

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

(Civil Jurisdiction)

2017/HPF/0028



IN THE MATTER OF:

**THE ESTATE OF THE LATE
WEDDIE CHEMLESYA CHELEMU**

IN THE MATTER OF:

**SECTION 29(1)(e) AND 29 (2) (a) OF
THE INSTEATE SUCCESSION ACT,
CHAPTER 59 OF THE LAWS OF
ZAMBIA**

BETWEEN:

MARGARET SARAH CHELEMU CHIPOMA

1ST APPLICANT

CHANA CHELEMU- JERE

2ND APPLICANT

AND

KELVIN KAKUNGU CHELEMU (MALE)

1ST RESPONDENT

*(Sued in his capacity as Administrator of the
Estate of the Late Weddie Chemlesya Chelemu)*

KENNETH CHELEMU (MALE) *(Sued in his*

2ND RESPONDENT

*Capacity as Administrator of the Estate of
the Late Weddie Chemlesya Chelemu)*

ODILE LOUKOMBO CHELEMU (FEMALE)

3RD RESPONDENT

*(Sued in her capacity as Administrator of the
Estate of the late Weddie Chemlesya Chelemu)*

**BEFORE HONOURABLE MRS. JUSTICE G. MILIMO - SALASINI, IN
CHAMBERS, ON 28TH FEBRUARY, 2020.**

For the Applicants: Ms. E. L Sitali - Messrs. Mulenga
Mundashi Kasonde Legal Practitioners

For the Respondents: Mr. S Kaonga - Messrs. Theotis Mataka &
Sampa

JUDGMENT

LEGISLATION REFERRED TO:

1. *Marriage Act CAP 50 of the Laws of Zambia*
2. *Intestate Succession Act CAP 59 of the Laws of Zambia*
3. *Penal Code Cap 87 of the Laws of Zambia*

CASES REFERRED TO:

1. *Charity Oparaocha vs Winfridah Murambiwa (2004) Z.R 141 SC*
2. *The People vs Paul Nkhoma (1978) Z.R. 4*
3. *Hyde v Hyde and Woodmansee [L.R] 1P. & D. 130*
4. *The People vs Roxburgh (1972) Z.R 31*
5. *Cheni (otherwise Rodriguez) vs Cheni [1962] 3 All E R 873 at page 877*

OTHER WORKS:

1. *Halsbury's Laws of England (2011) 5th Edition Volume 19.*
2. *Dicey & Morris, the Conflict of Laws 9th Edition*
3. *Halsbury's Laws of England (1974) 4th Edition Volume 8*

This is an application commenced by way of Originating Summons pursuant to **Order XXX Rule 11 of the High Court Rules Chapter 27 of the Laws of Zambia** was filed in the principal registry on the 6th day of July ,2017.

The 2nd Applicant, one Chana Chelemu Jere (herein referred to as the “2nd Applicant”) brought an action against Kelvin Chelemu (sued in his capacity as Administrator of the estate of the late Weddie Chemlesya Chelemu (the 1st Respondent herein), Kenneth Chelemu (sued in his capacity as Administrator of the estate of the late Weddie Chemlesya Chelemu (the 2nd Respondent herein) and Odile Luokombo Chelemu (sued in her capacity as administratrix of the estate of late Weddie Chemlesya Chelemu and 3rd Respondent herein.)

The 2nd Applicant seeks the following reliefs:

- (i) An Order for a declaration that the late Weddie Chemlesya Chelemu and Odile Luokombo Chilemu were not legally married as the late Weddie Chemlesya Chelemu was already married to the late Thelma Elizabeth Chelemu and as such not entitled to anything under the intestacy as his wife but as a dependent of the deceased.
- (ii) An Order that the 1st, 2nd and 3rd Respondents herein have failed to administer the estate of the late Weddie Chemlesya Chelemu.

- (iii) An Order compelling the 3rd Respondent to render an accurate account and inventory of the estate of the late Weddy Chemlesya Chelemu during her reign as sole administratrix.
- (iv) An Order for the 1st, 2nd and 3rd Respondents to render an accurate account and inventory of the estate of the late Weddy Chemlesya Chelemu.
- (v) An Order of revocation of the Order of appointment granted to the 1st, 2nd and 3rd Respondents so as to allow the appointment of alternative administrators.

