

**IN THE HIGH COURT FOR ZAMBIA**  
**THE PRINCIPAL REGISTRY**  
(Family Jurisdiction)

**2021/HPF/122**

**IN THE MATTER OF:** ORDER XXX RULE 11(b) and RULE 12  
of the HIGH COURT RULES CHAPTER  
27 OF THE LAWS OF ZAMBIA

**AND**

**IN THE MATTER OF:** SECTION 20 OF THE WILLS ACT  
CHAPTER 60 OF THE LAWS OF  
ZAMBIA

**AND**

**IN THE MATTER OF:** THE WILL OF THE LATE LAZAROUS  
TEMBO DATED 24<sup>TH</sup> JULY 2017

**BETWEEN:**

**CAROLINE TEMBO**

**APPLICANT**

**AND**

**MWAAZA TEMBO** (sued as Executrix of  
The Estate of the Late Lazarous Tembo)

**RESPONDENT**

**BEFORE THE HONOURABLE MR. JUSTICE KENNETH MULIFE**

**APPEARANCES:**

For the Applicant: Ms. C.K. Puta - Messrs. Robson Malipenga &  
Company.

For the Respondent: Mr. Sambo – Messrs Sambo Kayukwa &  
Company

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**RULING**

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### STATUTES REFERRED TO:

1. High Court Act, Chapter 27 of the Laws of Zambia.
2. Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia.

### CASES REFERRED TO:

1. Styler (1942) CD 387
2. Diamond vs Standard Bank of South Africa Limited (Executor) and 4 Others (1961) ZR61.

## **1.0 INTRODUCTION**

- 1.1. This is the Applicant's Originating Summons for **"an Order of the Court to Make Reasonable Provisions to an Unreasonable Will"**. It was filed into Court on 15<sup>th</sup> March 2021 pursuant to Order XXX, Rule II (b) and 12 of the **High Court Rules, Chapter 27 of the Laws of Zambia** (hereinafter referred to as 'High Court Rules') and Section 20 of the **Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia** (hereinafter referred to as 'Wills Act'). Order XXX, Rule 11(b) and 12 of the High Court Rules stipulates as follows:

*"11. The business to be disposed of in chambers shall consist of the following matters, in addition to the matters which under any other rule or by statute or by the law and practice for the time being observed in England and applicable to Zambia may be disposed of in chambers:*

*(b) An application by any person claiming to be interested under a deed, will or other written instrument for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested;*

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

*the Court of the estate or trust, of any of the following questions or matters so far as the same arise in the course of the administration or performance of such estate or trust:*

- (a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust;*
- (b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others;*
- (c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;*
- (d) the payment into Court of any money in the hands of the executors or administrators or trustees;*
- (e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees;*
- (f) the approval of any sale, purchase, compromise, or other transaction;*
- (g) the determination of any question arising in the administration of the estate or trust”.*

a. Section 20 of the Wills Act states as follows:

*“20. (1) If, upon application made by or on behalf of a dependant of the testator, the court is of the opinion that a testator has not made reasonable provision whether during his life time or by his will, for the maintenance of the dependant, and that hardship will thereby be caused, the court may, taking account of all relevant circumstances and subject to such conditions and restrictions as the court may impose, notwithstanding the provisions of the will, order that such reasonable provision as the court thinks fit shall be made out of the testator's estate for the maintenance of that dependant.*

*(2) The provision for maintenance to be made by an order may include-*

*(a) payment of a lump sum, whether immediate or deferred or grant of an annuity or a series of payments;*

*(b) grant of an interest in immovable property for life or any lesser period;*

*and where the order provides for periodical payments, it shall provide for their termination not later than-*

- (i) in the case of a husband or wife, his or her remarriage;*
- (ii) in the case of a child, his attaining the age of eighteen years or upon leaving secondary school or under graduate university, whichever is the later*
- (iii) in the case of a child under disability, the cesser of the disability; or*
- (iv) the death of the dependant.*

*(3) In determining whether, and in what manner, and as from what date, provision for maintenance ought to be made by an order, the court shall have regard to the nature of the property representing the testator's estate and shall not order any such provision to be made as would necessitate a realisation that would be unwise having regard to the interests of the*

LAZAROUS TEMBO (hereinafter referred to as the 'Testator') to whom she was married for a period of 15 years, and was dependent on the Testator till his time of demise. That the Deceased left a Will dated 24th July, 2017.

