

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)**

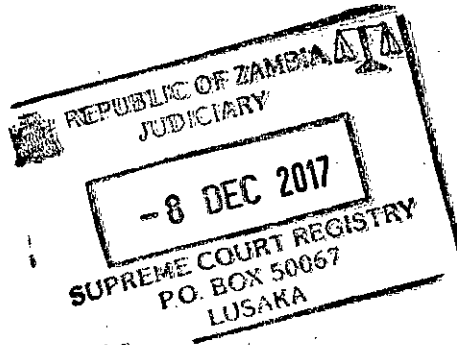
APPEAL NO. 76/2015

BETWEEN:

SIMON MICHELO

AND

BETSON CHILOPYA



APPELLANT

RESPONDENT

**Coram: Wood, Malila and Musonda, JJS
on 5th December, 2017 and 8th December, 2017**

For the Appellant: Mr. Marshal Muchende, Dindi & Co.

For the Respondent: N/A

JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **Lindiwe Kate Chinyanta -v- Doreen Chiwele & Judith Tembo: (2007) Z.R. 246**
2. **Undi Phiri v. Bank of Zambia (2007) Z.R. 186**
3. **Standard Chartered Bank Zambia Limited PLC v. Willard Solomon Nthanga and 402 Others: SCZ Judgment No. 13 of 2008**
4. **Augustine Kapembwa-Danny Maimbolwa & A-G: (1981) Z.R. 127**
5. **A-G v. Marcus Achiume: (1998) Z.R. 1.**
6. **Spiros Konidaris v. Ramral Daudikes: SCZ Appeal No. 157 of 1999**

Legislation referred to:

1. **The Intestate Succession Act, Chapter 59 of the Laws of Zambia**

This is an appeal against a judgment of a High Court Judge sitting in an appellate capacity who dismissed, with costs, an appeal which the appellant had launched against a judgment of a magistrate of the subordinate court of the first class who had also sat in an appellate capacity in relation to an earlier judgment or order of a local court which became the subject of an appeal to the latter court. For completeness, the magistrate had heard the appeal which had emanated from the local court *denovo* pursuant to the provisions contained in Section 58(2) of the Local Courts Act, CAP. 29 of the Laws of Zambia.

The background facts surrounding the present appeal are fairly straight forward.

The appellant was appointed as administrator of the estate of the late Lameck Chilopya who died intestate on 24th January, 1992. The appointment of the appellant as administrator arose following the revocation of the earlier appointment of Ribbon Chilopya as administrator of the said estate.

The revocation of Ribbon Chilopya's appointment as administrator by the local court had arisen at the behest of the

deceased's family members who had applied to that court seeking that relief on the basis that, Ribbon Chilopya, the then administrator, had sold part of the herd of the cattle which had formed part of the deceased's estate and that, following that sale, Ribbon Chilopya did not share the arising proceeds with those who were claiming to have been the legitimate beneficiaries, nor did he distribute the deceased's cattle which had not been the subject of the sale earlier mentioned in accordance with the law.

Following the appointment of the appellant as the administrator of late Chilopya's estate, disputes over the estate in question continued, not only with regard to the complete make-up of the estate but the distribution which had been effected by the appellant.

On 12th June, 2000 the respondent, Betson Chilopya, instituted a civil action in the Choongo Local Court, Division 'B' against Simon Michelo, the appellant, in terms of which the respondent sought to have the appointment of the appellant as the administrator of the estate of the late Lameck Chilopya revoked.

The basis on which the respondent had sought the revocation of the appellant's appointment as administrator was that he, the appellant, had not properly administered the estate of Lameck Chilopya.

When the matter was heard by the Local Court on 25th September, 2000, the respondent's claim was dismissed on the basis that the family was divided in that the majority did not like the respondent.

Following the dismissal of his action by the Local Court on 25th September, 2000, the respondent immediately filed a Notice of appeal to the Subordinate Court of the First Class at Monze.