In her supporting Affidavit also filed on 6th July, 2017, the 2nd Applicant, who is a daughter of the late Weddie Chemlesy Chelemu (herein after called “the deceased”) deposed that the deceased who died on 15th May, 2012 in Lusaka Zambia, died intestate leaving an estate comprising a number of properties within Lusaka District and thirteen (13) children. That the deceased married the late Thelma Elizabeth Chelemu on 5th November, 1960 at the District of Ramford, in the County of Essex, London, United Kingdom. Evidence of the said marriage was produced as exhibit “**CC1**”. The late Thelma Elizabeth Chelemu died on 1st September, 2010 and an exhibit “**CC1**” in a Supplementary Affidavit filed by the 2nd Applicant and sworn on 27th April, 2018 and filed on 3rd May, 2018, is a true copy of the Certificate of Death of late Thelma Elizabeth Chelemu.

The 2nd Applicant deposed that at the time of the death of the deceased, he had been co-habiting with the 3rd Respondent, Odile

Loukombo Chelemu who on 8th June, 2012 obtained Probate from the High Court as is exhibited in the 2nd Applicant's Affidavit of 6th July, 2017 as **"CC2"**. That when the appointment of the 3rd Respondent was challenged in the High Court on 26th August 2012, a Consent Order was entered into on 3rd September, 2012 by the beneficiaries which Consent Order revoked the 3rd Respondent's appointment as sole administratrix but made her and the 1st and 2nd Respondents co-administrators. The deponent exhibited the Consent Order as **"CC3"**.

The 2nd Applicant deposed that the conduct of the 3rd Respondent was such that she has been un co-operative and has failed to give an account of how she managed the estate when she was sole administratrix, to the family; particularly the businesses situated at Plot No. 1139 Lumumba Road Lusaka or to meet family members despite attempts by the family to meet her.

That an attempt by the 3rd Respondent to surrender the running of the deceased's estate to the office of the Administrator General proved futile after the 3rd Respondent failed to render a detailed account and inventory of the estate to the family after being ordered to do so by the office of the Administrator General.

It is on that basis that the 2nd Applicant seeks the indulgence of the court to order the 3rd Respondent to produce on oath in Court a full inventory of the estate of the deceased and an account of the administration of the estate.

In reaction to the 2nd Applicant's application the 3rd Respondent filed an Affidavit in Opposition on 19th July, 2017 in which she deposed that she and the deceased were legally married on 5th December, 1992 in Congo Brazzaville and that she had one child born on 19th April, 2000 with the deceased.

She stated that she was therefore not a dependent for purposes of benefitting from the estate of the deceased and produced a true copy of a Marriage Certificate in the French language and an official English translation marked as exhibit "**OLC2**". That prior to the death of the deceased in 2012, she and her late husband ran the business at Plot No. 1139 Lumumba Road and had run the business alone from 2006 upon the deceased's illness and until 2012 when he died.

That she was in charge of all administrative affairs of the business including receipt of rentals from tenants until her management of the affairs of the business was interrupted by a letter to the tenants from the 1st and 2nd Respondents advising the tenants to stop remitting rentals to her. That this conduct by the 1st and 2nd respondents prompted her to obtain Probate shortly after the death of the deceased. She further deposed that since the business at Lumumba Road was her only source of income, she sought to protect her interest and that of her son and dependents, hence her obtaining letters of Administration.

That when she was made co-administrator with the 1st and 2nd Respondents, she approached by the office of the Administrator

General who gave guidance regarding the estate by telling the co-administrators to provide a valuation of the estate of the deceased by engaging a firm of valuation surveyors. That she filed a valuation report which is exhibited as **"OLC6"**, as a way of demonstrating that she was willing to provide a valuation of the property.

The Affidavit in Opposition was replied to by the 1st Applicant, one Margaret Sarah Chelemu Chipoma, also a daughter of the deceased, who restated the assertion of the 2nd Applicant that her late father and the 3rd Respondent were not legally married because the deceased was still in an existing marriage with the late Thelma Elizabeth Chelemu.

The 1st Applicant alleges that the 3rd Respondent had other intentions when she promptly obtained letters of administration shortly after the death of the deceased and was not prompted by a letter written by the 1st Applicant and Shadrick Chelemu because the said letter which was instructing the tenants of the rented property of the deceased, to make payments into an account to be communicated, was delivered on 12th June, 2012 while the 3rd Respondent obtained letters of administration on 8th June, 2012, four days before the letter of 12th June, 2012 to the tenants.

The said letter is marked exhibit **"MGCC3"** of the 1st Applicant's Affidavit in Reply.

