

HOLDEN AT LUSAKA

BETWEEN :

HUBERT SAMBYANA MALENGA

1ST APPELLANT

GOERGE K. LIKANDO YEMBE

2ND APPELLANT

AND

PEERLESS NAMWINGA MALENGA

RESPONDENT

CORAM : BWEUPE DCJ., CHAILA AND CHIRWA JJS.

HELD ON 5TH MARCH, 1998 AND 15TH FEBRUARY, 1999

For the Appellant - N/A

For the Respondent - Mr. I.C. CHALI of Chali Chama and Company.

J U D G M E N T

BWEUPE DCJ., DELIVERED THE JUDGMENT OF THE COURT.

This is an appeal against the decision of the High Court Judge ordering that the Respondent be made an administratrix of the estate of the late Mr. MUBITA DUNSTAN MALENGA who died on the 26th day of June, 1995 at Kitwe without a will. The Appellant was not represented at the hearing. When the case commenced Mr. CHALI informed the Court that when he received the cause list he sent a fax message to the Appellant, the message was received by Shamwana and Company. He said that when the case first came on the 3rd of February, 1998, Mr. Shamwana of Shamwana and Company was present. Mr. SHAMWANA had also received the cause list but there was no appearance on their part. He said Shamwana and Company were therefore aware of the hearing of this appeal. He therefore asked leave of the Court to proceed. He was allowed to

proceed. MR. CHALI before proceeding, raised a preliminary objection. He said he issued a notice of preliminary objection in which he said that the Respondent shall raise the preliminary objection to the ground of appeal filed with the heads of argument on 17th February, 1998 on the ground that the same has been filed and is proposed to be argued contrary to the provisions of Rule 58 sub-rule 3 of the Supreme Court of Zambia. The Court therefore allowed the preliminary objection.

The facts of the case are to the effect that on the 12th June, 1995 the Respondent commenced this action by way of originating notice of motion praying for an order appointing her as administratrix of the estate of Mr. MUBITA DUNSTAN MALENGA who died on the 26th of June, 1995 at Kitwe without a will.

The Respondent and the Appellant both filed affidavits and gave viva voce evidence. The Respondent, Peerless Namwinga Malenga, testified that she was the widow of the late MR. MUBITA DUNSTAN MALENGA WHO DIED AT Kitwe on the 26th June, 1995. He left no will. The Respondent and the deceased had married on the 6th September, 1990 at the Registrar's Office at Kitwe. Prior to their marriage both the Appellant and the deceased had been married. The Respondent had been married to a Mr. ALEX TRYSON ZULU but the marriage was declared void on the 5th day of March, 1990 and a decree absolute was made and issued on 30th April, 1990. The deceased had been married to Mrs. ESSIE M. MALENGA nee SIMS now remarried and known as Mrs ESSIE EDWARDS of the State of Wisconsin in United States of America. That marriage was dissolved on the 15th January, 1988.

In her previous marriage the Respondent had three children namely Helen now aged 20 years, Anastasia aged 18 years and Chipso aged 16 years. The deceased had three children in his previous marriage namely Mubita MALENGA , 22 years, Jessica MALENGA 17 years, Lisulo MALENGA 15

15 years. In addition he had another child out of wedlock namely Ing'utu MALENGA aged 10 years. The deceased was also survived by his parents but the father has since died.

Apparently all the three children from the deceased's previous marriage are living with their mother in the United States of America. The Respondent and the deceased were keeping Ing'utu MALENGA and the Respondent registered her and is still registered with her employers ZCCM NKana Division for purposes of contributory medical scheme. The Respondent conceded that the deceased's four children are entitled to a share in the deceased estate as well as her children from her previous marriage. The Respondent estimated the value of deceased estate to be in excess of K150 million. The Respondent has not disposed of any of the property but had been looking after the deceased's estate single handedly. This including House No. 227, Limpopo Drive, Riverside, Kitwe and the farm. She testified that she had agreed to be co-administratrix with the Appellants.

The Respondent said that DUNMAL Limited and DUNMAL Farms Limited are her late husband's Companies, while she has 20% and 40% shares respectively. She said that after the demise of her husband it was agreed to appoint Mr. George YEMBE and Mr. Clement MALENGA to be administrators of the deceased's estate and not herself. She also testified that her late husband was supporting her children from her previous marriage.

The Appellant called one witness, Mr. Hubert SHAMBYANA MALENGA, the first Appellant. He is the young brother of the deceased. He testified that he is a custodian of what is left of the deceased's estate on behalf of his four children, three of whom are in the United States of America and one in Lusaka, Zambia. However, he testified that the Respondent was at present in control of the estate.

The first Appellant contended that the Respondent was to blame for the breakdown of his brother's previous marriage to his former American wife. He confirmed however, that after the dissolution of the marriage the deceased married the Respondent. The first Appellant averred that after the dissolution of the marriage custody of the children was given to the deceased.

