

IN THE HIGH COURT FOR ZAMBIA

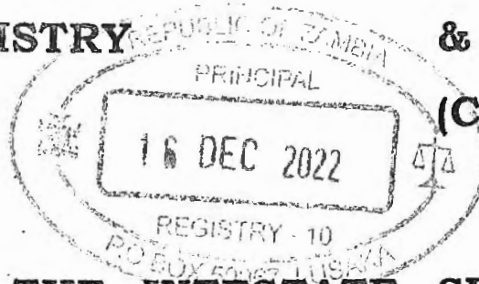
2021/HPF/099

AT THE PRINCIPAL REGISTRY

& 2021/HPF/117

HOLDEN AT LUSAKA

(Family Division)



(CONSOLIDATED)

IN THE MATTER OF:

**THE INTESTATE SUCCESSION ACT,
CHAPTER 59, VOLUME 5 OF THE LAWS
OF ZAMBIA.**

IN THE MATTER OF:

**SECTIONS 29 (1) AND 29 (2) OF THE
INTESTATE SUCCESSION ACT,
CHAPTER 59, VOLUME 5 OF THE LAWS
OF ZAMBIA, AS READ TOGETHER WITH
ORDER XXX RULE 11 (F) OF THE HIGH
COURT RULES, CHAPTER 27, VOLUME
3 OF THE LAWS OF ZAMBIA.**

BETWEEN:

BERNARD MUTALE (*Suing as Administrator and
beneficiary of the Estate of the late ANNIE MALUNGA-
MUTALE*)

1ST APPLICANT

BARRON MALUNGA (*Suing as Attorney for RENAH
MALUNGA, a beneficiary of the Estate of the late ANNIE
MALUNGA-MUTALE*)

2ND APPLICANT

FLORENCE MALUNGA-YABE

3RD APPLICANT

AND

VERNON MALUNGA

RESPONDENT

(*Sued in his capacity as Administrator of the Estate
of the late ANNIE MALUNGA-MUTALE*)

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 16TH DECEMBER, 2022, AT 10:00 HOURS.**

For the 1st Applicant:

Mr. Bernard Mutale – In Person.

For the 2nd & 3rd Applicants:

Mr. M. Z. Mwandenga – M.Z.
Mwandenga & Company.

For the Respondent:

Mr. H. Munsanje – Messrs. H. M.
Munsanje & Co.

JUDGMENT

CASES REFERRED TO:

1. *Miriam Mutasa and Jennifer Mutasa v Jane Phiri Mutasa* – CAZ Appeal No. 91/2018;
2. *Dorothy Salima Nyirenda v Mutumabaetwa Makweti Nyirenda* – SCZ/278/2002 (SCZ Appeal No. 7/2003);
3. *Charity Oparaocha v Winfridah Murambiwa* – SCZ Judgment No.15 of 2004, 2004 ZLR 141;
4. *Annie Scott v Oliver Scott* – SCZ Judgment No. 3 of 2007 (2007) ZLR 17;
5. *Lindiwe Kate Chinyanta v Doreen Chiwele and Judith Tembo* – SCZ Judgment No. 28 of 2007;
6. *Sable Hand Zambia Limited v Zambia Revenue Authority* (2005) ZLR 109;
7. *Base Chemicals v Zambia Air force* – SCZ Judgment No. 9 of 2011; and
8. *Waimiha Saw Milling Co. Ltd. v Waione Timber Co. Ltd.* (1926) AC 101 at p. 106.

LEGISLATION REFERRED TO:

1. *The Intestate Succession Act*, Chapter 59, Volume 5 of the Laws of Zambia;
2. *The National Pension Scheme Authority Act*, Chapter 256, Volume 15 of the Laws of Zambia;
3. *The Administrator General's Act*, Chapter 58, Volume 5 of the Laws of Zambia; and
4. *The High Court Act*, Chapter 27, Volume 3 of the Laws of Zambia.

OTHER WORKS REFERRED TO:

1. Bryan A. Garner, *Black's Law Dictionary* (Thomson West, 2004).

1 INTRODUCTION

1.1 On 20th September, 2021, I consolidated the action under Cause No. 2021/HPF/099 with the action under Cause

No. 2021/HPF/117 and directed that the consolidated actions will be heard and determined at the same time. Accordingly, this Judgment is in respect of the consolidated action.

2 BACKGROUND

2.1 The background to this matter is that shortly after the death of Anne Malunga-Mutale (“Deceased”), on 28th October, 2018, the 1st Applicant, Bernard Frederick Kundulo Mutale, who is the surviving spouse of the Deceased and the Respondent, Vernon Malunga, who was a dependent of the Deceased, were appointed Co-Administrators of the Deceased’s estate by the Local Court, on 12th November, 2018. Subsequently, the Respondent was granted the Letter of Administration from the High Court Probate Principal Registry on 31st December, 2019. On 4th March, 2020, the 1st Applicant was also granted the Letter of Administration from the High Court Probate Principal Registry. The 2nd Applicant is a brother of the Deceased and holds a Power of Attorney for Renah Malunga, who is the mother of the Deceased. The 3rd Applicant is a sister of the Deceased and allegedly a beneficiary of the Deceased’s Estate.

2.2 The disputes in both the actions that were consolidated, surround the questions of who are the rightful Administrators and beneficiaries of the Deceased’s estate.

The actions also seek the determination of an account and distribution of the estate. In short, the parties herein are duelling over the estate of the Deceased.

3 ORIGINATION SUMMONS

3.1 In Cause No. 2021/HPF/099, launched by Originating Summons on 26th February, 2021, the Applicants Bernard Mutale and Barron Malunga, as 1st and 2nd Applicants, respectively, seek *inter alia*, the following reliefs against the Respondent, Vernon Malunga: -

- i) *An Order for the revocation of the appointment of the Respondent as the Administrator of the Estate of the Late Annie Malunga Mutale; and*
- ii) *An Order that the Respondent renders an account of the administration of the estate of the late Annie Malunga Mutale.*

3.2 In Cause No. 2021/HPF/117 launched on 10th March, 2021, the Applicant who is Vernon Malunga, seeks against Bernard Mutale, Barron Malunga and Florence Malunga-Yabe, 1st, 2nd and 3rd Respondents, respectively, the following reliefs: -

1. *An Order that the value of the estate of the late Annie Malunga Mutale is beyond the jurisdiction of the Local Court and that the appointment of the Applicant and the 1st Respondent as Co-Administrators of the estate of the deceased on 12th November, 2018, was null and void;*