After several adjournments and re-allocations of the matter by/between different magistrates, the appeal was eventually heard *de novo*.

In the course of the *de novo* hearing before the Magistrate, evidence was led by both parties which was not limited to the redress of revocation of the appellant's appointment as administrator. The two sets of witnesses delved into what the

make-up of the deceased's estate was at the time when the appellant assumed his role as administrator and how the estate was 'supposedly' distributed.

One of the complaints which the subordinate court heard from the respondent and his witnesses was that the appellant had appropriated to himself some of the deceased's estate and did not distribute the herd of cattle to the lawful beneficiaries who included the deceased's widows.

In his judgment which was delivered on 14th April, 2011 allowing the respondent's appeal, the magistrate made a number of findings of fact including the fact that the appellant had admitted that the deceased's widows were not given their share of their deceased husband's estate. The magistrate also found, as fact, that the appellant had distributed some of the deceased's estate only to beneficiaries that he, the appellant, knew. The magistrate further found, as fact, that the estate in question had not been distributed in accordance with the dictates of the Intestate Succession Act, Chapter 59 of the Laws of Zambia. In short, the magistrate determined that the appellant had failed to administer late Lameck Chilopya's estate in accordance with the law. The

magistrate accordingly pronounced all the distributions which the appellant had effected up to that point illegal and, therefore, null and void. Arising from that declaration, the magistrate ordered the appellant to account for all the estate which he was supposed to administer, namely, 22 herd of cattle, a .375 rifle, 10 iron sheets, a plough and cultivators. The magistrate further ordered that after accounting for the estate, the appellant should proceed to redistribute the same by not later than 14th June, 2011 in accordance with the Intestate Succession Act, CAP. 59 of the Laws of Zambia.

The appellant was not pleased with the judgment which was pronounced by the subordinate court. Accordingly, on 13th May, 2011, he filed a Notice of Appeal in the High Court for Zambia at the Principal Registry. The basis of the appellant's appeal was a solitary ground which was expressed in the following terms:

- (a) "The court below misdirected itself to order distribution of the estate of the late Lameck Chilopya instead of directing itself to the sought remedy of revocation of the appellant's appointment as administrator."**

In his arguments before the Court below, the appellant contended that the magistrate had gone beyond the scope of what he ought to have properly adjudicated upon, namely, the revocation of the order of appointment of the appellant as administrator. In the view which the appellant took, the order of the magistrate requiring the appellant to redistribute the estate in question went beyond the proper realm of the case as instituted which was limited to the revocation of the appellant's appointment.

For the removal of any doubt, the record does, in fact, attest to the fact that in the action as instituted by the respondent in the local court, the redress which was sought was for the revocation of the appointment of the appellant as administrator.

Relying on what had transpired in the magistrate's court, the learned judge, from whose decision the seed of the appeal now before us was planted, reasoned that she could not fault the magistrate on account of any of the orders which that inferior court had pronounced. Indeed, the learned judge below embraced those orders as if they had been her own.

In the view of the judge below, merely revoking the order of appointment of the appellant as administrator would not have addressed the real issues which had been in contention around the estate in issue, namely, the rendering of an account relating to the manner in which the appellant had administered the estate and ensuring that all the beneficiaries received their respective entitlements or shares of the same. The judge accordingly concluded that the magistrate did not err when he granted the orders earlier mentioned as he had been obliged to adjudicate upon all the issues which had been brought before him in pursuance of the action which had been instituted.

Having reached the above conclusion, the judge below then proceeded to examine the law which was germane to the issues which had been at play before that court. The judge started off by citing our decision in **Lindiwe Kate Chinyanta v. Doreen Chiwele & Judith Tembo**¹ where we said, at page 255:

“We wish to make it clear that the courts will intervene in matters of administration of a deceased’s estate where there is sufficient evidence of breach of the law.”

