

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



2016/HP/0327

IN THE MATTER OF:

**SECTIONS 29(1)(e) and 29 (2) OF THE INTESTATE
SUCCESSION ACT CHAPTER 59 OF THE LAWS OF
ZAMBIA**

AND

IN THE MATTER OF:

**SECTION 19(1)(b) AND (c) OF THE INTESTATE
SUCCESSION ACT, CHAPTER 59 OF THE LAWS
OF ZAMBIA**

AND

IN THE MATTER OF:

**ORDER 30 RULE 12 OF THE HIGH COURT
RULES, CHAPTER 30 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**AN APPLICATION FOR AN ORDER OF
REVOCAION OF THE LETTERS OF
ADMINISTRATION FOR THE ESTATE OF THE
LATE ROSEMARY RACHAEL 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 Kanyanta)*

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 31st DAY OF
JANUARY, 2020**

For the Plaintiff : Mr M. Mando, Mando & Pasi Advocates

For the Defendant : Mr S. Zulu SC, Zulu & Company

J U D G M E N T

CASES REFERRED TO:

1. ***Charity Oparaocha v Winfrida Murambiwa 2004 ZR 141***
2. ***Lindiwe Kate Chinyanta v Doreen Chiwele Judith Tembo SCZ No 28 of 2007***

LEGISLATION REFERRED TO:

1. ***The Intestate Succession Act, Chapter 59 of the Laws of Zambia***

This matter was commenced on 18th February, 2016 by originating summons in which the plaintiff seeks the following reliefs;

1. *That the letters of administration granted to the defendant be revoked.*
2. *That the ownership of Lot 2751/M be vested back to the estate of the late Rosemary Rachael Kanyanta.*
3. *That the defendant vacates the house on Lot 2751/M and the same be rented for the benefit of the estate.*
4. *That the defendant pays back to the estate, the sum of ZMW894, 638.95, which he has failed to account for.*
5. *That the defendant bears the costs of this matter.*

The claim as set out in the affidavit in support of the originating summons is that the plaintiff is a beneficiary of the estate of the late Rosemary Rachael Kanyanta, which estate is being administered by the defendant. The plaintiff deposes that the defendant has wasted and mismanaged the estate, which prompted the plaintiff to commence an action against the defendant in 2013 for an order to render an account of the estate.

He avers that on 2nd August, 2013, Hon Mrs Justice M.S. Mulenga delivered a judgment which is exhibited as 'BMK1' to the affidavit, ordering the defendant to render a full account of the estate within one month of the judgment. The plaintiff states that following the judgment, he made all efforts to compel the defendant to render an account, and to distribute the estate, but the defendant failed to do so for more than seven (7) months later.

This prompted the plaintiff to commence committal proceedings against the defendant, but before they could be heard, the defendant applied for extension of time within which to render the account, and in the affidavit in support of that application, he undertook to;

- a) subdivide the remaining 11.8 acres into five (5) subdivisions of 2.36 acres each, which he was to distribute to the plaintiff and the other beneficiaries, as shown on the affidavit exhibited as 'BMK2'.

That due to the undertaking made by the defendant to render an account and distribute the estate, Hon Mrs Justice M.S. Mulenga as shown in the ruling exhibited as 'BMK3' to the affidavit, accordingly extended the time, and further directed the defendant to ensure that the remaining extent was subdivided as proposed.

However, contrary to the proposal to subdivide the remaining extent into five (5) plots of 2.36 acres each, and the court's order to distribute the estate as proposed, the defendant instead subdivided the remaining extent into six (6) plots as shown on the letter and the site plan exhibited as 'BMK4' and 'BMK5' to the affidavit.

It is further deposed that in the affidavit deposed to on 21st October, 2015, the defendant rendered an account of the estate, and he further

made an undertaking to subdivide the remaining extent into five (5) pieces. In the affidavit rendering the account, the defendant admitted that he had failed to account for the amount of ZMW894, 638.95, being proceeds of the sale of the land belonging to the estate.

It is averred that on the same 21st October, 2015, the plaintiff filed an application for an order to revoke the letters of administration that were granted to the defendant. However, a preliminary issue was raised to the effect that such an application could only be commenced by originating summons. Exhibited as 'BMK6' to the affidavit, is the notice to raise preliminary issues.

