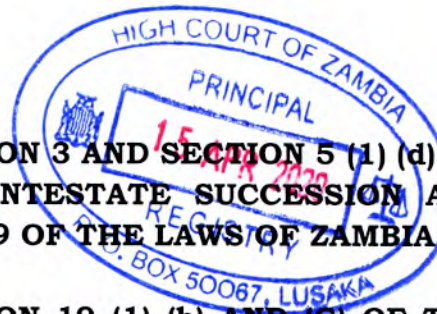


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2019/HP/F153



IN THE MATTER OF:

SECTION 3 AND SECTION 5 (1) (d) OF
THE INTESTATE SUCCESSION ACT
CAP 59 OF THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF:

SECTION 19 (1) (b) AND (c) OF THE
INTESTATE SUCCESSION ACT CAP
59 OF THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF:

IN AN APPLCIAITON FOR THE
ACCOUNT AND DISTRIBUTION OF
THE INTESTATE OF THE LATE
RICHARD MOYO COMPRISING INTER
ALIAS LOT NO 5023 OLD MUSHILI
TOWNSHIP.

BETWEEN:

RABBECCA KABUNGO

APPLICANT

AND

JOHN MOYO SALATIEL MOYO

1ST RESPONDENT

SALATIEL MOYO

2ND RESPONDENT

Before the Hon. Mr Justice M.D. Bowa in Chambers on 15th April 2020

For the Applicant: In Person

For the Respondents: In Person

JUDGMENT

Authorities Referred to

1 *Sablehand Zambia Limited v. Zambia Revenue Authority* (2005) ZR. 109 (SC).

2. *Lindiwe Kate Chinyanta v Doreen Chiwele Judith Tembo* (S.C.Z Judgment Number 28 of 2007)

3. *Coldham S Customary Marriage and the Urban Local Courts in Zambia*
1990 J.A.L VOL 34, NO 1 at 67 -75

3. *Intestate Succession Act Cap 59 of the Laws of Zambia.*

The Applicant commenced this action by originating summons dated 14th May 2019 seeking the following reliefs:

- (i) *A declaration that Applicant is a legal beneficiary of the estate of the late **RICHARD MOYO** as a widow.*
- (ii) *An order for the administrator to distribute the estate of the late **RICHARD MOYO**.*
- (iii) *A declaration that Applicant, other beneficiaries and dependents whom **RICHARD MOYO** maintained while he was alive, benefit from the estate and be given their shares or entitlement.*
- (iv) *Payments received from the estate of **RICHARD MOYO** by Respondent or any such person be reconciled and receipts or records surrendered to Court to share the same money to the beneficiaries equally.*
- (v) *Revocation of letter of appointment of administrators granted to the 1st and 2nd Respondent and new administrators be appointed to administer and distribute the estate of **RICHARD MOYO** to the beneficiaries.*

- (vi) The estate of **RICHARD MOYO** to be shared equally and record be rendered to the account.*
- (vii) Further or in the alternative, issuance of warrant of distress against the Respondents in respect of properties and assets of the Respondent at the premises.*
- (viii) Costs and interest.*

The affidavit in support was sworn by Rebecca Kabungo the Applicant herein. She deposed that she is the wife of the late RICHARD MOYO now deceased and one of the beneficiaries of his estate.

She deposed that she is the wife to the late Richard moyo and one of the beneficiaries to the estate. The marriage was entered into on 13th August 2013 and the couple was blessed with one child named Emmanuel Moyo. The family lived in old Mushili Township in Ndola.

It was averred further that the Late Mr. Moyo and the Applicant also kept 2 other children who were the offspring of one of his sisters. The court was further informed that the late Mr. Moyo was a businessman and was thus able to purchase the property

in dispute in this case. Following his funeral the Respondents were appointed administrators of the estate.

It was contended that the estate includes one house in Mushili and money reserved in an FNB account which needed to be shared to the beneficiaries. However it was the Applicants evidence that the Respondents have deprived her and other beneficiaries their share of the estate. That in their quest to do so the Respondent had even gone as far as removing the Applicant from the list of beneficiaries and proceeded to have themselves appointed administrators without her knowledge or consent and they had no legal authority to do so.

