IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 78 OF 2010

HOLDEN AT KABWE

(Civil Jurisdiction)

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

AND

IN THE MATTER OF: **THE ESTATE OF THE LATE LAGOS NYEMBELE**

B E T W E E N:

BONAVENTURE MUTALE 1ST APPELLANT

AUBIE WILLY MUBANGA 2ND APPELLANT
(Sued as Executors of the estate of the Late LAGOS NYEMBELE)

AND

MAJORIE MUMBI NYEMBELE RESPONDENT

CORAM: **SAKALA, CJ., MWANAMWAMBWA AND WANKI, JJS.**
On 1st November, 2011 and 23rd January, 2012

For the Appellants: Mrs. F. KALUNGA, of Messrs. Ellis and Company

For the Respondent: Mr. M. KABESHA of Messrs. Kabesha and Company

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J U D G M E N T

WANKI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Diamond -Vs- Standard Bank of South Africa Limited (executor) and Four Others, (1965) ZR 61.**
2. **Vrint -Vs- Swain, (1940) Ch. D. 920, 926.**
3. **Scott -Vs- Scott (1951) ALL ER 216.**
4. **Isaac Tantameni Chali (executor of the Will of the late Mwala Mwala -Vs- Liseli Mwala (Single woman), (1995/1997) ZR 199.**

This is an appeal against the **Order** of the High Court that the **Will** of the **late Lagos Nyembele**, be varied and that the widow **Marjorie Mumbi Nyembele** and the **Children Chishiba and Chibwe Nyembele** be granted seventy per cent (70%) of the value of the whole estate.

The facts leading to the appeal are that, the Respondent filed an Originating Summons in the Principal Registry against the Appellants for the following:-

1. A declaration that the last Will and Testament of the late Lagos NYEMBELE is unreasonable and must be varied by giving the widow, the Applicant herein and the 2 children of the family the following:-

(i) Nissan Sunny AAK 3592;

(ii) Double Bed

(iii) Head Board and Dressing Table used in the master bedroom;

(iv) Philips 21" Colour Television and the M-Net Decoder.

2. Any Order as the Court may deem fit.

The said Originating Summons was supported by an Affidavit and a further Affidavit. The Affidavit in Support showed that: the Respondent was married to the late Lagos NYEMBELE under customary law on 9th August, 2003; that her husband died on 10th

December, 2003 and left a **Will** appointing the Appellants as executors; that she has 2 children with her husband, namely, Chishiba NYEMBELE born on 30th August, 2001, and Chibwe NYEMBELE born on 16th December, 2003; that the **Will** by her late husband was written in 1999, before their marriage and before any of his two children were born; and that the **Will** provides that all that the late owned should be shared between the late's mother and sister.

The Affidavits further stated that the **Will** must be adjusted to provide for her and the said children; that her mother-in-law has since taken all the house hold goods in the house; that she lived with the said children and her late husband; that in fact, she simply moved into the house and took over everything and asked her to leave the house; that she has since been living with her sister in Woodlands and her two children; that she wants 70% of the terminal benefits of the late husband coming from Ellis and Company where, her husband worked as a partner Lawyer in the firm; and that she is not aware of the money due to the estate from the firm.

The further Affidavit in Support showed that the late and the Respondent were married under customary law; that at the time of the late's death, the two were living together and that they had one child and the Respondent was pregnant with the second child.

The Appellants did not file an Affidavit in Opposition. At the hearing of the application, Mrs. KALUNGA who appeared on behalf of the Appellants informed the Court below that the application was not opposed. She, however, said that, they wished to submit on a point of law that **Section 20 of the Wills Administration of Testate**

Estate Act, does not state the percentages and manner on which the **Will** can be varied; that it just says the Court can make reasonable provisions to vary the **Will** to provide for the Applicant. She left the issue to the Court to decide.

The Court below considering that, there was no opposition, granted, the application as prayed. It varied the **Will** and ordered, that the Applicant and the two children be granted 70% of the terminal benefits of the deceased from Ellis and Company.

The Appellants, not being satisfied with the foregoing Order, appealed to the Supreme Court, advancing one ground of appeal; namely:-

> **That the learned High Court Judge erred in law and in fact when he varied the Will of the late Lagos NYEMBELE and granted the widow and children of the family 70% of the value of the whole estate.**

The parties filed respective lists of authorities and heads of argument augmented by oral submissions.

On the sole ground of appeal, it was contended on behalf of the appellants that the learned High Court Judge erred in law and in fact; when he varied the Will and granted the Widow and the children of the family 70% of the value of the whole estate; that **Section 20(1) of the Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia**, pursuant to which the action was commenced in the High Court only makes reference to reasonable provision and reasonable maintenance out of the estate; and that no percentage or quantum are provided for.

