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**SCZ JUDGMENT NO. 22 OF 2012**

**IN THE SUPREME COURT FOR ZAMBIA APPEAL NO. 60/2011**

**HOLDEN AT NDOLA**

*(Civil Jurisdiction)*

***B E T W E E N:***

**DAVID OJAH MALEMBEAPPELLANT**

**AND**

**THOMAS NDONYO RESPONDENT**

**Coram: Mumba, Ag/DCJ, Chibomba and Phiri, JJS**

**On 20th March, 2012 and 17th July, 2012.**

**For the Appellant: In Person**

**For the Respondent: In Person**

**J U D G M E N T**

**Mumba, Acting DCJ, delivered the Judgment of the Court.**

***Cases Referred to:***

1. ***Mwananshiku and Others vs Kemp and Mwananshiku (1990/92) ZR 42.***

***Legislation Referred to:***

1. ***The Intestate Succession Act, CAP 59***

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The appellant was not satisfied with the judgment of the High Court sitting as an appellate court, he now appeals against the judgment.

This case was initiated in the Local Court whose judgment was appealed to the Subordinate Court which, in turn, set aside the Local Court Judgment. The Subordinate Court judgment was upheld by the High Court in its appellate jurisdiction, though for different reasons.

The history of this case is that the late Muteba Kambowa lived with his late wife Sophia Kashiko Kambowa in the house in dispute. The late Mr. and Mrs. Kambowa had no children of their own but they looked after relatives including the appellant, David Ojah Malembe, Mrs. Margret Kamboyi Malembe, Peggy Malembe and Edwin Kashiko until they completed their education. The appellant’s late father was the young brother to the late Muteba Kambowa who died in 1988. When the late Sophia Kashiko Kambowa remained in the disputed house as a widow, she was joined by her granddaughter, Kamwengo Chivukunyu who looked after her until her death in 2010; Kamwengo Chivukunyu remained in the disputed house. The appellant sued the respondent who represented Kamwengo Chivukunyu, for possession of the house claiming that the appellant with his two sisters were the beneficiaries to whom the house should devolve. The Local Court granted judgment to the

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appellant and his siblings as the rightful heirs to the house. The respondent appealed to the Subordinate Court. The Subordinate Court set aside the Local Court judgment and, applying the provisions of the Intestate Succession Act, Cap 59, decided that the granddaughter, Kamwengo Chivukunyu was a dependant and was entitled to the house. The Subordinate Court applied section 9 (2) of the Act which reads as follows:

***“Where the estate includes more than one house, the***

***Surviving spouse or child or both shall determine***

***which of the houses shall devolve upon them and the***

***remainder shall form part of the estate”***

The subordinate Court also applied Section 6 (c) which reads as follows:-

***6. Where an intestate leaves-***

***(c) no spouse, children or parents the estate shall be dis-***

***tributed to dependants in equal shares;***

These Sections were applied to determine that Kemwengo Chivukunyu was a dependant and therefore, the beneficiary.

In the Subordinate Court the appellant claimed that Kamwengo Chivunkuyu was married and was later divorced that was when she moved into the disputed house with her two children. Whilst it was not disputed that she had two children, the appellant was unable to identify the alleged husband of Kamwengo Chivukunyu.

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The Subordinate Court, following the provisions of Section 9 (2) and Section 6 (c) granted Judgment to the respondent and found that Kamwengo Chivukunyu was entitled to the house.

The appellant appealed to the High Court. The High Court, exercising appellate jurisdiction upheld the decision of the Subordinate Court that Kamwengo Chivukunyu was the beneficiary of the house in question but applied different provisions of the Intestate Succession Act. The appellate Judge explained that the Subordinate Court wrongly applied Section 9 (2) and Section 6 (c) because the two sections did not apply to the facts of this case. Instead, the appellate Judge held that Kamwengo Chivukunyu was not a dependant but that she fell under Section 6 (d) which reads:

**6**.  ***Where an intestate leaves-***

***(d) no spouse, children, parents, or dependants, the estate shall***

***be distributed to near relatives in equal shares;***

Section 3 defines **“near relative**” as “issue, brother, sister grandparent and other remoter descendants of the deceased;”

The appellate Judge found that Kamwengo Chivukunyu was a **“near** **relative”**, specifically, an **“issue”** of the late Sophia Kashiko Kambowa as she was a granddaughter. The appeal was dismissed.

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The appellant filed five grounds of appeal as follows:

1. **The appellate court below misdirected itself by failing to consider the fact that the late Mr and Mrs Kambowa brought up Margret Malembe Kamboyi and Edwin Kashiko until the two completed their education while Kamwengo Chivukunyu and her two children only joined the late Mrs. Sophia Kashiko Kambowa twelve years after the death of her late husband Muteba Kambowa and only after Kamwengo Chivukunyu was divorced.**
2. **Kamwengo Chivukunyu did not qualify as a beneficiary to the exclusion of Mrs. Margret Malembe Kamboyi and Edwin Kashiko who had stayed with the family since childhood.**
3. **The appellate Judge was in error when she excluded Margret Malembe Kambowa and Edwin Kashiko by stating that only granddaughters and brothers and sisters to the late Sophia Kashiko Kamboyi qualified as beneficiaries and by concluding that Margret Malembe Kambowa and Edwin Kashiko were niece and nephew and did not qualify. The appellant wondered how Kamwengo Chivukunyu who was a child of a nephew to the late Sophia Kashiko Kambowa could qualify as a beneficiary.**
4. **In the Local Court and Subordinate Court the Respondent was challenged to produce documents to show that the house was built jointly by late Mr and Mrs Kambowa but he failed to do so; consequently how could Kamwengo Chivukunyu benefit from the house when the land record at Ndola City Council was self-explanatory, in that the house was in the name of the late Muteba Kambowa.**

