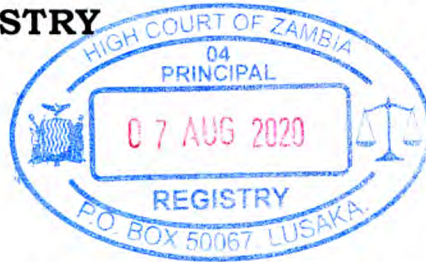


AMENDED PURSUANT TO SLIP RULE

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

2017/HPF/0073



IN THE MATTER OF: ORDER XXX RULE 12 OF THE HIGH COURT RULES, HIGH COURT ACT CHAPTER 27 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE INTESTATE SUCCESSION ACT, CHAPTER 59 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE ESTATE OF THE LATE PAUL MANDEFU

BETWEEN:

GRACE SIANONGE (Suing in her capacity as next of friend of Brenda Mandefu and Sumili Mandefu)

APPLICANT

AND

AGNESS MANDEFU (Sued in her capacity as Administrator of the Estate of the Late Paul Mandefu)

1ST RESPONDENT

LAS PHIRI (Sued in his capacity as Administrator of the Estate of the Late Paul Mandefu)

2ND RESPONDENT

Before Honorable Mr. Justice M. Chitabo, SC this 7th day of August, 2020

For the Applicant: Ms. M. Matoka of Messrs. Lusitu Chambers

For the Respondents: N/A

JUDGMENT

Cases Referred to:

1. *Mwale v Mtonga and another SCZ No. 25 of 2015*
2. *Attorney General v Cark (2008) 1ZR 38*
3. *Admark Limited v Zambia Revenue Authority (2006) ZR 43*
4. *Khalid Mohamed v The Attorney General (1982) ZR 42*

Legislation Referred to:

1. *The Wills and Administration of Testate Estates Act Chapter 60 of the Laws of Zambia*

This matter was commenced by the Applicant by way of Originating summons seeking the following reliefs:

1. An Order that the Respondents give an account and inventory of the estate of the late Paul Mandefu.

2. Property be shared equally and equitably amongst the rightful beneficiaries
3. A declaration that the Applicant is entitled to an equal share in the property in Lusoke village, Senior Chieftainess Nkomeshya Mukamambo II, namely, a unit of 8 3 roomed apartments.
4. Any reliefs the Court deems fit.
5. Costs.

The Originating summons was supported an affidavit deposed to by one Grace Sianonge, the Applicant herein. She deposed that on 31st March, 2001 she was lawfully married to the late Paul Mandefu under customary law and had two children of the family namely; Brenda Mandefu born on 25th June 2004 and was in grade at Chongwe Primary School and Sumili Mandefu born on 27th April, 2008 and was in grade 4 at Chongwe Primary School.

She averred that the late Paul Mandefu had four children from his previous marriage now living namely:

- a) Agness Mandefu born in 1983
- b) Emmy Mandefu born on 8th December, 1986
- c) Memory Mandefu born in 1988; and
- d) Kaseba Mandefu born on 9th June, 1995

She deposed that due to marital differences, the marriage between the Applicant and the late Paul Mandefu was dissolved by the Chilenje Local Court on 10th January, 2013. A copy of the divorce certificate was produced marked "GS1". Immediately after the divorce, she moved to Chongwe and was offered land by Florence Kashimbi. She produced a letter showing that she was given the land which was marked "GS2".

When the marriage was dissolved, the Court ordered the late Paul Mandefu to compensate the Applicant with a sum of K15,000 which he did and she was to use the money to build herself and the Children a house. The late Paul Mandefu then added a sum of K6,000 to the sum giving a total of K21,000. She produced a copy of the acknowledgement note which was marked "GS3". Whilst cohabiting in Chongwe, the late Paul Mandefu decided that they build a house together for the children on the land she had acquired.