2.2. The Applicant deposes that in the last six years, she has been living at her parents' farm in Kabangwe where the Testator took her due to marital disputes. That notwithstanding, the Testator was providing for her.

2.3. That as a couple, the Applicant and the Testator owned the under-listed properties which the Testator distributed in his Will as follows:

- (i) Plot 24626, Libala South, Off Kasama Road – to his children;
- (ii) Flat 96, Long Acers Executive Flat – to his children;
- (iii) 4 bedroomed house in John Harward - to his mother;
- (iv) 10 Acre – farmland in 10 Miles – to his children and mother;
- (v) Plot 2364 situated in Meanwood, Chamba Valley – to his children. And;

LAZAROUS TEMBO (hereinafter referred to as the 'Testator') to whom she was married for a period of 15 years, and was dependent on the Testator till his time of demise. That the Deceased left a Will dated 24th July, 2017.

2.2. The Applicant deposes that in the last six years, she has been living at her parents' farm in Kabangwe where the Testator took her due to marital disputes. That notwithstanding, the Testator was providing for her.

2.3. That as a couple, the Applicant and the Testator owned the under-listed properties which the Testator distributed in his Will as follows:

- (i) Plot 24626, Libala South, Off Kasama Road – to his children;
- (ii) Flat 96, Long Acers Executive Flat – to his children;
- (iii) 4 bedroomed house in John Harward - to his mother;
- (iv) 10 Acre – farmland in 10 Miles – to his children and mother;
- (v) Plot 2364 situated in Meanwood, Chamba Valley – to his children. And;

- (vi) Plot 2397 situated in Meanwood Chamba Valley – to the Applicant. Here however, the Applicant avers that this property has been sold and is non-existent.

2.4. The Will is the only document exhibited to the Originating Summons. I shall pause here to highlight what it states about the foregoing properties namely that much as the said properties have been bequeathed in the manner outlined above by the Applicant, the Will disclose that the properties were legally and equitably exclusively owned by the Testator. This therefore contradicts the Applicant's claim that she jointly owned the properties with the Testator. And, from the two versions, I am inclined to believe the Testator's claim of exclusive ownership over the property because the Applicant has not supplied evidence to the contrary. In the absence of evidence, there is no basis for me to believe her version. This is in light of the evidential requirement that a party that is alleging should prove his or her allegation.

2.5. The Applicant also avers that the Deceased left unascertainable amount in cash in a Bank and a further sum of K315, 000.00 which is yet to be collected and is bequeathed to the Testator's children in the Will. In terms

of money held in the Testator's bank account, the Will disclose that it is in respect of pension funds or proceeds of investment from the pension and the Will is elaborate on amounts and beneficiaries. These include the Applicant who was bequeathed an amount of K20, 000.00 as averred by the Applicant in paragraph 17 of her Affidavit in support of the Originating Summons. Suffice to state that the Applicant has not supplied evidence suggesting that the Testator left an undisclosed amount of money in his bank account and this defeats her allegations here.

2.6. As regards the sum of K315, 000.00, its source has been specified. It is FinRite Zambia, Messrs Edwin Mwikisa and Connwell Muzumbwe. Further it has been bequeathed in the manner averred by the Applicant.

2.7. The Applicant further avers that she jointly owned the following properties with the Testator: a white two-ton Mitsubishi Canter, a white 4x4 Isuzu and a White Toyota Spacio which he has all bequeathed on his children. Here, contrary to the Applicant's version, the Will disclose that the Testator had two and not three motor vehicles and that the two motor vehicles solely belonged to the Testator. Further, it must be highlighted that the Applicant has

neither supplied the registration numbers nor proof of ownership or existence of the three motor vehicles. As a result, I am inclined to conclude that the Testator left two and not three motor vehicles. Further, that the motor vehicles belonged to the Testator exclusively. In terms of distribution, the Will confirm the Applicant's version that the vehicles were bequeathed on the Testator's children.