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The said letter is marked exhibit **“MGCC3”** of the 1st Applicant’s Affidavit in Reply.

The 1st Applicant contended that the Court should revoke the appointment of the co-administrators and appoint at least two other administrators from among the members of the family.

I have noted that exhibit **“MSCC2”** which is a letter dated 12th June, 2012 and addressed to Ms. Mary Chelemu and Mrs. Odile Chelemu, the addressees are referred to as “widows” suggesting that the 3rd Respondent was recognized as one of the wives of the deceased.

On 18th July, 2019 the parties were before me. Counsel for the Applicants Ms. E. L. Sitali, of Messrs Mulenga Mundashi Kasonde Legal Practitioners notified the Court that most reliefs were resolved at Mediation and that the matters that were not resolved could now be dealt with.

Ms. Sitali submitted that the Applicants sought an order for a declaration that the late Weddie Chemlesya Chelemu and the 3rd Respondent were not legally married but that the 3rd respondent was a dependent. She further submitted that in Zambia, only one marriage is recognized where the marriage is contracted under statute i.e. The Marriage Act, Chapter 50 of the Laws of Zambia. Counsel cited the case of ***Charity Oparaocha vs Winifridah Murambiwa***¹ where the Supreme Court held that: -

“the Respondent went through a traditional ceremony, which on account of the deceased’s Statutory Marriage to the appellant was declared, rightly so, to be null and void”

Ms. Sitali argued that ***it is well settled*** that once a person has contracted a Statutory marriage any subsequent marriage is void. She further submitted that the 3rd Respondent has purported to have been married on 5th December, 1992, yet the deceased had been married since 1960 at a celebration in the United Kingdom to late Elizabeth Chelemu who died in 2010, as per the death certificate exhibited “**CC1**”. It was argued that by December, 1992, the date when the purported marriage of the 3rd Respondent to the deceased was contracted, the late Elizabeth Chelemu was still alive and still married to the deceased. That therefore, the 3rd Respondent cannot claim to be a spouse under Zambian Law. The applicants through their advocate prayed for a declaration that the marriage between the deceased and the 3rd Respondent is void hence she should not be considered a spouse and cannot benefit as such. The applicants pray for costs.

In Response, Counsel for the Respondent Mr. Kaonga, opposed the application and relied on the 3rd Respondent’s Affidavit in Opposition filed on 19th July 2017 and a Supplementary Affidavit filed on 22nd May, 2018.

Counsel for the 3rd Respondent countered the applicant’s submission for the reason that no legal provision had been cited to warrant the declaration sought. He advanced the argument that the *Oparaocha* case is distinguishable from the case in casu because in the *Oparaocha* case, a statutory marriage was celebrated in Kenya and a customary marriage was celebrated in Nigeria therefore the Supreme Court correctly declared the second marriage void.

That the facts before this Court are distinguishable because the deceased's first marriage in England was celebrated under Statute and the second marriage to the 3rd Respondent was equally celebrated under Statute in Congo Brazzaville, as shown in exhibit "**OLC1**" of the 3rd Respondent's Affidavit in opposition.

Mr. Kaonga submitted that the marriage certificate "OLC1" clearly shows that the 3rd Respondent equally celebrated a statutory marriage. He further argued that **Section 32(1)** and **Section 34 of the Marriage Act, Chapter 50 of the Laws of Zambia** does not address the issue of two Statutory Marriages. That the 3rd Respondent was married under Statutory Law in Congo Brazzaville and the two **Sections, 32(1)** and **34**, do not apply to the 3rd Respondent. He referred to the Marriage Certificate of the 3rd Respondent and the deceased which she exhibited as "**OLC1**" of her affidavit in opposition, and stated that the said Marriage Certificate includes a condition that recognizes a polygamous Marriage.

Counsel for the 3rd Respondent augmented his position by citing the case of **The People vs Paul Nkoma**² in particular the obiter of the Court. Mr. Kaonga has argued that the deceased adhered to the obiter and stayed clear of the Marriage Act when he celebrated his marriage in the Republic of Congo. He further submitted that should the Court be inclined to interpret the provisions of **Section 32** and **34** as affecting the 3rd Respondent and the deceased, the said section does not affect the deceased because the **Sections 32** and **34** of the Marriage Act were enacted after he celebrated his first marriage. That the said amendments were done in 1963 and 1964 while the

deceased's first Marriage was celebrated in 1960. That therefore, on the authority of *The People vs Paul Nkoma*², the deceased could contract a valid marriage to the 3rd Respondent. Mr. Kaonga concluded by stating that the mere fact that the 3rd Respondent had a valid Marriage Certificate from Congo Brazzaville entitles her to benefit as a spouse under the *Intestate Succession Act, Chapter 59 of the Laws of Zambia*, where in *Section 3* Marriage is defined as including a polygamous marriage, Thus the contention by the Applicants that the 3rd Respondent should not benefit as a spouse is misconceived.