She used the 21,000 to contribute to the construction of the unit of 8 3 roomed apartments at Lusoke village under Senior Chieftainess Nkomeshya Mukamambo II. On 28th May, 2016, the late Paul Mandefu passed on at the University Teaching Hospital (UTH). After

the burial, Agness Mandefu and Las Phiri were appointed administrators of the estate of the late Paul Mandefu.

She outlined that the late Paul Mandefu owned the following properties:

1. Plot No. A46 New Chilenje on which are the following semi-detached houses:
 - a) 3 bedroomed house
 - b) 2 bedroomed house
 - c) 1 bedroomed house
2. Bare Plot in Lusoke Village
3. 8 3 roomed apartments in Lusoke village
4. Household properties
5. Money in the bank, NAPSA benefits inter alia.

She averred that after the appointment of the 1st and 2nd Respondent as administrators, properties were shared amongst the beneficiaries and her two minor children were only given a blanket each and 4 units of the 8 units of the three roomed apartments. In July, 2016 she moved into one of the 4 units given to Brenda and Sumili Mandefu as she had difficulties paying rentals and sustaining herself and the children where she was initially residing. In October, 2016,

the 1st Respondent expressly asked her and the children to vacate the house which she refused as the same administrators were the ones who gave the apartments to her and the children.

In April, 2017, the 1st Respondent went to Chongwe and demanded that all the tenants in the apartments including the apartments which were given to her and the children be paying rentals in an unknown account, failure to which they would be evicted. She produced a copy of the notice which was marked "GS4".

She approached the 1st and 2nd Respondents on several occasions to be helping out with the needs of the two minor children especially with school needs but her request had been ignored. She stated that Brenda and Sumili Mandefu had not benefitted adequately from their late father's estate. She further deposed that the 1st and 2nd Respondent had failed to provide a full inventory of the estate of the late Paul Mandefu. The 1st and 2nd Respondents had failed to distribute the assets of the late Paul Mandefu equally and equitably considering the specific needs of each rightful beneficiary.

In response the Respondents filed in an affidavit in opposition deposed to by one Agness Mandefu and Las Phiri. It was deposed that the applicant was not offered the property she claimed as the

property in issue was obtained by the late Paul Mandefu and entry was done in the village register and a confirmation was given thereafter. They produced exhibit "AML P1" which was a copy of the confirmation letter.

It was their contention that the cohabitation by the with the late Paul Mandefu was temporal and short lived in Chilenje Lusaka and not as alleged. She stated that the property in issue was not yet acquired when the divorce was granted. They stated that the late Paul Mandefu did not author the note marked exhibit "GS3" and that the property in issue could not logically be built from the alleged K21,000 or any lesser amount.

It was contended that the late Paul Mandefu build on the land using his pension money without any contribution from the Applicant. That after ceasing cohabitation with the Applicant she sued the late Paul Mandefu in the local court where she claimed ownership of the 8 units of 3 roomed apartments and judgment was passed in favour of the late Paul Mandefu. Appeal was lodged by the Applicant against the decision of the local Court.

It was further deposed that with respect to the inventory, the property and estate account was outlined in exhibit "**AM, LP3**" and stated that

no properties were shared as most of them were taken by different people before the funeral ended apart from the clothes that were shared after the funeral.

It was also stated that the 1st Respondent had at no point requested the Applicant to vacate the house as alleged and the Applicant resided in the same house which was meant to partly assist Brenda and Sumili Mandefu. The respondent denied having received any rentals from the 4 units of apartments that the Applicant received rent from on behalf of Brenda and Sumili Mandefu AND CONTENDED THAT TO DATE THE Applicant received rentals and a copy of the 1st Respondent's bank account was exhibited marked "AM.LP4".

It was further deposed that the Respondent had on more than one occasion paid school fees for the and provided school requirements for minors and they still did so despite the Applicant using the minors' shares to also provide for her other children not born by the late Paul Mandefu with whom she resides. It was contended that the property in issue is used to pay for all school going children, their welfare and all the children equally benefit. However, it was asserted that the Applicants interest was to have properties indirectly benefit

her other children not the minors solely to the disadvantage of the minors.