In the context of the matter before her, the judge below observed that the magistrate had correctly highlighted in his judgment that the manner in which the appellant had purported to administer the estate in question had fallen below the requirements of the Intestate Succession Act, CAP. 59 in that the appellant had not observed the provisions of that statute and had even ignored some of the primary beneficiaries of the estate such as the deceased's widows.

The learned judge also noted that the issues which the magistrate had highlighted in his judgment had been the subject of interrogation in the course of the proceedings before that court. Under those circumstances, the learned judge opined that the magistrate would have failed in his duties had he not considered and adjudicated on the issues which had actually been argued by the parties.

Returning to our decision in **Lindiwe Kate Chinyanta v. Doreen Chiwele and Judith Tembo**¹, the learned judge noted that the appellant, as administrator of Lameck Chilopya's estate, was obliged to following the law as we had spelt it out in that case in the following terms:

“There is sufficient protection for beneficiaries as well as administrators under the law. An administrator has legal duties to the beneficiaries and other interested parties including creditors: an administrator may be called upon by a court to account for the administration of the estate or for default.

The duty of the administrator is not to inherit the estate, but to collect the deceased’s assets, distribute them to the beneficiaries and render an account.”

The court below also observed that although the action which the respondent had instituted in the local court had been confined to the respondent’s search for one remedy, namely, the revocation of the appellant’s appointment as administrator, the trial court was not precluded from considering and granting any other incidental or auxiliary relief as appropriate and in line with Section 19(1) of the Intestate Succession Act, Chapter 59 of the Laws of Zambia which enacts as follows:

“19(1). The duties and powers of an administrator shall be –

(a)

(b) To effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act.

(c) When required to do so by the court, either on the application of an interested party or on its own motion –

(i) To produce on oath in court the full inventory of the estate of the deceased; and

- (ii) To render to the court an account of the administration of the estate.”**

The above provisions of the law, according to the judge below, do grant the court power to order an administrator to render an account even on its own motion and even in the absence of an application at the instance of an interested party. The judge accordingly concluded that the magistrate below was on firm ground when he ordered the appellant not only to render an account as to how he had administered the deceased's estate following his appointment but to re-distribute the herd of cattle to all the legally entitled beneficiaries.

The judge accordingly dismissed the appellant's appeal with costs for want of merit. In addition, the judge directed the appellant to effectuate the orders of the magistrate upon the rendering of an account in respect of the estate and re-distribute the herd of cattle on or before 30th April, 2013.

The appellant was not satisfied with the outcome of his appeal to the court below and has now approached this court of last resort on the basis of the 4 grounds which have been presented in the memorandum of appeal in the following terms:

“GROUND (1)

The learned Court below misdirected itself by granting on her own accord an order for distribution of the estate of the Late Lameck Chilopya when the claim was for revocation of the letters of representation or order of administration granted to the Appellant.

GROUND (2)

The learned Court below erred in law and in fact by totally ignoring the law and relevant facts relating to revocation of orders of administration vide section 29(1) of the Intestate Succession Act Cap 59 of the Laws of Zambia.

GROUND (3)

The learned Court below fell into grave error when it awarded rather than advising the Complainant to commence proper proceeding for, distribution of estate if that was the dissatisfaction.

GROUND (4)

The court below erred in fact and came to a wrongful conclusion that the estate was not distributed when there was evidence on the record clearly pointing to the fact that the estate was firstly wasted by the first administrator and what remained was later distributed by the appellant.

Learned counsel for the appellant filed Heads of Argument to buttress the four (04) grounds of appeal. Three of the four grounds were argued together.

At the hearing of the appeal, counsel for the appellant, Mr. Muchende, informed us that he was going to rely upon the

Appellant's filed Heads of Argument. Learned counsel also informed us that it was, with our leave, his desire to augment certain salient elements of the filed heads of argument orally.