It was submitted that the Order by the Court below that 70% of the whole estate of the late Lagos NYEMBELE be paid to the widow

and the children of the family is not reasonable and is clearly at variance with the provisions of **Section 20(1)**, and that effect such an order was tantamount to rewriting the **Will** of the late Lagos NYEMBELE.

It was pointed out that in making the variations of the **Will**, the Court below, should have considered a number of factors as set out in the case of ***DIAMOND -VS- STANDARD BANK OF SOUTH AFRICA LIMITED (EXECUTOR) AND FOUR OTHERS*** (1) in which this Court held that:-

> **"An objective test is used to determine whether the testator made reasonable provision for a dependant, relevant circumstances to be taken into account include *inter alia*:**
>
> **(1) The size of the net estate;**
>
> **(2) The past, present and future income and capital of the claimant (from any sources);**
>
> **(3) Conduct of the claimant in relation to the deceased; and**
>
> **(4) The deceased reason for the provision made for the claimant."**

It was submitted that the Court below clearly did not exercise its mind to the foregoing factors.

The Court was further referred to the case of ***VRINT -VS- SWAIN*** (3) where it was held that:-

> **"The Court shall also on any such application, have regard to the testator's reason, so far as ascertainable for making the dispositions made by the Will, or for not making any provisions or further provisions as the case may be for a dependant."**

It was submitted that the Court did not make any enquiry into the reasons, if any, as to why the testator made such provisions or omission in his **Will**, when he left out the wife and the children of the

family; and that in the absence of such an enquiry, the 70% variation made could not be supported in principle; and as such, should not be allowed to stand.

The Court was further referred to the case of ***VRINT -VS- SWAIN*** (2) where the Court stated that:-

> **The Court shall, on any application made under the Act, have regard to any past, present or future capital or income from any source of the dependants of the testator to whom the application relates, to the conduct of that dependant in relation to the testator and otherwise, 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, to the beneficiaries under the Will or otherwise."**

It was argued that the Court below did not enquire into the capital or incomes of the widow, nor did it enquire into all other relevant or material factors or considerations that it ought to have considered in order to arrive at the right conclusion in the matter.

It was pointed out that the Court below did not consider the value of the estate of the late Lagos NYEMBELE, the past, present or future capital and income of the dependant, the reasons why the testator made such provisions in his **Will**, and the relationship between the testator and the dependant. It was submitted that in the absence of such a consideration and enquiry, the 70% variation ordered in the Court below, be set aside as it is not supported by any principles, and it amounts to a rewriting of the **Will** of the late Lagos NYEMBELE.

It was pointed out that, in the ***DIAMOND*** (1) case, the Supreme Court defined reasonable maintenance as follows;

> **"Reasonable maintenance for a dependant not adequately provided for in the testator's Will, refers to testators failure to provide**

adequate maintenance for proper support, but the Court may also consider whether the testator had good reason for making the provision in question."

The Court was referred to the case of ***SCOTT -VS- SCOTT*** (3) where the Court stated as follows regarding reasonable maintenance:-

"Reasonable maintenance must be considered with reference to the husband's common law liability to maintain them, and the word reasonable must be interpreted against the background of the standard of life which the husband had previously maintained."

It was argued that the decision to make provision for reasonable maintenance can, therefore, only be properly made after considering all the relevant and material factors of the case including the dependants, standard of life as maintained by the testator.

The Court was also referred to the case of ***ISAAC TANTAMENI CHALI*** (Executor of the **Will** of the late ***MWALA MWALA) -VS- LISELI MWALA (Single Woman)*** (4) in which the Supreme Court had the following to say as regards **Section 20(1)** and the application of its provisions:-

"The language of the Section is clear, it does not suggest the rewriting of the Will by the Court. The first consideration before varying a Will is that, the Court must be of the opinion that the testator has or has not made reasonable provision for the dependant in the Will. The second consideration is that, the absence of or inadequacy of reasonable provision for the dependant in the Will would cause hardship. The third consideration before making the reasonable provision is that, the Court may take into account all relevant circumstances."

It was pointed out that the relevant circumstances to be considered by the Judge before making a variation to a **Will** based on reasonable provisions are all outlined in **Sections 20 and 21 of**

Chapter 60. It was submitted that the provisions do not empower the Court to rewrite the **Will** of the testator, but merely to make reasonable provision for maintenance for a dependant, who may have been omitted or whose provision in a **Will** is unreasonable.

It was contended that variation of a **Will** is for purposes of securing reasonable maintenance and not to create legacies or gifts.