Both parties filed in written submission to support their case. On behalf of the Applicant, it was submitted that the administrators for the estate of the late Paul Mandefu had not administered the estate according to the guidelines as provided by the law and the children had not adequately benefitted. It was argued that despite the exhaustive list provided by the Respondents, there has not been tangible proof of how the younger children who are minors had benefitted from their father's estate.

Counsel cited section 5 and 6 of the Intestate Succession Act which provides as follows:

“”

It was contended that the Respondents had failed to demonstrate to this Court and the Applicant as to whether or not the deceased's estate was distributed in that manner. It was submitted that it was unsatisfactory for the Respondents to come to Court and alleged that the property was shared by other people. It was Counsel's submission that this showed a dereliction of duty on the part of the Respondents as appointed administrators of the estate of the late

Paul Mandefu and this failure to perform their duties had been greatly to the detriment of the beneficiaries.

It was further submitted that the Court could take into consideration the commensurate proportions that apply to the Children of the deceased. It was submitted that at the time of the late Paul Mandefu's death he had older working children who were no longer in school and were married apart from the two minor children he had with the Applicant. It was argued that regrettably the older children such as the 1st Respondent who was aged 36 years old had been benefitting from the estate of the deceased while the younger ones aged 15 and 11 years old had not.

Counsel highlighted that section 6(a) of the Intestate succession Act makes provision that where a deceased is not survived by a spouse, the portion that should have been for the spouse should be distributed to the children in such proportions as are commensurate with a child's age or educational needs or both. It was submitted that considering that the 1st Respondent and her siblings (aged 36,33,31 and 24) had a considerable age disparity with the younger children ages 15 and 11, the estate ought to be distributed accordingly.

It was further submitted that the Applicant should have been treated as a dependent at the time of the demise of the deceased Paul Mandefu and fit the definition of dependent under section 3 of the Intestate Succession Act. Counsel cited the case of **Oparaocha Charity Oparaocha v Winfrida Murambiwa (2004) ZR141** where it was held by the Supreme Court that:

“ in our view, the wording of Section 3 of the Act is clear. A dependent is any person who meets the criteria given in the section. If the intention was to cater for close relatives such intention could have been expressed in the language of statute. We uphold the learned trial Judge.”

It was submitted that the Applicant was a dependent of the late Paul Mandefu and as such is entitled to 10% of his estate.

It was further submitted that the intention of the Applicant and the deceased was to make the Chongwe houses their consistent source of income and the contribution by the Applicant was as a result of two agreeing to live together in a committed relationship. It was argued that it was therefore a huge error and dereliction of duty on the part of the Respondents to totally leave out the Applicant. Counsel cited the case of **Annie Bailes v Charles Antony Stacey and Anieria Simoes (1986) ZR 83** where it was held that:

“to establish a constructive trust there must be evidence that the property was acquired to provide a home for the couple who intended to live together in a stable relationship and that the claimant made a substantial contribution towards acquisition. This can be extended to cover substantial contribution towards development of the property or land.”

With respect to the allegation by the Respondents that the estate incurred expenses as a result of renovations made to the property forming part of the estate, Counsel referred to section 19 of the Intestate Succession Act which provides for the duties of an administrator. It was argued that the renovation, according to that provision do not form part of the duties of the administrators. Counsel cited the case of **Gray Nachalwe Mudenda v Dorothy Mudenda SCZ Judgment No. 12 of 2006** where it was held that:

“the actions of an administrator who enhanced the house and started living in it with his children , thus depriving the rightful beneficiaries(deceased widow) from occupying the house , were illegal.”

In view of this authority it was contended that the actions by the Respondents were illegal as the 1st Respondent was actually living in the house to the detriment of the other beneficiaries such as the Applicant’s minor children.

It was submitted that the Respondents had alleged that they paid school fees for the beneficiaries but had neglected to demonstrate this with any proof before the Court. It was contended that it was not enough to merely produce quotations from institutions. It was argued that this was a good case for the Court to order the Respondents to render a full and complete account on the administration of the estate of the late Paul Mandefu.