2. *An Order that the distribution of part of the estate of the deceased under the Local Court Order of Appointment of Administrator dated 12th November, 2018, was null and void;*
3. *An order to compel the parties herein and any one whom the part of the estate was distributed to, to pay back that which he or she received from the estate and an order that the same be re-distributed in accordance to the applicable law;*
4. *An Order that Plot 10423/20, Minestone, Chainama, Lusaka is not a matrimonial house and that the 1st Respondent is not entitled to benefit from the said property as it was purchased by the deceased before the marriage;*
5. *An Order to compel the 1st Respondent to account for rental he is collecting from House No. 26/55 Njiba Road, Kalingalinga, Lusaka;*
6. *An Order that Vernon Malunga, Faith Malunga-Hamalila, Susan Mutale, Sharon Zulu and Natasha Mutale are children of the deceased and that they are beneficiaries of the entire estate of the deceased;*
7. *An order to compel the 1st Respondent to surrender the deceased's motor vehicles namely, Toyota Hilux 4x4 Registration No. ALD 2503 and Mercedes Benz C180 compressor to the Applicant in his capacity as Administrator in roadworthy condition, the registration books, the certificates of title and any property of the deceased;*
8. *An order that the 1st Respondent is not an administrator and therefore lacks jurisdiction to administer the estate in*

dispute and a further Order that the Applicant is the only Administrator of the estate;

9. *An Order that the 2nd and 3rd Respondents were only nominated by the deceased to benefit from the Indeni Refinery Company Limited benefits and not the entire estate by virtue of being a brother and sister of the deceased and they lack jurisdiction to administer and involve themselves in the administration of the estate in dispute;*
10. *An Order revoking the probate if any granted to any of the Respondents or anyone else after the grant of the Applicant's probate.*
11. *An Order restraining the 2nd and 3rd Respondents from involving themselves in the administration of the estate in issue in their capacity as brother and sister of the deceased; and*
12. *An Order to distribute the estate in accordance with the applicable provision/s of the Intestate Succession Act.*

4 AFFIDAVIT EVIDENCE UNDER CAUSE NO. 2021/HPF/099

- 4.1 By the Affidavit filed herein on 26th February, 2021 and deposed by **Bernard Frederick Kundulo Mutale**, the 1st Applicant herein, it is averred, *inter alia*, that following the death of the Deceased, the 1st Applicant and Respondent were appointed as Co-Administrators of the Deceased's estate by the Local Court. Copies of the grant of letters of administration were exhibited as **BM2**.

- 4.2 The 1st Applicant deposed that upon realising that the grant from the Local Court was in contravention of the law, the 1st Applicant and Respondent applied for a grant of appointment from the High Court separately. The Respondent was appointed Administrator of the Deceased's estate on 31st December, 2019 and the said appointment was done without the consent of the rest of the family.
- 4.3 According to the 1st Applicant, after the death of the Deceased, it was determined that the beneficiaries of the Deceased's estate were the 1st Applicant, being the Deceased's spouse, her mother, Renah Malunga as the surviving parent and Natasha Mutale as the dependant. The 2nd Applicant holds a Power of Attorney for Renah Malunga who is aged 92 years old and is bed ridden.
- 4.4 The 1st Applicant deposed that in the Respondent's application for a grant of probate, he purported that he was the biological son to the Deceased when in fact not. The 1st Applicant was advised by his Counsel that the said statement amounted to fraud which empowers this Court to revoke the grant of probate that was made to the Respondent.
- 4.5 It was deposed that on 4th March, 2020, the 1st Applicant was also appointed Administrator of the estate of the Deceased and a copy of the grant of probate was exhibited

marked “**BM6**”. The Applicant deposed that since the appointment of the Respondent as Administrator, several amounts of money belonging to the estate of the Deceased have been paid out to both the Respondent and the 1st Applicant. Copies of the payments were exhibited and collectively marked “**BM7**”.

- 4.6 The 1st Applicant averred that the Respondent failed to pay the portion of money due to the Deceased’s mother after he received money from the Deceased’s Fixed Deposit Account held at Stanbic Bank in his capacity as Administrator. The 1st Applicant alleged that the amount that accrued to Natasha Mutale was deposited into the Respondent’s personal bank account.
- 4.7 It was further deposed that the Respondent received the repatriation allowance that had accrued to the Deceased as a former employee of Indeni Oil Refinery Company Limited, which amounted to K495,000.00, but that only 40 per cent of the said sum was paid to the 1st Applicant as beneficiary and the remaining 60 percent was acquired by the Respondent on behalf of Renah Malunga and Natasha Mutale, the other two beneficiaries, who have not yet received their share.
- 4.8 The 1st Applicant alleged that the Respondent has also neglected to give Renah Malunga her share of the Deceased’s current account held with Stanbic Bank which

amounted to K14,495.00 and the Deceased's salary account also held with Stanbic Bank which amounted to K56,000.00.

4.9 The 1st Applicant stated that the failure by the Respondent to distribute the amounts due to Renah Malunga have greatly inconvenienced her and that after the failure to distribute the proceeds correctly, letters of demand were written to the Respondent by the 2nd Applicant to account for his distribution but he failed to provide adequate responses to the same. Copies of the said letters were collectively exhibited and marked "**BM 9**".

4.10 The 1st Applicant further deposed that the Respondent started collecting rentals for Plot No. 10423/20 Minestone, Chainama, Lusaka from November, 2019, in his capacity as Administrator but failed and/or neglected to distribute the proceeds from those rentals to the rightful beneficiaries to date.

4.11 By Affidavit in Opposition to the Affidavit in Support of Originating Notice of Motion, filed on 4th March, 2022, deposed by the Respondent, **Vernon Malunga**, it is averred, *inter alia*, that the 1st Applicant obtained probate with respect to the Deceased's estate from the Probate Master of the High Court without disclosing that there was already a personal representative that had been appointed by the High Court.

4.12 The Respondent deposed that the 1st Applicant, Renah Malunga and Natasha Mutale, are not the only beneficiaries of the estate of the Deceased and relied on exhibit “**VM 5**” containing the Deceased’s employee personal details indicating that the Respondent is a child of the Deceased. The Respondent stated that he used the said document to obtain Probate from the High Court and that therefore, there was no fraud in the manner that he obtained Probate.

4.13 It was deposed that the probate granted to the 1st Applicant is of no effect as it was obtained after the one granted to the Respondent without the Respondent’s grant being revoked.

4.14 With respect to the allegation that several amounts had been paid out to the Respondent and the 1st Applicant since the appointment of the Respondent, the Respondent stated that on 8th January, 2021, he wrote a letter to all the beneficiaries nullifying the distribution done under the Local Court Order of Appointment of Administrator and demanded reimbursement to the estate of the Deceased the sums of money distributed so that the same could be redistributed using ***The Intestate Succession Act***¹ but that the beneficiaries refused to do so.