It was her strong belief that the intestate succession law makes provision and guides on the manner of distribution of an estate of a deceased person who dies intestate and defines who qualifies to be beneficiaries. In this regard, the Respondents had no capacity to declare her a non-beneficiary more so that the deceased did not declare she was not his wife whilst he was alive.

She averred further that the Respondents have converted to their use and for selfish reasons her share of the said estate and in light of their ill motive to deprive the beneficiaries of the estate

are not suitable to continue as administrators of the estate. She thus lives in constant apprehension of losing her share and entitlement of the estate.

The Affidavit in opposition was sworn by John Moyo the 1st Respondent. It was his position that the Applicant was not married to the deceased but merely cohabited with him for a period not exceeding 3 years out of which a child was conceived. It was contended further that the Applicant deserted the deceased who subsequently died in his house and his decomposing body was only found 2 weeks after his death by family members.

The deponent added that the house in issue situate on lot no 5023 New Mushili was purchased by the late Richard Moyo's mother Lamini Chibola in December 1999. It was averred further that at the time of his demise, the late Moyo was not doing any business nor was he in any formal employment. That he only left K10,000 in a fixed deposit account held at First National Bank(FNB) which funds have not been withdrawn as alleged by the Applicant. All adverse claims and averments made against the Respondents by the Applicant in her affidavit in support were denied.

The Applicant filed in an affidavit in reply dated 1st October 2019. She reiterated her claim to be married to the deceased and that the 1st Respondent was very aware of such marriage. She contended that the dowry was paid by one Elisha Ombarumee. She repeated her assertion that she and the deceased wed on the 13th of August 2013 and lived as husband and wife with their child in Mushili compound.

She insisted that the house claimed as part of the estate was not purchased by the deceased mother or anyone else but the late Richard Moyo. She further contended that the land record card exhibited "JM2" in his late mother's names was suspected to have been obtained by fraud and should be cancelled. Further that the record card has 2 different property numbers 1210 and 5023A. She denied the assertion that she deserted her husband and that his decomposed body was only discovered by his relatives. She believed the Respondents position should be dismissed for not having any merit.

I considered the affidavits and in terms of order 28 of the rules of the Supreme Court 1999 edition, determined that triable issues were raised rendering the matter proceeding by affidavit evidence

untenable. I therefore deemed the matter to proceed as if commenced by writ and gave directions to proceed to trial.

At the hearing which was held on the 14th of February 2020, the Applicant testified as Pw1. She testified that she had witnesses to confirm her assertion that she was lawfully wed to the deceased on the 13th of August 2013 in Choma. She testified that the dowry was paid to her father by the deceased's representative Mr. Elisha Wombalume who was accompanied by his sister. There was also a marriage ceremony and celebration held.

The Applicant informed the court that she had one child with the deceased and they lived together at house no 5023 old Mushili in Ndola. Before they moved to Ndola they lived in Choma where she was accepted by the whole family. The Respondents would also come to her house. She testified further that at some point her husband chased her from the matrimonial home. Further that they proceeded on separation for a period of 3 years from 2015 but did not divorce.

It was the Applicant's further evidence that the house that they lived in belonged to her husband and that he left money in an FNB account. He was a businessman as far as she knew. He died

around April 2019 and she attended the funeral. It was her evidence that the Respondents were depriving her child his entitlement. She stated that she was not making any claim for herself but her primary interest was for her child whom she stated had not been given anything. She prayed for the reliefs as set out in the originating summons.

When cross examined by the 1st Respondent the Applicant stated that there was no Moyo family in Choma but only Wombalumes. She accepted that she did not know where her late husband was buried as she arrived for the funeral late. She further accepted she did not stay at the funeral long. She accepted that the children she and her husband were looking after were from her side of the family.

Cross examined by the 2nd Respondent the Applicant accepted that she had never seen him visit their home. She contended that her husband's sister's name was Esther Wombalume and that she stays in Choma. She denied having stated that she lived with her husband until the time of his death in her affidavit. She testified that at the time she left the matrimonial home the deceased was not suffering from any sickness. He just had a swelling on his back. She denied that her family asked for the

house and money at the funeral. According to the Applicant they only asked what the welfare of the child would be in light of the house and money left by the deceased.

