IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.189/2012**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

IN THE MATTER OF : The Intestate Succession Act, Chapter 59 of the Laws of Zambia

BETWEEN:

JIMMINNY WALKER **APPELLANT**

AND

MORATUOA HESSIE WALKER **RESPONDENT**

Coram: Hamaundu, Kabuka and Mutuna, JJS
On the 3rd October, 2017 and 31st August, 2018

For the Appellants : Mr W.A. Mubanga, S.C, Messrs Chilupe and Permanent Chambers

For the Respondent : Messrs H.H. Ndhlovu & Company

JUDGMENT

Hamaundu JS, delivered the Judgment of the Court:

Cases referred to:

1. **Oparaocha v Murambiwa [2004] ZR 141**
2. **William David Carlisle Wise v E.F. Harvey (1985) ZR 179**

Legislation referred to:

The Marriage Act, **Chapter 50** of the **Laws of Zambia**
The Intestate Succession Act, Chapter 59 of the **Laws of Zambia**

This appeal is against a judgement of the High Court which ordered that farm No. 9440 Siavonga be sold so that half of the proceeds be paid to the respondent. The facts of this matter are not in dispute, and are these:

The respondent contracted a marriage with Peter Christopher Walker under the **Marriage Act**, **Chapter 50** of the **Laws of Zambia** in 2003. Before their marriage, the couple had cohabited since 1979. During the period of pre-naptial co-habitation, the couple had obtained a traditional piece of land in Siavonga, which they had started developing. The tenure on the piece of land was converted to a 99-year State Lease in the name of Peter Christopher Walker in 2005.

On 16th August, 2010 Peter Christopher Walker died intestate in Chirundu. His brother, the appellant herein, was appointed administrator of the estate. The appellant then moved on to the farm and evicted the respondent from there.

The respondent commenced this action under the **Intestate Succession Act, Chapter 59** of the **Laws of Zambia**. She sought the following orders:

(i) That she was the widow of Peter Christopher Walker

(ii) That she was entitled to 70% of the value of Peter Christopher Walker's estate under the **Intestate Succession Act**

(iii) That the appellant be removed as administrator of the estate

(iv) That the appellant be restrained from evicting her from the farm; and, that the appellant renders an account of his activities on the farm after he had evicted the respondent

The defence mounted by the appellant was that the respondent was not the widow of Peter Christopher Walker because their marriage was nullity: the reason being that, when Peter Christopher Walker married the respondent, he was still lawfully married to Sonia Walker; and that the marriage had subsisted until Peter Christoper Walker's death. The appellant even produced a marriage certificate between Peter Christopher Walker and Sonia Patricia Reed, who became known as Sonia Walker.

At the hearing, it was clear from the respondent's testimony that her claim was with respect to the farm in Siavonga, as opposed to the deceased's estate in general. It was also clear that she was basing her claim to the farm on the contribution that she made to its development; and not by virtue of inheritance under the **Intestate**

Succession Act. The respondent led evidence of her contribution towards the development of the farm. This went unchallenged.

The court below found that Peter Christopher Walker had, indeed, been married to Sonia Walker when he contracted the second marriage with the respondent. Consequently, the court held that the second marriage was void. In effect, the court's holding was that the respondent was not the deceased's widow and, therefore, was not entitled to 20% of the deceased's estate under the **Intestate Succcession Act**.

The court considered whether, going by our decision in **Oparaocha v Murambiwa**[1], the respondent could be said to be a beneficiary of the estate as a dependent of Christopher Peter Walker but found that the decision would not apply to her; the reason being that the estate of Peter Christopher Walker could not be administered under our **Intestate Succession Act** because Peter Christopher Walker was a British national. To arrive at this holding, the court below had read **section 2(1)** of the **Intestate Succession Act** which provides that the **Act** is only applicable to the estates of those people who belong to a community to which customary law would have applied if the **Act** had not been passed.

The court, however, found that the respondent had adduced evidence of her substantial contribution to the development of the farm. In the court's view, that evidence was unchallenged. The court held that, on account of that contribution, the respondent was entitled in equity to a share of the farm. According to the court's assessment, the respondent's entitlement was 50% of the farm. It then ordered that the farm be sold and 50% of the proceeds be given to the respondent.

The appellant appealed on the following four grounds:

"1. The learned trial judge erred in law by granting the respondent a relief which she had not pleaded.

2. The learned trial judge erred in law by awarding the respondent a relief not available to her as she had no *locus standi* and did not qualify under the law pursuant to which she commenced the action.

3. The learned trial judge misdirected herself in fact and in law by awarding the respondent fifty percentum (50%) of the estate of Peter Christopher Walker, deceased, when there was no justification for such award and contrary to the evidence on record.

4. That even assuming the respondent was entitled to any interest in the said estate, which is denied, the learned trial court ought to have ordered assessment of damages before the Depute Registrar".

