IN THE SUPREME COURT FOR ZAMBIA - APPEAL NO. 158/2002
SCZ Judgment No 15/2004

HOLDEN AT LUSAKA.
[CIVIL JURISDICTION]

BETWEEN:

Charity oparaoccha	-	**Appellant**
And		
Winfrida Murambiwa	-	**Respondent**

Coram: Lewanika, DCJ, Mambilima and Silomba, JJS
On the 26th of June 2003 and 11th June, 2004.

For the Appellant - Mr. C. S. Mundia; of Mundia and Company.

For the Respondent - Mr. L. C. Zulu; of Central Chambers, jointly with Shamwana and Company.

JUDGMENT

Mambilima JS, delivered the Judgment of the Court.

Authorities referred to:

1. Isaac Tentameni Chali (Executor of the Will of the late Mwalla Mwalla) vs Liseli Mwalla (1995/1997) ZR 199
2. Mwananshiku and Others vs Kemp and Mwananshiku (1990/92) ZR 42
3. Family Law, 6th Edition by P. M. Bromely at page 259.

Legislation referred to:

(1) Intestate Succession Act, Cap 59 of the Laws of Zambia.

(2) Wills and Administration of Testate Estates Act Cap 60 of the Laws of Zambia.

(3) Births and Deaths Legislation act, Cap 51 of the Laws of Zambia.

This is an appeal against the decision of the Court below which found that an Order of Administration of the estate of the late Dr. Christopher Oparaocha, obtained by the Appellant, was null and void ab-initio and cancelled it post-facto. The Court ordered that the Appellant should provide a full inventory of the estate showing how it was distributed within 60 days of the Judgment. It also ordered that all traceable assets should be re-assembled for fresh redistribution under the Intestate Succession Act No. 5 of 1989 (herein after sometimes referred to as the 'Act') and that to this effect, the said estate should be re-administered by the Administrator-General, in accordance with the appropriate law.

The record of appeal before us shows that the Respondent applied to the Court below for three orders. Firstly, that the Respondent and her children are entitled to benefit from the estate of the late Dr. Christopher Oparaocha by virtue of the Intestate Succession Act; secondly, that the Appellant should account to the beneficiaries, the extent of the estate; and thirdly, that the administration of the estate should vest in the Administrator-General.

The Respondent testified that she was married to the late Dr. Christopher Oparaocha in 1982, after the deceased approached her parents and paid bride price. In December 1986, the Respondent and the late Dr. Oparaocha underwent a traditional ceremony of marriage in Nigeria at the deceased's village. The Respondent told the lower Court that at the time of the said marriage, she knew that that deceased was married but did not know the type of marriage. She had three children with him, two of whom, were born at the University Teaching Hospital in Lusaka, and the third, in Nigeria. The birth Certificates in respect of the three children indicate the deceased and the Respondent as the parents. According to the Respondent, she lived with the deceased up to 1992 when he died. She testified that the deceased had rented a house for her in Kabwata Estates and met all her needs together with those of the children.

It was the testimony of the Respondent that after the death of Dr. Oparaocha, she traveled to Nigeria together with her children on air tickets provided by the Nigerian Embassy. While there, she went through traditional rituals at the deceased's village.

The Appellant's testimony in the lower Court was that she never knew the Respondent or her children before the death of her husband. She got

married to the late Dr. Christopher Oparaocha on 15th July 1971, under the Marriage Act of Kenya. She told the Court below that she lived with her husband throughout the marriage until his death. She went on to state that after the death of her husband, she checked the family file at Immigration Department and found that the Respondent's children were not registered. Using the statistics from the immigration file, she administered the estate. She put up a death notice in Zambia and abroad and no one came with any claim. She told the Court that she completed the administration of the estate and was now no longer the Administrator.

The Appellant further testified that after the death of the deceased, she did not travel to Nigeria but that sometime later in 1992, she became aware that someone claimed to have children with her husband but since the claimant did not provide any proof, she disregarded the claim and did not make any provision for her.

