

The action is commenced by way of Originating Summons by the Plaintiff; Moratuo Hessie Walker supported by an Affidavit dated 6th January, 2011 for the determination of the following questions;

- i) That she is the widow of the Late Peter Christopher Walker and that she is entitled to remain in occupation of the matrimonial home namely Farm No. 9440 Siavonga.
- ii) That she is entitled to seventy per cent of the value of the Late Peter Christopher Walker's Estate as provided for in the ***Intestate Succession Act Cap 59*** of the ***Laws of Zambia***.
- iii) That the Defendant be removed as an Administrator of the Estate of the Late Peter Christopher Walker and that in his place the Plaintiff be appointed.
- iv) That the said Defendant be restrained by an Injunction from harassing the Plaintiff, from evicting the Plaintiff from Farm No. 9440 Siavonga, from occupying Farm No. 9440 Siavonga and from interfering in whatsoever manner in the running of the said farm.
- v) That the Defendant be Ordered to account for his activities whilst he stopped the Plaintiff from occupying the said farm.
- vi) That the Defendant be liable for the costs of this action.

The application is opposed by way of an Affidavit in Opposition dated 17th January, 2011.

Due to the nature of the claim and issues raised, the Parties by consent agreed to have the matter determined and treated as though commenced by way of a Writ of Summons.

The Plaintiff Moratuo Hessie Walker testified that she met the Late Christopher Peter Walker in 1976 and had lived together for

25 years. The farm was obtained in Siavonga from Chief Sikongo. At the time the deceased had informed the Plaintiff that he was on separation with his wife. They stayed together for twenty five years and whilst the deceased stayed in the United Kingdom for seven years, he would come every year. In 2003 he informed the Plaintiff that he had resolved his problems and was ready to marry the Plaintiff. They got married on 7th of February, 2003 under the **Marriage Act** which was witnessed. She testified that whilst on the Farm she employed people to stamp the Farm, planted bananas, farmed fish and developed the Farm for the seven years that the deceased was out of the Country. Nobody objected to her developing the said Farm. She testified that in her mind the Farm is owned jointly between her and the Late Peter Christopher Walker.

She stated that she never had contact with Sonia Walker after she left Zambia in 1986 and denied Sonia Walker having any interest in the land as it was obtained by the Plaintiff with the Late Peter Christopher Walker (hereinafter referred to as the deceased). The deceased had three children with Sonia Walker. The Farm is her matrimonial home. She owned the Farm with the Late Peter Walker and the that deceased's children have a share in that said Farm.

In cross-examination the Plaintiff testified that she was not able to produce documentation to show that the deceased and Sonia Reed Walker were divorced. She testified that the basis of her claim of seventy per cent of the value of the Farm is because of the development she did to the Farm and that thirty per cent or fifty per cent can go to the children.

She further testified that she wanted the Defendant who is administrator of the Estate of her Late husband to be removed because he has removed her out of her house.

She stated that she was not aware that the deceased's family had appointed the Defendant as Administrator. She has no proof of ownership of Stand No. 9440 though they developed it together with the Late Peter Walker. Though the Defendant had letters of Administration, he had no right to break into the house in her absence and change the locks.

The Plaintiff's witness PW2 Albert Sebastian Nathansion testified that he knows the Plaintiff as well as knew the Late Peter Walker the husband to the Plaintiff. He witnessed the marriage between the Plaintiff and the late Peter Christopher Walker.

In cross-examination he testified that he never knew that the deceased was married before nor that he had children.

The Defendant who is sued in his capacity as Administrator of the Estate of the Late Peter Walker testified that he knew the Plaintiff around 1980 at the time the Late Peter Christopher's wife Sonia Walker, left Zambia due to marital problems caused by the Plaintiff. He is the elder brother to the deceased and Administrator of the Estate appointed in August, 2010 by Sonia Walker and the Children as per letter on page 18 of the Defendant's Bundles of document.

His brother died on 16th of August, 2010 and to his knowledge Sonia Walker was the deceased's wife. He attended their

wedding in the United Kingdom on the 27th July, 1974 and was a witness to the said marriage as the Marriage certificate shows.

The Defendant testified that he was shown by the Plaintiff a Marriage Certificate between his late brother and herself after the funeral. He informed the Plaintiff that the later Walker Peter was still married to Sonia Reed Walker. The Plaintiff lived with his brother for over twenty years. She is not his late brother's widow and is not entitled to seventy per cent of the value of the Estate as it belongs to the children and his widow. He testified that as Administrator of the Estate he has the right to decide how the Estate will be maintained and run.