The 3rd Respondent prays that the application should not be entertained and should be dismissed with costs as the applicants have not demonstrated any legal authorities that would entitle them to the discretionary remedy of a declaration.

In Reply, Ms. Sitali argued that the assertion by the 3rd Respondent's Counsel that the Oparaocha case is the only legal provision cited and that the applicants have not moved the Court to make a discretionary remedy holds no water because this Court has inherent jurisdiction to grant a discretionary remedy under *Order 30 rule 11 of the High Court Rules*. Thus, this Court has been properly moved and has inherent jurisdiction to make a declaration.

On the contention by the 3rd Respondents Counsel that the Oparaocha case is distinguishable from the case in casu, Ms. Sitali stated that the Oparaochi case, which is a Supreme Court decision which has not been overturned and is therefore binding on this

Court, cannot be distinguished from the present case as the facts are on all fours as the Oparaocha case. She submitted that the conduct by the deceased in this case was similar to the conduct of Dr. Oparaocha save that in the current case Mr. Chelemu conducted a second Statutory Marriage and not a Customary Marriage. That as a Zambian the deceased was subject to Zambian Laws as was the case for Dr. Oparaocha and therefore the estate is distributed in accordance with Zambian Law. When a person contracts a marriage in Zambia, that person is prohibited from contracting a second marriage whether under Statutory or Customary Law. That it is a crime in Zambia to have two Statutory Marriages according to section 38(a) of the Marriage Act, Chapter 50 of the Laws of Zambia. In addition, the fact that the Letters of Administration were obtained under Zambian Law and therefore Zambian Law applies. Counsel brought to the attention of the Court, the fact that the deceased owned property in Zambia hence his estate ought to be administered under Zambian Law and not the Law of Congo Brazzaville.

Counsel further argued that since the deceased contracted a Statutory Marriage, first in 1960, he was prohibited by law, in this case the **Marriage Act, Chapter 50 of the Laws of Zambia** from contracting a second Marriage, even under Customary law. Counsel also referred to **Section 38 (a) of the Marriage Act, Chapter 50** to state that to have two Statutory Marriages is a crime in Zambia. On the contention by the 3rd Respondents Counsel that the Zambian law did not apply, it was argued that in contrast to that contention, the **Marriage Act in Section 48** and **Section 49** requires that any

intended solemnization in the United Kingdom may be notified to the registrar of the marriage district in which he resides. Ms. Sitali concluded by submitting that it is conceded that **Section 3** of the **Intestate Succession Act** recognizes polygamous marriages, however, a polygamous marriage should not be confused with a statutory marriage because under the Marriage Act a person cannot contract a second marriage whether in Zambia or outside Zambia. It was also argued that the deceased owned property in Zambia and therefore the laws of Zambia are applicable in administering his estate.

The hearing concluded the same day and the parties were ordered to file written submissions by 16th August 2019.

SUBMISSIONS

The Applicants did file their submissions on 16th August 2019 while the Respondent filed her submissions on 19th August 2019.

In the Applicants submissions the issues for my determination were as follows;

1. Whether the late Weddie Chemlesya Chelemu was validly married to the 3rd respondent and;
2. Whether the 3rd respondent is entitled to share in the estate of the late Weddie Chemlesya Chelemu as a widow of the deceased.

Counsel cited **Hyde v Hyde and Woodmansee**³ a celebrated case in which a statutory marriage was defined as “ **a voluntary**

union for life of one man with one wife to the exclusion of all others “.