The Court in its judgment said as it would be noted from the evidence of both parties, it was not in dispute that when the deceased died, he left no will. The provision of the Intestate Succession Act No. 5 of 1989 therefore applies in this particular case. The judge said that it had also been established that when the deceased died, he left the Respondent as surviving widow. In terms of Section 5 of the aforementioned the Respondent is entitled to 20% of the deceased's estate. There is no doubt also that the deceased was survived by four children, three of whom were with his former American wife and one who was born out of wedlock. In terms of the Act aforementioned, these children are entitled to fifty percent of the deceased's estate. The deceased was also survived by his parents of whom the father has since died. The mother is nevertheless entitled to 20% of the deceased's estate. The Respondent testified that she also had three children from her previous marriage. Prior to the death of the deceased these children were living with them and were also being supported by the deceased and herself of course. The Court said that these children are not children born in or out of marriage, adopted children or conceived but not yet born. They therefore do not qualify as children in terms of the Act. However the evidence is not contradicted that the three children were living with the deceased and the Respondent prior to the deceased's death. The evidence is also uncontradicted that the deceased was supporting them. At best, they were therefore the deceased's dependants. In terms of the Act, They, and any other dependants are entitled to 10%

of the deceased's estate in equal shares.

The Court further went on to say that it may grant letters of administration to any interested persons who applied for the grant of such. Up to four persons may be granted letter of administration upon application. The Respondent and the Appellants have all applied for letter of administration of the deceased estate. Although the Respondent does not necessarily object to be a joint administratrix, the Appellants do object to the grant of letters of administration to the Respondent on the ground that she is an interested party.

The Court said that the enactment of the Intestate Succession Act was passed in order to redress the misery experienced by the widows and their children from such property grabbers. The Respondent therefore has to be protected if her interests in the estate are to be safe-guarded especially in view of the 1st Appellant's evidence that she is to blame for the breakdown and subsequent dissolution of the deceased's former marriage to his former American wife. The Court said that her interests can only be protected if she is also granted letters of administration.

There are at least three minor children in this matter, namely Ing'utu MALENGA aged 10 years, Lisulo MALENGA aged 15 years and Jessica MALENGA aged 17 years. In terms of Section 16 of the Act, where there is a minor, letters of administration must be granted to the Administrator - General either solely or jointly with another or with not less than two individuals.

The Court granted letters of administration to the Administrator - General jointly with the Respondent and the 1st Appellant. The Court also said that to clear any doubt, the former American wife of the deceased was not entitled to any share in the deceased's estate as she was not catered for under the Act aforementioned in particular Section

5 as she is not a surviving spouse of the deceased.

The Appellants filed heads of argument. Ground One, they said the learned trial judge erred when he directed the former American wife of the deceased was not entitled to any share in the deceased's estate. They argued that whilst it is appreciated that since the former wife was not catered for in the Intestate Successions Act as a beneficiary, the Court did not take into account that the former wife and the deceased had agreed to settlement after their divorce on 15th February, 1988. They also contended that the lower Court should have taken this evidence into consideration and held that the former wife be allowed to exercise her rights in the assets. They prayed therefore that the lower Court's decision be reversed and an order that the former wife benefits from the 50% settlement granted to her after her divorce from the deceased be made.

The Respondent argued ground one. He said the Court did not err when it held that the only way the interests of the Respondent could be protected was to make her administratrix. They urged the Court to take judicial notice of how widows in Zambia are mistreated and their benefits taken away from them by the deceased husband's relatives. This is a notorious fact and well documented in daily newspapers in the country. In this particular case there was evidence of baseless mistrust of the Respondent by the Appellant's family as shown in her evidence on the record particularly at pages 73 to 79 and in the testimony of DW1 particularly at pages 81 to 83 of the record. The learned trial Judge properly invoked the powers granted to him in terms of Section 15 of the Act.

Ground 2: The learned trial Judge did not err in fact or in law when he decided that the deceased's former wife was not entitled to

any share in the deceased's estate. He argued that as a matter of fact the former wife of the deceased was not a party to the proceedings. secondly this was an application for the appointment of an administrator in an intestate estate. Question of beneficiaries could not therefore be decided in the trial of those proceedings because it was not the matter before the Court. The claims of any person beneficially entitled to claim from the estate could be handled subsequently by the appointed administrator or by the Court in separate proceedings.

We have carefully considered the evidence before the Court below and we are satisfied that the proceedings only concerned the making the Respondent as an administratrix or as a co-administrator. We agree with MR. CHALI that the American wife was not a party to these proceedings and therefore could not in these proceedings claim anything. The claims of any person beneficially entitled to claim from the estate could be handled subsequently by the appointed administrator or the Court in separate proceedings. We confirm that the learned Judge was correct to make the Administrator - General an administrator in view of the three minor children Ing'utu MALENGA and the two others from the American wife. We also confirm the appointment of PEERLESS LAMWINGA MALENGA as co-administratrix and MR. HERBERT SAMBYANA MALENGA, the first Appellant, as co-administrator of the estate of the late Mr. MALENGA. We therefore uphold the finding of the learned Judge. The appeal is accordingly dismissed.

We direct that the costs be borne and paid out of the estate of the late MUBITA DUNSTAN MALENGA.

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B.K. BWEUPE
DEPUTY CHIEF JUSTICE

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M.S. CHAILA
SUPREME COURT JUDGE

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D.K. CHIRWA
SUPREME COURT JUDGE