

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

2016/HP/0809

Between:

NAWA SIPALO

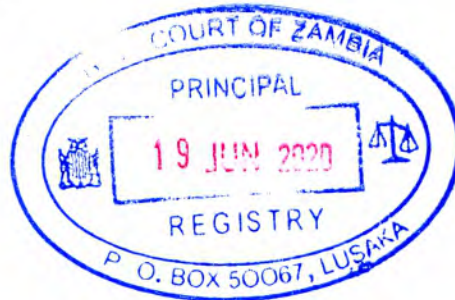
PATRICIAL SIPALO

NAMUKOLO SIPALO

LISHOMWA SIPALO

AND

MUNUKAYUMBWA SIPALO (JUNIOR)



1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

4TH APPLICANT

RESPONDENT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 19TH JUNE, 2020 - IN CHAMBERS

For the Appellant : *Mr. M. Mwack – Messrs. Mwack Associates*
For the 1st Respondent : *In Person*
For the 2nd Respondent : *Mr. Mambwe – Messrs. Mambwe, Siwila & Lisimba Advocates*

JUDGMENT

CASES REFERRED TO:

1. *Mudenda v Mudenda* (2006) ZR 57
2. *Miriam Mbolela v Adam Bota Judgment No. 26 of 2017*

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *Section 19 of the Intestate Succession Act, Chapter 59 of the Laws of Zambia*
2. *Intestate Succession Act, Chapter 59 of the Laws of Zambia. Section 19, Part II of the Act provides for distribution of the estate. Sections 5 and 6*
3. *Halsbury's Laws of England, Fourth Edition, paragraph 1369*
4. *(Williams & Mortimer Executors, Administrators and Probate paragraph) 1119, 1551 & 1553*

This is a matter commenced by way of originating summons and filed into court on 25th April, 2016, in which the applicants seek the following:

1. *An order that the respondent produces on oath an inventory of the estate of the late Munukayumbwa Sipalo (Senior);*
2. *An order that the respondent renders account from the sale of land on Farm No. 675, Lusaka West, cows, vehicles, tractors, household goods and other properties;*
3. *An order that the deed of transfer signed by the respondent on Farm No. 675/W be nullified as it has no blessings of other beneficiaries;*
4. *Any other relief the court deem fit;*
5. *Costs.*

In the affidavit in support of the originating summons deposed to by Nawa Sipalo and filed into court on 25th April, 2016, it was averred that the father, Munukayumbwa Sipalo (Senior) died intestate on 20th November, 1991. He left behind properties including a farm in Lusaka West, known as Farm No. 675, Lusaka, cows, vehicles, tractors, and household goods. The respondent has subdivided the said Farm No. 675, Lusaka and he is selling land to other people and other properties without the consent and blessing of the other beneficiaries. The respondent has given out Farm No. 675/W through a deed of transfer to Lishomwa Mubita Lishomwa without the consent or blessing of the other beneficiaries. The land

register was exhibited as “NS1”. It was averred that the respondent has no authority to give land to anyone or sell without the consent of the other beneficiaries.

Subsequently, a consent judgment was entered on 29th June, 2016, where it was adjudged as follows:

1. *That the applicant is appointed the administrator of the estate of the estate of the late Munukayumbwa Sipalo Senior, replacing the respondent;*
2. *That the respondent will account for all the monies received from the sale of the land on Farm No. 675, Lusaka West, Lusaka;*
3. *That the deed of transfer signed by the respondent on Farm No. 675/W, Lusaka West be cancelled as the same did not have the blessings of the other beneficiaries and that the land should be subdivided equally to all the beneficiaries and that the registrar of lands and deeds should register the said piece of land in the name of the new administrator, Nawa Sipalo; and*
4. *Each party to bear its own costs.*

Lishomwa Mubita Lishomwa, applied and was added as 2nd defendant. This was followed by an application to stay execution of the consent order concerning subdivision W to Farm No. 675, Lusaka pending setting aside the consent order.

Subsequent to this there was application by the 1st, 2nd and 3rd applicants to be removed from the proceedings as they were not interested in Subdivision W of Farm No. 675, Lusaka, and had no intentions of pursuing the matter further.