The plaintiff also states that Hon Mrs Justice M.S. Mulenga in a ruling dated 29th January, 2016, which is exhibited as 'BMK7', agreed with the preliminary issue that was raised, stating that the only recourse in removing the defendant as administrator of the estate was to commence a fresh action. The plaintiff deposes that he commenced this action for the revocation of the letters of administration that were granted to the defendant on the following facts;

- a) The defendant has transferred to himself and he owns Lot 2751/M which forms part of the estate herein into his personal name thus depriving the rest of the beneficiaries to the estate. Exhibited as 'BMK8-9' is the certificate of title and the print out from the Ministry of Lands.
- b) The defendant has through the affidavit that he has sworn, failed to account for a total sum of ZMW894, 638.95 belonging to the estate.

- c) The defendant has failed to abide by the court orders directing him to render an account of the estate and to distribute the estate within specified time.
- d) The defendant has failed to distribute the estate in line with the court's directions, and his own undertaking to the court, to subdivide the remaining extent into five (5) pieces.
- e) The defendant has continued to benefit personally from the estate by staying in the house belonging to the estate rent free.
- f) The defendant has failed to distribute the estate for more than eight (8) years since 2007.

The defendant filed an affidavit in opposition on 23rd May, 2019, and a further affidavit in opposition with leave of the court of 21st June, 2019. In the affidavit in opposition, he admits that he is the administrator of the estate of the late Rosemary Rachael Kanyanta. He further deposes that the plaintiff is his younger brother, who on 21st October, 2015, took out summons under cause number 2013/HP/0367 for the revocation of the letters of appointment of as administrator, which were issued to him.

The defendant also avers that Hon Mrs Justice M. S Mulenga by a ruling dated 29th January, 2016, which is exhibited as 'AMK3' to the affidavit dismissed the said application, and granted leave to the plaintiff to appeal. However, the plaintiff did not appeal that ruling. In the further affidavit in opposition, he deposes in paragraph 6 that he caused Lot No 2751/M Leopards Hill Road Lusaka which forms part of the estate, to be valued, and the valuation report put the value at ZMW950, 000.00.

The defendant avers that there are six (6) beneficiaries under the estate, and that when he sold subdivisions A, B and C of the property, he paid

the plaintiff the sum of ZMW158, 000.00 as his share of the estate, who acknowledged the same, as shown on exhibit 'AMK2', indicating that he had no further claim to the property. However, the plaintiff sued the defendant under cause number 2013/HP/0367, for an order that he renders an account of the proceeds of the sale of the estate, and to pay the plaintiff what was due under the estate.

The plaintiff in that cause also prayed for an order that the defendant vacates Lot No 2751/M, and he pays mense profits, and distributes the same to the beneficiaries, as well as the remaining estate according to the law, and damages for breach of duty. It is deposed that Hon Mrs Justice M.S. Mulenga by a ruling dated 30th July, 2015, ordered that the defendant renders a full account of the estate within thirty (30) days of that date, and ensures that the remaining extent of the property be subdivided as proposed.

It is the defendant's averment that he was unable to render an account within thirty (30) days, but he was granted leave to the extend the time for doing so, as shown on the affidavit exhibited as 'AMK4' to the affidavit. He also deposes that under this cause, 2016/HP/0327, Hon Lady Justice F.M. Lengalenga in the ruling which was delivered on 31st August, 2018, and which is exhibited as 'AMK5', found that most of the reliefs sought in this cause were addressed in the earlier action, and are therefore res judicata.

With regard to the defendant having been ordered to subdivide the property and transfer the subdivisions to the beneficiaries, and sell the remaining extent on which there is the dwelling house, the defendant avers that he has been unable to do so as the plaintiff registered a caveat

on the property on 18th September, 2013, which caveat is exhibited as 'AMK6' to the affidavit.

At the hearing, Counsel for the plaintiff stated that they had applied for an order that the letters of administration that were granted to the defendant be revoked, and they relied on the amended affidavit that was filed on 24th September, 2019. He added that Section 29 (1) (e) and (2) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia grants the court power to revoke letters of administration where;

1. A person who is granted letters of administration fails to render an account or renders an untrue account.

Counsel stated that where the court is satisfied,

- a) It may suspend or remove an administrator.
- b) Provide a successor to the administrator who shall cease to hold office.

He further submitted that the court may also order that the property vest in the successor. Counsel referred to the case of **Charity Oparaocha v Winfrida Murambiwa** ⁽¹⁾ where it was held that the court has power under Section 29 of the Intestate Succession Act to remove an administrator. Further reliance was placed on the case of **Lindiwe Kate Chinyanta v Doreen Chiwele Judith Tembo** ⁽²⁾ which held that the administrator has legal duties, and can be called upon to account.