It was submitted that in Zambia a statutory marriage is a marriage where a person contracts a marriage to the exclusion of others and is monogamous in nature. Further that the **Zambian Penal Code, Chapter 60 of the laws of Zambia at section 166** provides that any person who undergoes a marriage while the other marriage is still subsisting commits a felony. It was also submitted that the Zambian courts have jurisdiction concerning offences committed by its citizens anywhere in the world. The case of ***The People vs Roxburgh***⁴ was relied on and it was proffered that if an act is illegal in Zambia a Zambian cannot purport to sanction that act in another country. That therefore, a citizen of Zambia who is domiciled in Zambia who purports to marry another person whilst still being married to another under statute commits the offence of bigamy. Counsel also argued that the issue of domicile was a factor for the validity of a marriage which was considered by the court in the case of ***Cheni (otherwise Rodriguez) v Cheni***⁵, which case I have had sight of. Counsel further referred to **Section 33(2) of the Marriage Act , Chapter 50 of the Laws of Zambia** which section states that marriages solemnised or contracted before the 20th May 1949 would not be affected by the section, to argue that the section was applicable to the parties of the first marriage who celebrated their marriage in 1960; which marriage was recognized as valid and monogamous. That consequently neither party was at liberty to contract a second marriage in any other jurisdiction.

The second issue for my determination is whether the 3rd Respondent is entitled to a share of the estate of the deceased. It was submitted that since the late Weddie Chemlesya Chelemu died intestate the law that is applicable to his estate is the ***Intestate Succession Act Chapter 59 of the Laws of Zambia*** particularly ***Section 4 (1)*** which defines intestacy and ***Section 5 (1)*** provides for the manner an estate shall be distributed. It is argued that since the marriage of the deceased was a monogamous marriage, he was precluded from contracting a second marriage. That although his wife late Thelma Elizabeth Chelemu died in 2010 the purported marriage between the deceased and the 3rd Respondent was in 1992, and therefore at the time of the deceased death in 2012 there was no surviving spouse. As a result, the share that would have gone to his spouse should go to the children in accordance with ***Section 6(a) of the Intestate Succession Act.***

With that deduction the applicants, while acknowledging that they had earlier prayed that the 3rd respondent be declared a dependent, prayed to the contrary, that the 3rd respondent should not be declared a dependent either. This prayer was hinged on the fact that no evidence had been tendered before me to support the position that she should be declared a dependent. To buttress the argument section 3 of the Intestate Succession Act was cited and it reads;

“dependent” in relation to a deceased person means a who was maintained by that deceased person immediately prior to his death and who was-

**(a) a person living with that deceased person; or
(b) A minor whose education was being provided
for by that deceased person; and who is
incapable, either wholly or in part of
maintaining himself ‘**

The case of **Charity Oparaocha v Winfridah Murambiwa¹** was cited regarding **Section 3 of the Intestate Act**. In that case the Supreme Court (after citing Section 3(a)) held that “**the evidence had clearly established that the deceased was living with the respondent and that he actually maintained her.**” Counsel has now argued that in order to qualify as a dependent one must meet two tests namely;

- 1. one must have been living with the deceased at the point of his death; and*
- 2. that the deceased must have been maintaining the person seeking to be declared a dependent of the deceased.*

It is argued that despite her allegation that she lived with the deceased the 3rd Respondent did not produce any evidence and actually denied being a dependent and it is submitted that in the absence of any evidence the court is not at liberty to make a declaration that she was a dependent.

Counsel on behalf of the Applicants prays that this court declares the purported marriage between the deceased and the 3rd Respondent was null and void. It is also their prayer that the court declares that the 3rd Respondent was neither a spouse nor a

dependent and is not entitled to a share in the estate of the late Weddie Chemlesya Chelemu.

The 3rd Respondent through her Counsel, on the other hand, in opposing the application submitted that the application is misconceived and should not be entertained because firstly, the case upon which the applicants rely on for their prayer is the case of ***Charity Oparoacha vs Winfridah Murambiwa***¹.

It was argued that the case in casu was different from the Oparoacha case in that in the Oparoacha case the deceased had contracted a statutory marriage first and subsequently a traditional marriage hence the undisputed decision of the Supreme Court where the second marriage was held to be null and void. In the case before me the facts were that the deceased had married under statute in 1960 in the United Kingdom to late Thelma Elizabeth Chelemu and later contracted a statutory marriage in Congo Brazzaville in 1992 to the 3rd Respondent. That by the distinction of the two cases the court ought not to be bound by the Oparoacha case. Counsel then directed me to the ***Marriage Act, Chapter 50 of the Laws of Zambia*** and to ***Section 32(1)(a)*** which describes an invalid marriage as being one where the parties share biological or close relations such as brother and sister. ***Section 32(b)*** provides that a marriage is invalid where one of the parties is married under African customary law at the time of the celebration of such marriage. It was submitted that in the case in casu, the deceased contracted a statutory marriage with late Thelma Elizabeth Chelemu and also contracted a statutory marriage

with the 3rd Respondent therefore the case of Oparaocha cannot not bind this court in arriving at its decision.