When the matter came on 14th June, 2019, Counsel for the respondent proposed that the matter be deemed as having been commenced by way of writ of summons as there is now a dispute as to the title. I granted the application and gave orders for directions and a date for commencement of trial.

The 2nd defendant filed a defence in which he averred that he legally obtained title to Subdivision W of Farm No. 675, "Kafue" in Lusaka through the instrumentality of transfer by Munukayumbwa Sipalo, the 1st defendant acting as a legitimate sole administrator of his father, the late Munukayumbwa Sipalo's estate. That the 1st defendant in the same capacity distributed 50 hectares of Farm No. 675 Kafue, being Subdivision CC of Farm No. 675 Kafue, to the plaintiff as beneficiary under the said estate. The plaintiff is one of the 9 children of the late Munukayumbwa Sipalo to whom 50 hectares of the Farm was distributed, besides the widow who got 130.2 hectares.

It was further averred that prior to his demise, the late Munukayumbwa Sipalo who was the first cousin to the 2nd defendant was greatly assisted by the 2nd defendant to acquire the

said Farm 675, Kafue. The 2nd defendant accepts that this close relationship between the late Munukayumbwa Sipalo and himself may have influenced the 1st defendant in his decision to grant him a subdivision of the property gratis.

Further that the 2nd defendant at no time influenced the grant of the property to him and takes great exception at being dispossessed of the property in the manner the plaintiff is attempting. The 2nd defendant having been given his inheritance by the 1st defendant who acted in his legal capacity as administrator, the plaintiff is not entitled to any portion of Subdivision W of Farm No. 695, Kafue, Lusaka.

The matter came up for trial on 29th September, 2019. **PW1** was **Mss. Lishomwa Sipalo**, the applicant herein. She testified that she was one of the daughters to the late Mr. Munukayumbwa Sipalo Senior. The father left a farm in Lusaka West. At the time of the father's demise there were 13 beneficiaries, but now they are nine. She mentioned the names of the beneficiaries as Steven, Zita, Munukayumbwa Junior, Sebusha, Nawa, Namukolo, Patricia, the widow, their mother and herself.

She conducted a search at Ministry of Lands and discovered that her brother, the 1st defendant had given their uncle land as a gift. She found a property transfer tax receipt and a deed of transfer bearing the names of the 1st defendant and the 2nd defendant. The

deed of transfer was exhibited at page 16 and the property transfer receipt was on page 15 of the 2nd defendant's bundle of documents.

When it was discovered that land had been given to the 2nd defendant, the rest of the beneficiaries sat with the 1st defendant to find out what compelled him to give land to the 2nd defendant. After realizing that the 1st defendant could not give a reasonable explanation, they decided to come to court. This was so because there was no agreement among the beneficiaries that the land should be given to their uncle. It was the request of the beneficiaries that the Certificate of Title issued to the uncle should be cancelled and the title reverts to the rightful beneficiaries, who are the children of the deceased.

It was further her testimony that even if the 2nd defendant says he did not influence the 1st defendant, there could have been an element of influence.

In cross examination by the 1st defendant she reiterated that there was no agreement to give the 2nd defendant any portion of land.

In further cross examination by the 2nd defendant's Counsel, she admitted that the other beneficiaries with whom she sued the defendants had abandoned the claim. She added that the reason the other beneficiaries abandoned the claim was because the 2nd defendant told them he was no longer interested in the land.

She confirmed that at the time of the transfer of land the 1st defendant was the administrator of the estate of the deceased and that the appointment was by the court. She also confirmed that the 1st defendant distributed the land to all and only left a portion of the same land. That was the portion which he transferred to the 2nd defendant. When shown a letter on page 12 of the 2nd defendant's bundle of documents to confirm that the beneficiaries freely agreed to have the 1st defendant's distribution of the land, she denied ever seeing that letter before. It was the first time she was seeing that letter. The said letter was signed by Nawa, Steven and Zita. She further confirmed that they all got 50 hectares each of the land and the widow got 130.2 hectares.