He stated that the Widow Sonia Walker resides in Harrow Essex, United Kingdom and was unable to travel due to Thrombosis of the Legs and her Doctors advised her not to travel by air. There is an Affidavit in verification of facts on record.

In cross-examination he testified that his late brother and the Plaintiff lived together in Siavonga. Further to his knowledge and his brother was not a liar. The land in Siavonga was got from the Chief Sikongo with the Defendant's help. At the time it was undeveloped piece of land and that the developments on the Farm were done whilst the deceased and the Plaintiff were living together. The deceased sent money to the Plaintiff for the development of the Farm as that is the arrangement they had. The Defendant stated that he was in the United Kingdom in 2003 at the time the marriage between the deceased and the Plaintiff was contracted. A search for a decree absolute was conducted in respect of the earlier marriage but none could be found. He

testified that a John Birch used to supervise and oversee the Farm in his brother's absence.

The parties filed into Court written submissions dated 27th September, and 13th October, 2011, respectively.

The Plaintiff's submission are that the only issue raised by the Defendant is that the Plaintiff is not the Widow of the late Peter Christopher Walker because the Marriage between Peter Christopher Walker and Sonia Emma Reed Walker was still valid and subsisting as per copy of marriage certificate produced. A letter from her Majesty's Court certifying that a Search was conducted showing that no Decree Absolute was found relating to Peter Christopher Walker and Sonia Emma Reed Walker was produced. It is submitted that the Plaintiff has been deprived of chance to cross-examine the said Sonia Walker, the author of the letter from the Registry and that the Affidavit evidence by the Defendant is not conclusive.

It is submitted that the assertion by the Defendant that the marriage between Peter Christopher Walker and the Plaintiff was a nullity is not tenable at Law. **Section 55** of the **Matrimonial Causes Act No. 20 of 2007** empowers the Court to make Orders as to the property where there is nullity of a marriage.

It is submitted that the Plaintiff's contribution cannot be ignored as the property in Siavonga was jointly developed. The Case of **Bernard Vs Josephs (1982) 3 ALL ER 162¹** was referred to where **Lord Griffiths LJ** considered the principles which must apply in

determining the property rights of unmarried couples where he said that;

“The legal principles to be applied are the same whether the dispute is between married or unmarried couples, but the nature of the relationship between the parties is a very important factor when considering what inferences should be drawn from the way they have conducted their affairs. There are many reasons why a man and a woman may decide to live together without marrying, and one of them is that each values his independence and does not wish to make the commitment of marriage, in such a case it will be misleading to make the assumption and draw the same inferences from their behaviour as in the case of a married couple. The Judge must look most carefully at the nature of the relationship, and only if satisfied that it was intended to involve the same degree of commitment as marriage will it be legitimate to regard them as no different from a married couple”.

It is submitted that from the way the Late Peter Christopher Walker and the Plaintiff conducted their affairs and commitment to each other for so many years the Court has no option but to hold them as no different from a married Couple or partners.

In the event of the Court finding that the marriage between the Late Peter Christopher Walker and the Plaintiff was a nullity then the Court must Order that the Plaintiff is entitled to half the value of the Farm and all the development thereon. The basis of the Plaintiff's claim of seventy per cent is that she is entitled to her fifty per cent as a joint developer and a further twenty per cent as the Widow from the deceased's fifty per cent.

It is further submitted that the Defendant is biased against the Plaintiff and as such the Court should appoint an independent person or the Plaintiff as Administrator. Further that she is entitled to continue staying at Farm 9440 Siavonga which has been her home for many years and that the Defendant should further account for his activities at Farm 9440 for the period that the Plaintiff was barred from it.

The defendant in opposing the claims by the plaintiff submitted that the determination of the matter hinges on the validity of the marriage between the Plaintiff and the deceased 1. The case of ***Hyde vs Hyde and Woodmansee (1866) LR 1 P & D 130²*** was referred to where Lord Penzance defined the term marriage as follows:

“... Marriage has been well said to be something more than a contract, either religious or civil - to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position of status of “husband” and “wife” is recognized one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon offspring. What then is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must meet (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceived

the marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others...

It is submitted that once there is a marriage between a man and a woman, the parties are incapable of contracting another marriage during the subsistence of their marriage unless there is dissolution of the marriage or death of one spouse. If a party to a marriage marries another person during the subsistence of his or her marriage to another person, that subsequent marriage is void. Section 11 (b) of the ***Matrimonial Cause Act No. 20 of 2007*** was cited as well as the case of ***Reneville vs - Reveille (1948) ALLER 56*** in regard to the effect of a void marriage as having not taken place.

