

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(Civil Jurisdiction)

2021/HK/111

BETWEEN:

VICTORIA MPELEMBE

APPLICANT

AND

KNOBLE MHANGO (Sued in his capacity as Co-Administrator) 1ST RESPONDENT

EXILDAH MHANGO (Sued in her capacity as Co- Administrator) 2ND RESPONDENT

Before the Hon. Mr. Justice E. Pengele on 30th December, 2022.

For the Applicant: Mr. J. Kalimina of Messrs. Legal Aid Board

For the Respondents: Mr. G. Kalandanya and Ms. P. Banda
both of Messrs. G. M Legal Practitioners

J U D G M E N T

Cases referred to:

1. Charity Oparaocha V. Winfrida Murambiwa (2004) Z.R. 141; and
2. Isaac Tantameni C. Chali (Executor of the Will of the Late Mwala Mwala) V. Liseli Mwala (Single Woman) (1995/1997) ZR 199.

Legislation referred to:

- a. Intestate Succession Act, Chapter 59 of the Laws of Zambia.**

INTRODUCTION

1. The Applicant commenced this matter on 9th April, 2021, by way of originating summons and affidavit in support. She asked the Court for the following reliefs:

- 1. an order for the distribution of the estate of the late Phoebe Kasongo in accordance with the Intestate Succession Act;**
- 2. an order for the Respondents to distribute 10% of the estate to the Applicant as a dependant;**
- 3. an order for the Respondents to submit a full inventory of the estate;**
- 4. an order for the Respondents to render a full account of the administration of the estate;**
- 5. any further or other relief the Court may deem fit;**
and
- 6. costs.**

AFFIDAVIT IN SUPPORT

2. The Affidavit in support is deposed to by the Applicant. She has stated that the late Phoebe Kasongo was her grandmother who died intestate on 23rd May, 2020. She further stated that she had been a dependant of the deceased from the time she was 2 years old in 1990, after the Applicant's mother died. She deposed that the deceased took care of her, paid her medical

bills, clothed her and paid for her education from nursery school to tertiary education level up to the time of the deceased's death.

- (3. She went on to depose that, after the death of her grandmother, the Respondents obtained letters of administration from the High Court. She listed the properties which were left by the deceased. She alleged that the Respondents have not administered the estate in accordance with the law on intestacy. She further alleged that the Respondents have shared the properties between themselves and have indicated that they will not give her anything but will instead keep her as their child.

AFFIDAVIT IN OPPOSITION

- (4. On 9th September, 2021, the Respondents jointly deposed to an affidavit in opposition to the originating summons. The gist of their depositions is that the Applicant was taken in by the deceased in 2001, when the Applicant was 2 years old, before the death of her biological mother. They deposed that the Applicant is not the only grandchild of the deceased but one of six grandchildren. According to them, the deceased used to provide assistance to all her grandchildren but not as regularly as she would if they were her dependants.
5. The Respondents went on to say that the deceased cared for the Applicant when the Applicant was a minor and unable to take care of herself, and paid for her school fees, upkeep and general expenses. They went on to state that in 2011, the

Applicant graduated with a diploma in Human Resource from the National Institute of Public Administration after which she lived independently in Lusaka for a year before returning to Kitwe where she resumed staying with the deceased. They stated that shortly thereafter the relationship between the Applicant and the deceased became sour and was characterised by heated arguments. They disclosed that sometime in 2014, while the Applicant was attached to the Labour Office in Kitwe, and still living with the deceased, the Applicant was involved in yet another heated argument with the deceased in which the Applicant became violent and left the deceased's home to go and live on her own.