The 1st defendant called Steven Sipalo as **DW1**, the brother to the plaintiff and the 1st defendant. His testimony was that after his father's demise, the 2nd defendant was the one who brought the existence of the Farm as an asset to their attention. They were living in poverty and did not know that they had an asset. The 2nd defendant brought them together, even from the village. After the demise of the father, the father's brother was chosen as administrator. It was his testimony that the Certificate of Title was not in his father's hands. The administrator used the Certificate of Title as collateral for a loan from Union Bank. The Bank did not want to give back the title until the loan was paid. The 2nd defendant intervened, but the administrator, their uncle Ngenda did nothing. It took long before they could get the Certificate of Title.

After obtaining the Certificate of Title, they chose the 1st defendant as the administrator. There were arrears that had to be paid at Ministry of Lands, for which the 2nd defendant advised that they could sell a portion of the Farm and use the proceeds to settle the arrears. The 2nd defendant played a major role and everything worked and every child of the deceased had a Certificate of Title. Afterwards a meeting was called for where it was agreed that the 2nd defendant would be appreciated by giving him a farm because he has been caring. It was his testimony that he was told by the 2nd defendant that he was being taken to court. He felt bad because, according to him, they would not have gotten the farm had it not been for the 2nd defendant's intervention.

It was his testimony that he did not take part in the suit against the 2nd defendant. He did not know anything about it. He further testified that when the land was being distributed, everyone was there.

In cross examination by Counsel for the 2nd defendant, he told the court that the 2nd defendant was present when a decision was made to give him land. He did not ask for the land. That it was not true that the 1st defendant was influenced by the 2nd defendant. The day the decision was made to give the 2nd defendant the piece of land was the same day the beneficiaries signed the document on pages 12 to 13 of the 2nd defendant's bundle of documents.

In further cross examination by Mr. Mutemwa, Counsel for the plaintiff, **DW1**, insisted that the plaintiff was present in the meeting where the 2nd defendant was. However, he said he had no proof. He admitted being aware that the matter was commenced by four of his siblings and that they entered into a consent. He denied knowing that his brother (1st defendant) was not forced into signing the consent. He further denied having knowledge that the brother was removed as administrator by the consent.

In further cross examination he told the court that the meeting was held in the year 2000, and that it was agreed that the 2nd defendant be given 100 acres. When asked whether the 2nd defendant changed the title to the land into his name, his response was that each one of them knew that it was in his name.

DW2 was **Sebusha**. Her testimony was the same as **DW1** that the land was given to their uncle, 2nd defendant as a token of appreciation for helping them.

In cross examination by Counsel to the 2nd defendant, she told the court that there were thirteen children of the late father's and they were given land, except some had died. That the applicant was present when they agreed to give the land to the 2nd defendant and she also agreed. She, too said she was not in support of bringing the 2nd defendant to court.

In cross examination by Counsel to the plaintiff, she said she had no proof that the plaintiff had agreed to giving the land to the 2nd defendant. She too was not aware of the consent and that by the same consent the brother, 1st defendant had ceased to be an administrator. It was also her testimony that the 1st defendant stays in Kabwata, in a house that was given to him when he was working for the 2nd defendant.

DW3 was *Esther Manaya Sipalo*, the biological mother to the plaintiff. It was her testimony that all the children were present including the plaintiff at the meeting where they all agreed to give the 2nd defendant the portion of land.

In cross examination, she reiterated that the plaintiff was present at the meeting and agreed to giving the 2nd defendant a portion of land. That is why **DW3** did not understand why she came to court.

In further cross examination by Mr. Mutemwa, **DW3** denied having knowledge that the 1st defendant agreed that he had no authority to give the land to the 2nd defendant and that the family members had not authorized him; neither was she aware that because of that he had been removed from being an administrator. In further cross examination, when asked whether the 2nd defendant was present at the meeting where it was decided that he be given the piece of land, **DW3**, told the court that she was not present at the meeting but

she was asked and she agreed that the 2nd defendant be given the land.