The Court was further referred to the ***VRINT -VS- SWAIN*** (2) case, where the Court stated that:-

> **"I think that the intention of the Act was that, it was maintenance that was to be provided for a wife, who was a dependant, out of the net estate of the testator, her husband who by his Will had not made reasonable provision for her maintenance, its object is to secure to dependants not legacies but maintenance."**

It was submitted that the Court below effectively created gifts or legacies for the widow and children thereby rewriting the **Will**, which was at variance with the letter and spirit of the provisions of **Section 20** and the authorities cited in support.

It was contended that **Section 20** only provides for reasonable provisions or maintenance and cannot be used to create legacies or gifts out of the estate of the testator.

The Court was again referred to the case of ***ISAAC TANTAMENI CHALI*** (4) where it was observed that:-

> **"But it must be recognized that Section 20 of Act No. 6 of 1989 is a departure from the long standing recognition of unfettered right of disposition by the testator of his property. This departure is a limited one as it only confers on the 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 had not done so himself. The Court's jurisdiction to make reasonable provision for**

the dependent only arises if it is of the opinion, that it is satisfied, that, such provision has not been made by the testator."

It was submitted that the exception or departure provided by **Section 20** to the general rule that a **Will** should be construed and given effect in its original form as made by the testator is limited; that it can only be invoked after a careful consideration of the factors and the resulting and inescapable conclusion by the Court that the testator did not make reasonable provision for a dependant. In the absence of such, the provisions of **Section 20** need not be evoked.

It was finally submitted that the Court below erred in law and fact when it varied the **Will** of the late Lagos NYEMBELE by ordering that, 70% of the whole estate be given to the widow and children, that in so doing, the Court below was rewriting the **Will** of the testator and was doing so against the letter and spirit of **Section 20**.

In response on behalf of the Respondent, it was submitted that the Court below was on firm ground when it varied the **Will** of the late Lagos NYEMBELE by granting the widow and children of the family 70% of the value of the estate.

It was pointed out that, the evidence on record, indicates that the Appellants did not oppose the application but left it to the discretion of the Court to make reasonable provisions to vary the **Will**; that the Appellants did not even attempt to assist the Court by proposing what would have been deemed to be a reasonable percentage; that the **Will** was written before the testator had married and before he fathered the said two children, who were aged 4 years and 1 year 9 months; respectively, at the time of variation by the

Court; and that the order that the Respondent together with children of such tender age be given 70% of the estate cannot be taken to be unreasonable, if anything; that the Court should have given them 80%.

It was contended that **Section 17 of Chapter 60 of the Laws of Zambia**, provides for the doctrine of equity to be applied; that it was equitable to vary the **Will** of Lagos NYEMBELE in the manner the Court below did.

It was argued that though **Section 20(1) of Chapter 60 of the Laws of Zambia** does not provide for percentages, it empowers the Court to vary the **Will** if in its opinion the testator has not made reasonable provision for the maintenance of the dependants.

It was submitted that the Court below's jurisdiction to make the 70% reasonable provision for the Respondent and the two children of the family, arose because it was satisfied that such provision had not been made by the testator.

It was pointed that according to **Section 20 of Chapter 60**, the Court has no power to make an order which will effectively rewrite a **Will**. It was further pointed out that, the children were not born at the time of the **Will** and they were not covered by the said **Will**.

She submitted that, the decision of the Court below was against the law.

We have considered the sole ground of appeal; the heads of argument by the Appellants and by the Respondent; and the submissions on behalf of the parties.

We have also considered the proceedings before the Court below and the Order appealed against.

The application being unopposed, the issues as we see it are, whether the Court below properly exercised its discretion to vary the **Will** of the late Lagos NYEMBELE and to order that the Respondent and the two children of the family be given 70% of the estate; and whether the 70% of the estate could be deemed reasonable in the circumstances.

In the application, the Respondent in paragraph 13 of her Affidavit in Support, specifically applied for 70% of the estate of her late husband. There was no counter proposal and the Appellants did not in any way assist the Court by proposing a figure. The Appellants left it to the wisdom of the Court. The Court below considering that the percentage applied for had not been challenged, granted the application and the 70% that had been applied for.

We are satisfied on the evidence on record that the Court exercised its discretion properly. **Section 20(1) of Chapter 60 of the Laws of Zambia** reads as follows:-

> **"If upon application made by or on behalf of a dependant of the testator, the Court if 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."**

We agree that Section 20(1) does not provide the figures or percentage. That is left to the discretion of the Court. However, the

circumstances of this case, where there is a widow and two minor children of the testator, Lagos NYEMBELE and in the absence of evidence of other children of the testator, we do not find 70% unreasonable.

We find no merit in the sole ground of appeal. It is, accordingly, dismissed with costs to be taxed in default of agreement.

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E. L. Sakala,
CHIEF JUSTICE

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M.S. Mwanamwambwa,
SUPREME COURT JUDGE

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M. E. Wanki,
SUPREME COURT JUDGE