In response, it was submitted by the Respondents that sections 5 and 6 makes provision for distribution of the deceased's estate and the distribution of the share of a spouse where there is no spouse. It was submitted that the estate of the late Paul Mandefu had not yet been distributed. It was their contention that all the children of the deceased Paul Mandefu had been collecting rentals from the 7 flats in Chongwe and the house in Chilenje in line with the advice from the victim support unit at the police in Chongwe.

It was submitted that the Applicants and their mother were staying in one of the 8 flats in Chongwe. It was their arguments they did not know the basis of the claim by the Applicants' mother that she is entitled to a share of the 8 flats when she was not suing in her own capacity and therefore was not a party to the cause. It was prayed

that this claim should not be entertained because she ought to institute an action for a claim in her personal capacity and to prove the claim. It was submitted that this action had been instituted in line with the provisions of Order XXX rule 12 of the High Court Rules which provides for instituting matters arising out a law which is this case was the Intestate Succession Act.

It was submitted that the claim that Grace Sianonge was a dependent of the late Paul Mandefu in line with the provisions of the Intestate Succession Act. It was submitted that the late Paul Mandefu resided and continued to reside at new Chilenje with Emmie Mandefu, Kaseba Mandefu, Olipah Chitambala and Worried Chitambala, his children, niece and nephew respectively even after divorcing Grace Sianonge until the time of his death.

It was argued that the late Paul Mandefu never maintained Grace Sianonge in any way after the divorce and she never lived with him at his place of residence in New Chilenje. He built the flats at Chongwe but never resided there. They argued that Grace Sianonge did not qualify as a dependent in line with the provisions of the Intestate Succession Act.

With respect to the issue of rendering an account or inventory of the estate of the late Paul Mandefu, the 1st and 2nd Respondent understands that this is one of their duties which was explained to them at the time of granting them the Letters of Administration and in line with the provisions of the Intestate Succession Act.

It was submitted that the respondent had been distributing an equal share of the rentals to the two properties to each of the 6 children of the deceased, they do not have a problem with giving an account if this Court so directs.

I have carefully considered the affidavit evidence and the submissions by both parties.

The facts not in dispute are that Grace Sianonge, who has sued on behalf of her children, and the late Paul Mandefu were married under customary law but their marriage was later dissolved at the Chilenje Local Court. It was further not disputed that the said Grace Mandefu was paid compensation by the late Paul Mandefu. It was further not disputed that the late Paul Mandefu and Grace Sianonge had two children during their marriage.

The issues for determination are whether the estate of the late Paul Mandefu had been distributed to the beneficiaries in accordance with

the provisions of the Intestate Succession Act. It is based on that determination that this Court has further been asked to render an account and inventory of the estate of the late Paul Mandefu. The said Grace Sianonge also asked this Court to make an Order declaring that she has a claim in part of the properties, namely, the 8 units of the three roomed flats in Chongwe.

Section 5 of the intestate succession Act as already referred to by both parties is very clear as regards the distribution of the estate of a deceased who dies intestate. Further section 6 also provides that where there is no spouse surviving the deceased, the share would be distributed amongst the children.

In the case in casu the Respondents were appointed as Administrators of the estate of Paul Mandefu. He had six children of which two were with Grace Sianonge who has sued on their behalf.

It therefore follows that all the children will be entitled to the 50% of the estate as provided under section 5 of the Act. Section 5 goes further and provides that where there is no surviving spouse, the children will inherit that portion of the estate consumerate to the age of the child and their educational needs.

The Applicant had submitted that Brenda and Sumili Mandefiu were the minor children who were still school going. This fact has not been disputed by the Respondents but the Respondents adds that Kaseba Mandefu aged 24 was also in school. This Court hold the view that the three school going children should be given priority for their educational needs in comparison to the other older children. It therefore follows that the distribution of the 70% of the estate cannot be equally done because more priority will be given to the minors and those in school.