DW4 was the 1st defendant. It was his testimony that his father died in 1991. The family chose their late uncle, Ngenda Sipalo as administrator. He did not administer the estate accordingly. They later realized that their father had debts with Lima Bank. The children did not have money to clear the bills and the rates at Ministry of Lands. It was agreed at a meeting where the 2nd defendant was present that a portion of the land be sold to clear the bills. After that was done, the family sat again and agreed that each and every beneficiary should have his or her own property. The land was demarcated and every beneficiary benefited. Each one of them got 125 acres and the mother, who was the surviving spouse to the late got 355 acres. There was a portion left, so again all of the beneficiaries sat again as a family and it was agreed that that portion be given to the 2nd defendant. This was because from the time the father died the 2nd defendant was the one who took care of them.

In cross examination by Mr. Mambwe, he denied being influenced by the 2nd defendant into giving him the land. He reiterated that they all agreed to giving the 2nd defendant the land. He further told the court that the house in Kabwata was given to him by the company (Guardian Motors) owned by the 2nd defendant as his terminal benefits. He had worked for the company for 17 years.

He denied being given a part of the garage in Soweto where he collected rentals. He testified that as an employee of Guardian Motors, he was given a responsibility to collect rentals and deposit in the account of the company. The plaintiff was given a similar responsibility.

Concerning the consent, his testimony was that it was a mistake, he was influenced by some members of the family. That they sat with the family to apologize and reverse what they did. When asked why the 2nd defendant was not part of the meeting to reverse the consent, he said he did not know. He showed the court the letter on 12 to 13 and testified that every beneficiary had a similar letter which they signed but that he did not have a copy of the one signed by the plaintiff. He confirmed that the nine of them got land.

In further cross examination by Mr. Mutemwa, he told the court that he was not forced to sign the consent judgment. Further that he was not aware as to whether the consent judgment had been set aside by the court. It was brought to his attention that the consent was registered at Ministry of Lands. He further reiterated that he did not have the letter signed by the plaintiff concerning the distribution of land. He insisted that everyone agreed to giving the 2nd defendant the land. Further that there was no written agreement to that effect.

At the end of trial, the plaintiff and the 2nd defendant filed written submissions for which I am indebted.

It was submitted that following the demise of the late Mr. Munukayumbwa Sipalo Senior on 20th November, 1991, the 1st defendant as Administrator of the estate, decided on his own volition, to parcel out a piece of land in extent 58.1808 hectares more or less being subdivision "W" of Farm No. 675, Lusaka through an instrument of transfer dated 14th March, 2007 as a gift to the 2nd defendant. This act by the 1st defendant did not go well with the plaintiff and three of her siblings as beneficiaries in the estate of the late father, in that she was neither consulted nor did she ever give her consent to such a decision.

It was submitted that the courts have held that alienation of land without consultation or obtaining consent of the affected parties renders the disposition void at law.

I was referred to a number of authorities including **section 19 of the Intestate Succession Act, Chapter 59 of the Laws of Zambia** on the duties of an administrator. The section provides as follows:

(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.”

I was also referred to the case of *Mudenda v Mudenda (2006) ZR 57*¹ where it was held that:

“The duty of an administrator is not to enhance the estate, but to collect the deceased’s estate, distribute it to the beneficiaries and render an account.”

I was further referred to the case of *Mirriam Mbolela v Adam Bota Judgment No. 26 of 2017*², where it was held that:

“The import of section 19(2) of the Act is very clear. It proscribes the sale of property (including real property) forming part of the estate of a deceased person without prior authority of the court. In the mind of the legislature, this statutory provision was intended to prevent administrators of estates of deceased persons from abusing their fiduciary responsibilities by selling property forming part of such estates, without due regard to the interest of the beneficiaries. No doubt, the court can only grant such authority when it is satisfied that the sale

would be in the interest of the beneficiaries. In our view, prior authority of the court is a sine qua non of a valid sale of such property.”

It was submitted that the administrator must effect the distribution of the estate to beneficiaries and render an account. He is personally liable for any negligence in handling an estate or mismanagement or misapplication of the assets from the estate. In this case the 1st defendant testified that he parceled out the piece of land to the 2nd defendant because he had been such a very good man to the whole family. Quite clearly, this was a mistaken belief on the part of the 1st defendant, which belief was based on moral considerations. It was further submitted that this does not absolve the 1st defendant from fulfilling his legal obligations under the law or escaping liability. Further there was no proof that the plaintiff as a beneficiary consented to have the land parceled to the 2nd defendant.