Counsel opened the appellant's written Heads of Argument by going for the jugular and contending that the respondent's claim in this matter was for the revocation of the order of appointment of the appellant as administrator of the estate of the late Lameck Chilopya and not for the redistribution of his estate. This position, according to counsel, was amply confirmed by the judge below in her judgment now under attack when she said:

"Perusal of the record and the trial court's judgment confirms that the respondent's claim was for the revocation of the appellant's administratorship of the estate of the late Lameck Chilopya..." (at p. J3)

Counsel for the appellant further confirmed in his arguments that even the local court action which the respondent had instituted in the local court against the appellant had been instituted for the purpose of securing the revocation of the appointment of the appellant as the administrator of the estate of late Lameck Chilopya.

According to the appellant's counsel, following the decision of the Local Court declining to revoke the appellant's appointment as administrator and the subsequent escalation of the matter to the Monze Subordinate Court, the latter court proceeded to grant an order which had not been sought in the action in question. That order by the magistrate had been expressed in the following terms:

"... It is hereby ordered that he [the appellant] should account for [what] he was supposed to administer, namely, the .375 rifle, the 10 iron sheets, plough, cultivators. The administrator cannot be said to have discharged his duty if he did not distribute the estate within the confines of the Intestate Succession Act, Chapter 59 of the Laws of Zambia which came into force ... two years before the demise of late Lameck Chilopya. As to the number of cattle ... the correct number claimed by the [respondent] and his witnesses ... appears to [be] 22 herds of cattle. It is hereby ordered that the said redistribution be done on or before the 14th day of June, 2011."

Having recited the above portion of the magistrate's judgment, counsel for the appellant then went on to criticize the court below for having supported the magistrate's order to have the appellant render an account in respect of his administration of the late Lameck Chilopya's estate and to have him redistribute the cattle to the entitled beneficiaries.

According to counsel for the appellant, his client did, in fact, render the account which he was being required to render. In this regard, learned counsel drew our attention to the following portion of the judgment of the court below:

“It is apparent from the trial court’s judgment that the learned magistrate took into consideration the fact adduced by the appellant that there was nothing left to distribute” (at p. J4).

Counsel then went on to criticise the High Court judge’s reliance upon the case of **Undi Phiri v. Bank of Zambia**² on the basis that, unlike the **Undi Phiri Judgment**², the judgment of the court below had created or superimposed its own relief, based on the evidence before it. Counsel further argued that the whole approach by the court below was wrong adding that the judge in question should, instead of pronouncing a wrong remedy, have sent the matter back to the trial court so that that court could address the relief of revocation which the pursuer of the action had been seeking.

Counsel went on to cite our judgment in **Standard Chartered Bank Zambia Limited PLC v. Willard Solomon Nthanga and 402 Others**³ where, at pages J41-J42, we said:

“It is clear to us that the trial judge was invited to determine the claim of salary arrears on the basis of the documentary evidence and submissions. But the trial judge did not address himself to the claim for salary arrears. In the circumstances, sitting as an appellate court, we cannot determine that claim. The cross-appeal is, therefore, dismissed. But we refer the claim for salary arrears to the trial judge to make a pronouncement on it.”

According to counsel for the appellant's final arguments around the first 3 grounds, the appellant was ambushed by the court below when it inflicted the remedy of redistribution which the appellant had not prepared for. Counsel accordingly urged us to set aside the judgment of the court below on the basis that the real concern of the parties was not addressed. In the view of learned counsel, what the parties wanted was revocation and not redistribution.

Under the 4th and final ground of appeal, counsel for the appellant argued that this court has power to interfere with findings of fact made by a trial court if such findings are found to be such as no trial court, with a proper view of the evidence and acting correctly can reasonably make. To support this proposition, learned counsel referred us to our decisions in **Augustine**

Kapembwa-Danny Maimbolwa & A-G⁴ and A-G v. Marcus Achiume.⁵

Counsel went on to argue that the trial court's finding that the late Lameck Chilopya had 22 herd of cattle and not 14 was hardly supported by any reasoning or rationalization on the part of that court. According to counsel, the appellant had explained that he received 14 herd of cattle from the kraal at Monze Police Station.