2.8. The Applicant further avers as follows: that the Will provided for the Testator's former wife who is married to another man and it has bequeathed more money on her than it has onto the Applicant; that the Will bequeathed the matrimonial house onto the Testator's children unreasonably leaving the Applicant with only kitchen utensils considering that the Applicant has been squatting in a cabin at her young brother's house in Chilenje.

2.9. The Applicant also averred that the following properties have not been provided for in the Will and are in the possession of the Respondent: an LG TV, a Samsung plasma, 1 set of sofas, coffee table, small carpet, dining table, cabinet display, defy kitchen stove, 3 double beds, HIFI system, mini fridge, I banker bed, 1 computer and 1 dressing table.

2.10.A perusal of paragraph 9 of the Will disclose that the remainder of all household property save for kitchen utensils, were bequeathed on the Testator's children. Kitchen utensils were bequeathed on the Applicant. This defeats the Applicant's averment that the foregoing properties have not been provided for in the Will.

2.11.For avoidance of doubt, the relevant portions of the Will are reproduced thus:

***1. "I Lazarus Mushasho TEMBO herein referred to as the "Testator"...***

***3.I appoint my daughter, Mwaaza TEMBO...I bequeath the following items to which I enjoy exclusively, both legal and equitable ownership, to the beneficiaries as I outline here below;***

***4.To my two (2) children named Mwaaza TEMBO and Lazarus TEMBO (junior) herein referred to as "my children" I bequeath my Flats number G6 – Chisekela Road, Long acres and Plot 24626 Libala South both being situated in the Lusaka Province of the***

*Republic of Zambia which shall be held jointly and collectively in equal shares without any exclusive right by either of them. My children shall therefore have equal powers on matters relating and incidental to the two properties and that all Title Deeds thereto shall be transferred unto them jointly, collectively and in equal shares when they both attain age of maturity of eighteen years. Currently, Mwaaza is already on Titles pending inclusion of Lazarus.*

*5.To my mother, Justina BANDA, herein referred to as "my mother" I bequeath House number, 12/06 John Howard in Lusaka, together with all structures in it, which shall be exclusively hers but at the time she ends her tour of duty on earth the aforesaid property shall revert back to my estate and vest unto my two children, Mwaaza and Lazarus, who shall own it jointly and collectively in equal shares.*

*6.I also will that Plot number A 2364 Meanwood in Chamba Valley in Lusaka jointly owned property of my two children, Mwaaza and Lazarus while, Plot number, 2397 in the same area be given to my treacherous wife, Caroline TEMBO, who deserted me for what she termed "old age" and her desire to make money, if still single at the time of my demise.*

*7.My Farm Plot and commercial Plot at 10 miles, Mungule road Kandeke Village and Headman Saili, Chief Mungule respectively are bequeathed collectively jointly and in equal shares to my children and mother. Further, none of the other aforesaid beneficiaries to the farm would have the rights to sell any portion of the farm until my children attain the age of maturity and are able to comprehend with the issues relating to the sale and even then the sale should be done in the interest of my children only.*

*8. WITH REGARDS TO MY PENSION FUNDS, or indeed monies in my Bank accounts realized from any investment that I will engage in using my pension Fund, I bequeath them to the beneficiaries as follows;*

- i) Twenty Thousand Kwacha (K20,000.00) be given to my deserted wife if she will be single at the time.*
- ii) Thirty thousand Kwacha (K30,000.00) to the biological mother to my children, Royce MWALE.*
- iii) Ten Thousand Kwacha (K10,000.00) be bequeathed to my brother Aaron TEMBO and;*
- iv) Sixty Thousand Kwacha (K60,000.00) to my aforementioned mother.*
- v) The remaining amount shall vest unto my two children and the*

*money to remain in the Bank in equal shares with only ten percent (10%) reserved for their schooling and upkeep.*

*vi) Beauty Ndhovu K5,000.00.*

*NB: That the above distributions of monies will only be disbursed upon receipt of trapped investment funds, currently being held by Bank of Zambia repossessed Intermarket Bank Ltd, failure to which any funds in the bank accounts listed below will STRICTLY be reserved for the schooling and up keep of my two children, Mwaaza and Lazarus.*

*Barclays Long Acres, Madison Finance, opposite Post Office, ABC Church Road and Echo Bank – Cairo broad.*