After evaluating the evidence on record and submissions by Counsel, the learned trial Judge found that the Respondent's marriage to the deceased was null and void because the deceased had been married to the Appellant under the Kenyan Statutory Law. On this premise, the trial Judge was of the view that the Respondent could not validly claim to be

the deceased's widow. The Judge also found that although the parties in this case were not Zambians, Section 2 (1) of the Act applied to the case because foreign customary law has not been expressly excluded by the Act. According to the Judge, the correct interpretation of Section 2(1) is that it is inclusive of foreign customary law, more so, that the Appellant chose to administer the estate under African Customary Law as it is applied in Lusaka. The trial Judge was of the view, however, that in view of the size of the estate, it was beyond the jurisdiction of the Local Court and the Subordinate Court as prescribed by law. According to the Court below, the Appellant should have obtained pro-bate in the High Court for Zambia. On the evidence which was before him, the learned trial Judge found that the Respondent was a dependant of the deceased and therefore entitled to her share of 10% of the estate since immediately prior to his death, she was maintained by the deceased together with her children and they were housed in a rented house for which the deceased paid rent. The trial Judge also found that there was cogent evidence to prove that the Respondent had three children with the deceased. He went on to state that these children were entitled to the share of their father's estate in accordance with the applicable law and that these shares must be equal to the shares taken by the Appellant's own children.

Dissatisfied with the Judgment of the Court below, the Appellant has appealed to this Court advancing four grounds of appeal namely:

"1. **that the Trial Judge erred in Law and in fact by holding that the Respondent was entitled to 10% share in the Estate because she was never a dependant of the deceased and there was no proof that the deceased ever paid rent for her.**

2. **that the Trial Judge erred in Law and in fact by declaring that the Appellant's appointment as Administrator of the Estate was null and void ab-initio as the said Trial Judge had no power nor capacity to cancel such appointment post facto.**

3. **that the Trial Judge erred in Law by declaring that the purported 3 children belonged to the deceased as there was no evidence before the Court to show that there was a joint request by the Respondent and the deceased to have the children registered as required by the Law.**

4. **that the Trial Judge erred in Law and in fact by failing to distinguish the purport of the Interstate Succession Act and that of the Local Courts Act and the Order therefore that the assets be reassembled for fresh distribution had no basis in Law."**

Both Counsel argued the first three grounds of appeal. It appeared to be common cause between them that the fourth ground of appeal, being inter-related to the first three grounds, would be covered by the arguments in respect of these grounds.

Submitting in support of the first ground of Appeal, Mr. Mundia in his written heads of argument augmented by oral submissions stated that the trial Court misdirected itself seriously because the Respondent was never a dependant within the meaning of the Intestate Succession Act. To this effect, he referred us to section 3 of the Act, in which a dependant, in relation to a deceased person, is defined as **"a person who was maintained by that deceased person immediately prior to his death and who was (a) living with that deceased person or (b) a minor whose education was being provided for by that deceased person".**

Mr. Mundia argued that the evidence before the lower Court clearly established that the Appellant was the only legal wife of the deceased. He went on to state that there was no evidence to prove that the deceased was maintaining the Respondent apart from what the Respondent told the Court. He submitted that when the Act refers to a dependant **"living with the deceased",** it does not refer to a mistress or girlfriend, but to such a person whom the deceased had a legal duty to maintain. According to Mr. Mundia, the intention of the Legislature was to cater and/or provide for close relations and not every person including mistresses. He argued further that on strict construction of the law, the Respondent was an adult of over 21 years of age and could not be said to have been a dependant.

Mr. Mundia also referred us to the definition of the word dependant in the Wills and Administration of Testate Estates Act.[2] According to Section 3 of this Act, a dependant means **" a wife, husband, child or parent".** He also referred us to the case of Isaac Tantameni Chali (Executer of the Estate of the Wills of the late Mwalla Mwalla) vs Liseli Mwalla[1] in which, according to Mr. Mundia, the Court held that an adult daughter who was not provided for under the Will could not be said to be a dependant even though she was living with her father at the time of his death. Mr. Mundia submitted that it was a serious misdirection, on the

part of the lower Court, ever to imagine that mistresses could fall within the definition of dependant, which meant that if one had 100 mistresses and not wives, they could be entitled to a share of the assets. He urged us to set aside this finding by the Court below.