I was further referred to the case of ***Boniface Kafula & Others v Billings Choonga Mudenda SCZ Appeal No. 202 of 2003*** where it was held that even if the contract of sale in that case had been executed and completed by the administrator, the purchaser could not enforce it because the administrator had not obtained leave of court prior to the sale.

The plaintiff's prayer was that the Certificate of Title No. 60430 relating to subdivision "W" of Farm No. 675, Lusaka issued in the name of the 2nd defendant be cancelled and that the said property reverts to the estate.

The **Halsbury's Laws of England, Fourth Edition, paragraph 1369** states that:

"The rules of intestate succession are laid down by statute, and govern the distribution of the residuary estate of intestates, subject to the court's overriding power in relation to family provision. They apply to all property of which the deceased owner died intestate, subject to certain savings."

Similarly, it has been stated by the authors of **Williams & Mortimer Executors, Administrators and Probate** that:

"The rules for distribution of the estate where the deceased has died totally or partially intestate are prescribed by statute."

The duties of the personal representatives are stated in **paragraph 1119** as follows:

"The personal representatives of a deceased person are under a duty to collect and get in the deceased's real and personal estate and administer it according to law."

It is further stated in **paragraph 1551** concerning the duties of the personal representatives that:

"It is the duty of personal representatives to keep clear and accurate accounts, and always to be ready to render such accounts when called upon to do so... where they are required by the beneficiaries to furnish accounts, they may demand to have the costs of doing so paid or guaranteed before complying with the request."

A personal representative is liable to be ordered by the court to account either generally in proceedings for general administration of the estate.”

It is also provided in **paragraph 1553** that:

“Where a personal representative has paid away money to a wrong party, even if in good faith by mistake, or has made unauthorized investments, he is to be treated as having the sum in hand and must replace the capital with interest, it is no answer that he has acted on legal advice. He will not be charged, however, with interest at the instance of a beneficiary who was in a position to ask for accounts long before the application, nor in respect of disbursements honestly made, but disallowed in taking his accounts.”

This is also repeated by the authors of **Williams & Mortimer Executors, Administrators and Probate** where they stated:

“Personal representatives are for some purposes considered as trustees. They are personally liable for all breaches of the ordinary trusts which are considered to arise from their office.

A personal representative who has improperly paid away money is deemed by a court of equity still to have the money in his own hands. Principle and authority both require that in such a case he should be dealt with as if he had improperly retained the money in his own hands, and his liability to pay interest as well as principle is clear.”

As pointed out by the foregoing authorities, in our jurisdiction the powers of the administrator and the rules of distribution of the estate where the deceased has died totally or partially intestate are prescribed by the **Intestate Succession Act, Chapter 59 of the Laws of Zambia. Section 19** which provides for the duties of an administrator

is highlighted above. Part II of the Act provides for distribution of the estate. **Sections 5 and 6** clearly provides as follows:

5. (1) *Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows:*

- (a) *Twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;*
- (b) *Fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;*
- (c) *Twenty per cent of the estate shall devolve upon the parents of the deceased;*
- (d) *Ten per cent of the estate shall devolve upon the dependants, in equal shares:*

Provided that a priority dependant whose portion of the estate under this section is unreasonably small having regard to his degree of dependence on the deceased shall have the right to apply to a court for adjustment to be made to the portions inherited and in that case, Part III of the Wills and Administration of Testate Estates Act shall apply, with the necessary changes, to the application

(2) *In respect of a minor, the mother, father or guardian shall hold his share of the estate in trust until he ceases to be a minor.*