4.15 The Respondent stated that the failure to distribute the remaining estate of the Deceased was due to the dispute

between himself and the Applicants. The Respondent deposed that the beneficiaries could not agree on how to keep the money pending determination of the disputes and he decided to open a Fixed Deposit Account in order to keep the money safe and the Applicants and beneficiaries were duly informed.

4.16 With regards to Natasha Mutale's share of the money the Respondent received, the Respondent stated that she was under his custody and that he was paying for her education requirements from her share.

4.17 Further, the Respondent stated that following the Applicants' complaint to the police that he had deprived them of their share of the Deceased's estate, the Respondent paid them the sum of K222,000.00. A copy of the deposit of the sum of K212,000.00 was exhibited as **"VM1"**.

4.18 The Respondent deposed that the record shows that he is the duly appointed Administrator of the Deceased's estate and that it is his duty to collect the estate of the Deceased on behalf of the beneficiaries.

4.19 It was deposed that Natasha Mutale is the child of the Deceased and 1st Applicant and that when she attained the age of 18 years, the Respondent facilitated the issuance of National Registration Card in her name, which act he

stated was not an offence. A copy of the said National Registration Card was exhibited as 'VM 4'.

4.20 Finally, it was deposed that the Applicants' intention is to deprive Natasha Mutale and other beneficiaries appearing in the Deceased's personal details that she submitted to her employers of their share in the Deceased's estate.

5 AFFIDAVIT EVIDENCE UNDER CAUSE NO. 2021/HPF/117

5.1 By the Affidavit in Support of the Originating Summons filed on 10th March, 2021 under the said cause, the Respondent herein, **Vernon Malunga**, who was the Applicant in said cause, deposed *inter alia* that the Deceased died intestate and that the 1st Applicant herein is the surviving spouse of the Deceased.

5.2 The Respondent deposed that the estate of the Deceased comprised the following: -

A. Real Estate

1. Plot 10423 Minestone, Chainama, Lusaka (Two Units); and
2. House No. 26/55 Njiba Road Kalingalinga, Lusaka (Flat1-4).

B. Motor Vehicles

1. Toyota Hilux 4x4 Registration No. ALD 2503; and

2. Mercedes Benz C180 Compressor

C. Money

Indeni Refinery Company Benefits

- i) Insurance Benefits K1,378,055.16;
- ii) Repatriation Allowance K 495,000.00;
- iii) NAPSA Contributions K 552,370.00.

Stanbic Bank Lusaka Main branch

- i) Savings Account No.9130001543958 -
K39,268.82;
- ii) Current Account No. 9130003278283 -
K140,000.00; and
- iii) Fixed Deposit Account - K556, 450.75.

D. Personal Effects

1. Clothes; and
2. Phones.

E. Liabilities

1. Rentals in Ndola Dr. Mumbiana Mubita -
K3,000.00; and
2. Litigation Under Cause No. 2019/HP/0829
relating to Plot 10423/20 Minestone, Lusaka,

commenced against the Deceased after the death.

5.3 The Respondent deposed that the Deceased had no biological children and was looking after and educated the Respondent, Faith Malunga, Susan Mutale, Natasha Mutale and Sharon Zulu from their tender age till the Respondent started living on his own; Faith Malunga got married; and for Natasha and Sharon, till Deceased's death. The Respondent stated that when the 1st Applicant married the Deceased, the said persons were living with her.

5.4 The Respondent stated that following the death of the Deceased, he was selected as Co-Administrator in his absence during a family meeting. Later, on 12th November, 2018, the Local Court appointed the 1st Applicant as Co-Administrator of the estate of the Deceased and ordered the distribution of the Deceased estate as follows: -

- i) 40% to the surviving spouse (the 1st Applicant);
- ii) 40% to the Deceased's Mother (Renah Malunga); and
- iii) 20% to the dependants (Natasha Mutale and Sharon Zulu).

5.5 The Respondent deposed that before the Deceased died, the Deceased worked for Indeni Oil Refinery Company Limited and that she had registered the Respondent, Faith,

Sharon and Natasha as her Children, the 1st Applicant as her husband and Renah Malunga as her mother, the 2nd Applicant as her brother and the 3rd Applicant as her sister. A copy of the Deceased's vital statistics form was exhibited as "VM5".

5.6 The Respondent deposed that the Deceased and the 1st Applicant applied for a passport for Natasha Mutale on 6th November, 2013 and in the application they indicated that they were her parents.

5.7 The Respondent averred that when it came to the distribution of benefits from Indeni Refinery Company, the Deceased's family members adopted the Local Court Order and ignored the advice of the Legal Counsel at Indeni Refinery Company Limited that the benefits of the Deceased should be shared among the people indicated on the Vital Statistics form as they were beneficiaries. The Respondent stated that he was directed by the Applicants herein on how and to whom to distribute the money to.

5.8 The Respondent resisted the directive by the Applicants herein and sought guidance from Legal Counsel who advised him to distribute the Deceased's estate as follows:-

a. Indeni benefits

- | | |
|------------------------------|--------------|
| i) 1 st Applicant | K971,802.00; |
| ii) Renah Malunga | K971,802.00; |

iii) Natasha Mutale and Sharon Zulu
K485,901.00.

**b. Stanbic Bank Fixed deposit account -
K556,450.00**

i) 1st Applicant K222,580.00;
ii) Renah Malunga K222,580.00;
iii) Natasha Mutale and Sharon Zulu
K111,290.00.

c. Stanbic Bank Savings Account

i) 1st Applicant K15,707.00;
ii) Renah Malunga K15,707.00;
iii) Natasha Mutale and Sharon Zulu K7,853.76.

d. Stanbic Bank Current Account

i) 1st Applicant K56,000.00;
ii) Renah Malunga K56,000.00;
iii) Natasha Mutale and Sharon Zulu K28,000.00.

5.9 The Respondent deposed that the Deceased's NAPSA contributions of K159,162.00 were still pending and that Natasha Mutale was registered as a beneficiary of the said contributions.

5.10 Further, the Respondent deposed that in total, the beneficiaries received the following sums: -

- i) 1st Applicant K1, 266,089.53;
- ii) Renah Malunga K1, 266,089.53;
- iii) Natasha Mutale and Sharon Zulu K 633,044.76.

5.11 Further, it was deposed that the Respondent received the sum of K160,000.00 from the Deceased's mother's share on instruction of the 2nd and 3rd Applicants and that they instructed him to distribute part of the Deceased's mother's share to the extended family members.

5.12 The Respondent deposed that the 1st Applicant issued Summons in the Local Court for an order to direct the Respondent and the 3rd Applicant herein to swear an Affidavit that Natasha Mutale was not the biological daughter of the Deceased and thereby effectively disqualifying her from benefitting from the Deceased's NAPSA contributions. A copy of the Judgment was exhibited as **"VM 13"**.