Asked what the 2nd Respondent said to her in response, the Applicant informed the court that he told her family that the deceased did not leave any money and that the house belonged to the Respondent. Further that he had just left blankets. He further informed her to keep the child whom the family would support but no support has been forthcoming.

Cross examined further the Applicant accepted that her family refused to leave the child on account of his age. They further refused to accept the blankets offered to them as part of the deceased property. She admitted that her family refused to accept the food they were offered at the funeral as they were not pleased with what the Respondent was saying to them. In particular that the deceased had not left anything to his name and was in fact being looked after by the Respondents

There was no re-examination.

PW2 was Richard Kabungo the Applicant's father resident at Kapongo farm in Kafue. He expressed concern about the welfare

of the child the deceased left. As far as he was aware the deceased had a house and other property although he did not see them. He testified that his daughter was lawfully wed to the late Richard Moyo. He personally received the dowry of K1700, 000 unrebased through Mr. Moyo's brother and sister. The marriage was celebrated at a formal ceremony in Choma at which a goat and chickens were slaughtered. A second wedding party was later held at Mr. Moyo's house in Choma.

When cross examined by the 1st Respondent, Pw2 insisted that the deceased had family in Choma. He testified that he never visited the couple once they wed at their house. He revealed that his daughter returned home in 2015 and unwell. Cross examined by the 2nd Respondent Pw2 stated that the person who paid the dowry was a Mr. Elisha Wambulume. Though not a Moyo the said Wambulume came from the same family as far as Pw2 was concerned and paid the dowry on behalf of Mr. Moyo. He accepted that he had never seen the 2nd Respondent before in Choma and that he had never visited Ndola. Further that he did not attend his son in law's funeral but sent his wife, son and daughter to represent him.

According to the witness, the deceased had told him he had a house in Zambia and another in South Africa. He had further informed him that he had put the house documents in his son's names. He insisted that it was possible to change the house details. He explained that the deceased passed on within a few years of the union which would explain why the families did not get to know each other well.

The last of the Applicant's witnesses was Esther Mbalume. Her evidence was that the Applicant was married to her elder brother. She added that the 2 Respondents are her uncles. She testified that she was present when the dowry for the Applicant's hand in marriage was being paid. After the money was paid there was a celebration of the marriage and the bride was handed over. The couple lived in Choma for a while and later relocated to Ndola

When cross examined by the 1st Respondent Pw3 stated she was given authority to find a woman for her late brother by her mother based in Botswana. In further cross examination by the 2nd Respondent the witness testified that she did not inform her relatives in Ndola that she had been requested to find a wife for the deceased. She admitted she had not met the Respondents before but heard about them from her mother who would tell her

she had uncles in Ndola. Her mother however never mentioned anything to her about visiting them in Ndola.

She testified further that she never visited Richard Moyo whilst he was sick nor did she go to the funeral house. She admitted she hasn't been to the funeral house to present day. This was because her husband fell ill and died.

There was no re-examination and that was the case for the Applicant.

In his defence the 1st Respondent testified that the late Richard Moyo left Zambia in 1994 and went and stayed in South Africa. His mother fell ill whilst he was away and efforts to trace him failed. When he resurfaced his mother had already died. The 1st Respondent explained that the deceased mother was his elder sister and had 2 houses. Richard informed the family he was going through a hard time in South Africa. After the family sat down they decided to sell one house and gave him the money. At some point he said he could not continue to live in Zambia and wanted to return to South Africa.

The deceased later resurfaced in 2014 and informed the family he had a child. The second house that his late mother left was

incomplete and was a two roomed structure. The late Richard Moyo told the family he had used up all the money he was given and bought plots in Choma. He asked if he could live in the incomplete house and the family agreed. The 1st Respondent purchased the roofing sheets and his nephew moved in. He further extended it to 4 rooms and started living there with the Applicant. 2 of the rooms were put on rent. The Deceased wasn't doing any work at the time.