The learned Authors Passingham and Harmer's book Law and Practice in matrimonial cause 4th Edition where the cases of ***R vs Gould (1968) 1 ALLER 849 and Dryden vs Dryden (1973) 3 ALLER 526³*** was cited where it was stated that:

"In such a case, the marriage is obviously void ab initio irrespective of whether or not the parties or either of them knew that the marriage was bigamous, and notwithstanding that either or both may have a valid defence to a charge of bigamy, such as mistaken but honest belief on reasonable grounds that the former spouse was dead, or that the marriage had been validly dissolved..."

The case of **Lillian Mushota vs Doreen Mwila Mushota 200/HP/077⁴** was referred to where it was held that the rightful widow was the wife from the first marriage. It is submitted that the marriage between the Plaintiff and the deceased contracted on 7th February, 2003 at the Lusaka Registry of marriages is void and of no legal effect in view of the 1974 marriage of the deceased to Sonia Walker. The Plaintiff's claim of 70% of the value of the deceased's estate is therefore unfounded and untenable.

The defendant's other contention is that though the action was brought on the basis of the Intestate Succession Act Chapter 59, of the laws of Zambia, the said law is not applicable as the Plaintiff is Masotho and the deceased was British. I was referred to section 2 (1) of the Intestate succession Act Cap 59 of the Laws of Zambia.

In respect of the Defendant's appointment as administrator, it's submitted that the appointment is valid due to the fact that the deceased at the time of death was domiciled in Zambia and there are letters of Administration produced in the Defendant's bundle of Documents.

The case of **William C. Holland (1965) 1 WLR⁵** was cited where the court held that the Plaintiff was entitled to possession as against a beneficiary. It is contended that the Defendant's acts though determined to the Plaintiff were merely done as part of his duties as a personal representative as one of the duties of administrators is taking possession and control over the assets of

the deceased. The case of **Gavy Nachandwe Mudenda v Dorothy Chileshe Mudenda [2006] Z.R. 57⁶** was referred to. It is submitted that the claim by the Plaintiff that she be appointed administrator in place of the Defendant as widow cannot be sustained as she is not the widow of the deceased. It is submitted that the Court declares the marriage of the Plaintiff to the deceased as a nullity and order that the Plaintiff's claim for 70 % of the value of the deceased's estate is without legal basis and that the defendant's acts are justified as legal representative of the Estate. It is prayed that the action be dismissed with costs.

I have seriously considered the matter before the Court together with the affidavits on record, the evidence adduced by the parties and the submissions by the learned Advocates. The issues for determination in my view are as follows.

- (i) Whether the Plaintiff is the widow of the Deceased Christopher Peter Walker.
- (ii) The effect of contracting a marriage whilst there is subsisting an earlier marriage.
- (iii) Whether the Applicant is entered to the claim of 70 % of the estate.
- (iv) Whether the administrator has conducted himself in such a manner that he ought to be removed as Administrator.

In regard to the issue of whether the Applicant Moratona HESSIE Walker is the Widow of the Late Christopher Peter Walker (hereinafter referred to as the deceased), there is evidence of record that the Applicant and the deceased got named on the 7th

February, 2003 at the office of the Registrar of Marriages in Lusaka. There is also evidence on record showing that the deceased had earlier on contracted a Marriage under the English law with one Sonia Patricia Emma Reed Walker on the 27th of July 1974. It's not in dispute that the said Union produced 3 children as per copies of the birth certificates on record. There is no evidence to show that the earlier marriage was dissolved. The Applicant in her evidence testified that she believed the deceased when he told her he had sorted out his problems with the first wife Sonia Walker and she went ahead to marry him.

I am of the considered view that at the time the Applicant contracted a marriage with the deceased, there was in existence a valid statutory marriage subsisting between the deceased and Sonia Walker. It is irrelevant whether the Applicant honestly believed the earlier marriage dissolved. I therefore find as a fact that the marriage between the deceased and Emma Walker was subsisting at the time of the second marriage in 2003.

Having found that the earlier marriage was subsisting, the next issue is the legal effect or the position of the law as regards the 2nd marriage. There are a number of case authorities where the issue of a party marrying another person during the subsistence of his or her marriage to another person have been discussed. The case of **Reneville - vs - Reneville**⁷ already cited held that ***"a void marriage is one that will be regarded by every Court in any case in which the existence of marriage is in issue as not having taken place and can be so treated by both parties to it without the necessity of any decree annulling it."*** In the case of ***Dryden v Dryden (1973)***⁸, it was

held that in such a case, the marriage is obviously void ab initio. Void ab initio literally means of no legal effect.