*There will also be need to vigorously pursue K315,000.00 from FinRite Zambia, Messrs Edwin Mwikisa of Cell 0966730113/0976748198 and Connwell Muzumbwe Cell: 0977870472. Court ruling to this effect was passed and Order to confiscate property exist with Mbambala Associates Cell: 0966432127. If obtained money should be reserved for education for my two children.*

**9. FROM ALL THE HOUSEHOLD PROPERTIES,**

*I bequeath them to the beneficiaries as follows;*

- i) My Bedroom bed and everything in it, I bequeath to my son Lazarus except for female clothes and*

*kitchen utensils to my "wife"  
Caroline.*

- ii) The remainder of all household property including my two (2) vehicles, to my children collectively and in equal shares and my clothings to my son Lazarus. The decision of what to give away will solely depend on him.*

*10.I also recognise the Deed of Trust dated 6<sup>th</sup> September 2011 which I lodge at the Ministry of Lands in favour of my children relating to the two houses which I have bequethed to them herein...I hereby give my relatives all exclusive rights to see to it that my estate is distributed in accordance with this WILL by those empowered to do so..."*

(ii) **The Respondent's Affidavit in Opposition**

2.12. The Respondent is opposed to the Originating Summons and in doing so, she filed into Court on 22<sup>nd</sup> November, 2021, an Affidavit in Opposition in which she avers as follows: that she is the Executrix in the Will in issue and she is the eldest of the Testator's two children; that contrary to the Applicant's claims that it was the Testator who took her to her parents' farm in Kabangwe due to marital disputes and that up-to the time of his demise, she was dependent on him, the Applicant is the one who deserted the Testator in the year 2014 until his demise. That under the circumstances, the Applicant must prove her alleged dependence on the Deceased.

2.13. A perusal of the Will in paragraph 6 confirm the Respondent's version in that the Deceased has described the Applicant as a ***"treacherous wife...who deserted me for what she termed old age and her desire to make money, if still single at the time of my demise."***

2.14. The Respondent further avers that the truth as regards the property being referred to by the Applicant is as stated in the Will and that as the Applicant had deserted her marriage to the Testator and not living in the same house with him, she is not aware, as has also been discovered by the family after the demise of the Testator, that the said properties were disposed of by the Testator during his lifetime and before the Will was executed, save for the property in Chibombo District namely the 10 acre farmland which is still in the name of the Testator.

2.15. The Respondent deposes that Plot 2397 situated in Meanwood, Chamba Valley bequeathed onto the Applicant in the Will has indeed been sold as averred above by the Applicant. However, the Respondent clarifies that together with other members of her family, they discovered in the course of executing the Will that some of the properties shown as being devised in the Will, were not available as part of the estate as they were already devised by the Testator during his lifetime and long before the Will was drawn and executed, whilst others were sold by the Testator during his lifetime, and therefore not available after the demise of the Testator. In support of this

averment, the Respondent exhibited 'MT1' - 'MT4', documents depicting transfer of ownership of the said properties from the Testator to various persons. Thus for example, exhibits 'MT1' and 'MT2' depict a transfer of Plot No. 24626 and Stand No. LUS/7382/CL/2/2/ to the Respondent yet according to paragraph 4 of the Will, Plot No. 24626 is denoted as having been bequeathed onto the Testator's two children as joint owners.

2.16. Exhibit 'MT4' depicts a deed of moiety in which the Deceased is transferring onto his brother, Mr. Aaron Tembo, beneficial ownership in house number 06/12 situated in Chawama Improvement area in Lusaka.

2.17. It is further averred that the Respondent deposed that the Applicant's averment that the Testator left an ascertainable amount as cash in the bank and also owed a sum of K315,000.00 is misleading as the fact is that the deceased had made provision in his WILL for the bequest of monies to beneficiaries, including the Applicant who was given a specific amount.

2.18. The Respondent disputed the Applicant's claim that the Testator left behind three motor vehicles. Rather, that according to the Testator, there were only two motor

vehicles, which motor vehicles, he bequeathed in the WILL to his two children.