In response to Mr. Mundia's argument on the first ground of appeal, Mr. Zulu, on behalf of the Respondent submitted that Section 3 of the Act clearly defines who shall be a dependant for the purpose of the Act, and the definition includes any person who was maintained by the deceased immediately prior to his death. According to Mr. Zulu, this definition of dependant is very clear and unambiguous. It does not allow for any alterations and amendments. To this effect, he referred us to the case of **Mwananshiku and others vs Kemp and Mwananshiku**[2] in which this Court discouraged the practice of reading into a statute, words that would have a tendency of amending the same. On the reference by Mr. Mundia to the definition of a dependant in the Wills and Administration of Testate Estates Act, Mr. Zulu submitted that the Appellant cannot properly rely on this definition because the subject matter of the action in the Court below was intestate succession. He went on to state that the case of **Isaac Tantameni Chali vs. Liseli Mwalla** [1] which has been cited by the Appellant was irrelevant to the case at hand. On the submission that there was no evidence before the lower Court to prove

that the Respondent was maintained by, and lived with the deceased, Mr. Zulu referred us to the letter at page 58 of the record of appeal. This is a letter from the High Commissioner of the Republic of Nigeria to Zambia which states inter alia:-

Re: ***ESTATE OF LATE DR. CHRISTOPHER OZOBIA OPARAOCHA.***

I have the honour to inform you that the above-named person was very well known to me before his unfortunate and tragic death in February, 1992. He was, at the time of his death, a Nigerian citizen. In fact, he was the leader of the Nigerian Community in Zambia and, in that capacity, he related very closely to this Chancery. At the time of his death, Dr. Oparaocha had two wives known to this High Commission namely:

(a) Mrs. Charity Oparaocha and

(b) Mrs. Winfrida M. Oparaocha.

The late Dr. Oparaocha had children by both wives. He obtained Nigerian Passports for his children from this Chancery. For example, on 3rd December, 1991 he came to the Chancery with his three children born by Mrs. Winfridah Oparaocha and obtained Nigerian Passports for them.

I attach hereto copies of <u>FORM "C2" APPLICATION FOR A PASSPORT FOR A CHIULD UNDER 16 YEAS OF AGE WHO IS A CITIZEN OF NIGERIA</u> completed in respect of the afore-mentioned three children by the late Oparaocha himself on 3rd December, 1991. The names and Nigerian Passport numbers of the three children are:

<u>Name</u>		<u>Nigerian Passport No:</u>
Master Christopher Oparaocha Jr	-	**A110910**
Master Raphael Obinna Oparaocha	-	**A110911**
Miss Adaku Akunna Oparaocha	-	**A110912"**

According to Mr. Zulu, whether or not the purported marriage between the late Dr. Oparaocha to the Respondent was null and void, the letter from the Nigerian High Commission collaborates the Respondent's testimony that she was maintained by the deceased.

We have anxiously considered the submissions of Counsel on the first ground of appeal. Mr. Mundia has forcefully argued that the Respondent cannot be said to be a dependant of the late Dr. Oparaocha so as to benefit from his estate under the Intestate Succession Act.

The evidence on record does show that the Respondent went through a traditional ceremony of marriage, which on account of the deceased's statutory marriage to the Appellant, was declared, rightly so, to be null and void. The Respondent could not therefore be validly said to have been a widow. The Court below found her to have been a dependant.

Mr. Mundia has referred us to the definition of dependant in both the Intestate Succession Act[1] and the Wills and Administration of Testate Estates Act[2]. It is common cause that the deceased left no will and his estate was administered under the Intestate Succession Act. We agree with Mr. Zulu that on this premise, the relevant definition of dependant to be applied is the one espoused by the Intestate Succession Act. This Act defines **'dependant'** in relation to the deceased, inter alia as **"... 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."**

The evidence of the Respondent in the lower Court was that she was living with the deceased in Kabwata in a flat which they were renting from the National Housing Authority. Part of her evidence on page 26 of the record of appeal states:

"The late Oparaocha paid for the rentals. He was supporting me and the children. He actually stopped me from working and he used to do everything for me."