Counsel's submission was that the defendant has failed in his duties to administer the estate on the following grounds;

1. That he has taken too long to complete the process of administering the estate. He was granted letters of administration on 9th October,

2007, and at the time of the hearing in 2019, the administration of the estate had not been completed. That while there had been ongoing litigation over the estate, this was not from 2007, when the letters of administration were granted to the defendant.

2. The defendant has failed to account for the estate or the assets belonging to the estate, as shown on exhibit 'BMK2' to the defendant's affidavit, which was filed on 24th September, 2019. That paragraph 10 of that affidavit shows how the defendant handled the proceeds of the sale of the estate, and he states that he has not accounted for ZMW1, 107,000.00 and subtracts ZMW204, 361.00 from that amount leaving an amount of ZMW884, 638.95 which is not accounted for, and the defendant admits to having failed to account for that amount.

Counsel submitted that in paragraph 11 of his affidavit, the defendant proposes to atone for the loss of funds by creating five (5) sub divisions of 2.36 acres each, to be transferred to four (4) beneficiaries, except himself. That the Judge accordingly directed that he should administer the estate as proposed, and that the defendant should ensure that the remaining extent is subdivided as proposed.

However, when the defendant subdivided the property, which subdivision appears as 'BMK5' to the plaintiff's affidavit, and the said subdivisions are contrary to the undertaking, and the order of the court, as there is an extra subdivision measuring 1.71 acres, while the rest of the subdivisions have been reduced to 1.88 acres each.

Counsel submitted that this was a sign of dishonesty on the part of the defendant, and that unless he is removed as administrator, the estate

will not be distributed to the benefit of the beneficiaries. It was also submitted that the plaintiff had shown in paragraph 6 of the affidavit in support of the originating summons that the defendant sold three (3) subdivisions without any evidence that he applied to the court for authority to sell the same, pursuant to Section 19 (2) of the Intestate Succession Act.

Therefore, this is a proper case where the Court should invoke the provisions of Section 29 (1) and (2) of the Intestate Succession Act to revoke the letters of administration, and allow the plaintiff to complete the administration, as there is only one asset of the estate that remains to be distributed.

In response, State Counsel on behalf of the defendant stated that with regard to the submission that the defendant had taken too long to complete the administration of the estate, the respondent was ordered to comply with the directives that were given by Hon Mrs Justice M.S. Mulenga in 2013. The defendant had however not done so as the plaintiff registered a caveat on the property on 18th September, 2013.

It was further State Counsel's submission that with the caveat in place, the defendant could not obtain planning permission for the approved subdivisions. His view was that the plaintiff had come to court with dirty hands, and he is obstructing the order of the court.

As regards the assertion that the defendant has failed to account for the estate, State Counsel agreed that the defendant has failed to account, and his submission was that he was ordered to do so in the earlier action. Further, that the defendant made proposals in a bid to account,

which the court accepted, and directed him to comply with the said proposals.

It was stated that the defendant in the further affidavit in opposition had attached the proposed subdivisions, which showed that it was not possible to subdivide the land into 2.36 acres each for the other beneficiaries, as the Surveyor who went on the ground discovered that there is a road reserve on the property.

Thus, the plots were reduced to 1.88 acres each, and the proposed new subdivision was presented to the court, and it was accepted. State Counsel submitted that the plaintiff is asking this court to revoke the letters of administration based on issues that were before another court which made an order. Further, that he is asking this court to ignore the order that the defendant complies with the proposals.

It was State Counsel's view that the plaintiff should have appealed against the order accepting the proposals, and that if the letters of administration are revoked on the basis that the defendant did not comply, such would fly in the teeth of the order for leave to appeal. State Counsel in conclusion stated that the court gave directives with regard to how the proceeds of sale should be accounted for.

In reply, Counsel for the plaintiff stated that it not being physically possible to subdivide the property, due to the road reserve, was not the issue. He stated that the issue was the creation of an additional subdivision, which was not proposed to the court, and was therefore outside the scope of the account, and the order of the court.

It was further Counsel's submission that the defendant undertook to create four (4) subdivisions and distribute them to the beneficiaries, and

to sell the dwelling house and distribute the proceeds thereof, to atone for the missing money, which the defendant admitted having used.

Thus, the question was, where would the fifth subdivision would go? Counsel also stated that the caveat was registered to prevent the registration of the sub division which was outside the scope of the account, and the order of the court. It was further Counsel's submission that had the caveat not been registered, the land would have gone by now. Therefore, the caveat was registered to protect the estate.