2.19. The Respondent admits that in his WILL, the Testator bequeathed a sum of K20,000.00 to the Applicant as averred by the Respondent. She however deposes that the Applicant refused to receive or accept the money. Further, the Testator bequeathed monies as he wished and was specific with the amounts and intention for the use of the money and the amounts were in accordance with what he felt he could give respective beneficiaries. This averment is in relation to the Respondent's complaint in paragraph 19 of her Affidavit in Support of the originating summons that the Will provided for the Testator's former wife who is married to another man. The Respondent deposes that the Applicant is aware that the plot given to her in the Will was sold by the Testator and not the Respondent.

2.20. The Respondent disputed the Applicant's Assertions in paragraphs 19 and 20 of the Affidavit in Support of the originating summons that in the Will, the matrimonial house was given to the Deceased's children unreasonably leaving her with kitchen utensils which have not even been given to her. Here the Respondent avers that the Testator

never mentioned any matrimonial house as he was not living with any wife and the Applicant has not specified where the matrimonial house is as he was not living with any wife and the Applicant has also not specified where the matrimonial house was as she had deserted her marriage and did not live with the deceased for some years until his demise. Further, that the place where she lived during her desertion is known only to herself. That any house as was devised to the Deceased's children was devised to them during the life time of the deceased. That the fact of the Applicant not living with the deceased before his demise, is confirmed even by the Applicant in her Affidavit in Support of the Originating Summons. Further, the Applicant collected the kitchen utensils together with some clothes which she had left behind when she deserted her marriage, which had actually been packed by the Testator and they were given to her, in the presence of her relatives, after the funeral of the Testator.

2.21. Concerning the household property mentioned in paragraph 21 of the Applicant's Affidavit in support of the Originating Summons, which the Applicant claims have not been provided for in the Will and that they are in the

Respondent's possession, the Respondent first denied being in possession of the said property. She averred that the property is either not available or if it is available (particularly the deft kitchen stove, 3 double beds, hifi system, 1 computer), was bequeathed to respective beneficiaries in the Will as residue of the Deceased's estate.

2.22. The Applicant avers that the Will is not and its provisions are not unreasonable and that the same has adequate provisions for the Applicant in the provision of a lump sum payment to be given to her from the monies left by the Deceased as stated in the Will. That the Testator made reasonable provisions for the Applicant in view of her conduct in the marriage, which is indicative of her desertion of the marriage, which the Testator fully stated in the Will.

**(i) Applicant's Affidavit in Reply**

2.23. The Applicant filed an Affidavit in Reply on 2<sup>nd</sup> February 2022 in which she largely recited her averments in the Affidavit in Support of the Originating Summons save to add as follows: that she never deserted the Testator and the Testator's sentiments in the Will depicting that the

Applicant had deserted him were made out of emotions; that she was taken to the farm by her husband and he was responsible for her day to day living costs. That in relation to the property alleged to have been sold by the Testator before his demise, there is no documentary evidence proving the sale. Therefore, it is not true that the property was sold.

2.24. The Applicant disputed the Respondent's assertion that she declined to get the K20,000.00 which the Testator bequeathed on her in the Will. Further, that the plot given to her in the Will was sold by the Respondent.

2.25. The Applicant averred that plot No. 24626, Chilenje South was her matrimonial home with the Testator; that she never knew that the same house has been transferred to the Testator's children as per Will when the Testator was still alive; that furthermore, none of the household goods were given to the Applicant by the Respondent.

2.26. It is the Applicant's position that the household properties which are not available, were sold by the Testator and those bequeathed to the Testator's children show how the Applicant has been unfairly treated to the extent of

grabbing household goods from her, when under normal circumstances such goods are for a wife.

2.27. The Applicant maintains that the Will has unreasonable provisions as reasonable provision is not dependent on the conduct of a party in the marriage.

### **3. ARGUMENTS**

3.0. The Applicant filed a list of Authorities and Skeleton Arguments on 15<sup>th</sup> May, 2021. Here I was referred to **Section 16 (1) of the Wills Act** to posit that the intention of the testator must be given effect as far as possible and that the court cannot interfere with what the Will says even if it appears likely that it will achieve a better result. That notwithstanding, section 20 of the same Act empowers the High Court to alter the Will where the Testator made an unreasonable provision to a dependant.

3.1. That even when the court invokes section 20, it does not so much alter the provisions of the Will as to amend their effect. Rather, the Will remains but the implementation of its provisions is what is partly altered by the implementation of the subsequent order of the court.