6. The Respondents went on to state that the following year, the Applicant got a job at Copperhill Mall as a Human Resource Manager. Further that, when she needed somewhere to stay, the deceased refused to stay with her because of her behaviour after which she went and started living with the 2nd Respondent. The Respondents alleged that in 2016, the Applicant left the job at Copperhill Mall because she was unable to get along with her boss and her colleagues. Further that, while living with the 2nd Respondent, she got into an argument with the 2nd Respondent's maid which nearly escalated into violence.
7. It was the additional deposition of the Respondents that later on, the Applicant got a job at Bayport Financial Services but kept it as a secret from the 2nd Respondent who only learnt of it through her acquaintances. They went on to say that the 2nd

Respondent confronted the Applicant who became very upset and a quarrel erupted after which the deceased intervened and rebuked the Applicant for not having told the 2nd Respondent that she had a job and stable income. They stated that after the deceased rebuked her, the Applicant reported her to the Victim Support Unit at Kitwe Central Police. Further that, the Police advised the Applicant that she was old enough to live alone and made her promise to leave the 2nd Respondent's house in October, 2019. That on 5th October, 2018, the Applicant indeed left the 2nd Respondent's house and never told anyone about her whereabouts until the deceased became ill on 23rd October, 2018. The Respondents insisted that from the time she left the 2nd Respondent's home, the Applicant has been responsible for her own upkeep and has not been in touch with any of her close relatives.

8. They went on to say that the Applicant was not a dependant of the deceased and is not entitled to a 10% share of the estate.

HEARING

9. When the matter came for hearing on 13th October, 2022, the learned Counsel for the Applicant applied for leave to file an affidavit in reply to the Respondents' affidavit in opposition. The learned Counsel for the Respondents requested the Court for leave to file submissions to comment on the reply. I allowed the requests as prayed and adjourned the matter for Judgment.

AFFIDAVIT IN REPLY

10. On 3rd November, 2022, the Applicant filed an affidavit in reply where she deposed that of the six grandchildren, three are for the 1st Respondent and the other two are for the 2nd Respondent. She explained that the other five grand children have both parents still alive to support them. She maintained that conversely, she does not have her parents and depended entirely on the deceased from the time she was two years old up to the time of the deceased's death.
11. The Applicant went on to depose that, after she graduated from the National Institute of Public Administration with a diploma in Human Resource Management, the deceased continued to pay for her rentals for a one roomed house in Lusaka until she returned to Kitwe and continued to stay with the deceased. She maintained that her relationship with the deceased was like that of a mother and her daughter and, therefore, that it was normal for the deceased to get upset when the Applicant did something wrong. She alleged that the deceased was being pressurized by accusations from the 2nd Respondent who despised the Applicant for managing the deceased's properties without involving the 2nd Respondent.
12. The Applicant went on to say that she was attached to the Labour Office for purposes of getting experience but that she was not on a salary and she continued living with the

deceased. She explained that the only arguments she used to have with the deceased were normal arguments like when she cooked meals late or started doing house chores a bit late. She disputed the Respondents' assertion that she would turn violent or physical with the deceased. She maintained that she never left home to go and stay alone because she did not have capacity to do so.

13. The Applicant went on to depose that she did not resign from her job at Copperhill Mall but that her period of probation for three months came to an end and her contract was not renewed because her employers needed someone more experienced. She added that her probation was continued for another three months and that it was that extension which made the deceased upset after which she told her to go and stay with the 2nd Respondent as a way of teaching her a lesson. She explained that she eventually lost the job on the ground of being inexperienced. She denied ever getting into a violent argument with the 2nd Respondent and averred that the 2nd Respondent's maid was being influenced by the 2nd Respondent not to get advice from the Applicant on the ground that she was not the owner of the house.

14. It was her further deposition that the job at Bayport Financial Services was that of an agent employed on commission basis. She stated that bearing in mind the experience she had with her grandmother over the Copperhill Mall job, she did not want to tell the 2nd Respondent about the job at Bayport Financial Services for fear of raising her hopes

when she would sometimes get as low as K250.00 per month as commission.

15. She went on to state that she was not rebuked by her grandmother in relation to the Bayport Financial Services job but in relation to her refusal to go on foot to get results for her little cousin from Parklands Secondary School when the 2nd Respondent had a motor vehicle. She explained that she reported the deceased and the 2nd Respondent to the Victim Support Unit for making her walk a long distance to collect her cousin's results when the 2nd Respondent could have driven to the school. She added that the 2nd Respondent was not even present at the Victim Support Unit when the Police advised the Applicant to leave the 2nd Respondent's house and either go to her grandmother's house or stay with some other relatives. She disclosed that the deceased suggested that the Applicant goes to stay with a family friend in Kawama where the deceased continued to support her with groceries. She disclosed that the deceased made that suggestion to avoid tension between the Applicant and the 2nd Respondent because the two were sharing the same flat. She stated that she only stayed in Kawama with her Aunt Mary for one month and then moved back to her grandmother's place after the tension had reduced.