I am of the considered view that the marriage contracted between the Applicant and the deceased on 7th February, 2003 is void and of no legal effect due to the subsistence of the earlier marriage by the deceased to Sonia Walker. I am further of the considered view that the Applicant herein is not the widow of the deceased. The rightful widow being Sonia Patricia Reed. It therefore goes without saying that in respect of the claim of 20% of the estate of the deceased on the basis of Applicant being a widow is unfounded and untenable.

The Applicant and the deceased lived together for 25 years. There is evidence on record that the Applicant contributed to the development of the farm which was acquired during the period of living together. This evidence has not been challenged by the Respondent. All the Respondent stated was that the deceased used to send money to the Applicant for the development of the farm. It is not in dispute that upon the land being acquired the Applicant and the deceased lived there for over 16 years developing it.

The issue is whether the Applicant is entitled to her claim of 50 % of the estate due to her contribution. It is also pertinent to ascertain the intention of the parties at the time. In the case of ***Annie Bailes V Charles Antony Stacey and Anierica Simoes (1986) ZR 83 SC***⁹. It was held that ***“to establish a constructive trust there must be evidence that the***

property was acquired to provide a home for the couple who intended to live together in a stable relationship and that the claimant made a substantial contribution towards acquisition.” This can be extended to cover substantial contribution towards development of the property or land. The intention of the Applicant and the deceased in my considered view was to make Farm No. 9440 Siavonga their home even though it was acquired in the Respondent’s name.

I am of the considered view that the Applicant is entitled under equity to a share of farm no. 9440 due to the contribution she made towards the development of the property. She testified that land was acquired from Chief Sikonngo in Siavonga in 1994 and from 1998 to 2000 the deceased was out of the country leaving her to develop the piece of land. She stayed at the farm alone, stamping the land, and planted a banana plantation. In addition she sold fresh fish from the Zambezi river to raise money for the development of the farm as well as farming fish. She developed the farm for 7 years even in the absence of the deceased. This evidence was unchallenged. She even testified that she personally used to chase elephants from the land. I am of the considered view that the Applicant did contribute substantially to the development of the Farm No. 9440 Siavonga. I find as a fact that the Applicant substantially contributed to the development of the farm.

I am also of the considered view that she is entitled to 50 % of the value of the estate of the deceased namely Farm No. 9440 due to her contributions. She has a beneficial interest in the said

property. In regard to the claims of 20% as widow I reiterate my earlier findings that she is not entitled because she is not the widow.

I am mindful of view that though the applicant is not the widow she might have been considered a dependant of the deceased as per case of ***Oparaocha and Murambiwa ZR 2004 P. 142***. The difficulty is due to section 2(1) of the Intestate Succession Act Chapter 59 of the laws of Zambia which states that **“Except to the extent specifically pronded in this Act, this Act shall apply to all persons who are at their death domiciled in Zambia and shall apply only to a member of a community to which customary law would have applied if this Act had not been passed.”**

In the case at hand the Applicant is Masotho and the correct interpretation of section 2 (1) is that it is inclusive of foreign customary law. On the other hand the deceased was a British national at the time of his demise and as such the intestate succession Act is not applicable to him. I am of the considered view that because the deceased was a person to whom the intestate succession act did not apply, his estate cannot be distributed in accordance to the Act. This answers the argument raised by the Respondent that the deceased is not a person to who customary law of Zambia would have been applicable before the enactment of the Act.

In respect of the Applicant's prayer that the Respondent be removed as administrator of the estate on account of biasness

against her. I have analysed the evidence on record. The Applicant's borne of contention is her removal from the home. It is not in issue that the letters of administration were granted. The issue as I see it is whether the administrator's action can be considered to be biased as alleged. One of the duties of an administrator is to effect distribution of the estate. I am further of the considered opinion that there is no bias on the part of the Administrator. There only contention was his refusal to recognise the Applicants beneficiary interest in the property which I have dealt with.

For the foregoing reasons it is hereby adjudged that the Applicant is entitled to the estate of the deceased to the extent of 50% of the value of Farm No. 9440, Siavonga, on account of her substantial contributions to the development of the farm.

- (i) It is further adjudged that the defendant continues as Administrator of the estate of Peter Christopher Walker.
- (ii) The interim injunction granted on the 28th day of February 2011 is hereby discharged.

It is further adjudged that Farm number 9440 be sold and that the share of 50% proceeds of the sale be distributed to the Applicant. It is further ordered herein that the Administrator do render an account into court on the proceeds of sale of Farm 9440 Siavonga.

Cost normally follow the event but in this matter I order that costs to the Applicant be paid out of the proceed of sale of farm No. 9940.

Leave to Appeal granted.

Dated the 9th day of November, 2011.

JUDGE F. M. CHISHIMBA