3.2. I was referred to Section 3 of the Wills Act for the definition of the term “dependant” as to include a wife hence the

Applicant in the present case; that this Application has merit because the Will in issue has unreasonable provisions towards the Applicant. And that further, Order XXX, Rule 12 of the High Court Rules provides the mode in which an application to alter a Will can be made.

3.3. These are the Applicant's arguments which her Legal Advocate, Ms. Puta, largely recited during the hearing on 21<sup>st</sup> June 2022.

3.4. During the same hearing, Counsel also informed the Court that the Applicant will further rely on her Affidavits. Counsel also cited the case of **Styler (1)** with the following facts: that the testatrix, after agreeing to make a Will, in favour of the husband, left all her property to her daughter and her first husband, leaving nothing to her second husband. An Application was made by the second husband for reasonable provision and the court held that the Act did not impose a duty on a Testator, to make reasonable provision for his dependents but it just gives the right to the court to interfere if it concluded that the disposition in the Will is unwarranted.

3.5. The Respondent did not file submissions. During the hearing, her Legal Advocate informed the Court that she

shall rely on her Affidavit in Opposition to the Originating Summons. Counsel further highlighted that as can be discerned from the Respondent's Affidavit, most of the properties in the Will were disposed of by the Testator during his lifetime and not by way of the Will.

- 3.6. Further, that the Applicant has not specified the property which is still available that may be considered in the circumstances of the present application.

#### **4. CONSIDERATION AND DECISION**

- 4.0. I have considered the parties' respective Affidavits and arguments. I shall henceforth state my position. It is not in dispute that the Applicant is the Deceased's surviving spouse. It is also not in dispute that the Deceased died testate. He left behind the Will in issue in which he made various dispositions of his property.

- 4.1. It is also not in dispute that at the time the Deceased passed on, he and the Applicant had been living apart for a period of six years – the Applicant had been living with her parents at their farm situated in Kabangwe Area. The duo has fronted conflicting versions for their separation. According to the Applicant, it is the Deceased who took her to her parents' farm. According to Testator's Will, it was

the Applicant who deserted the Testator due to his old age and her desire to generate money for herself.

4.2. After considering the two versions, I am inclined to believe the Testator's version namely that the separation was as a result of the Applicant deserting the Testator and not the Testator evicting the Applicant from the matrimonial home. I am of this view because I have not found any basis for the Testator to have lied against the Applicant. In any event, the Testator's version has been corroborated by the Respondent even when there is no evidence of collusion between the Testator and the Respondent. To the contrary, the Applicant's version is unsupported yet in my view, she could have easily called her same parents to testify.

4.3. Turning to the present Application, it is properly before me pursuant to **Section 20 of the Wills Act** read with **Section 3 of the same Act** and **Order XXX, Rule 12 of the High Court Rules. Section 20 of the Wills Act** enacts that only a Testator's dependant or a person acting on behalf of such dependant, can make the present application. **Section 3 of the Wills Act** defines the term 'dependant'. This includes a wife to the Testator such as the Applicant in the present case. **Order XXX, Rule 12 of**

**the High Court Rules**, empowers a person interested in a Will to lodge an application relating to the Will and there is no dispute that being a beneficiary, the Applicant is a person interested in the Will in issue. Further about Section 20 of the Wills Act, the provision is a departure from the long standing recognition of unfettered right of disposition by the testator of his property. It confers on the High Court a jurisdiction to depart from the dispositions of a testator by providing reasonable provisions for certain of his dependants if it is of the opinion that he or she had not done so himself whether during his life time or by his Will, for the maintenance of the dependant, and that hardship will thereby be caused.

4.4. Matters to be considered by the Court when determining an application such as the present one are outlined in Section 21 of the Wills Act. They include the following:

- (i) the testator's reasons for making the dispositions made by his Will or for not making any provision for a dependant;
- (ii) the conduct of that dependant in relation to the testator;
- (iii) any past, present or future capital or income from any source of the dependant to whom the application relates.

And;

(iv) and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant and to the beneficiaries under the will.

4.5. The foregoing was adopted by the Supreme Court of Zambia in the case of **Diamond vs Standard Bank of South Africa Limited (Executor) and 4 Others (2)**.

