filed an Affidavit in Opposition. In addition both the Respondent and PW2 stated that the Applicant had attempted to sell the house but

she was prevented due to the caveat that had been placed by the Respondent and based on their demeanor, I am inclined to believe them as they were more credible than the Applicant.

Based on the foregoing facts, I hold the view that the *note* does not validly dispose of subject house to the Applicant and that it consequently forms part of the Estate of the Deceased and subject to the provisions of the **Intestate Succession Act**. I thus decline to grant the reliefs sought by the Applicant and dismiss the application.

It is evident that the Applicant was the Deceased's dependant and therefore she ought to be considered as such in the distribution of the Deceased's Estate. I therefore, further direct that the family appoints an Administrator who should take an inventory of the Deceased's Estate and distribute it in accordance with the provisions of the **Intestate Succession Act**, which was enacted to provide for the distribution of the Estate of an Intestate Deceased to family members. I make no Order as to costs.

Delivered at Lusaka this 29th day of March, 2018



S. M. Wanjelani
HIGH COURT JUDGE