Mr Kaonga then referred to the **Marriage Act, Chapter 50 of the Laws of Zambia** (the Act) to counter the assertion of the applicants that the marriage between their late father and the 3rd Respondent was invalid. In so doing, he cited **Section 32(1)(a)** which makes a marriage “**null and void on the ground of kindred or affinity**” and **Section 32 (1) (b)** “**where at the time of the marriage either of the parties is married under African customary law to any person other than the person with whom such marriage is had**”. Counsel argued that a marriage will only be invalid if it fell within the ambit of **Section 32(1) of the Act**. He further argued that **Section 34 of the Act** which prohibits “**any person who marries under the Act, during the continuance of such marriage, to contract a valid customary marriage under any African customary law.**” only applies to circumstances where one contracts a second marriage under African customary law. That the 3rd Respondent’s interpretation was premised on the literal rule of statutory interpretation while different rules of statutory interpretation will achieve the same end. Counsel relied on the case of **The People v Paul Nkoma**² which I have noted, to advance the contention that polygamous marriages are still recognized in Zambia and in the absence of an express provision in the Marriage Act regarding two distinct marriages which are celebrated under different statutes from different jurisdictions, the marriage between the deceased and the 3rd Respondent is valid.

Counsel for the 3rd Respondent attempted to augment the 3rd respondent's claim regarding the claim for a share in the estate of the deceased as a widow by referring to **Section 3 of the Intestate Succession Act Chapter 59 of the Laws of Zambia** which defines marriage as "(including) a polygamous marriage and "husband", "surviving spouse", "wife" or "widow" shall be construed accordingly. I am therefore invited to discern that the Intestate Succession Act recognizes polygamy for purposes of distribution of an estate of deceased person and under **Section 5 of the Intestate Succession Act** the manner and proportion of distribution to affected beneficiaries is prescribed.

The 3rd Respondent therefore prays that the reliefs sought by the applicants should not be granted and the application be dismissed with costs to the 3rd Respondent.

After hearing the evidence submitted orally and written from the parties, I will proceed to arrive at my decision bearing in mind that in civil matters the standard of proof is based on a balance of probabilities and not on proof beyond reasonable doubt as is the case in criminal matters.

Firstly, I find that it is an undisputed fact that late Weddie Chemlesya Chelemu married late Elizabeth Thelma Chelemu under United Kingdom statutory law in 1960 as is evidenced from the Marriage certificate exhibit "**CC1**"; Elizabeth died in 2010 and death certificate is shown as "**CC1**" of the supplementary Affidavit dated 3rd May 2018.

I also find that it is not in dispute that the deceased married Odile Loukombo Chelemu under statute in Congo Brazzaville and there is a certificate of Marriage exhibited as “**OLCI**”. It is also undisputed that the late Weddie Chellemu was a Zambian who died intestate in Zambia thus falling under the jurisdiction of Zambian law regarding the administration of his estate.

What is in dispute and for my determination is whether or not the statutory marriage between Weddie Chemlesya Chellemu and Odile Loukombo Chellemu was valid in light of the fact that the late Weddie Chemlesya Chellemu had two statutory marriages. Secondly, I am invited to determine whether or not Odile Loukombo Chelemu is entitled to benefit from the estate of late Weddie Chemlesya Chelemu as a spouse or dependant or a beneficiary at all.

Having considered the evidence, I will first consider the marriage between the deceased and the 3rd Respondent. Was it a valid marriage given that the deceased had earlier contracted a statutory marriage with late Elizabeth Thelma Chelemu? In Zambia a statutory marriage is a marriage governed by ***the Marriage Act Chapter 50 of the laws of Zambia***. It was enacted “***to provide for the solemnization of marriages; to provide for the validation of marriages already solemnized...***” In the celebrated case of ***Hyde vs Hyde (1886) L.R 1& D. 130*** Lord Penzance stated thus;

“I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman,

to the exclusion of all others.” Such a marriage is as rightly argued by the Applicants is a monogamous marriage.

In Zambia the law is that a statutory marriage will conform to this condition or status quo of one man and one woman to the exclusion of all others.

