

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



2020/HP/0247

IN THE MATTER OF:

**SECTIONS 11 AND 13 OF THE HIGH COURT
ACT, CHAPTER 27 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**RULE 53 OF THE NON CONTENTIOUS
PROBATE RULES OF 1987 AND ALL
ENABLING PROVISIONS**

AND

IN THE ESTATE OF:

LIEUTENANT HUMPHREY KALENGA

AND

THE ATTORNEY GENERAL

APPLICANT

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

*For the Applicant : Captain M.I Lifunana, State Advocate, Attorney General's
Chambers*

J U D G M E N T

CASES REFERRED TO:

- 1. Re Hurlstons Goods 1898 P27**
- 2. Re Pyare Al Sahota 2014/HP/0048**

LEGISLATION REFERRED TO:

- 1. Rule 53 of the Non Contentious Probate Rules of 1987**

The applicant commenced this matter by way of ex-parte originating summons on 21st February, 2020, in which the following reliefs are sought;

- 1. An order granting leave to swear death of Lieutenant Humphrey Kalenga for the reason that he has been missing since March, 2005, when he was on active duty, and having not heard or seen him since then, is presumed to have died.*

The affidavit in support of the originating summons which is deposed to by Lieutenant Colonel Elias Zulu, the Manpower and personnel Administration Officer in the Zambia Army, states that he is responsible for man power in the Regular Force of the Zambia Army. He states that Lieutenant Humphrey Kalenga was a bona fide officer, as he was attested as an Officer Cadet in the Regular Force of the Zambia Army on 3rd May, 1998, as shown on the attestation paper, which is exhibited as 'AZ1' to the affidavit.

It is also deposed that Lieutenant Humphrey Kalenga was deployed in Senanga on active service, and on 10th March, 2005, whilst attempting to cross the Zambezi River from Safaris to Kalongola, the boat in which he was, hit into a sand bar and capsized. Lieutenant Humphrey Kalenga fell into the river as a result, and he has not been heard from since. The deponent avers that the Zambia Army made frantic efforts to recover the body of Lieutenant Humphrey Kalenga, which efforts were in vain.

Consequently, as per procedure in the Zambia Army, a board of enquiry was duly convened on 5th October, 2005 to enquire into the accident, and the whereabouts of Lieutenant Humphrey Kalenga, which board of enquiry is exhibited as 'EZ2' to the affidavit. Further, that as per

procedure in the Zambia Army, a Committee of Adjustment in respect of Lieutenant Humphrey Kalenga's estate was conducted on 22nd May, 2014, as shown on exhibit 'AZ3', the Committee Adjustment Report.

The deponent avers that prior to convening the Committee of Adjustment, the Command wrote to 3 Brigade on 9th January, 2013, declaring Lieutenant Humphrey Kalenga to have died. The letter so declaring is exhibited as 'EZ4'. Then on 28th January, 2013, the Regimental Commander 17 Calvary, a unit to which Lieutenant Humphrey Kalenga belonged, wrote a "*To Whom it may Concern*" letter, exhibited as 'EZ5' to the affidavit, confirming that Lieutenant Humphrey Kalenga was presumed dead.

The averment is that the father to Lieutenant Humphrey Kalenga, Beanwell Peter Kalenga was on 5th March, 2013, granted letters of Administration by the Mpongwe Local Court to administer the estate of Lieutenant Humphrey Kalenga, and the letters of Administration, the general affidavit deposed to by Beanwell Peter Kalenga and his national registration card are exhibited as 'EZ6a-c'.

It is also deposed that the Zambia Army caused to be published Part Two Orders relating to the death and retirement of Lieutenant Humphrey Kalenga, which is exhibited as 'AZ7'. The deponent further states that another Board of Enquiry was convened on 22nd November, 2016, to declare Lieutenant Humphrey Kalenga dead, as shown on the enquiry report exhibited as 'EZ8'.

That however, the Public Service Pensions Fund Board has declined to compensate the estate of Lieutenant Humphrey Kalenga on account of failure to produce an order swearing and declaring the death of

Lieutenant Humphrey Kalenga. It is deposed that the deponent verily believes that Lieutenant Humphrey Kalenga died on the fateful day on 10th March, 2005, on the Zambezi river, and that he was twenty eight (28) years old.

Further, that neither the Zambia Army nor his relatives have heard from him since, and it is stated that Lieutenant Humphrey Kalenga did not have insurance, and the Committee of Adjustment, as shown on exhibit 'EZ4' reveals that he had no bank account. The deposition is further that from his personal file, Lieutenant Humphrey Kalenga did not leave any valid will, and that the estate of Lieutenant Humphrey Kalenga having been deemed to have retired after fourteen (14) years at the time he was presumed dead, is valued at K277, 336.08 (Two Hundred and Seventy Seven Thousand, Three Hundred and Thirty Six Kwacha Eight Ngwee).