5.13 The Respondent appealed against the decision to the Subordinate Court and the Court ruled in the Respondent's favour. A copy of the Judgment was exhibited as **"VM 14"**.

5.14 The Respondent stated that the Applicants herein took the issue to the Administrator General who advised that

Natasha was not the biological daughter of the Deceased but that in view of the Subordinate Court Judgment, Natasha is a beneficiary of the Deceased's estate and that the Respondent was not a beneficiary of the estate as he was not a biological child of the Deceased.

5.15 The Respondent further deposed that the 1st Applicant herein is claiming Plot No. 10423/20 Minestone Chainama, Lusaka to be a matrimonial house when the same was purchased by the Deceased before the marriage and the 1st Applicant did not contribute in any way or form.

5.16 The Respondent deposed that after the 1st Applicant and the Deceased got married, they allegedly co-owned the following properties namely: -

- i) House no. 8667 Kamloops Road Kalingalinga Lusaka (Flat1-4);
- ii) House No. B425 near PHI, Mtendere, Lusaka; and
- iii) Farm Plot L/10163/M, Lusaka West.

5.17 The Respondent averred that Natasha Mutale who is at the University of Zambia and Sharon who is rewriting her Grade 12 are still interested in pursuing their education and that they are in need of money for their education. A copy of a provisional admission to the University of Zambia in respect to Natasha Mutale was exhibited as **"VM 21"**.

5.18 It was further deposed that the 1st Applicant had refused to surrender Toyota Hilux Registration No. ALD 2503 and Mercedes Benz C10 Compressor, the registration books and Certificate of Titles for the Deceased's properties and that he had been illegally collecting rentals from the property belonging to the estate.

5.19 The Respondent stated that on 8th January, 2021, he wrote a letter to all the beneficiaries of the estate of the Deceased nullifying the distribution that was done under the Local Court Order of Appointment of Administrator and demanded the return of the money that had been distributed. A copy of the said letter was exhibited as "**VM 23**".

5.20 Finally, the Respondent deposed that due to the disputes over the Deceased's estate, he has not distributed the estate.

5.21 There was no response to the Affidavit in Support under this cause by the Applicants herein.

6 SUBMISSIONS

6.1 By the Respondent's Skeleton Arguments filed on 10th March, 2021, the Respondent submitted *inter alia* that since the Deceased died intestate, her estate was to be administered by the provisions of ***The Intestate Succession Act***¹. The case of ***Miriam Mutasa and***

Jennifer Mutasa v Jane Phiri Mutasa¹ was cited in support of the foregoing submission as follows: -

“Since Cecil Mutasa died intestate, the management of his estate is subject to the provisions of the Intestate Succession Act.”

6.2 Additionally, the case of ***Dorothy Salima Nyirenda v Mutumabaetwa Makweti Nyirenda²*** was cited for the following: -

“That the Administration of the Estate of the Late Kabuka Stanley Benny Nyirenda under the purported Order of Appointment of Administrator of the Respondent by the Local Courts Act was null and void as the Local Court had no jurisdiction to appoint an Administrator and the value of the estate was more than what a Local Court could administer.”

6.3 Based on the foregoing authority, the Respondent submitted that his appointment as Administrator and that of the 1st Applicant as Co-Administrator of the Deceased's estate, by the Local Court, was null and void due to lack of jurisdiction and that the distribution of the estate under the Local Court Order was therefore of no effect.

6.4 The Respondent urged this Court to compel the parties to pay back the money that had been distributed to them and to issue an order to re-distribute in accordance with the applicable law.

6.5 The Respondent submitted that despite the Deceased not being their biological mother, she portrayed herself as such and that therefore, Faith, Susan, Natasha, Sharon and himself were children of the Deceased. In support of the foregoing submission, the Respondent cited the case of **Charity Oparaocha v Winfridah Murambiwa**³ as follows: -

“We have considered the argument by counsel on the third ground of appeal. Mr. Mundia has laboured, in his spirited arguments to show that the deceased did not acknowledge in writing, to be the father of the respondent’s children. It is common cause that the deceased was Nigerian. According to the letter from the Nigerian High Commissioner, he applied and obtained Nigerian Passports for the said children. The documents on record clearly show that he portrayed himself as the father of the children in the applications for passports and the children appear to have claimed their status as Nigerians through the deceased. In our view, the deceased duly acknowledged the children as his and we find no basis to hold otherwise. The third ground of appeal fails.”

6.6 The Respondent cited the provisions of **Sections 29, 30 and 31 of The National Pension Scheme Authority Act**² and submitted that the said provisions clearly state that beneficiaries of the NAPSA contribution of a Deceased member are the beneficiaries under **The Intestate Succession Act**¹.

6.7 Further, the Respondent submitted that with respect to Plot 10423/20 Minestone, Chainama, the 1st Applicant herein is not entitled to it as a matrimonial home as the said property was purchased before the Deceased and 1st Applicant got married. The case of **Annie Scott v Oliver Scott**⁴ was cited in support of the submission as follows: -

“Any property purchased by one spouse with his or her own money presumptively belongs exclusively to the purchaser.”

6.8 The Respondent set out the duties of an Administrator and stated that one of his duties is to collect the property of the Deceased which includes her motor vehicles but that the 1st Applicant has refused to surrender them including the rental collected from the Deceased’s property House No. 26/55 Njiba Road, Kalingalinga. The Respondent urged the Court to find merit in his action and to grant him the reliefs sought.

6.9 By submissions filed on behalf of the 2nd and 3rd Applicants on 11th May, 2022, learned Counsel submitted, *inter alia*, that this is a proper case in which this Court should order the revocation of the appointment of the Respondent as Administrator of the estate of the Deceased.

6.10 Counsel submitted that the Respondent herein in approaching the High Court for the grant of letters of Administration, deceptively or fraudulently held himself

out as a child of the Deceased when he knew that he was not a child of the Deceased. The Respondent based his assertion on the Deceased's Vital Statistics Form submitted to the Deceased's employer, Indeni Oil Refinery Company Limited, wherein it was indicated that the Respondent was a child of the Deceased. It was submitted therefore, that the Respondent herein obtained Letters of Administration through deception or fraud.

6.11 Further, Counsel submitted that the Respondent obtained the Letters of Administration without the consent of the family of the Deceased and that therefore, the grant should be revoked as it was not properly obtained. Counsel referred the Court to the Zambia Family Division Guide on what should be contained in the Affidavit in Support of Originating Summons for an application for the grant of Letters of Administration as follows: -

“Consent from priority dependants or family resolution authorising the applicant to obtain letters of administration.”