Under the ***Penal Code Chapter 87 of the laws of Zambia, Section 166*** provides for the offence of bigamy that: -

“Any person who having a husband or wife living goes through a ceremony of marriage which is void by reason of it taking place during the life of such husband or wife, is guilty of a felony and is liable to imprisonment for five years”

The Penal Code also provides at ***Section 6(1)*** as follows;

“(1) Subject to subsection (3), a citizen of Zambia who does any act outside Zambia which if wholly done within Zambia, would be an offence against this Code, may be tried and punished under this Code in the same manner as if such act had been wholly done within Zambia”

This means that the Zambian courts have extra territorial criminal jurisdiction. This position was restated in the case of ***The People v Roxburgh***⁴ where Doyle C J in disagreeing with the

assertion that bigamy consists of two criminal acts, one, the first marriage and two, the second marriage had this to say at page 45;

“The criminal act is the second bigamous marriage. The first lawful marriage is not part of the crime, but merely creates a status in relation to which a crime can subsequently be committed by a second marriage. I have not the slightest doubt that this offence of bigamy was committed entirely outside Zambia”

In the case before me the facts clearly show that the deceased late Weddie Chemlesya Chelemu contracted a second marriage to the 3rd Respondent in 1992 while he was legally married to his wife of the first marriage. This second marriage was void because it had been celebrated during the life of Thelma Elizabeth Chelemu. I have taken cognizance of the 3rd Respondents arguments that she was equally married under statute suggesting that the marriage law of Congo Brazzaville could be equally applied to the marriage law of Zambia. This in my view raises the question of conflict of laws. I have examined the law on conflict of laws regarding marriages. Dicey & Morris, *The Conflict of Laws* (1973) at page 265 state as follows;

“Citing the case of White vs White (1937) P 111 and 128 where Bucknill J opined that “ there cannot be any conflict of laws between different jurisdictions, because it is clear that the ceremony was bigamous , and therefore , by the law of every Christian community there never was any matrimonial status common to the petitioner and the respondent.”

I now turn to the next issue for my determination that is whether the 3rd Respondent can benefit from the estate of the late Weddie Chemlesya Chelemu as a spouse or as a dependant or not at all. My starting point in this question is to consider the reliefs available to surviving members of a person, who dies intestate? ***The Intestate Succession Act Chapter 59 of the Laws of Zambia*** (“the Act”) was enacted in 1989 ‘to provide a uniform intestate succession law that will be applicable throughout the country.

For purposes of addressing the question before me I have considered ***Section 4(1)*** of the Act which, provides that: -

“A person dies intestate under the Act if at the time of his death he has not made a will disposing of his estate”

It has already been determined that the late Weddie Chemlesya Chelemu died intestate having left no will. In the case before me the 3rd Respondent claims she is entitled to a share of the estate of the deceased as a spouse on the belief that she was a wife of the deceased. It has been argued by the applicants that since the first marriage to Elizabeth Chelemu in 1960 was a monogamous marriage she was the only spouse of the deceased and that at the time of the deceased death Weddie Chelemu had no spouse because his marriage to the 3rd Respondent was void therefore even at the time of death of Elizabeth Chelemu in 2010 she was not married to the deceased as her marriage was void. The 3rd Respondent however argued that the Marriage Act could not be applicable to the marriage between herself and the deceased as the marriage was not done

pursuant to **Section 32(1)** of the Act which invalidates a marriage on grounds of prohibited degrees of marriage such as kindred or affinity or where a person is already married under African customary to another person. The 3rd Respondent also cited **Section 34** arguing that **Section 34** only applies to a situation where one contracts a second marriage under African customary law. That in the case in casu **Section 34** does not invalidate the marriage between the herself and the deceased. Counsel for the 3rd Respondent cited the case of **The People v Paul Nkhoma** which I have considered, and argued that polygamous marriages are still recognized in Zambia which was why the 3rd Respondent relied on her marriage certificate which was obtained in Congo Brazzaville and which marriage certificate clearly provides, under the heading “*Conditions of Marriage*” that polygamy is accepted. It was argued that in the absence or express provisions in the Marriage Act relating to two distinct statutory marriages from different jurisdictions the applicant’s arguments are misconceived.

I must state that I do not accept the submission of the 3rd Respondent that the inapplicability of **Sections 32 and 34 of the Marriage Act** does not preclude her from being recognized as a spouse or widow of the deceased because she also has a marriage certificate. It is unacceptable because evidence has shown that the deceased was married under English Laws under statute to late Elizabeth Thelma Chelemu in 1960. That marriage was a monogamous marriage and the deceased could not contract another marriage by statute or otherwise while the statutory marriage of 1960 was subsisting. There is no evidence that the marriage between

Elizabeth Thelma Chelemu and Weddie Chelemu was annulled at any time and the 3rd Respondent could not, by law, be considered as a spouse. I find that the 3rd Respondent cannot benefit from the estate as a spouse.