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1. **After the death of Muteba Kambowa in 1988, the family had decided to let the widow continue staying in the house, part of the house was leased out and the rentals were, collected by the late Sophia Kashiko Kambowa. The family had also decided to give all the property to the widow. At the time when the family had a meeting, Kamwengo Chivukunyu was married elsewhere, she only sought refuge in the house after her divorce, seeking refuge as she did could not make her a dependant.**

In his oral arguments the appellant contended that he was a nephew to the deceased and that he had looked after the late Sophia Kashiko Kambowa until her death as Sophia Kashiko Kambowa and Muteba Kambowa had no children. The appellant wondered where Kamwengo Chivukunyu the granddaughter, came from. He wondered why other dependants, such as Margret Malembe Kamboyi and Edwin Kashiko could not qualify as beneficiaries.

In responding to the appeal, the respondent did not agree with the submissions of the appellant, he urged the court to uphold the judgment appealed against contending that the Intestate Succession Act had been correctly applied by the appellate Judge.

We have considered the grounds of appeal and the oral submissions. We have also considered the judgment appealed

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against. We shall deal with grounds 1,2, 3 and 5 together as they contain the same objections that Kamwengo Chivukunyu does not qualify as a beneficiary to the exclusion at of those who were brought up and educated by the late Mr. and Mrs. Kambowa because Kamwengo Chivukunyu only sought refuge in the disputed house later and after her divorce.

It was not in contention that Kamwengo Chivukunyu had two children by the time she moved into the house to look after the late Sophia Kashiku Kambowa. The appellant, however, did not identify any person as being a husband or a former husband of Kamwengo Chivukunyu. In any case, the marital status of Kamwengo Chivukunyu is not material to this appeal. The facts as to the relations of the persons mentioned by the appellant in the Local Court and Subordinate Court are clear. Among the surviving relatives were the appellant himself, Margret Kambowa and Mr. Edwin Kashiko besides Kamwengo Chivukunyu. The Intestate Succession Act, clearly spells out the line of devolution for intestate estates and defines eligible beneficiaries. These legal provisions are specific and not general. The Appellate Judge discussed Section 9 (2) and correctly decided that Section did not apply to the appeal because there was only one house to the intestate estate. Instead, the appellate Judge correctly applied Section 3, on the definition of “**near relative**” and **“issue”** in the search for eligible beneficiaries.

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It must be understood that the purpose of this Act is to provide for the proper devolution of property comprising intestate estates and to define the eligible beneficiaries, it is not the purpose of the Act to define family or blood lines generally. The appellate Judge was not in error when she applied the relevant Sections of the Act in order to determine eligible beneficiaries, she was correct to follow the definitions in Section 3 for **“near relative** “and **“issue”.** We are ofthe view that **the** appellate Judge was correct when she stated that the definition did not include other terms of family relations such as a brother or a sister.

We have considered the facts on record, they do not show that there was any other **“issue”** as defined by the Act, only Kamwengo Chivukunyu was described as a granddaughter and qualified as a beneficiary. Under the said Act, there is no provision to the effect that any family member brought up or educated by a deceased person automatically qualifies as a beneficiary of the estate, neither is there any provision that brothers and sisters generally qualify as beneficiaries. In the case of **Mwananshiku and Others,** ¹ this court stated that rendering assistance to relatives does not place automatic obligations on one after death.

The Intestate Succession Act was put in place as already pointed out, to protect eligible beneficiaries and to direct how intestate

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estates should be distributed. We also agree that Kamwengo Chivukunyu was not a dependant as defined in Section 6 (c), as such, that Section did not apply. As there is only one house, Section 9 (b), did not apply as was wrongly assumed by the Subordinate Court. We uphold the decision of the appellate Judge that Kamwengo Chivukunyu, the granddaughter, is the eligible heir to the house. Consequently, grounds 1, 2, 3, and 5 of the appeal are dismissed.

Regarding ground 4, as to who built or contributed towards the building of the house, we find that this is not the basis upon which eligibility as beneficiary can be decided, on the facts of this case. The record shows that the house was occupied by the late Mr. and Mrs. Kambowa, it was registered in the name of late Muteba Kambowa. The cause of action was not founded on how the disputed house was constructed. We find that this ground of appeal is misplaced and it must fail.

We have observed that the appellate Judge sought to correct the format in the drafting of Section 3, which reads:-

***“Dependant” in relation to a deceased person means a person***

***who was maintained by that deceased person immediately***

***prior to his death and who was-***

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1. ***a person living with that deceased person; or***
2. ***a minor whose education was being provided for by***

***that deceased person; and who is incapable either***

***wholly or in part of maintaining himself;***

The appellate Judge pointed out that words “***and who is incapable of either wholly or in part maintaining himself*”** should cover both (a) and (b) by arguing that the draftsman must have meant those words to apply to both paragraphs (a) and (b); the appellate Judge thus read the Section with the format as corrected by herself. We cannot accept this correction; the relevant parts of Section 3 should be read as drafted. Fortunately, in this appeal it makes no difference to the eligibility of Kamwengo Chivukunyu as the beneficiary. We wish to point out that the authority to correct any mistake in the drafting of pieces of legislation lies with the Attorney-General; it does not lie with the courts. We draw the attention of the Attorney-General to this necessary correction of the drafting of Section 3 in the Intestate Succession Act, so that the description of dependant is properly aligned to paragraphs (a) and (b).

In conclusion, the appeal has no merit; it is dismissed with costs here and in the court below.