In our view, this evidence clearly established that the deceased was living with the Respondent and that he actually maintained her. There is also the letter from the Nigerian High Commissioner on page 58 of the record to which we have been referred by Mr. Zulu. According to this letter, both the Appellant and the Respondent were known as the deceased's wives to the Nigerian High Commission.

Mr. Mundia has argued that the intention of the legislature was to cater for close relatives and not every person including mistreses. In our view, the wording of Section 3 of the Act is clear. A dependant is any person who meets the criteria given in the Section. If the intetion was to cater for close relatives, such intention could have been expressed in the language of the statute. We uphold the learned trial Judge that the Respondent was a dependant within the meaning of Section 3 of the Act. The first ground of appeal therefore fails.

On the second ground of appeal, Mr. Mundia argued that the orders given by the trial Judge to provide a full inventory of the estate showing

how it was distributed within 60 days of the Judgment; that all traceable assets be re-assembled for fresh distribution; and that the estate be re-administered by the Administrator-General in accordance with the appropriate law, were not in conformity with the provisions of the Intestate Succession Act. To this effect, he referred us to Section 29(1) of the Act which lays down grounds on which letters of administration could be revoked or nullified. He also referred us to Section 29(2) which grants power to the Court inter alia to suspend or remove an administrator.

Mr. Mundia argued that from the provisions of Section 29, any of the offending acts or circumstances under which a suspension or removal of an administrator could be provided were never present in this case, let alone, cancellation of the letters of administration post-facto. He went on to state that the letters of administration in this case were properly issued out of Court without any impediments. He submitted that the actions of the trial Court were ultra-vires the powers conferred on the Court by Section 29 of the Act. Mr. Mundia further argued that the ordering for the re-distribution of the assets by the Court was not provided for under the Act. According to Mr. Mundia, the Court only had power to provide for another person in the office of the administrator and to vest in that person, the property belonging to the estate. He stated

further that the estate having been distributed to the known beneficiaries, the Appellant as Administrator, acted within the confines of Section 5 of the Act. Mr. Mundia also referred us to the provisions of Section 19 of the Act which is on the duties of an Administrator and submitted that there was no evidence that those duties and powers were not properly carried out by the Appellant and therefore, that the nullification of the order of administration by the Court was a misdirection.

In reply to the submissions on the second ground of appeal, Mr. Zulu submitted that the High Court is empowered under Section 29 (2) of the Act to remove an administrator of an estate and in his place, appoint another, if it is satisfied that proper administration of the estate and the interests of persons beneficially entitled under the estate so required. He went on to state that the Court below, was satisfied on the evidence before it, that the estate was not properly administered by the Appellant in that she did not provide for the interests of the Respondent's minor children who were beneficially entitled to the estate. He submitted that the Court therefore acted within its powers to revoke the Appellant's appointment as administrator of the estate of her late husband. Mr. Zulu further submitted that the proceedings to obtain letters of

administration herein were defective in substance, since the value of the estate exceeded the jurisdiction conferred on the Local Court by Section 43 (2) of the Act.

In considering this ground of appeal, we have had to ascertain the jurisdiction of the Local Court which appointed the Appellant to be the administrator in this case. Section 43 (2) of the Act limits the jurisdiction of the Local Court in matters of succession to estates whose value do not exceed Fifty Thousand Kwacha. It is clear to us that this provision was enacted at a time when the Kwacha had more value. We say so because going by the current trends very few, if any, would an estate have the value of fifty thousand kwacha and below. It is however on record in this case that the deceased's estate had property within and outside Zambia, which included real property. Clearly, the value of the deceased's estate went beyond the jurisdiction of the Local Court. We agree with Mr. Zulu that probate, in this case, should have been obtained from the High Court. We cannot therefore fault the trial Judge for having found that the appointment of the Appellant by the Local Court as administrator of the estate of the deceased was null and void. The consequence of such a finding was cancellation of the Order of appointment post-facto.