The respondents has argued that the estate of the late Paul Mandefu has not yet been distributed and yet they have produced evidence of amounts equally shared from the rentals from some of the properties. The said distribution is amongst four of the six children. Further, there is evidence from the Respondent that the 1st Respondent now resides in the three bedroomed house which belonged to the late Paul Mandefu.

In my view there is evidence that the estate is being distributed and because there is an issue that has been raised on behalf of two of the beneficiaries, it is in the interest of justice that an account and inventory be rendered by the Administrators of the estate. The said

account and inventory will be made on oath before the learned Deputy Registrar.

With respect to the claim by Grace Sianonge that she is entitled to a share in the property situate in Chongwe whereupon 8 units of 3 roomed apartments were built, it has been submitted that she had contributed to the construction of the said apartments. It was further her contention that her contribution came from the sum of money that the late Paul Mandefu paid as compensation after their marriage was dissolved by the Chilenje Local Court. She contended that she acquired a piece of land from one Florence Kashimba and it was on this piece of land that the apartments were built.

She further argued that even after they were divorced, the late Paul Mandefu went back to cohabit with Grace Sianonge in Chongwe. According to her it was during this time that apartments were built. She cited the case of **Annie Bailes v Charles Anthony Stacey and Another(1986) ZR 83** to support her claim. She further submitted that she be considered as a dependent as defined under section 3 of the Intestate Succession Act and cited the case of **Oparaocha v Murambiwa (2004) ZR 141**.

On the other hand the Respondents have submitted that this Court cannot entertain this claim because she has sued not in her personal capacity but in her capacity as next of friend and mother of Brenda and Sumili Mandefu. It was contended that if she sought to claim a share in that property, an action should have been instituted on her own behalf specifically for that purpose.

It was further stated that the said Grace Sianonge who was suing on behalf of her children had sued the deceased Paul Mandefu in the local Court where she was claiming for the share in the property of the late Paul Mandefu. From the Certificate of Judgment it is noted that the judgment was against the Plaintiff who was Grace Sianonge and it was found that she was not entitled to the property as there was no marriage between her and Paul Mandefu. Further that there was no evidence that she had made any contribution to the purchase of the plots and construction of the two houses.

It was further argued that the said Grace Sianonge could not qualify as a dependent as defined under section 3 of the Intestate succession Act. It was contended that the late Paul Mandefu was not cohabiting with Grace Sianonge at the time of his demise and that they cohabited only briefly after their divorce.

I have carefully considered the arguments by both parties and I will begin to address the issue of whether this is a matter properly before me when Grace Sianonge is only suing on behalf of her children.

It is evident from the summons that the Applicant was suing in her capacity as the mother and the next of friend of her two minor children Brenda and Sumili Mandefu. The summons do not indicate that she is suing on her own behalf as well as on behalf of the children who are beneficiaries.

It is trite law that parties goes to jurisdiction as was established by the Supreme Court in the case of UNIP V..

I therefore agree that this Court cannot entertain a claim on behalf of Grace Sianonge because she is not suing in her own personal capacity.

Having said this, it is on record that the Applicant is staying with her children in one of the flats which forms part of the estate of the late Paul Mandefu. It is also on record that her children are minors under her care. It therefore only follows that in the best interest of the children that they continue to reside at the said property. I call in aid the case of ***Myzeche v Simeza***.

For the avoidance of doubt I make the following orders:

1. That the estate be distributed equitably amongst all the beneficiaries with higher priority being given to the two minor children of the late Paul Mandefu and the other school going children.
2. That the Respondents give a statement of account on oath and inventory before the learned Deputy Registrar.
3. I decline to grant the relief sought for the Court to find that Grace Sianonge is entitled to a claim in the 8 units of 3 roomed apartments as this matter is not properly before me.
4. I order that each party bears its own costs.

Delivered under my hand and seal the 7th day of August, 2020

A handwritten signature in black ink, appearing to be 'Mwila Chitabo', written over a horizontal line.

**Mwila Chitabo, SC
JUDGE**