6.12 Counsel submitted that the Respondent has not properly distributed the huge sums of money he has received to the intended beneficiaries on the basis that the Local Court had no jurisdiction to grant him the order of Appointment as Administrator but that despite obtaining the grant of Appointment from the High Court, the Respondent has neglected to distribute the estate and has also failed to give

an account to the beneficiaries on the manner the estate is being administered.

6.13 Counsel cited the provisions of **Section 29** of **The Intestate Succession Act**¹ on revocation of letters of administration and submitted that based on the Respondent's false claim that he was a child of the Deceased and his failure to account for the distribution of the estate of the Deceased, his appointment as Administrator of the Deceased's estate should be revoked.

6.14 With regards to the Respondent's claims, Counsel submitted that as the Respondent brought the action in his capacity as Administrator of the Deceased's estate, once the Applicants are granted the reliefs sought, the Respondent's action will be rendered *otiose*.

6.15 By the 1st Applicant's submissions filed on 6th June, 2022, the 1st Applicant identified the legal issues for determination as follows: -

1. *Whether the appointment of the Respondent as Administrator of estate of the deceased should be revoked;*
2. *Whether the Respondent should be ordered to render an account of the administration of the deceased's estate; and*
3. *Who should administer the estate of the deceased.*

6.16 On the first issue of whether or not the Respondent's appointment as Administrator should be revoked, the 1st Applicant submitted that the Respondent obtained letters of administration fraudulently and that not only did he fail in his duties as administrator but also mismanaged the Deceased's estate. The 1st Applicant cited the definition of a 'child' and a 'dependant' according to **Section 3 of The Intestate Succession Act¹** and submitted that the Respondent was neither a child or dependant of the Deceased as he did not meet the definitions as set out in the foregoing section of **The Intestate Succession Act¹**. Further, the 1st Applicant submitted that the Respondent did not have the consent of the family before obtaining the Letters of Administration and that this was sufficient reason to have the Respondent removed as Administrator.

6.17 With regards to the second issue of whether the Respondent should be ordered to render an account of the Deceased's estate, the 1st Applicant submitted that the Respondent has repeatedly failed to give the beneficiaries what is due to them save for the 40 percent of the Deceased's benefits from Indeni Oil Refinery Company Limited that was remitted to the 1st Applicant. It was submitted that the actions of the Respondent have deprived the beneficiaries and has affected them greatly.

6.18 The 1st Applicant cited the provisions of **Section 19 (c)** of **The Intestate Succession Act¹** and the case of **Lindiwe Kate Chinyanta v Doreen Chiwele and Judith Tembo⁵** and submitted that that one of the duties of the Respondent as Administrator was to account for the administration of the estate.

6.19 The 1st Applicant further cited the provisions of **Section 29 (1) and (2)** of **The Intestate Succession Act¹** in support of the submissions that as the Letters of Administration were obtained fraudulently and the Respondent failed to account for the administration of the Deceased's estate, the Respondent should be removed as Administrator of the Deceased's estate.

6.20 On the issue of who should administer the estate of the Deceased, the 1st Applicant cited the provisions of **Section 29 (2) (b)** of **The Intestate Succession Act¹** as follows: -

“...provide for the succession of another person to the office of that administrator who shall cease to hold office.”

6.21 The 1st Applicant further cited the provisions of **Section 15 (4)** of **The Intestate Succession Act¹** and submitted that both Letters of Administration issued in relation to the estate of the Deceased be revoked and that the Administrator General should administer the estate of the Deceased who is a third neutral party who can administer

the estate in accordance with the provisions of ***The Administrator Generals Act***³.

6.22 By the Respondent's final submissions filed on 6th June, 2022, the Respondent submitted, *inter alia*, that with regards to the issue of whether or not he was a child to the Deceased, it is undisputed that the Deceased portrayed herself as a parent of the Respondent as is evidenced by the Vital Statistics Form she submitted to her employers in which she indicated that the Respondent was her child and that therefore, he was the Deceased's son. The case of ***Charity Oparaocha v Winfred Murambiwa***⁵ was cited in support of the foregoing submission.

6.23 On the issue of whether the Respondent has an interest in the Deceased's estate and whether consent was obtained from the beneficiaries when he obtained probate to administer the Deceased's estate, it was submitted that there is no provision in the law for one to obtain consent to be appointed as Administrator of the estate of the Deceased. The Respondent cited the provisions of ***Section 15 (4) of The Intestate Succession Act***¹ on the requirement for one to have interest in the estate to qualify to obtain Letters of Administration, in support of the said submission.

6.24 In response to the allegation that the Respondent's appointment as administrator was obtained by fraud, the

Respondent cited the cases of *Sable Hand Zambia Limited v Zambia Revenue Authority*⁶ and *Base Chemicals v Zambia Airforce*⁷ in support of the submission that the allegation of fraud was not distinctly pleaded in the Applicants' pleadings and that as the standard of proof is higher than a mere balance of probabilities, the Applicants herein had failed to prove the allegation of fraud against the Respondent.

6.25 On the issue of whether the Respondent failed to distribute the estate of the Deceased to the beneficiaries and to account for it to the beneficiaries, the Respondent submitted that under the Local Court Order of Appointment of the Respondent as Administrator, he had partially distributed the estate and that in view of the dispute on the determination of the beneficiaries of the estate of the Deceased, it cannot be said that the Respondent has deprived the beneficiaries of their shares and that he has failed to distribute the estate as it was his duty to investigate who the beneficiaries are.

7 AT THE HEARING

7.1 At the hearing of the consolidated cause, the 1st Applicant relied entirely on the Originating Summons filed herein and the Affidavit in Support thereof.

7.2 The 2nd and 3rd Applicants relied on the Originating Summons filed herein and the Affidavit in Support

deposed by the 1st Applicant. Their Counsel reiterated their written arguments and stated that it shall not be necessary for this Court to determine the reliefs sought by the Respondent as the issues that he raised will be dealt with by the 1st Applicant.

- 7.3 The Respondent also relied on Originating Summons that he filed herein, the Affidavit in Support thereof and Skeleton Arguments. He further relied on his Affidavit in Opposition to the Applicant's Affidavit in Support under Cause No. 2021/HPF/099 and Skeleton Arguments and list of authorities filed herein.

8 CONSIDERATION AND DECISION OF THE COURT

- 8.1 I have carefully considered the Originating Summons, Affidavit evidence placed before me and the submissions by the parties. I have also considered the Skeleton Arguments and Lists of Authorities cited, for which I am grateful. In this consolidated action, Bernard Mutale, Barron Malunga and Florence Malunga-Yabe, who are the 1st, 2nd and 3rd Applicants, respectively, are seeking the revocation of the appointment of the Respondent, Vernon Malunga, as Administrator of the estate of the Deceased and an Order that the Respondent renders an account of the administration of the estate of the Deceased.