With respect to whether or not the appellant had distributed the estate, counsel for the appellant quoted the following passage from the judgment of the court below:

"Upon hearing all the parties and their opposing evidence, the learned magistrate found for the respondent whose evidence was in some aspects acknowledged by the appellant. It was the appellant's evidence that there was no remaining part of the estate which was undistributed and that he completed the distribution of the estate sometime in 1992 within 90 days of appointment."

On the basis of the passage we have quoted above, counsel for the appellant submitted that there was no question of his client not having distributed the estate in question.

According to the appellant's counsel, even the magistrate had acknowledged the fact that the appellant had attended to the distribution when he said:

"The distribution which was effected by the [appellant] was illegal hence null and void."

The appellant's counsel further observed that even the judge below had also acknowledged that the distributions had since taken place when she said, at p.J4 of her judgment that:

"It is apparent from the trial court's judgment, that the learned magistrate took into consideration the fact adduced by the appellant that there was nothing left to distribute despite acknowledging that the widows and possibly other dependants were not given any share of the deceased's estate. The proceedings and the evidence of the parties show that the main contention of the parties was the distribution of the estate in that some legitimate beneficiaries were overlooked by the appellant as administrator. It was on this basis that the magistrate ordered that the cattle be redistributed to ensure that all the beneficiaries got their entitlement."

The appellant's counsel then went on to contend that the remedy of 'redistribution' is not available under the intestate and testate succession law in general and under S. 19(1) of the Intestate Succession Act, CAP. 59 in particular. According to learned counsel for the appellant, the only reliefs which are available under

the law cited above are (1) distribution, (2) production of inventory of the estate and (3) rendering of accounts of the administration of the estate.

Counsel further contended that once an administrator has distributed an estate, rightly or wrongly, his decision is binding on the estate and that it is not possible to redistribute what the administrator will have distributed.

According to counsel for the appellant, the remedies available to aggrieved beneficiaries under Section 19 of the Intestate Succession Act, CAP. 59 are:

- (1) rendering of accounts;**
- (2) distribution of any undistributed part of an estate;**
- (3) damages for breach of trust; or**
- (4) damages for negligent distribution of the estate.**

Counsel concluded his arguments by inviting us to set aside the judgments of the Subordinate Court and High Court and award the respondent appropriate costs both in the court below as well as the subordinate court.

As earlier noted, at the hearing of the appeal, Mr. Muchende sought our indulgence to emphasise some of the elements in the filed Heads of Argument which counsel considered crucial to the fate of the appeal. In this regard, counsel reminded us that the relief which had been sought in the action in question from the local court right through to the High Court was for the revocation of the appellant as the administrator of the estate of late Lameck Chilopya.

Mr. Muchende, however, complained that when the matter reached the subordinate court, a *“strange remedy not supported by Section 19 of the Intestate Succession Act, CAP. 59”*, was inflicted on the parties, *“to the surprise of all.”*

According to counsel, the subordinate court could not direct itself to the remedy which had been sought in the action as instituted, namely, revocation. Instead, the court below ordered redistribution of the estate. Counsel complained that the court failed to pay attention to the remedy which the parties wanted, namely, the revocation of the appellant's appointment as administrator of the estate of late Lameck Chipoya.

We are undoubtedly indebted to Mr. Muchende for his clear and forceful arguments supporting his client's appeal. For the removal of any doubt, the Appellant's Heads of Argument were not challenged in the way of the Respondent filing counter arguments.