4.6. I have considered the circumstances of the present case in light of the foregoing requirements. In my discernment, the Applicant's complaint regarding the unreasonableness of the dispositions in the Will in issue is anchored on the following two grounds: firstly, that she is the Testator's surviving spouse and should, on that basis, have been apportioned more. And secondly, that she was economically dependent on the Testator during his life time so that the dispositions are inadequate to sustain her livelihood.

4.7. As noted already, the fact of an applicant being a dependent of a testator and the fact of a disposition made in favour of such applicant in a Will being inadequate, does not automatically entitle the applicant to an alteration of the Will in his or her favour. To succeed, the Court must

be satisfied that the circumstances surrounding the applicant are deserving and this is possible by considering the matters outlined above in Sections 20 and 21 of the Wills Act.

4.8. With the foregoing insight, in determining the merits of the Applicant's first ground of complaint, I have endeavoured to ascertain if there is any reason for the Testator making the impugned dispositions in the Will. I have been adequately guided by the averments of the parties to these proceedings and the Testator's declarations in the Will.

4.9. According to parties, the marriage between the Applicant and the Testator was turbulent. According to the Will, the Testator depicted the Applicant as a deserter and treacherous wife. The Testator's foregoing description of the Applicant, in my view, is the reason the Testator made the impugned disposition for the Applicant. The description clearly disclose that the Applicant was unaffectionate towards the Testator and this aggrieved him. He thus expressed his grievance through the dispositions in issue and in my view, the Testator's grievance and consequent reaction are reasonable because

it is highly traumatising to be deserted by a spouse on account of old age or insufficient money.

4.10. To ignore such unaffectionate conduct as expressed by the Testator and proceed to alter the Will in favour of the Applicant is to battle against the Testator's wishes and to rewrite the Will for the Testator, which in my view, will be a violation of the intention of the legislature in Sections 20 and 21 of the Wills Act. I am of this view because the powers conferred on the Court by Section 20 of the Wills Act must be exercised sparingly and only in deserving cases such as where a Testator had no justifiable reason to make an inadequate provision in favour of his or her dependant. To the contrary, in the present case, the Testator had a justifiable reason to make the provisions he made for the Applicant.

4.11. For the above reasons, I decline to invoke my powers under Section 20 of the Wills Act to vary the Testator's Will. This position, renders the Applicant's second ground of complaint otiose.

4.12. The Applicant has also asserted that plot number 2397 situated in Meanwood Chamba Valley which was bequeathed on her in the Will has been sold by the

Respondent. I dismiss the assertion because it is not supported by evidence when in my view the Applicant could have easily supplied supportive evidence considering that transactions in land are evidenced in writing and records thereof kept in requisite land registries. On the contrary, the Respondent's explanation that the property was disposed of by the Testator during his lifetime is reasonable because the Applicant cannot be privy to the Testator's decisions during the long period she was in desertion from him. In any event, statements in a Will are mere declarations which can be defiled, altered or cancelled by the testator during his lifetime. Thereby, a testator can dispose of the gift he or she bequeathed in a Will, even without having to amend the Will. Where such is the position, a beneficiary cannot be heard to complain at the time the Will is executed.

4.13. The Applicant has further asserted that the Deceased did not include some household properties in the Will. She thus urged this Court to direct for the distribution of the said property in accordance with the principles of intestacy. I dismiss the assertion because the Will has specifically provided for household properties under

Paragraph 9 and the Applicant is herself a beneficiary of kitchen utensils. Under the circumstances, there is no intestate portion in the Testator's estate.

4.14. Further, I have not found force in the Applicant's complaint that the Will in issue has made provisions in favour of the Deceased's former wife. I adopt this position because a testator is entitled to bequeath his property on whoever he or she desires. This applies to all the property bequeathed on the various beneficiaries in the Will in issue.

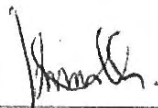
## **5. CONCLUSION**

5.1. Based on the foregoing, I dismiss the Originating Summons in its entirety.

5.2. Parties shall bear their respective costs.

5.3. Leave to appeal is granted.

**DELIVERED AT LUSAKA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2022**



**KENNETH MULIFE**  
**HIGH COURT JUDGE.**