- 8.2 The Respondent on the other hand is seeking an order that the Local Court Order of appointment of the 1st Applicant

and Respondent, as Administrators of the Deceased's estate, be declared null and void; an order that Plot 10423/20, Minestone is not a matrimonial house; an order for the 1st Applicant to account for the rentals he has been collecting from House No. 26/55 Njiba Road Kalingalinga, Lusaka; an Order that Vernon Malunga, Faith Malunga-Hamalila, Susan Mutale, Sharon Zulu and Natasha Mutale are children of the Deceased and beneficiaries of the Deceased's estate; an Order to compel the 1st Applicant to surrender the Deceased's motor vehicles; an Order that the Respondent is the only Administrator of the Deceased's estate and a further order that the 1st Applicant is not an Administrator of the Deceased's estate; an order that the 2nd and 3rd Applicants are not beneficiaries of the estate of the Deceased and to restrain them from involving themselves in the Deceased's estate; and an order to distribute the Deceased's estate in accordance to the provisions of ***The Intestate Succession Act***¹.

- 8.3 Having perused the evidence placed before this Court, I find that it is not disputed that the Deceased died intestate and was survived by a widower, who is the 1st Applicant herein and her mother Renah Malunga, who is represented herein by the 2nd Applicant. It is further not disputed that the Deceased had no children with the 1st Applicant, but raised several dependants, some of whom were registered as her children with her former employer, Indeni

Petroleum Refinery Company Limited. Furthermore, it is not disputed that the 1st Applicant and Respondent were appointed Co-Administrators of the Deceased's estate by the Local Court and subsequently, they obtained separate Letters of Administration of the Deceased's estate from the Probate Registry of the High Court. It is also not disputed that the distribution of the Deceased's estate is subject to ***The Intestate Succession Act***¹. What is disputed is whether the Respondent has discharged his duties in accordance with ***The Intestate Succession Act***¹. Accordingly, having analysed the claims and the evidence before me, I find that the legal issues for determination are as follows: -

1. *Whether the Letters of Administration obtained separately from the Probate Registry of the High Court by the 1st Applicant and Respondent should be revoked;*
2. *Whether the 2nd and 3rd Applicants, the Respondent, Faith Malunga-Hamalila, Susan Mutale, Sharon Zulu and Natasha are entitled as beneficiaries of the Deceased's estate; and*
3. *Whether or not Plot 10423/20, Minestone is a matrimonial house.*

8.4 I will address the legal issues in the order that I have identified them above starting with whether or not the

Letters of Administration obtained separately from the Probate Registry of the High Court by the 1st Applicant and Respondent should be revoked.

8.5 For convenience, I shall begin by considering the Respondent's appointment as Administrator, as it was the first one obtained from the Probate Registry of the High Court. The Applicants' claim for an Order of revocation of the Respondent's grant of appointment as Administrator is on the basis that the Respondent fraudulently obtained the Order of Appointment as Administrator. The particulars of this allegation are that the Respondent in his application for a grant of probate purported to be a child of the Deceased when in fact not and that he is claiming to be a beneficiary of the Deceased's estate as a son despite the Deceased not having any biological children.

8.6 Further, it was alleged that the Respondent as Administrator has failed to properly distribute the estate of the Deceased to its rightful beneficiaries and has deprived them of the use of their benefits. Additionally, it is alleged that the Respondent has failed to render an account of the estate despite being requested to do so by the 2nd Applicant.

8.7 In response to the said allegations, the Respondent stated that he was a child of the Deceased as the Deceased

portrayed herself as a mother to him, Faith Malunga-Hamalila, Susan Mutale, Sharon Zulu and Natasha Mutale, whom she registered as her children in her vital statistics form submitted to her employer Indeni Oil Refinery Company Limited. Further, the Respondent stated that he had partially distributed the estate of the Deceased and that following the disputes regarding the identification of the beneficiaries, he could not continue distributing the estate pending the resolution of the disputes.

- 8.8 According to **Section 3 of *The Intestate Succession Act*¹**, a child is defined as follows: -

“child” means a child born in, or out of marriage, an adopted child, a child who is conceived but not yet born.”

- 8.9 From the foregoing, it is clear that the Respondent who is not a biological child of the Deceased, nor was he legally adopted, does not fit the definition of a child as stated above. I note further that case of ***Charity Oparaocha v Winfrida Murambiwa*³** that the Respondent relied upon to support his assertion that the Deceased was his mother is distinguishable from this case. In that case, the children whose paternity was in dispute were the Deceased's biological children who met the description of a child as stated above. However, in this case, the Respondent herein, who has based his claims that he is a child of the

Deceased on the manner that the Deceased portrayed herself to him and on the information on the Deceased's vital statistics form, is not the Deceased's biological child. It follows, therefore, that Faith Malunga-Hamalila, Susan Mutale, Sharon Zulu and Natasha are not the children of the Deceased within the meaning of ***The Intestate Succession Act***¹.

8.10 I now turn to consider whether the Applicants have proved that the Respondent fraudulently obtained the grant of administration by stating that he was the child of the Deceased when in fact not. ***Black's Law dictionary***¹ defines the term 'fraud' as follows: -

"Knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

8.11 Additionally, in the case of ***Sable Hand Zambia Limited v Zambia Revenue Authority***⁶, the Supreme Court held as follows: -

"1. Where fraud is an issue in the proceedings, then a party wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at trial of the cause, the party alleging fraud must equally lead evidence, so that the allegation is clearly and distinctly proved."

2. Allegations of fraud must once pleaded be proved on a higher standard of proof than on a mere

balance of probabilities, because they are criminal in nature.”

8.12 Further, in the case of *Waimiha Saw Milling Co. Ltd. v Waione Timber Co. Ltd.*⁸, Lord Buckmaster said that fraud implies some act of dishonesty.

8.13 Additionally, **Section 29 (1)** of *The Intestate Succession Act*¹ provides as follows on revocation of a grant of letters of administration: -

“Letters of administration may be revoked or annulled for any of the following reasons:

- (a) that the proceedings to obtain them were defective in substance;*
- (b) that the grant was obtained fraudulently;*
- (c) that the grant was obtained by means of an untrue statement of a fact essential in point of law to justify the grant, though that statement was made in ignorance or inadvertently;*
- (d) that the grant has become of no use and inoperative;*
- (e) that the person to whom the grant was made has, without reasonable cause failed, to furnish an account of his administration after having been lawfully called upon to do so, or has prepared an account which is untrue in a material particular.”*
(Court’s emphasis)

8.14 From my analysis of the foregoing authorities and the evidence on record, I find that though the Applicants have clearly and distinctly alleged fraud against the Respondent herein, they have not proved to the required standard that the Respondent fraudulently misrepresented himself in his application for the grant of Letters of Administration when he stated that he was the son to the Deceased. Therefore, the Applicants' allegation of fraud against the Respondent is dismissed.

