

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



IN THE MATTER OF: The estate of the late Paul Simango;

IN THE MATTER OF: An application for appointment of an administrator of the estate of the late Paul Simango (deceased);

IN THE MATTER OF: An application for an order for Petros Sinantekamba Simango to render an account of the goods and chattels obtained from the estate of the late Paul Simango;

IN THE MATTER OF: Section 19(1)(ii) of the Intestate Succession Act, Cap 59 of The Laws of Zambia;

IN THE MATTER OF: Section 5 (1) (d) of the Intestate Succession Act, Cap 59 of the Laws of Zambia; And

IN THE MATTER OF: Order XXX Rule 12 (c) of the High Court Rules Cap 27 of the Laws of Zambia

BETWEEN:

DANIEL SIKASAMBA SIMANGO

Applicant

AND

PETROS SINAKATEMBA SIMANGO

Respondent

Before the Hon. Mrs. Justice N.A. Sharpe-Phiri on the 3rd December 2018

For the Applicant:

Mr. W. Simutenda of Messrs GDC
Chambers

For the Respondent:

No appearance

JUDGMENT

Cases referred to:

1. *Rosemary Musa Phiri vs Comfort Lozililo Phiri and Mike Msanide*
2013/HP/0593

Legislation referred to:

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

This is a Judgment on an action commenced by the Applicant by way of Originating Summons filed into Court on 23rd May 2018 in which the Applicant seeks against the Respondent the following reliefs:

1. **An Order that the Applicant is a bonafide and legitimate beneficiary of the estate of the deceased as a dependant of the estate of the late Paul Simango;**
2. **An Order for the appointment of the Applicant as Administrator of the estate of the late Paul Simango;**
3. **An Order for the distribution of the estate of the late Paul Simango in accordance with the provisions of the Intestate Succession Act, Chapter 59 of the Laws of Zambia;**
4. **An Order for the Respondent to render an account of the goods and chattels obtained/grabbed from the estate of the late Paul Simango and return of the goods and chattels obtained/grabbed by the Respondent from the estate of the late Paul Simango and for the distribution of the same in accordance with the provisions of the law;**

- 5. An Order of Interim Injunction restraining the Respondent whether by himself, his servants or agents or whomsoever from dealing with, distributing or intermeddling and interfering in any manner whatsoever with the estate of the late Paul Simango until final hearing and determination of the main matter herein;**
- 6. Further or other reliefs that the Court may deem fit and proper under the circumstances; and**
- 7. Costs of the action herein.**

The summons were supported by an affidavit filed into Court on 23rd May 2018 and deposed to by the Applicant. The Applicant also filed a further affidavit in support of the Originating Summons on the 11th September 2018.

The gist of the Applicant's affidavit evidence was that he resided at Monze Secondary School, Monze district of the Southern Province of the Republic of Zambia. That the said deceased Paul Simango was his brother who died on the 1st June, 2016. In his initial affidavit evidence under paragraph 5 therein, the Applicant deposed that he was unable to show proof of the death of the deceased by way of certificate of death or burial permit as the said documents were in the custody of the Respondent who had refused to release them to him. However, in his subsequent and further affidavit of 11th September, 2018, the Applicant deposed that he had located documentation evidencing the death of the deceased. These were documents, whose date is unclear, were marked as exhibit "DSS 1" and "DSS 2" in the said further affidavit. The Applicant has also deposed that he had been solely dependant on the

deceased for his upkeep, education and overall support and welfare and that made him a legitimate beneficiary under the deceased's estate. His affidavit also said that the deceased was not survived by a spouse or children. The deceased estate is comprised of various household goods, chattels and terminal benefits or severance package pay due and payable from the Government of the Republic of Zambia where the deceased was employed as a Policeman in Ndola.

The Applicant gave further evidence by way of affidavit that the deceased estate had not appointed any personal representative but that the Respondent had been intermeddling with the deceased's estate by grabbing all household goods and chattels of the deceased. He stated further that the Respondent was now in the process of using some distant cousins without the authority or consent of the Applicant and other immediate family members to have him appointed as administrator of the deceased's estate and to collect the deceased's terminal benefits. He has also deposed that as the deceased dependant, he was a legitimate beneficiary and entitled to be administrator of the estate. He repeated that the Respondent has grossly intermeddled in the deceased estate as outlined above. That he had written a letter to the Respondent on the 11th April 2018 through his legal Counsel demanding that he ceases to intermeddle in the estate and that he return all the goods and chattels that he is said to have grabbed from the estate. However, the letter has not yielded any positive results as the Respondent has continued holding on to the said goods and chattels and is also in the process of collecting the deceased terminal benefits. Further, he stated that the Respondent is also pushing for his

appointment as administrator of the deceased's estate in total disregard to the Applicant who is a bonafide beneficiary of the estate.

There are two issues I wish to comment on before I determine the Plaintiffs case. The first is that the Plaintiff had brought an application for an Interim Injunction against the Respondent on the said 23rd May 2018. Consequently, a Ruling by this Court on the said application was issued on the 19th October dismissing the said application for the reasons stated therein.

The second issue the Court wishes to highlight is the continued absence, non-attendance or representation of any kind on the part the Respondent. This is unfortunate given the fact that this Court had earlier granted the Applicant leave to serve Court process herein by way of substituted service. The Applicant accordingly filed the notice of advertisement on 6th November, 2018 which was published in the Zambia Daily Mail editions of the 12th and 13th November 2018. The fact of this publication is evidenced through the affidavit of service of 15th November, 2018 sworn by one Gratify Mungala Chibele.