The Court has power under Section 29(2) of the Act to remove an administrator where it is satisfied that proper distribution of the estate and the interests of persons beneficially entitled to them so require. It is on record that the Appellant, in her administration of the estate of the deceased, did not take into account the interests of the Respondent and her children. The second ground of appeal cannot also succeed.

On the third ground of appeal, it was Mr. Mundia's submission that the Appellant did not know, at the time of the distribution of the estate, about the Respondent and her children. He went on to state that the Respondent in the Court below, was trying to prove that the deceased was the putative father of her children by presenting birth certificates that had the name of the deceased as the father. He submitted that the birth certificates of the children, whose copies appear on page 113-115 of the record of appeal, clearly show that the informant was the Respondent as the mother. He went on to state that another document on page 114 of the record which was issued outside Zambia, does not show who the informant was. According to Mr. Mundia, the evidence of these birth certificates was not sufficient.

Mr. Mundia referred us to Section 15 of the Births and Deaths Registration Act[3] which states that **"no person shall be bound as a father to give notice of the birth of an illegitimate child, and no person shall be registered as the father of such child except on the joint request of the mother and himself and upon his acknowledgement in writing to be the father of the child.** He submitted further, that there was no evidence on record to show that there was a joint request by the Respondent and the deceased to give a notice of birth of the purported children to the Registrar. Mr. Mundia went on to state that the Court below seriously misdirected itself to have found that the children of the Respondent were those of the deceased and should rank as beneficiaries within the provisions of Section 5 of the Act since there was no legally acceptable standard of proof before it. To this effect, he referred us to the writings of P. M. Bromley in his book, **Family Law[3]** in which he stated that the **"...entry of a man's name as that of the father on the registration of a child's birth will be prima facie evidence of paternity; if the child is illegitimate, however, this can be done only with his consent unless an affiliation order has been made against him."** Mr. Mundia pointed out that there were no

affiliation proceedings taken in this matter and therefore, the arguments by the Respondent were not justified and not supported in law, as to proof of paternity.

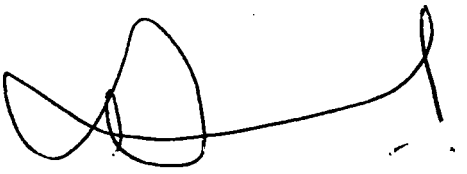
In response, Mr. Zulu submitted that the entire argument in support of the third ground of appeal must fall because there was conclusive evidence, in form of the letter on page 58, to which were attached application forms for passports for the Respondent's children. He submitted that these forms were concluded by the late Dr. Oparaocha in his own handwriting and he declared his relationship to the Respondent's children as that of father. He went on to state that these documents were originated from the Nigerian High Commission and they were officially certified as true copies of the originals. Mr. Zulu further submitted that the Appellant conveniently avoided all mention of the fact that the Respondent's children all carry Nigerian passports that were obtained for them by Dr. Oparaocha as their father.

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

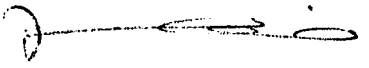
Respondent's children. It is common cause that the deceased was Nigerian. According to the letter from the Nigerian High Commissioner, he applied and obtained Nigerian Passports for the said children. The documents on record clearly show that he portrayed himself as the father of the children in the 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.

It follows from our dismissal of the first three grounds of appeal, that the fourth ground, which in essence attacks the Order by the Court below, that the assets of the deceased's estate be reassembled for fresh distribution, cannot stand. The evidence before the lower Court clearly established that the Respondent's interests together with those of her children, who were beneficiaries under the estate were completely ignored.

We find no merit in the whole appeal. It is dismissed. In the circumstances of this case, we Order that each party will bear its own costs.



D. M. Lewanika
DEPUTY CHIEF JUSTICE



I. C. Mambilima
SUPREME COURT JUDGE

S. S. Silomba
SUPREME COURT JUDGE