8.15 In my view, the Respondent herein was of the genuine belief that at law, he could be deemed to be the son of the Deceased on the basis that she portrayed herself to be his mother. However, as the Respondent's grant of Letters of Administration was based on the Respondent's erroneous belief that he was the son to the Deceased, I find that the grant of Letters of Administration to him should be and is accordingly revoked pursuant to **Section 29 (1) (c) of *The Intestate Succession Act*¹**, as they were obtained by means of an untrue statement of a fact essential in point of law to justify the grant, though that statement was made in ignorance.

8.16 Having revoked the Respondent's Order of Appointment as Administrator, it follows that the Respondent herein has no *locus standi* to make the claims and seek the Orders as set out in the Originating Summons as Administrator of the Deceased's estate. However, as the claims raised by

the Respondent have a bearing on the effective administration of the Deceased's estate, I am of the view that this Court should consider the issues raised by the Respondent in order to bring them to finality. My finding is fortified by **Section 13** of **The High Court Act**⁴, which provides as follows: -

"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." (Court's emphasis)

8.17 I note that the Respondent herein partially administered the estate of the Deceased under the Local Court Order of

appointment and upon realising that the Local Court had no jurisdiction to order the same due to the value of the Deceased's estate, the Respondent and the 1st Applicant applied for a grant of appointment as administrators from the High Court on different dates and they were each granted separate Letters of Administration. Therefore, the partial distribution conducted by the Respondent under the Local Court is null and void. It follows therefore, that the Respondent should render an account of the administration of the estate under the Local Court grant of administration and his administration of the Deceased's estate under the High Court Letters of Administration.

8.18 Further, I Order that all the Deceased's family members who erroneously received a share of the Deceased's estate from the Respondent under both grants of Letters of Administration reimburse and/or account for the share so received.

8.19 I now turn to consider whether or not the 1st Applicant's order of Appointment should be revoked. According to the Respondent's Affidavit in Opposition, it was averred by the Respondent that as the 1st Applicant's order of appointment as Administrator was granted after his, it is of no effect as it was obtained without his probate being revoked and therefore, it should be revoked.

8.20 **Section 15 (2)** of **The Intestate Succession Act¹** provides as follows: -

“Subject to section sixteen where more than one person applies for letters of administration, the court may make a grant to any one or more of them, and in the exercise of its discretion the court shall take into account greater and immediate interests in the deceased's estate in priority to lesser or more remote interests.” (Court's emphasis)

8.21 Additionally, **Section 16 (1)** of **The Intestate Succession Act¹** provides as follows regarding the limit on the number of Administrators that can be appointed with respect to an estate: -

“Letters of administration shall not be granted to more than four persons in respect of the same estate and if there is a minority or a life interest, letters of administration shall be granted to the Administrator-General, to a trust corporation solely or jointly with an individual or to not less than two individuals.”

8.22 From my analysis of the foregoing provisions, I find that as four (4) is the limit on the number of Administrators that can be appointed with respect to the Deceased's estate, the subsequent appointment of the 1st Applicant as Administrator after the appointment of the Respondent with respect to the Deceased estate did not render the said appointment null and void.

8.23 On my further analysis of the evidence, I find that the Respondent herein has not led any evidence to support the claim for revocation of the Order of appointment of the 1st Applicant as Administrator of the estate of the Deceased in terms of the law as quoted in paragraph 8.13 above. Accordingly, I find that the Respondent's claim for an order of revocation of the 1st Applicant's Order of Appointment lacks merit and is dismissed.

8.24 However, owing to the nature and extent of the disputes raised in the administration of the estate of the Deceased due to the failure by the Deceased's family members to cooperate and by the 1st Applicant's submission that he should be removed as Administrator, in order for a neutral party to be appointed, I am of the view that the 1st Applicant should be removed as Administrator of the estate of the Deceased and I so Order. My decision is fortified by **Section 29 (2) of The Intestate Succession Act¹**, which provides as follows: -

"Where the court is satisfied that proper administration of the estate and the interests of the persons beneficially entitled to them so require, it may-

(a) suspend or remove an administrator;

(b) provide for the succession of another person to the office of that administrator who shall cease to hold office; and

(c) *provide for the vesting in the successor of any property belonging to the estate.*" (Court's emphasis)

8.25 Based on the foregoing provisions and my analysis of the evidence on record, I Order the 1st Applicant herein to account for his administration of the Deceased's estate under the High Court grant of Letters of Administration within a period of 60 days from the date of this Judgment. The said account should also take into consideration the rental amounts collected from House No. 26/55 Njiba Road, Kalingalinga, Lusaka.

8.26 Additionally, I Order and direct that the Administrator General expeditiously applies for a grant of Letters of Administration to effectively administer the estate of the Deceased in accordance with the provisions of ***The Intestate Succession Act***¹. My order is fortified by ***Section 15 (3) and Section 15 (4) of The Intestate Succession Act***¹, which provides as follows: -

"15(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.

15(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.”
(Court’s emphasis)

8.27 I now turn to consider the second legal issue of whether the 2nd and 3rd Applicants, the Respondent, Faith Malunga-Hamalila, Susan Mutale, Sharon Zulu and Natasha are entitled to a share in the Deceased’s estate as beneficiaries.

8.28 The ***Intestate Succession Act***¹ makes provision for individuals who are not, the spouse, child and parent to benefit from the estate of the Deceased. ***Section 5 (1) (d)*** of ***The Intestate Succession Act***¹ provides as follows: -

“ten per cent of the estate shall devolve upon the dependants, in equal shares...”

8.29 Additionally, ***Section 7 (b) and Section 7 (f)*** of ***The Intestate Succession Act***¹ provides as follows: -

“Where an intestate leaves -

(b) a spouse, parents, dependants but no children, the portion of the estate which the children would have inherited shall be distributed to the surviving spouse, parents and dependants in proportion to their shares of the estate as specified in section five...

(f) a spouse but no children, parents or dependants, the portion of the estate which the children, parents and dependants would have inherited shall be distributed equally between the surviving spouse on the one hand and the near relatives on the other.” (Court’s emphasis)

8.30 From the foregoing, it is clear that when a person dies intestate, the dependants of a deceased person are entitled to 10 percent of the estate of the deceased. In the event that the deceased leaves a spouse, parents and dependants but no children, the dependants are entitled to a share of 50 percent of the deceased’s estate that the deceased’s children would have been entitled to, in proportion to their share of the estate as specified in **Section 5 of The Intestate Succession Act¹**. This means that in addition to their share of 10 percent, the dependants are also entitled to 10 percent of the 50 percent that was meant for the children, while the surviving spouse and parent are entitled to 20 percent each from the 50 percent meant for the children. Further, it is clear that in the event that the deceased leaves a spouse but no children and dependants, near relatives would then be entitled to a share in the portion allocated to children, parents and dependants.