Having regard to the primary and overarching ground around which this appeal revolves and in order to properly appreciate and place into context the conclusions which we have reached in this appeal, it is necessary that we give a fuller and more comprehensive account of the evidence (particularly the respondent's) which had played out in the magistrate's court when the matter was heard *de novo* following an appeal to that court from a decision of a local court. We are, indeed, of the settled view that this exercise is necessary given learned counsel for the Appellant's insistence and unequivocal invitation to us to set aside the lower court's judgment on the basis that ***the real concern of the parties*** (that is, both the appellant and the Respondent) was not addressed ostensibly because "***the parties wanted revocation and not redistribution***" (emphasis ours).

Our examination of the proceedings in the magistrate's court revealed that, when this matter was heard (*de novo*) in that court, the respondent, who had been designated as plaintiff in that court, called 4 witnesses. The first witness to testify was Betson Chilopya, the respondent, who had identified himself as one of the late Lameck Chilopya's sons. The gist of the respondent's evidence before the magistrate's court was that after some initial confusion and setbacks with respect to the appointment of an administrator of his father's estate, the family members had settled for the appellant who was subsequently appointed as administrator on the advice which the deceased's family members had received from the Choongo Local Court.

According to the respondent, following the appellant's appointment as administrator of his father's estate, he (the appellant) immediately proceeded to sue his (that is, the respondent's elder brother), Ribbon Chilopya (who had been appointed at first as administrator) for the purpose of compelling him to surrender all the estate of his late father so that the appellant could take the same to his village. According to this witness:

"The [appellant] took away 22 herd of cattle, 10 iron sheets and a door frame, two cultivators, a .375 rifle whose serial number was 11611. After he got all those things, each time we went to ask him to use the said property he refused to allow us to use them. That is why we want to have his appointment as administrator revoked as he does not help us in any way whenever we have problems. He does not even know what the widows are eating. But the [appellant] is holding on to property that [the widows] acquired with their late husband. That is what has made us come to court as we feel life has become hard for us, that is why we want to get back our property so that we can keep it on our own. That is our complaint."

Under cross-examination by the appellant, the respondent told the magistrate's court that he wanted part of the estate which the appellant was "holding on to".

The witness also reiterated that he and the other relatives of the deceased had expected the appellant to call them and share the estate instead of just holding on to their wealth.

The respondent's second witness was Modify Hamweemba (PW1) who described the late Lameck Chilopya as his son. PW1 told the magistrate court that:

"One day having been a person who was affected by the death of the deceased, ... I went to check on the late's children. I found some paramilitary police officers who had gone there and they

drove away [with] 22 herd of cattle, 2 cultivators, a door frame and its door and 10 iron sheets. I wanted to know where the said things were being taken. It came out clear that the items were headed to the [appellant's] home. I wanted to see what the [appellant] wanted to do, and because he was the administrator I thought he wanted to do the sharing at his home. After 10 months, I went to the [appellant's] brother by the name of Haakanda to find out from him as to how long it takes to share the estate of the deceased ..."

The next witness was Haakanda Jacobo (PW2) whose testimony was expressed in the following terms:

"The Appellant was appointed to look after the estate of the deceased. Since there were disputes with the family, we involved the police, we went to get 22 herd of cattle, 2 cultivators and a door frame and door and 10 iron sheets. Finally a rifle was retrieved. From that time the children have been coming to ask for their share of their late father's property. The first time when they approached me I told them to give me time to talk to [the appellant].

I went to talk to appellant over what the children had sent me for. But he told me that he could not share the animals as he wanted them to breed and multiply ... I went again to see [the appellant], but this time around I found him in an angry mood and from that time I have not approached him."

Under cross-examination by the appellant, the following responses were recorded from PW2:

"When I came to remind you to share the estate of late Lameck Chilopya I found you with your wife and your late son Kenneth. Even if you showed me the list on how you allegedly shared the estate I would dispute. You did not give me one animal. You did not give Chuumbwe two animals...

The firearm you got was for Lameck Chilopya... We gave you 22 herds of cattle..."