16. It was the Applicant's further deposition that in October, 2018, she and the deceased agreed that she starts school at Zipsip College after which the Applicant suggested that she moves to Nkana East which was closer to Zipsip. She pointed

out that the deceased assured her of total support and indeed continued supporting her until her death. She insisted that the deceased would not have continued to maintain her if their relationship had been strained. She insisted that she is entitled to her 10% share of the deceased's estate and that, from the time the deceased died, she has faced tremendous hardships as the Respondents only supported her for a few months despite having earlier agreed at a family meeting that they would be supporting her in the manner the deceased did. She stated that she is currently living with her grandmother's friend because she has been failing to make ends meet.

APPLICANT'S SUBMISSIONS

17. On 3rd November, 2022, the learned Counsel for the Applicant filed written submissions. The crux of Counsel's submissions is that the Applicant has demonstrated that she was raised and maintained by the deceased person from the time she was 2 years old up to the time of the deceased's death. Counsel contended that, therefore, the Applicant was a dependent of the deceased as defined in section 3 of the **Intestate Succession Act**^a (hereinafter also referred to as "the Act"). Counsel further cited section 5 of the Act relating to the distribution of the estate. To augment the foregoing submissions, Counsel referred me to the case of **Charity Oparaocha V. Winfrida Murambiwa**¹, where the Respondent was held to have been a dependent within the meaning of Section 3 of the Act.

18. Counsel proceeded to ask this Court to order the Respondents to render an account and thereafter to distribute the estate in accordance with section 19 of the Act.

RESPONDENT'S SUBMISSIONS

19. On 11th November, 2022, the learned Counsel for the Respondents filed the Respondents' submissions. The kernel of the said submissions is that the Applicant does not fall within the definition of a dependent of the deceased as defined in section 3 of the Act. Counsel advanced the view that this is because the Applicant long left the deceased's household to live independently and has been financially independent. Counsel maintained that the Respondent's evidence shows that the Applicant was financially independent and did not depend on the deceased.
20. It was Counsel's further submission that the assertion that the deceased paid the Applicant's rentals is quite farfetched because the Applicant's relationship with the deceased was strained and the Applicant was already working. To fortify his submissions, Mr. Kalandanya relied on the case of **Isaac Tantameni C. Chali (Executor of the Will of the Late Mwala Mwala) V. Liseli Mwala (Single Woman)**² where the Court provided a definition of the term "dependent".
21. It was Counsel's further argument that, therefore, the Applicant is not entitled to the 10% share of the estate referred to in section 5 of the Act.

22. Counsel went on to argue that the Respondents have performed their duties as Administrators diligently and in accordance with section 19 of the Act. He contended that the Respondents can only be required to furnish accounts by an interested party.

CONSIDERATION AND DECISION

23. I have carefully considered the application by the Applicant; the response by the Respondents and the submissions by Counsel for both sides.
24. The four reliefs claimed by the Applicant depend on the resolution of the question of whether or not the Applicant was a dependant of the deceased. I will, therefore, first decide on that question before pronouncing myself on the main reliefs contained in the Applicant's originating summons.
25. It is not in dispute that the Applicant is one of the 6 grandchildren of the deceased. It is also not in dispute that the deceased started living with the Applicant when the Applicant was only 2 years old after the Applicant's mother died. There is also no contest that the deceased took care of all the essential needs of life for the Applicant such as general care, food, medical bills, clothes and education up to tertiary level.
26. The evidence of the Applicant is that she never ceased to be a dependant of the deceased. According to her, the deceased continued supporting her from wherever she would go and stay.