Having mentioned the foregoing issues, I will now revert to addressing the main issues before Court. The matter came up for hearing on the 27th November 2018. Counsel for the Applicant was present and as earlier stated, the Respondent was absent and there was no one to represent him.

Counsel for the Applicant stated that the Applicant would mainly rely on the contents of the affidavits of 23rd and 11th May 2018 filed in support

of originating summons. He also referred this Court to the case of **Rosemary Musa Phiri vs Comfort Lozililo Phiri and Mike Msanide 2013/HP/0593** in trying to advance an argument on behalf of the Applicant that the Applicant was indeed a dependant of the deceased within the meaning of **Section 3 of the Intestate Succession Act**. Counsel stated that the Applicant's evidence is that he was maintained by the deceased. He further stated that the Applicant being a dependant of the deceased was a beneficiary under the estate and therefore entitled to be appointed as the administrator and prayed accordingly. Counsel also submitted that the conduct of the Respondent as shown through the Applicants affidavits amounts to intermeddling. Counsel also submitted that it was also the Applicants prayer that this Court should Order for the distribution of the estate in accordance with the provisions of Sections **42(c)** and **43(1)** of the **Intestate Succession Act of the Laws of Zambia**.

That marked the end of the Applicant's case.

Having considered the Applicant's contentions, it is now for this Court to consider whether or not to grant the reliefs being sought by the Applicant. The prayer by the Applicant is that by virtue of having submitted that he was a dependant of the deceased, it made him a beneficiary under the estate and entitled him to be appointed as administrator. The Court has considered the evidence before it in addressing this issue. The law as provided under **Section 3** of the **Intestate Succession Act** defines a dependant as follows:

"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-

- (a) a person living with that deceased person; or**
- (b) 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 learned author of **Black's Law Dictionary, 8th Edition**, also defines "dependant" at page 470 thereof as, one who relies on another for support; one not able to exist or sustain oneself without the power or aid of someone else.

Further, **Section 5** of the **Intestate Succession Act** is instructive on the persons recognised as beneficiaries entitled to an estate of a deceased. It provides that:

5. (1) Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows:

- (a) twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;**

- (b) **fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;**
- (c) **twenty per cent of the estate shall devolve upon the parents of the deceased;**
- (d) **ten per cent of the estate shall devolve upon the dependants, in equal shares:**

The import of the foregoing provisions is that while **Section 5(d)** of the **Intestate Succession Act** makes provision for a dependant to be a beneficiary of the estate, such person will only qualify as dependant if he was maintained by the deceased immediately prior to his death and was living with such deceased person or if such person was being maintained by such deceased person and is a minor whose education was being provided for by the deceased person. Further, my learned brother Chashi J. in the case of **Rosemary Musa Phiri** stated at page 10 of the judgement that *"the fact that the deceased person was rendering assistance to his relatives prior to death does not in itself make such relatives his dependants"*.

The above authority illustrates that although a deceased person may have assisted his relatives now and again during his life time, this fact does not in itself render such relatives dependants of the deceased. An Applicant seeking to be regarded as a dependant must satisfy the requirements of the Intestate Succession Act and show that he was living with the deceased and being maintained by the deceased immediately prior to his death.

The Court has considered the Applicant's affidavit evidence in relation to his contention that he is a dependant of the estate of the deceased. Although the Applicant contends that he was solely dependant on the deceased for his upkeep, education, support and welfare, the Applicant did not provide any evidence whatsoever to support this contention. The Applicant also did not lead any evidence to the effect that he was a person who was living with the deceased immediately prior to his death or that he was a minor whose educational needs were being met by the deceased. In view of the foregoing, the Court is not satisfied that the Applicant herein has demonstrated that he was indeed a dependant of the deceased.

Furthermore, the law provides that in its appointment of administrator[s] of the estate, the Court takes into account greater and immediate interests in the deceased's estate in priority to lesser or more remote interests. This position is found under **Section 15(2)** of the **Intestate Succession Act** which states as follows:

“Subject to section sixteen where more than one person applies for letters of administration, the court may make a grant to any one or more of them, and in the exercise of its discretion the court shall take into account greater and immediate interests in the deceased's estate in priority to lesser or more remote interests”.

Furthermore, the Court has also considered that since the evidence on record shows that the deceased is not survived by a wife or children, the Respondent, being the parent stands with a greater and priority interest

to benefit from the residue of the estate as compared to the Respondent who has not satisfied the Court as having any beneficial interest in the estate. This view is supported at law as provided under **Section 6(b)** of the **Intestate Succession Act** which provides that:

Where an intestate leaves-

.....

- (b) no spouse or children; the aggregate portion of the estate which the spouse and children would have inherited shall be distributed equally to the parents of the deceased;**

Given the evidence on record, it is clear that the only beneficiary in the residue of the estate of the deceased who has died without leaving a wife, children nor dependants are the parents. It is they who hold a greater interest of being appointed as administrator against other applicants for letters of administration. Considering that the Applicant has not satisfied Court that he was a dependant of the deceased, the Applicant's prayer for grant of letters of administration, distribution of the estate and rendering of an account are also denied. Having found as I have above, I accordingly dismiss the Applicant's case. I make no order as to costs in view of the fact that the Respondent did not defend the action.

Delivered at Lusaka this 3rd day of December 2018


N.A. Sharpe-Phiri
High Court Judge