The third witness for the respondent was Mary Hamawo (PW3), one of the deceased's widows who also confirmed that the appellant had been appointed as the administrator of the deceased Lameck Chilopya's estate. She testified before the magistrate's court as follows:

"After [the appellant took over as administrator] he came to our village and got 22 herds of cattle, 2 cultivators, a door and its door frame and 10 iron sheets. We waited for (the appellant) to call us and the children to share the property, but todate he has not done so. Since then we have been suffering and are only being helped by our children. That is what made us bring the matter to court so that may be our children could be helped."

Under cross-examination by the appellant, the widow testified that:

"The animals were taken to your home. I was present when the animals were collected. The animals were collected by you..."

The respondent's 4th witness was Milden Chilopya (PW4) whose testimony was expressed in the following terms:

"The [appellant] was picked as the administrator of the estate of the late Lameck Chilopya. ...[the appellant] engaged police officers and he got 22 herds of cattle, a firearm serial No. H11611, 2 cultivators, 10 iron sheets and a door and its door frame... We waited for many years [but the appellant] never called us to go and get our shares.

That's how we came up with the idea of revoking his administratorship as he has failed to execute his duties..."

Under cross-examination by the appellant, PW4 proffered the following responses:

"... You got the firearm. We have been claiming our cattle from the time you got them from us. We were sending Jacobo Hakaantu. The 10 iron sheets were bought by the deceased from Bhabu's shop. My father never borrowed the said iron sheets; he bought them using his own money. I don't know that you gave [the respondent] 5 animals. I don't know you gave Charlie Chilopya, Paulo Chuumbwe and Jacobo Hakaanda.

From the time the animals were collected I have been to your home, following up on the animals..."

For his part, the appellant testified on his own behalf and also called two witnesses.

In his evidence, the appellant started off by telling the magistrate's court that he had long ceased to be the administrator of Lameck Chilopya's estate.

He then went on to tell the magistrate which assets belonging to the deceased he found and described these as 44 herd of cattle, 6 ox-drawn cultivators, 12 chairs, 12 yokes, 5 firearms, 12 pots, 2 ox carts, 2 hand-grinding mills, 1 safe, 2 bicycles, 1 wheelbarrow, 12 spanners and other miscellaneous items. The appellant also explained how he had distributed the estate in question.

Under cross-examination by the respondent, the appellant told the magistrate's court that he took the deceased's cattle to his house and that he distributed the estate to deserving beneficiaries. The appellant, however, confirmed under cross-examination that he did not know what percentage of the deceased's estate should have gone to his children. The appellant also confirmed that "the widows were not given anything." He also confirmed that he did not know whether there were other beneficiaries, hence his decision to distribute the estate to those that he knew.

As we observed early on in this judgment, the appellant's overriding or overarching complaint in this appeal was that the remedy which the magistrate's court pronounced and which the immediate court below endorsed had not been the redress which the pursuer of the action had conceived and sought in the first and subsequent courts below.

There was, indeed, no dispute as to the nature of the relief which the respondent had sought in the first court, namely, the local court. That relief was to secure the revocation of the appellant's appointment as administrator of the estate of late Lameck Chilopya.

However, in his judgment, the magistrate below noted that the distribution which the appellant had effected had been illegal and therefore null and void on account of non-compliance with Section [5] of the Intestate Succession Act, Chapter 59 of the Laws of Zambia.

The magistrate accordingly ordered the appellant to account for what he was supposed to administer, namely, the 22 herd of cattle, the .375 rifle, the 10 iron sheets, plough and cultivators. In

the view which the magistrate took, an administrator of an estate under the provisions of the Intestate Succession Act, Chapter 5 of the Laws of Zambia, *“...cannot be said to have discharged his duty [under the provisions of the Intestate Succession Act CAP. 59] if he did not distribute the estate within the confines of that statute.”*

As previously noted, the judgment and order of the magistrate found favour with the learned judge below.