27. Conversely, the Respondents maintained that the Applicant ceased to be a dependant of the deceased. According to the Respondents, the Applicant left the deceased's home sometime in 2014 to go and live by herself, later lived with the 2nd Respondent and again left without informing any of her relatives about where she had gone to live.
28. The resolution of this matter depends on the definition of the term "dependant" under intestacy law. The definition of a "dependant" under the Intestate Succession Act^a is very clear. Section 3 of that Act defines a dependant as follows:

"‘dependant’ in relation to a 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; 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...."

29. For purposes of this matter, the relevant portion of section 3 is paragraph (a). This means that for the Applicant to be held to have been a dependant of the deceased, she must prove on a balance of probabilities that (1) she was maintained by the deceased person immediately before the deceased's

death; and (2) she was living with the deceased person before the deceased's death.

30. The Applicant does not dispute that she graduated from the National Institute of Public Administration in 2011. The deceased died on 23rd May, 2020, which was about 9 years after the Applicant had graduated from college. The evidence of the Respondents is that the Applicant left the deceased's home in 2014 after she had a heated argument with the deceased where the Applicant became violent and left home to go and live on her own. In her affidavit in reply, the Applicant has denied having left the deceased's home in 2014. However, in her affidavit in reply, the Applicant has not stated the specific year when she left the deceased's home. It appears that the Applicant somehow avoided replying to the specific years mentioned by the Respondents despite the fact that the Applicant bears the burden of proof and is in a better position to know the specific years when the relevant events could have happened.

31. I hold the firm view that the Respondents' version of when the Applicant could have left the deceased's home seems to be more plausible. This is because the Respondents have stated that the following year, which was 2015, after the Applicant argued with the deceased and left home, the Applicant started looking for a place to stay and the deceased refused to get her back. The Applicant ended up staying with the 2nd Respondent.

32. I do not believe that the deceased could have chased the Applicant from home simply because she got upset after learning that the Applicant had been given a three months' extension of her probationary work at Copperhill Mall. It is more believable that the deceased chased the Applicant, or the Applicant left home on her own, because of the differences between her and the deceased.
33. But even assuming that the Applicant did not leave home in 2014 but was chased by the deceased after the deceased learnt about the Applicant's extended employment with Copperhill Mall, in my view, that does not change the fact that the Applicant at that point ceased to live with the Respondent. From my reading of the Affidavit in opposition and the affidavit in reply, that must still have been either in 2015 or 2016 because the Applicant does not dispute that she finally left Copperhill Mall in 2016. It is clear from the evidence of both sides that at the time the Applicant left Copperhill Mall in 2016 she was not living with the deceased. It is also clear from paragraph 12 of the Applicant's affidavit in reply that at the time she was leaving her job at Copperhill Mall, she was staying with the 2nd Respondent and not with the deceased.
34. In view of the foregoing, I am inclined to hold that, as at the year 2016, the Applicant was not living with the deceased.
35. Further, there is uncontested evidence from the Respondents that, at the Victim Support Unit of the Zambia Police, the Applicant promised to leave the 2nd Respondent's home in the course of October, 2018. In fact the Applicant

does not dispute the Respondents' assertion that she left the 2nd Respondent's home on 5th October, 2018, and only resurfaced about a year later on 23rd October, 2019, when the deceased was ill.

36. But whatever the case, the uncontested reality still remains that the Applicant was not living with the deceased after 2016 but with the 2nd Respondent until she left the 2nd Respondent's home on 5th October, 2018. According to the Applicant's affidavit in reply, after she left the 2nd Respondent's home she went and started living with some family friend in Kawama.

37. The Applicant claims in her affidavit in reply that after staying with her family friend in Kawama for a month, she went back to the deceased's home as the deceased felt that the tension had reduced. The Applicant deposed in paragraph 20 of her affidavit in reply that she only moved from the deceased's home in October, 2018, after the deceased agreed that the Applicant should start school at ZIPSIP. This deposition is clearly not believable because the Applicant does not dispute the deposition of the Respondents that in fact in October, 2018, that is when she left the 2nd Respondent's home. According to the Applicant herself, it was on 5th October, 2018, when she went and started staying with her family friend where she allegedly lived for a month. So she could not have at the same time returned to stay with the deceased in the same month of October, 2018.