He later told the family that his wife had run away after he gave her some money to do some business. The Respondents thus started taking care of him as they run a big workshop. At some point the late Richard travelled to South Africa to sell the house he had there. He came back with the money from the sale and deposited the money in a fixed deposit account. He started getting sick soon after that. He announced his intention to go to Chilabombwe and everyone assumed that's where he had gone.

Sometime later, the family heard that there were flies coming out of and around the house he was staying. The Respondent went to the house and discovered his nephew's decomposed body in the house which they had to promptly bury in light of its state.

He testified that he is not the administrator of the estate for the deceased. He insisted that the house claimed belonged to Richard's late mother as confirmed by the land record card exhibited in the affidavit in opposition. He testified further that the Respondents did not touch the money the deceased left in the account.

When asked by the court what property the late Richard Moyo left, the 1st Respondent testified that he did not have any property to his name except for a mattress, meal bins and the money in an FNB account. The details of the bank account were as per exhibit JM3.

When cross examined by the Applicant, the 1st Respondent testified that the family was unaware of a marriage subsisting with the deceased. That the Applicant came to ask about the money and house a day after his burial and whilst the family was still in mourning so no documents had been found for the bank at the time. This explained why they told her there were no documents for the bank at the time she asked.

As far as the 1st Respondent was aware, the Applicant deserted her husband in 2015 and he died in 2019. He therefore did not

have any communication with her which was why he didn't tell her Richard had passed on. He denied ever mentioning anything about cleansing the Applicant at the funeral as suggested.

The 2nd Respondent adopted the evidence given by the 1st as his own. He only came to know the Applicant for the first time when she came to the funeral house with her parent and sibling. He explained further that the family had never sat down to appoint an administrator for the properties that Richard left. As far as he was aware, Richard had some money in the Bank account and did not have any other property. He like the 1st Respondent maintained that the house in issue belonged to their late sister.

Asked by the court who is currently living in the house the 2nd Respondent stated it was unoccupied and locked up. Further that since the matter is now in court they have not yet rendered any support to the child whom they nonetheless recognize and accept to have been their nephew's offspring.

He testified further that the family does not recognize the marriage as they were not aware or told about it. He explained that he is presently the eldest sibling in the family and young brother to the deceased mother.

He testified further that he did not know PW3 but admitted that he did know the person that she referred to based in Botswana. He however did not know the persons named that allegedly delivered the dowry.

The witness was not cross examined and that was the case for the Respondents.

I have carefully considered the evidence before me. The parties opted not to file any submissions and relied on the evidence before court. The primary issue for my determination is simply whether the Applicant has discharged her burden of proving her case in this matter on a balance of probabilities to warrant the grant of the reliefs sought. I note that in the affidavit in support and in reply the Applicant quite clearly claims she was entitled to a share of the estate as the spouse of the deceased. However in examination in chief she appeared to change her position and stated her primary interest lay in making a claim for her son.

Notwithstanding her shift in position, the issues in dispute as I see them are firstly whether the Applicant was married to the late Richard Moyo to stake a claim to the estate and secondly whether the house in issue formed part of the late Richard's estate.

Further i ask myself if there is evidence that the Respondents were the administrators of the estate who are deliberately depriving the beneficiaries of the estate their share and further if there is sufficient basis for the court to revoke their appointment as administrators as prayed. I proceed to consider each of these questions in turn.

1. Was there a marriage?

Writing on his research based on the Zambian experience, Simon Coldham in his article titled **“Customary Marriage and the Urban Local Courts in Zambia”** published in 1990 J.A.L VOL 34, NO 1 at 67 -75 observes that:

“ for customary marriage to subsist it is sufficient that parties observe the requirements customary in their community governing capacity, consents, bridewealth, mode of celebration etc...In practice the courts tend to infer the existence of a marriage from the presence and evidence of the parties, their relatives and friends rather than consider whether certain antecedent prescribed conditions have been met...”

The evidence before me as led by pw1, pw2 and pw3 is the deceased using his representatives approached the Applicant’s father declaring intent to marry and paid the requisite dowry.