Be that as it may, evidence from both parties revealed that the 3rd Respondent was living with the deceased from about 1992, when she and the deceased celebrated a marriage in Congo Brazaville, until the time of the deceased's death on 15th May, 2012. There is also evidence that she was an active participant of the affairs of the deceased because after she obtained Probate for the estate of Weddie Chemlysa Chelemu as sole administratrix, which appointment was challenged by family members of the deceased, she was subsequently re appointed as a co-administrator by Consent of the family members. The management of the properties, especially the businesses at Plot No 1139 Lumumba road Lusaka, was done by the 3rd Respondent. The applicants have prayed that the court should declare that the 3rd Respondent is not a dependent as she does not fall within the definition of a dependent under section 3 of the Intestate Succession Act which provides: -

“dependent” in relation to deceased person means a person who was maintained by that deceased person immediately prior to his death and who was-

(a) a person living with that deceased person;

The Applicants argued that in order for the 3rd Respondent to qualify as a dependent she was to meet two tests namely;

1. *that she was living with the deceased immediately before his death and;*
2. *that she was maintained by the deceased.*

The Applicants argue that the 3rd Respondent has not produced any evidence to Court to show that she was maintained by the deceased and in the absence of such evidence the court is not at liberty to declare her a dependent.

The 3rd Respondent did not argue the notion of being considered a dependent as she was of the view that she was not a dependent because she believed her marriage was valid.

To address this question, I considered the case of ***Charity Opaoracha vs Winfridah Murambiwa (supra)*** where the question of a dependent was considered by the Supreme court. The court stated at page 147;

“In our view, the wording of section 3 of the Act (Intestate Succession 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 the statute. We uphold the learned trial Judge that the respondent was a dependent within the meaning of Section 3 of the Act”

The evidence before me shows firstly that in the Affidavit in Support of Originating Summons filed on 6th July ,2017 and deposed by the 2nd Applicant Chana Chelemu Jere states at paragraph 8 that

the 3rd Respondent co – habited with the deceased at the time of his death. Secondly the Affidavit in opposition of the 3rd Respondent shows at paragraph 7 that the deceased and herself were jointly running the business premises at Plot No.1139 Lumumba road and from 2006 when the deceased got ill to the time of his death she was running the business alone and was in charge of all administrative affairs of the business including receiving rentals from tenants.

In my view the undisputed evidence shows that the 3rd Respondent was part of the affairs of the deceased and who by virtue of her living with the deceased was maintained as the person who was responsible for her well-being of the 3rd Respondent and that of her child, who she was blessed to have with the deceased. Further, the 3rd Respondent has been considered all along as a part of the Chelemu Family, hence her re-appointment as a co-administer to the estate of the deceased. It was also not disputed by the applicants when the 3rd Respondent deposed in her Affidavit in opposition of 19th July, 2017 at Paragraph 9 that:- ***“that considering that the said business situated at Plot No. 1139 Lumumba road was our source of income and in order to protect my interest as well as that of my child and dependants, I proceeded to obtain letters of my late husband.”***

This clearly shows that not only did she depend on the deceased, but on the business, which was mainly run by the deceased before he became ill.

Therefore, in exercise of the of the powers in my by virtue of **Order 30 rule 11**, I declare that Odile Luokombo Chelemu, the 3rd

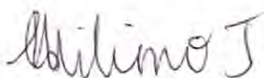
Respondent was a dependent of late Weddie Chemlesya Chelemu and is entitled to benefit from the estate as a dependent in accordance with **Section 5 (1) (d) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia** which entitles her to ten percent of the estate.

Accordingly on the prayer for a declaration that the marriage between late Weddie Chemlesya Chelemu and Odile Luokombo was invalid and hence Odile Luokombo Chelemu is not entitled to any benefit from the estate of the late Weddie Chemlesya Chelemu as a spouse, I find that Odile Loukombo Chelemu's marriage was void and I order that she is not entitled to any benefit as a spouse and I am satisfied that she meets the criteria required in the Intestate Succession Act and order that she should benefit as a dependent.

Both parties shall bear their own costs.

Leave to appeal is granted.

Delivered at Lusaka on 28th February, 2020



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**G. MILIMO - SALASINI
HIGH COURT JUDGE**