6. *Where an intestate leaves-*

- (a) *No spouse, the portion of the estate which the spouse would have inherited shall be distributed to the children in such proportions as are commensurate with a child's age or educational needs or both;*
- (b) *No spouse or children; the aggregate portion of the estate which the spouse and children would have inherited shall be distributed equally to the parents of the deceased;*
- (c) *No spouse, children or parents, the estate shall be distributed to dependants in equal shares;*
- (d) *No spouse, children, parents, or dependants, the estate shall be distributed to near relatives in equal shares;*
- (e) *No spouse, children, parents, dependants or near relatives, the estate shall be bona vacantia and shall devolve upon the State;"*

As stated above, the duty of the administrator is to collect and get in the deceased's real and personal estate and administer it according to the law. In this case, in accordance with **sections 5 and 6 of the Intestate Succession Act.**

It is not in dispute that in the case before me, the administrator who is also a beneficiary of the estate of his late father, Mr. Munukayumbwa Sipalo, after apportioning certain portions of the late father's estate to fellow beneficiaries and I believe himself, went ahead and gifted what he called a remainder of the late father's farm to his uncle, the 2nd defendant. This is the subject matter of this case. The plaintiff contends that this was against the law and the administrator be ordered to give an account of the estate of the late father as well as an order to nullify the deed of transfer to the 2nd defendant of Subdivision W of Farm 675.

A perusal of sections 5 and 6 of the Intestate Succession reveals that the priority beneficiaries of the estate of the deceased are their spouse, children, parents and dependants, in prescribed proportions. It is only in the case where the deceased is not survived by a spouse, children, parents and dependants that near relatives are considered.

Near relatives are defined by the **section 2** of the Act as follows: ***means issue, brother, sister, grandparent and other remoter descendants of the deceased.***

The 2nd defendant herein would fall in the group of near relatives. It is also not in dispute that the late Mr. Munukayumbu Sipalo was survived by a spouse and children, including the plaintiff and the 1st defendant herein. This therefore means that the correct beneficiaries to the estate of the late Munukayumbu Sipalo are the spouse and the children only. There was no evidence of any dependants.

I should add that the 1st defendant was free to share his own portion with whoever he wanted, but to a portion part of the estate to the 2nd defendant is against the law as the 2nd defendant is not one of the beneficiaries envisaged by the Act.

I have taken into consideration the defence of the 1st defendant that he had consent from the other beneficiaries. Like I have stated above, nothing would have stopped any beneficiary to take out of

their own share to gift to the 2nd defendant. Clearly, there is no such evidence before me. I had three of the other beneficiaries, apart from the 1st defendant, testify that all the beneficiaries consented to the gifting the 2nd defendant the piece of land. They all relied on the letter from the 1st defendant on pages 12 and 13 of the 2nd defendant's bundle of documents but there is nothing in that letter to suggest that any of the beneficiaries gave consent. Infact, despite saying that all the beneficiaries agreed to give the 2nd defendant the piece of land, **DW3** testified in cross examination that she was not present at the meeting where it was agreed, but that she had been asked and agreed. It is strange that the 1st defendant documented his giving the land to the rightful beneficiaries and neglected to document his obtaining consent from the other beneficiaries when giving the land to the 2nd defendant.

I have heard the testimonies of how helpful the 2nd defendant has been to the beneficiaries but this does not absorb an administrator of his legal obligations. As pointed out by the plaintiff in the submissions this court is not swayed by emotions into making moral judgments. It is a court of law and it is our duty to uphold the law. (*Zambia Revenue Authority v Post Newspaper SCZ No. 18 of 2016*). Similar, the administrator can only distribute the estate within the confines of the law and not as he pleases.

All in all, the act of gifting the land to the 2nd defendant was against the law and therefore null and void. I therefore nullify that

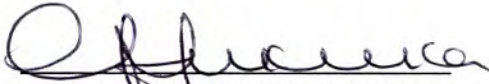
transaction and order that the Certificate of Title No. 60430 relating to Subdivision "W" of Farm number 675, be cancelled forthwith and the land be redistributed among the rightful beneficiaries.

I further order that the 1st defendant to give an account of the estate of the late Munukayumbwa Sipalo.

I award costs for and incidental to this matter to the plaintiff, to be taxed in default of agreement.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 19TH DAY OF JUNE, 2020.


G.C. CHAWATAMA
HIGH COURT JUDGE