On the requirement for the defendant to have obtained authority of the court to sell the sub divisions, Counsel stated that no judgment of the court could atone for actions that were done outside the provisions of the law, as they were illegal. It was also submitted that the defendant's admission of having wasted over ZMW880, 000.00, was sufficient to revoke the letters of administration, and that proposals to make good the wastage did not absolve the defendant. Counsel reiterated that the order to revoke the letters of administration that were granted to the defendant be granted.

I have considered the matter and the submissions that were filed. In this matter, the plaintiff commenced this action seeking the following reliefs;

- 1. That the letters of administration granted to the defendant be revoked.*
- 2. That the ownership of Lot 2751/M be vested back to the estate of the late Rosemary Rachael Kanyanta.*
- 3. That the defendant vacates the house on Lot 2751/M and the same be rented for the benefit of the estate.*

4. *That the defendant pays back to the estate the sum of ZMW894, 638.95 which he has failed to account for.*
5. *That the defendant bears the costs of this matter.*

The defendant on 11th March, 2016 filed summons to dismiss the matter for being a multiplicity of actions. In a ruling dated 31st August, 2018, Hon Lady Justice F.M. Lengalenga struck out the 2nd, 3rd and 4th reliefs on the ground that they amounted to a multiplicity of actions, and were res judicata, having been determined by Hon Mrs Justice M.S. Mulenga under cause number 2013/HP/0367. The plaintiff was directed to amend the originating summons to remove those claims.

Thus the issue before me is whether the letters of administration that were granted to the defendant should be revoked, and whether he should bear the costs of the proceedings. In terms of revocation of the letters of administration, Section 19 of the Intestate Succession Act, Chapter 59 of the Law of Zambia, provides for the duties of the administrator of an estate as follows;

“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-***

(d) to produce on oath in court the full inventory of the estate of the deceased; and

(e) 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 defendant was granted letters of administration on 9th October, 2007, as seen from the letters of administration, exhibited as ‘AMK1’ to the further affidavit in opposition to the originating summons dated 21st June, 2019. While the Intestate Succession Act, does not provide a time limit for when an estate should be administered, other statutes like the Administration of Estates Act, 1925 of England in Section 44 provides that an estate should be distributed within one year.

Therefore, as the defendant was granted letters of administration in 2007, the fact that the estate has not been distributed to date, is a long period of time. The plaintiff conceded that there have been legal proceedings over the estate, but his position was that this was only in 2013, when he sued the defendant under cause number 2013/HP/0327. That prior to that, there was sufficient period for the defendant to have distributed the estate.

Under cause number 2013/HP/0327, judgment was delivered on 2nd August, 2013. At page J9 of that judgment, Hon Lady Justice M.S.

Mulenga ordered the defendant to produce a full inventory of the estate, and render an account of the administration, which would include the proceeds of sale of sub divisions A, B, and C of Lot 2751/M within one (1) month of that date. The defendant was further directed to distribute the remaining estate in accordance with the law.

As seen from exhibit 'AMK4' to the further affidavit in opposition dated 21st June, 2019, the defendant applied for an order to extend time within which to render an account, and exhibited as 'AMK3' to that affidavit is the ruling dated 31st July, 2015, extending the time to render the account to within thirty (30) days of that date, and that in doing so, the defendant would take into account the expenses that he incurred when completing the dwelling house that forms part of the estate. He was further directed to ensure that the remaining extent was sub divided as proposed.

Exhibited as 'AMK7' to the affidavit in opposition to the originating summons, and for an order to dismiss the action for multiplicity of actions, is a letter dated 25th August, 2015, in which a Surveyor, Sailas Tembo, was instructed by the defendant's advocates, Zulu & Company to survey and produce diagrams relating to five (5) subdivisions of 2.36 acres each, including the subdivision on which the dwelling house is constructed.

Exhibit 'AMK9' to that affidavit is the proposed subdivision, which apart from the four (4) subdivisions of 1.88 acres each, and the remaining extent which houses the dwelling house, is a subdivision of 1.71 acres. The defendant deposed that he has been unable to complete the process of subdivision so that four (4) subdivisions measuring 1.88 acres each is

distributed to the other beneficiaries, as the plaintiff registered a caveat on the property on 18th September, 2013.

In response to that allegation, the plaintiff stated that he registered the caveat to protect the estate, as the defendant subdivided the land contrary to the proposal and the order of the court, and he had transferred ownership of the property into his name. The plaintiff stated that the defendant has admitted to not accounting for ZMW884, 638.95, which were the proceeds of sale of subdivisions A, B and C of the property.