That the beneficiary of Lieutenant Humphrey Kalenga is his biological father Mr Beanwell Peter Kalenga, and that he has been advised that the law presumes a person to have died if their whereabouts are unknown for a period of seven (7) years and beyond.

At the hearing, Counsel stated that they relied on the affidavit filed in support of the application, as well as the list of authorities. Counsel also reiterated the contents of the affidavit, stating that Lieutenant Humphrey Kalenga was enlisted in the Zambia Army in 1998, and that on 10th March, 2005, whilst he was on active service on a boat on the Zambezi River, it capsized, and he has not been heard from to date.

Counsel further reiterated that as per Zambia Army Procedure a Committee of Adjustment was conducted, whose rationale is ascertain the assets and liabilities of the deceased, and whether such person still

has military kit, which report is exhibited as 'EZ3'. Further reliance was placed on the case of **Re Pyare Al Sahota** ⁽²⁾ stating that in that case, Hon Mrs Justice F.M. Chisanga relying on the case of **Re Hurlstons Goods** ⁽¹⁾ granted a similar order swearing the death of Manjid Pal Sahota.

He went on to state that the court in that matter guided that the applicant ought to have demonstrated the age of the deceased prior to them going missing, and that they have not been heard from for a period exceeding seven (7) years. Further, that the applicant reasonably believes that the deceased actually died, and they had a bank account, and where that is so, how much they had in that account, as well as the last transaction that was made on the account.

It was also Counsel's submission that it must be shown that the deceased had life assurance. Counsel still in submission stated that the applicant had met all the requirements that need to be satisfied in order for the order to be granted. He reiterated that Lieutenant Humphrey Kalenga went missing on 10th March, 2005, and the period of seven (7) years elapsed in 2014. It was stated that the Administrator of his estate has not accessed his terminal benefits and pension, which is valued at K277,386.08, as there is no order declaring him dead.

Counsel prayed that the court grants the order declaring Lieutenant Humphrey Kalenga to have died seven (7) years after 10th March, 2005, when the presumption of death materialized, so that the family through the Administrator, who is his father, can access the benefits, as well as bring closure to the family over the loss. He further stated that this will also bring closure to the Zambia Army for the loss of their fallen comrade.

I have considered the matter. It was brought pursuant to Sections 11 and 13 of the High Court Act, as well as Rule 53 of the Non Contentious Probate Rules of 1987, and all the enabling legislation. Section 11 of the High Court Act provides that;

“11.(1) The law and practice for the time being in force for the Probate, Divorce and Admiralty Divisions of the High Court of Justice in England with respect to the Queen's Proctor shall, subject to rules of court and to any rules made under the provisions of the Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926 to 1950, of the United Kingdom, apply to the Attorney-General.

(2) The jurisdiction of the Court in probate causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911)”.

Section 13 of the said High Court Act on the other hand states that;

“13. In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any

and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail”.

Rule 53 of the Non Contentious Probate Rules, 1953 states that;

“An application for leave to swear the death of a person in whose estate a grant is sought may be made to the Registrar and shall be supported by an affidavit setting out the grounds of the application, and containing the particulars of insurance effected on the life of the presumed dead, together with such evidence as the Registrar may require”.

In this case the affidavit evidence shows that Lieutenant Humphrey Kalenga was a duly attested Officer Cadet in the Regular Force of the Zambia Army, and that on 10th March, 2005, when he was active duty on a boat on the Zambezi river, the boat capsized, and that he has not been heard from since.

The affidavit also shows that a board of enquiry and Committee of Adjustment were held, which established that no one had heard from Lieutenant Humphrey Kalenga since the boat capsized on 10th March, 2005. Further, that Lieutenant Humphrey Kalenga was aged twenty eight (28) years at the time, and that he had no bank account, and that he had

written no will, and the deponent of the affidavit reasonably believes that he died, as he had not been heard from since 10th March, 2005 when the boat capsized.

Therefore, the requirements of **Rule 53 of the Non Contentious Probate Rules of 1987**, and the case of **Re Hurlstons Goods** ⁽¹⁾ have been satisfied. The evidence shows that Lieutenant Humphrey Kalenga went missing on 10th March, 2005 and he has been heard from since, which is a period of fifteen (15) years now. I accordingly grant leave to swear the death of Lieutenant Humphrey Kalenga, and I declare that he is presumed dead.

DATED AT LUSAKA THIS 26th DAY OF MARCH, 2020

Saonda
S. KAUNDA NEWA
HIGH COURT JUDGE