This was followed by a celebration or wedding party attended by both sides of the families and the couple initially lived in Choma before relocating to Ndola. The Respondents dispute the union simply on account of the fact that there were no Moyo's in Choma and they were unaware or involved in the marriage formalities. However the 1st Respondent acknowledges that the Applicant lived with the deceased in the house in Ndola and that they had a child together. I therefore have no basis to discount the marriage subsisted in the wake of this evidence.

However in 2015, the Respondent left the matrimonial home and did not return until her husband died. The family appears incensed by this and accuses her of having deserted him and left him to die. A read of the affidavit in opposition can mislead one into believing she left the man in his dying bed when they actually separated 3 years earlier. The question is was the marriage still subsisting at the time of his death? I would think not. They had been apart for close to 4 years and though a customary marriage it cannot be said there was a marriage in such circumstances. Coldman in his work (supra) at page 71

concludes that divorce may be obtained extra-judicially based amongst other grounds desertion.

Although no formal divorce was obtained in the local court I find that there was no marriage subsisting at the time of the deceased death. This therefore means she was not a spouse entitled to any share of the estate within the meaning placed in the intestate succession Act.

1. Was the house part of the estate?

PW1 and her father insist that the house was part of the estate. PW1 said her husband was a businessman and bought the house. The Respondents dispute this and produce a land record card in the names Limani Chibola as proof the property belonged to their sister. The Applicant suggests in her affidavit in support that the land record card could have been forged pointing to the 2 property numbers as proof of such fraud.

In **Sablehand Zambia Limited v. Zambia Revenue Authority**¹ the Supreme Court makes clear that where fraud is alleged it must be distinctly and clearly set out. The Applicant did not do so. It is also settled that the standard of proof to establish such fraud is much higher than a balance of

probabilities. Needless to say that standard has not been met and I accept the property fell in the estate of the deceased's late mother.

Richard Moyo may very well have been a beneficiary of his mother's estate and could have inherited the house. No evidence of the manner of distribution of her estate was led and is in any event is outside what has been pleaded in this case. Further the evidence before me is there was no administrator appointed to distribute her estate. Suffice to state for present purposes there is no evidence to support the assertion that the house belonged to the late Richard Moyo as claimed.

3. Were the Respondents appointed administrators of the estate?

The Applicant contends that the Respondents were appointed administrators of the estate for Mr. Moyo. Both deny this. In fact that the family did not get round to appointing an administrator and the monies deposited in a FNB account forming the only asset of value left by the deceased remain untouched. I have no reason to find differently. There was no

evidence led to confirm that the Respondents were appointed administrators and depriving the beneficiaries of the estate share of their estate. It follows that as the Respondents were not appointed administrators, the question of the revocation of such appointment does not arise or the need for them to account for the distribution of the estate.

5. Conclusion

The above settled, I conclude that it is not in dispute that the deceased was survived by a child who is duly entitled to a share of the money left in the fnb account. The problems in this case were exacerbated by the family's failure to appoint administrators to distribute the estate for both the late Lamini Chibola and her son Richard Moy's estate. Section 15 subsection 3 and 4 of the Intestate succession Act provides that.

(3) Where no person applies for letters of administration, letters of administration may be granted to the Administrator-General or to a creditor of the deceased.

(4) Where it appears to the court to be necessary or convenient to appoint some person to administer the estate or any part of it other than the person who under subsection (1) in ordinary

circumstances would be entitled to a grant of letters of administration, the court may, having regard to consanguinity, amount of interest, the security of the estate and the probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

Pursuant to the above sections and granted no party has applied for letters of administration I have deemed it necessary to appoint the Administrator General in particular to establish and administer the full extent of the estate for the late Richard Moyo and to proceed to distribute it in accordance with the intestate succession Act.

In keeping with the Supreme Court decision in **Lindiwe Kate Chinyanta v Doreen Chiwele Judith Tembo²** the family of the deceased are obligated to provide information or documents which may be required by the Administrator in order to perform their duties. Any form of interference or meddling in the estate is liable to sanction. The Respondent's are therefore expected to cooperate to ensure the winding up and distribution of the estate to the identified beneficiaries and not hinder the process in any way.

Each Party will bear their own costs for this matter.

Dated at Lusaka the 15th of April 2020.



HON. JUSTICE M.D. BOWA