That while the issue of the road reserve is there, why did the defendant create an additional subdivision of 1.71 acres, when he had failed to account for the proceeds of the sale? Further, the question is to who, will that subdivision go?

Section 29 of the Intestate Succession Act provides that;

“29. (1) Letters of administration may be revoked or annulled for any of the following reasons-

(a) that the proceedings to obtain them were defective in substance;

(b) that the grant was obtained fraudulently;

(c) that the grant was obtained by means of an untrue statement of a fact essential in point of law to justify the grant, though that statement was made in ignorance or inadvertently;

(d) that the grant has become of no use and inoperative;

(e) that the person to whom the grant was made has, without reasonable cause failed, to furnish an account of his administration after having been lawfully called upon to do so, or has prepared an account which is untrue in a material particular.

(2) Where the court is satisfied that proper administration of the estate and the interests of the persons beneficially entitled to them so require, it may-

(a) suspend or remove an administrator;

(b) provide for the succession of another person to the office of that administrator who shall cease to hold office; and

(c) provide for the vesting in the successor of any property belonging to the estate”.

In this case, it is not in contention that the defendant was ordered to render an account, and to distribute the estate as proposed. He alleges that he has not distributed the estate as proposed, as the plaintiff registered a caveat on the property. The plaintiff on the other hand contends that he registered the caveat to protect the estate, and further, he has issue with the subdivision of 1.71 acres being created, apart from the four (4) subdivisions and the remaining extent, as the defendant admitted having benefited from the sale of subdivisions A, B and C and not accounting for the same. The plaintiff also contends that the account of estate that was rendered is not true.

In the case of ***Charity Oparaocha v Winfrida Murambiwa*** ⁽¹⁾ it was stated that;

“The Court has power under Section 29(2) of the Act to remove an administrator where it is satisfied that proper distribution of the estate and the interests of persons beneficially entitled to them so require. It is on record that the Appellant, in her administration of the estate of the deceased, did not take into account the interests of the respondent and her children”.

In the case of ***Lindiwe Kate Chinyanta v Doreen Chiwele Judith Tembo*** ⁽²⁾ it was held that;

“(3) There is sufficient protection for beneficiaries as well as Administrators under the law. An administrator has legal duties to the beneficiaries and other interested parties including creditors; and Administrator may be called upon by a Court to account for the administration of the estate or for default.

(4) The duty of the Administrator is not to inherit the estate, but to collect the deceased’s assets, distribute them to the beneficiaries and render an account”.

The directive of the court in cause number 2013/HP/0327 was for the defendant as administrator of the estate, to subdivide the land into four (4) subdivisions for the benefit of the other four (4) beneficiaries who include the plaintiff, and to sell the remaining extent on which the dwelling house is constructed. In the proposed subdivision, the defendant did not comply with the directive of the court, as he created an extra subdivision with no explanation as to whom it will go.

From this, it is clear that the defendant has failed to take into account the interests of the other beneficiaries in distributing the estate as

directed, as he has created an extra subdivision, with no explanation as to whom it will go, when he is on record as having failed to account for K894, 638.95.

As rightly submitted by the plaintiff, the position of administrator of an estate is one of trust, and by failing to subdivide the property as proposed in the account, is ground for removal of an administrator, as it flies in the teeth of the duty of trust.

The fact that the plaintiff placed a caveat on the property is immaterial, as this was done to protect the estate, as the defendant created an extra subdivision on the land that he was directed to distribute to the other beneficiaries, and he was to be excluded as a beneficiary of those subdivisions, as he had already benefited from the sale of the earlier subdivisions.

The plaintiff therefore succeeds, and I accordingly revoke the letters of administration that were granted to the defendant, and appoint the plaintiff as administrator of the estate, with the following directives;

1. That he subdivides the remaining land into five (5) subdivisions, which shall comprise four (4) subdivisions to be distributed to the remaining four (4) beneficiaries, who shall not include the defendant, and the portion that houses the dwelling house. The defendant having had title to the property changed into his name shall do all acts necessary to ensure the transfer of the subdivisions in the other four (4) beneficiaries names.
2. That the remaining extent of the land which houses the dwelling house shall be sold, and the proceeds distributed to the beneficiaries after taking into account the money that the

defendant has failed to account for, as well as that which was given to the plaintiff.

3. The said acts are to be done within one (1) year from today.

The defendant shall bear the costs of the proceedings, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 31st DAY OF JANUARY, 2020

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE