

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



2019/HPF/343

BETWEEN:

**IN THE MATTER OF: THE ESTATE OF THE LATE WAMUNDILA
MUKELABAI**

**IN THE MATTER OF: KOPANO MUKELABAI ADMINISTRATOR OF
THE ESTATE OF THE LATE WAMUNDILA
MUKELABAI**

**IN THE MATTER OF: SECTION 19(2) OF THE INTESTATE
SUCCESSION ACT, CHAPTER 59 OF THE LAWS
OF ZAMBIA**

**IN THE MATTER OF: ORDER 30 RULE 12 OF THE HIGH COURT
RULES, CHAPTER 27 OF THE LAWS OF
ZAMBIA**

**IN THE MATTER OF: AN APPLICATION FOR AUTHORITY FROM
THE COURT TO SELL SUB DIVISION A OF
SUB 3 OF SUB 'O' OF FARM NO 196a
SITUATE IN THE LUSAKA PROVINCE OF THE
REPUBLIC OF ZAMBIA TO ADOJA AMEYAA
PARKER**

AND

KOPANO MUKELABAI

APPLICANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 26th
DAY OF JUNE, 2020**

For the Applicant : Messrs Chilupe & Permanent Chambers

R U L I N G

LEGISLATION REFERRED TO:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. The Intestate Succession Act, Chapter 59 of the Laws of Zambia**

OTHER WORKS REFERRED TO:

- 1. Atkins Court Forms Vol 15, 2nd Edition, 1998 Re-issue**

The applicant by summons filed on 24th June, 2020, has applied pursuant to Order 35 Rule 6, as read together with Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, for an order to set aside the order of 21st February, 2020 which dismissed the originating summons.

The affidavit in support of the application, which is deposed to by Willie Aubie Mubanga an advocate practicing in the firm Chilupe & Permanent Chambers, states that this honourable court on 17th October, 2019 directed the applicant to obtain probate from the High Court of Zambia before it could entertain the application before it. It is averred that in compliance with the said directive by the court, the probate obtained before the High Court was filed on 17th February, 2020, which is exhibited as 'WAM1' to the affidavit.

However, when the matter came up on 21st February, 2020, it was dismissed on account of the letters of administration being invalid, when in fact, a grant of probate from the High Court had been obtained, which was exhibited to the affidavit filed on 17th February, 2020. The averment is further that this matter was being handled by Mwinji Nachinga an advocate before she left the firm, and the deponent only became aware that the matter was coming up on 21st February, 2020, as he was

travelling back from Ndola where he had been attending the Court of Appeal session, as evidenced on the cause list exhibited as 'WAM2'.

I have considered the application. It was made pursuant to Order 35 Rule 5 and Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia. Order 35 Rule 5 provides as follows;

“5. Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such terms as may seem fit”.

Order 3 Rule 2 of the said Act on the hand states that;

“2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not”.

The background leading to the application before me, is that on 30th September, 2019, the applicant filed originating summons pursuant to Order 19 (2) and Order 30 Rule 12 of the High Court Rules, Chapter 27 of the Laws of Zambia, seeking an order that the applicant be granted leave to sell the property known as Sub A of Sub 3 of Sub 'O' of Farm No 196a Lusaka in his capacity as Administrator of the estate of the late Wamundila Mukelabai.

I scheduled the matter for hearing on 17th October, 2019, but neither the applicant nor his Counsel were before the Court. I noted that the letters of administration that had been exhibited as 'KM1' to the affidavit in support of the originating summons were obtained from the Local Court, and that under Section 43 of the Intestate Succession Act, Chapter 59 of

the Laws of Zambia, the Local Court only has jurisdiction in matters of succession, where the estate does not exceed K50.00.

I further noted that the property sought to be sold exceeded K50.00 and that accordingly, the letters of administration obtained were invalid. I directed the applicant to obtain letters of administration from the High Court before I could entertain the matter. I adjourned the matter to 22nd November, 2019.

On that date, neither the applicant nor Counsel were before court, and I adjourned the matter to 9th December, 2019. I did not sit on that date, and notices of hearing were issued for 21st February, 2020. There was no attendance by the applicant and his Counsel on that date, and I accordingly dismissed the matter, as the letters of administration obtained from the Local Court were invalid.

The applicant has applied for an order to set aside the order dismissing the matter. **Atkins Court Forms Vol 15, 2nd Edition, 1998 Re-issue** states that dismissal finally terminates a dismissed action, and no further steps can be taken in it in relation to the claim made in it. Therefore, the matter having been dismissed, the application to set aside the order dismissing cannot be validly made under the file. I do however note that the deponent deposes that the applicant had filed an affidavit on 17th February, 2020, exhibiting the grant of probate by the High Court.

The grant of probate is exhibited as 'WAM1' to the affidavit. The affidavit dated 17th February, 2020 exhibiting the grant of probate is not on the court record. However, I will give the applicant the benefit of doubt, and

in the exercise of my powers of review under Order 39 of the High Court Rules, I set aside the order dismissing the matter.

Order 30 Rule 12 of the High Court Rules, Chapter 27 of the Laws of Zambia states that;

“12. The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested under the trust of any deed or instrument in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law of a deceased person or as cestui que trust or as claiming by assignment or otherwise under any such creditor or other person as aforesaid may take out an originating summons for such relief of the nature or kind following, as may be specified in the summons and as the circumstances may require, that is to say, the determination, without an administration by the Court of the estate or trust, of any of the following questions or matters so far as the same arise in the course of the administration or performance of such estate or trust:

(a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust;

(b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others;

- (c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;***
- (d) the payment into Court of any money in the hands of the executors or administrators or trustees;***
- (e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees;***
- (f) the approval of any sale, purchase, compromise, or other transaction;***
- (g) the determination of any question arising in the administration of the estate or trust.***

On perusal of the affidavit filed in support of the originating summons and the affidavit filed in support of the summons for an order to set aside the order dated 21st February, 2020, I note that the applicant is the duly appointed administrator of the estate of the late Wamundila Mukelabai who died intestate on 19th November, 1997.

I further find that the late Wamundila Mukelabai was the beneficial owner of Sub A of Sub 3 of Sub 'O' of Farm 196a Lusaka. The applicant deposes that he is the sole beneficiary of the estate of the late Wamundila Mukelabai and he wishes to sell the property to Adoja Ameyaa Parker. Section 19 (2) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia provides that;