Counsel for the appellant argued the appeal entirely on the written heads of arguments filed by the appellant. We must state here that the respondent did not file any heads of arguments; and both herself and her advocates did not attend the hearing. Learned counsel for the appellant combined the second and third grounds of appeal and argued them as one. He also combined the first and fourth ground and argued them as one. The composite ground resulting from the combination of grounds two and three now read:

> **"the learned trial judge erred in law and in fact by awarding the respondent relief not available to her as she had no locus standi and did not qualify under the law pursuant to which she commenced the action and therefore there was no justification for such award as it was contrary to the evidence on record."**

Counsel's arguments on these two grounds were based on the manner in which the first and second reliefs in the originating summons were couched, namely;

(i) that she was the widow of Christopher Peter Walker and entitled to remain on that farm for that reason; and

(ii) that she was entitled to 70% of the estate of Christopher Peter Walker under the **Intestate Succession Act**.

Counsel argued that, in view of the holding by the court below that the marriage between the respondent and Christopher Peter Walker was null and void, the respondent was not the widow of Christopher Peter Walker and, therefore, her claim for 70% of the deceased's estate on that basis was untenable. Counsel argued that, in those circumstances, the court below erred when, despite its holding, it went ahead and awarded the respondent 50% of the deceased's estate.

In the mistaken belief that the court below granted judgment to the respondent on the strength of our decision in the case of **Charity Oparaocha v Winfrida Murambiwa**[1], counsel went on to argue that the court below misapplied the decision in that case to this one because, in this case, the court had already found that the **Intestate Succession Act** was not applicable to Christopher Peter Walker. By that argument, Counsel obviously missed the point because the award of 50% of the farm to the respondent was not on the basis that she was a dependent of Christopher Peter Walker in line with the **Oparaocha** case but on the basis of her contribution.

The composite ground arising from merging grounds one and four read as follows:

> **"The learned trial court erred in law by granting the respondent a relief which she had not pleaded. Assuming the respondent was entitled to any interest in the said estate, which is denied, the court erred by not having ordered assessment of damages before the Deputy Registrar."**

In support of these grounds, learned Counsel for the appellants referred us to several of our cases in which we have emphasized the importance of pleadings; and the need for parties to give notice of the boundaries of their cases to their opponents through pleadings. Among the cases cited was **William David Carlisle Wise v E.F. Harvey**[2]. Counsel argued, then, that the case which the respondent had taken to court was for a declaration that she was the widow of Christopher Peter Walker; and that she was entitled to remain on the farm and to a share of 70% of his estate on account of her status as a widow. That case, according to counsel, failed. He argued that, notwithstanding the failure of the respondent's case, the court went on to consider matters which were outside the pleadings and awarded the respondent 50% of the farm. According to counsel, that was a misdirection.

Counsel argued that, in any case, there was no evidence that the respondent had any beneficial interest in the farm. He went on to

point out that the land was acquired when Christopher Peter Walker was married to Sonia Walker. It was his argument also that the evidence suggested that the respondent was merely a mistress of Christopher Peter Walker. On the contributions, Counsel argued that the respondent ought to have adduced evidence of a joint effort in the acquisition of the farm; as well as the intention by herself and Christopher Peter Walker to set up a home thereon in which they intended to live. He argued that such interest should have been determined by a reference to the Deputy Registrar for assessment.

We were urged to allow the appeal.

We agree with the appellant that the case that the respondent pleaded on the documents was for a declaration that she was a widow and that she was claiming from the estate under the **Intestate Succession Act**. However, as we have pointed out, her testimony was very clear that she was claiming her contribution to the farm. Further, the claim was understandably pleaded the way it was because the respondent had a marriage certificate which, up to that time had not yet been declared null and void.

Now with regard to the approach that the court below took after finding that the marriage between the respondent and Christopher

Peter Walker was null and void, we think that it is important to bear in mind the provisions of **S.13** of the **High Court Act, Chapter 27** of the **Laws of Zambia**. That section demands of the High Court to administer law and equity concurrently in order that to ensure that all matters in controversy are determined and a multiplicity of legal actions is avoided. In this case, in view of the fact that the respondent's marriage was found to be a nullity, the respondent was, by the provisions of **Section 55(b)** of the **Matrimonial Causes Act, No. 20** of **2007** entitled to settlement of property. In so far as the respondent's claim to the farm was based on her contributions to its development, the claim was essentially one of settlement of property. Although the court below did not state that it was proceeding by virtue of the **Matrimonial Proceedings Act**, that statute, together with **section 13** of the **High Court Act**, provided the court below with the authority for the approach that it took. The court would have been shirking its responsibility under the provisions of **Section 13 of the High Court Act**, if, after having found that the marriage was null and void, it advised the respondent to go and commence proceedings nullifying the marriage before she could be heard on her

claim for settlement of the farm. Therefore, it is our considered view that the court below was on firm ground in its approach.

The only issue we wish to consider is the argument that the respondent did not adduce sufficient evidence of her contribution. Again, we have noted at the beginning that the respondent in her testimony adduced evidence of her contributions towards the farm and the appellant did not even challenge it. The court below accepted the respondent's evidence and, in its assessment, found it to amount to 50% entitlement. We cannot fault the court for that assessment when there was no evidence to contradict it with. The court was, therefore, on firm ground when it assessed the respondent's entitlement to the farm at 50%.

On the whole, the appeal fails. We dismiss it, with costs to the respondents.

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E. M. Hamaundu
SUPREME COURT JUDGE

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J. K. Kabuka
SUPREME COURT JUDGE

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N. K. Mutuna
SUPREME COURT JUDGE