38. Additionally, although the Applicant claims that the deceased enrolled her at ZIPSIP in October, 2018, she has not adduced any tangible evidence to support her claim. Furthermore, the Applicant claims that after enrolling at ZIPSIP the deceased accepted the Applicant's suggestion to move to Nkana East, Kalungwishi Street near the College and assured her of support. But again there is absolutely nothing from the Applicant to support her assertions. Apart from her mere assertion, there is no proper evidence to prove that the deceased continued supporting her after she had moved from the deceased's home. Surely if that assertion was true the Applicant could have adduced some proof like money transfers of any kind to her or some other believable evidence of continued support. I do not believe that such support could have left absolutely no trial of evidence.
39. In addition to the foregoing, I do not believe the Applicant's deposition in paragraph 27 of her affidavit in reply that she is currently living with the deceased's friends because she is failing to make ends meet. I have refused to believe this deposition because, firstly, there is no evidence to support it. Secondly, it is clear from a reading of the Applicant's affidavit in support and affidavit in reply that the Applicant does not live at the home of any of the deceased's friends as claimed but has continued staying at the same house she was staying at in April, 2021. In her affidavit in support of originating summons filed into court on 9th April, 2021, the Applicant stated that she resided at House Number 39, Kalungwishi

Street, Nkana East Kitwe. A look at her affidavit in reply filed on 3rd November, 2022, establishes that, as at that date, the Applicant was still residing at House Number 39, Kalungwishi Street, Nkana East Kitwe.

40. All in all, I have not been convinced that the deceased continued maintaining the Applicant after the Applicant left the deceased's home in either 2014 or 2016. I am more inclined to believe the Respondents' version that, after leaving the deceased's home, the Applicant became independent and started maintaining herself. I find it hard to accept that the Applicant could have continued being a dependant in light of the evidence showing that the deceased did not even want to continue staying with the Applicant.
41. Further, the evidence before me shows that the Applicant was indeed old enough at the time the deceased died. The Applicant completed her tertiary education in 2011 which was about 9 years before the deceased's death. In addition, it is clear from paragraph 4 of the Applicant's affidavit in support that she was aged 2 years in 1990 when the deceased started staying with her. This means that at the time of the deceased's death the Applicant must have been about 32 years old.
42. But even supposing that the deceased continued to maintain the Applicant up to the time of the deceased's death, I hold that the Applicant still has not proved on a balance of probabilities that she was a dependant of the deceased in the context of section 3 of the Act. This is because the Applicant has not proved the second component of the definition of

dependant, that is, she has not established that she was living with the deceased before the deceased's death.

43. For the Applicant to prove that she was a dependant, she needed to establish both components of the definition of dependant. In so holding I rely on the case of **Charity Oparaocha V. Winfrida Murambiwa**¹. In that case, the Supreme Court held that the Respondent was a dependant because the deceased was staying with her and maintaining her. The evidence on the Respondent before the trial Court in that case, which the Supreme Court accepted, was that she was living with the deceased in Kabwata in a flat which they were renting from the National Housing Authority. The Respondent testified that the late Oparaocha paid for the rentals; he was supporting her and the children; and he actually stopped her from working and he used to do everything for me. After considering the foregoing evidence, the Supreme Court said that-

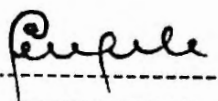
"In our view, this evidence clearly established that the deceased was living with the Respondent and that he actually maintained her."

44. In the case of **Charity Oparaocha V. Winfrida Murambiwa**¹, the Supreme Court added that-

"In our view, the wording of Section 3 of the Act is clear. A dependant is any person who meets the criteria given in the Section."

45. On the totality of the foregoing, I hold that the Applicant has failed to prove on a balance of probabilities that she was a dependant of the deceased in the context of section 3 of the Act. I, consequently, hold that the Applicant is not entitled to the 10% of the deceased's estate which is reserved by the Act for dependants.
46. On the facts of this case, I make no order for costs.
47. Leave to appeal is granted.

Delivered at Kitwe this 30th day of December, 2022.



E. PENGELE
HIGH COURT JUDGE