Having regard to the detailed evidence by PW1, PW2, PW3 and PW4, in relation to the first three grounds, we indeed, find ourselves in agreement both with the analysis and conclusion of the trial court and the court below. It was, indeed, clear from the evidence which the respondent on the one hand and his 4 witnesses on the other, had deployed before the trial magistrate that the relief of ‘revocation’ of the appointment of the appellant as the administrator of the estate of late Lameck Chilopya which the respondent had sought in the local Court was neither being sought in isolation from the other reliefs which were evident from the evidence nor as an end in itself. What was resoundingly clear from the evidence which was placed before the trial magistrate on behalf of the respondent was that the beneficiaries of Lameck Chilopya’s

estate wanted not only to have the appellant removed as administrator but to have him surrender the estate which had been entrusted to him and which he had been “holding on to”. In our view, rather than being inconsistent, the conclusion which the two courts below had reached was consistent with the approach which we had adopted in **Standard Chartered Bank Zambia Limited PLC v. Willard Solomon Nthanga and 402 Others**³ which learned counsel for the appellant had cited in the course of presenting his arguments to the extent that the evidence which had been deployed before the court had been determinative of the relief that the Court had to pronounce.

We also agree with the immediate lower court’s observations that the appellant’s contention suggesting the preclusion of a court from proceeding on its own motion to require an administrator to render an account in respect of their administration of an estate as totally misplaced in the light of the clear provisions contained in Section 19(1) (ii) of the Intestate Succession Act, CAP. 59.

We also wish to observe that, rather than proceeding in the manner suggested by the appellant via ground 3, that is to say, to *advise* the respondent to institute “proper proceedings” for the

purpose of distributing the estate in question, the two courts below were perfectly entitled to proceed in the manner they did for the sake of avoiding needless multiplicity of actions. In this regard, Order 47, rule 21 of the High Court Act which deals with civil appeals provides that:

“... The court shall have power to give any judgment and make any order that ought to have been made and to make such further or other orders as the case may require.”

Quite clearly, a judge sitting in an appellate capacity in respect of a civil cause has sufficient latitude under the provision we have cited above to pronounce such further or other orders as the “[justice] of the case may require.” In the context of the appeal with which the court below was faced, it simply opted to endorse the redress which the trial court had pronounced. Under these circumstances, neither the High Court judge nor the Magistrate deserve the criticism which the appellant had conjured.

It is also worthy of note, as the magistrate’s court had observed, that in the light of the appellant’s own admission that he did not, in his purported distribution, observe the provisions contained in section 5 of the Intestate Succession Act, CAP. 59, or

for that matter, any provision of that statute, there was no lawful or valid distribution of late Lameck Chilopya's estate by the Appellant and, consequently, the question of a *re-distribution* cannot lawfully arise. Consequently, all the grounds of appeal must fail.


Having regard to the conclusion we have reached in this appeal, we would vary the Order of the magistrate below which had been directed against the appellant to the extent that the use of the word 're-distribute' in that Order should be substituted with the word 'distribute' as this word is used in the Intestate Succession Act, CAP. 59. Accordingly, the appellant is hereby directed to comply with the Order of the magistrate (as we have varied it in this judgment) which had directed him to distribute the 22 herd of cattle, the gun, the 10 iron sheets, the plough and the cultivators.

In sum, this appeal fails in its totality. Perhaps we should, in closing, call to mind what we said in **Spiros Konidaris v. Ramral Daudikes**⁶ (unreported) at pp. 4-5:

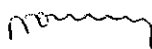
"The learned trial judge himself dealt with the matter from the more realistic viewpoint that the events that had happened could not be ignored."

Contrary to that well-known cliché, justice is not blind after all. In the context of this appeal, both the magistrate and the learned appellate judge were clearly alive to this reality.

With regard to the question of costs, these must be borne squarely by the appellant himself.



.....
A. M. WOOD
SUPREME COURT JUDGE



.....
DR. M. MALILA, SC
SUPREME COURT JUDGE



.....
M. MUSONDA, SC
SUPREME COURT JUDGE