8.31 **Section 3 of The Intestate Succession Act¹** defines the term ‘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.” (Court’s emphasis)

8.32 Additionally, **Section 3** of ***The Intestate Succession Act***¹ defines the term “near relative” as follows: -

“near relative means issue, brother, sister, grandparent and other remoter descendants of the deceased.”

8.33 I will begin by considering the eligibility of the 2nd and 3rd Applicants to benefit from the estate of the Deceased. From my analysis of the evidence before me, I find that the 2nd Applicant is a brother to the Deceased and an Attorney of the Deceased’s mother, Renah Malunga, under a Power of Attorney. Further, the 3rd Applicant is the Deceased’s sister. Based on my analysis of the foregoing provisions of ***The Intestate Succession Act***¹, I find that the 2nd and 3rd Applicants as siblings to the Deceased are not entitled to benefit from the estate of the Deceased as they have not shown that they were dependants of the Deceased. Furthermore, as the Deceased is survived by a spouse and a parent, the siblings of the Deceased are not entitled to

benefit from the Deceased's estate as near relatives of the Deceased.

8.34 Similarly, I find that the Respondent and Faith Malunga-Hamalila are not dependants of the Deceased within the definition of dependant as cited above as they were not living with the Deceased nor was the Deceased paying for their education and maintaining them at the time that she died. Therefore, they are also not entitled to benefit from the estate of the Deceased. However, with regards to Natasha Mutale and Sharon Zulu, it is not in dispute that the two were dependants of the Deceased as she was responsible for their education and Natasha Mutale lived with her. Therefore, they are both dependants of the Deceased and are entitled to 10 percent meant for the dependants and in addition, they are entitled to 10 percent from the 50 percent meant for children.

8.35 I now turn to consider the third legal issue of whether or not Plot 10423/20, Minestone is a matrimonial house. From the assertions of the Respondent, he alleged that the said property was purchased by the Deceased before she married the 1st Applicant and that therefore it cannot be a matrimonial home.

8.36 **Section 3 of *The Intestate Succession Act*¹** defines the term 'estate' as follows: -

"estate" means all the assets and liabilities of a deceased, including those accruing to him by virtue of death or after his death and for the purposes of administration of the estate under Part III includes personal chattels."

8.37 Additionally, **Section 9 (2)** of *The Intestate Succession Act*¹ provides as follows: -

"Where the estate includes more than one house the surviving spouse or child or both shall determine which of the houses shall devolve upon them and the remainder shall form part of the estate." (Court's emphasis)

8.38 From my analysis of the evidence on record, the Respondent asserts that the Deceased's estate has two real properties being plot 10423 Minestone, Chainama (two units) and House No. 26/55 Njiba Road Kalingalinga, Lusaka (Flat1-4). Based on the foregoing cited provisions and the fact that the Deceased was survived by a spouse, the spouse being the 1st Applicant herein is entitled to determine which one of the houses shall devolve upon him, while the rest will form part of the estate to be distributed in accordance with the Act. From the provision cited it is clear that whether or not the real property referred to was purchased by the Deceased prior to her marriage to the 1st Applicant is of no relevance as it forms part of the Deceased's estate and does not affect the surviving spouse's entitlement to it.

9 CONCLUSION

- 9.1 In conclusion, the Respondent, Faith Malunga-Hamalila, Susan Mutale, Sharon Zulu and Natasha are not children of the Deceased within the meaning of ***The Intestate Succession Act***¹.
- 9.2 The 2nd and 3rd Applicants, the Respondent and Faith Malunga-Hamalila, are not entitled to benefit from the estate of the Deceased as they have not shown that they were dependants of the Deceased, within the meaning of ***The Intestate Succession Act***¹.
- 9.3 Natasha Mutale and Sharon Zulu, were dependants of the Deceased are entitled to benefit from the Deceased's estate as such.
- 9.4 The Applicants have not proved to the required standard that the Respondent fraudulently misrepresented himself in his application for the grant of Letters of Administration when he stated that he was the son to the Deceased. Therefore, the Applicants' allegation of fraud against the Respondent is accordingly dismissed.
- 9.5 As the Respondent's grant of Letters of Administration was based on the Respondent's erroneous belief that he was the son to the Deceased, I find that the grant of Letters of Administration to him should be and is accordingly revoked. It follows therefore, that the Respondent should

render an account of the administration of the estate under the Local Court grant of administration and his administration of the Deceased's estate under the High Court Letters of Administration within 60 days of this Judgment. I also Order the Respondent to surrender to the High Court Probate Registrar the Letters of Administration granted to him, forthwith.

- 9.6 Further, I order that all the Deceased's family members who erroneously received a share of the Deceased's estate from the Respondent under both grants of Letters of Administration must reimburse and/or account for the share so received within 60 days of this Judgment.
- 9.7 Furthermore, the subsequent appointment of the 1st Applicant as Administrator after the appointment of the Respondent with respect to the Deceased's estate did not render the said appointment null and void. I find that the Respondent's claim for an order of revocation of the 1st Applicant's Order of Appointment lacks merit and is accordingly dismissed.
- 9.8 Owing to the nature and extent of the disputes raised in the administration of the estate of the Deceased due to the failure by the Deceased's family members to cooperate and by the 1st Applicant's submission that he should be removed as Administrator in order for a neutral party to be appointed, I am of the view that the 1st Applicant should

be removed as Administrator of the estate of the Deceased and I so Order. I further Order the 1st Applicant herein to account for his administration of the Deceased estate under the High Court grant of Letters of Administration within 60 days of this Judgment. I also Order the 1st Applicant to surrender to the High Court Probate Registrar the Letters of Administration granted to him, forthwith.

9.9 Additionally, I Order and direct that the Administrator General expeditiously apply for a grant of Letters of Administration to effectively administer the estate of the Deceased as so ordered.

9.10 With regard to the status of Plot 10423/20, Minestone, I find that whether or not the property was purchased by the Deceased prior to her marriage to the 1st Applicant is of no relevance as it forms part of the Deceased's estate and does not affect the surviving spouse's entitlement to it. Accordingly, the 1st Applicant shall determine which of the houses forming part of the Deceased's estate shall devolve upon him, while the rest of the real estate shall form part of the Deceased's estate for distribution in accordance with ***The Intestate Succession Act***¹.

9.11 Due to the nature of this matter, I make no order for costs.

9.12 Leave to appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 16TH DAY
OF DECEMBER, 2022.**



**P. K. YANGAILO
HIGH COURT JUDGE**