

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



2019/HPF/312

IN THE MATTER OF:

**THE ESTATE OF THE LATE
GEORGE NKHOWANI**

AND

IN THE MATTER OF:

**ORDER 30 RULE 12 OF THE HIGH
COURT RULES CHAPTER 27 OF THE
LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**SECTION 5, 19 AND 42 OF THE
INTESTATE SUCCESSION ACT
CHAPTER 59 OF THE LAWS OF
ZAMBIA**

BETWEEN:

BENNY NKHOWANI

APPLICANT

AND

CONSTANCE NKHOWANI *(sued in her capacity
as Administrator of the estate of the Late George Nkhowani)*

RESPONDENT

Before the Honorable Mrs. Justice C. Lombe Phiri in Chambers

For the Applicant : Mr E. M. Kani – EMK & Associates

For the Respondent : N/A

J U D G M E N T

CASES REFERRED TO:

1. **Gray Nachandwe Mudenda v Dorothy Chileshe Mudenda (2006) Z.R. 57**
2. **Lindiwe Kate Chinyanta v Doreen Chiwele Judith Tembo SCZ Judgment NO 28 of 2007**

LEGISLATION REFERRED TO:

Intestate Succession Act Cap 59 of the laws of Zambia

1. BACKGROUND

This is a matter wherein Benny Nkhowani, the Applicant, has moved the Court by way of Originating Summons claiming the following Orders against the Respondent:

- i. An Order that Constance Nkhowani, as Administrator of the Estate of the Late George Nkhowani, discloses the inventory of the estate of the late George Nkhowani namely; real estate, moveable assets, moneys and other chattels;*
- ii. A further Order compelling the said Constance Nkhowani to account for the manner in which she has so far distributed the estate of the late George Nkhowani;*
- iii. An Order compelling the Administrator to grant or avail Benny Nkhowani his full share of the estate of the late George Nkhowani;*
- iv. Cost of the action be borne by the estate of the late George Nkhowani;*
and
- v. Any other order that the Court may deem fit.*

2. FACTS

The said Originating Summons are supported by an Affidavit in support sworn by the Applicant himself. He deposed that he was born on 4th March, 1998 and produced a copy of his National Registration Card. He further deposed that he is the biological son of the late George Nkhowani who died intestate on 14th March 2018. That the Respondent is the first born daughter of the deceased and was appointed Administrator following the death of Mr. George Nkhowani. It was deposed that due to his status as a child born out of wedlock the Applicant had been disadvantaged by the Respondent in the administration of the estate of late George Nkhowani. That the Respondent had never given him a true account of the assets that form part of their late

father's estate despite his numerous attempts to be availed the said information. It was further deposed that after a family meeting it was agreed that all the beneficiaries receive an equal share of the proceeds of rentals from a house in Chalala. That consequent to this the Applicant has been receiving K300 per month since August, 2018. Further, that he was given the sum of K24, 436.00 from his late father's NAPSA contribution. It was further deposed to the Respondent and other beneficiaries of the estate have been hostile towards the Applicant and his mother. Also that attempts to settle the matter excuria have proved futile. It was further deposed to that the Applicant believes that his late father's estate also comprises of two houses – one in Mtendere and another in Chalala Lusaka, three motor vehicles and pension. The Applicant deposed that all his efforts and enquiries to the Respondent on the inventory of the Estate have been in vain as the Respondent and other family members have been hostile.

The Respondent in turn filed into Court an affidavit in Opposition to the Originating Summons before Court deposed to by the Respondent herself. It was deposed to that the Applicant has been accepted and recognized by the whole family as being a child of the family. She further stated that she had verbally given an account to the Applicant of the remaining assets of the deceased. That the Respondent was aware of the three houses, two in Chalala and another in Mtendere East, 2 cars and a bus that is not in working condition. Regarding the pension it was deposed to that the said money was drawn and used by the deceased before he died. Further, that any remaining amount was used for funeral expenses. The pension documents were exhibited as exhibit "CN1". It was further deposed to that the houses in Chalala have

been shared amongst the various beneficiaries. One house was taken by the widow and the other house is rented out and the income shared out among the beneficiaries. It was stated that the only properties to be shared are the house in Mtendere East and 2 cars being the personal car belonging to the deceased and the bus. It was stated that the Respondent did not have any trouble in giving the Applicant what is due to him just as he had received his share of the NAPSA contributions.

3. SUBMISSIONS

The Applicant filed into Court skeleton arguments in support of the Originating Summons. The same were mainly to demonstrate that the Originating Summons are premised on the law. That the Applicant is indeed the son of the deceased. Further, that there was an error in distribution of the estate taking into consideration Section 9(2) of the Intestate Succession Act which relates to what happens when the estate includes more than one house. It was concluded in the arguments that the Applicant is entitled to a share of the estate commensurate to his age and educational needs. It was submitted that considering the hostile environment in the family the Court is urged to grant the orders for the Administrator to give a full inventory of the estate within a specified time, account for the manner in which she has so far distributed the estate and grant the applicant his full share commensurate with his age and educational needs.

At the hearing of the proceedings, having satisfied myself that the Respondent had been served with the Notice of Hearing for that day, I proceeded to invite Counsel for the Applicant to argue the case. In so doing total reliance was

placed on the Originating Summons, Affidavit in Support of the Originating Summons and the skeleton arguments filed into Court and the prayers contained therein.

4. LAW

The cause before the Court is premised on the Intestate Succession Act, Chapter 59 of the Laws of Zambia. Of particular reference the provisions referred to are Sections 5, 19 and 42. The said provisions provide as follows:

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 dependents, in equal shares:

Provided that a priority dependent whose portion of the estate under this section is unreasonably small having regard to his degree of dependence on the deceased shall have the right to apply to a court for adjustment to be made to the portions inherited and in that case, Part III of the Wills and Administration of Testate Estates Act shall apply, with the necessary changes, to the application.

(2) In respect of a minor, the mother, father or guardian shall hold his share of the estate in trust until he ceases to be a minor.

19. (1) *The duties and powers of an administrator shall be-*

- (a) to pay the debts and funeral expenses of the deceased and pay estate duty if estate duty is payable;*
 - (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.*
- (2) Where an administrator considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may,*

with the authority of the Court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property.

42. *On application in the prescribed manner, by an interested person, a court shall have jurisdiction in relation to a deceased person's estate-*
- (a) to decide whether or not the deceased person died intestate;*
 - (b) to decide what is the property to which the deceased person was entitled at the date of his death;*
 - (c) to decide how the distribution of the property forming part of a deceased person's estate should be carried out;*
 - (d) to order the sale or other disposition of property belonging to a deceased person's estate for the purpose of paying the debts of the deceased or for the purpose of distribution;*
 - (e) to appoint a guardian in place of a guardian who has acted improperly, or who has died.*

Considering the nature of the claims contained herein it is important to here further state the following provisions of the Intestate Succession Act in order to put the issues in context:

8. *Notwithstanding section five where the intestate in the case of a monogamous marriage is survived by a spouse or child or both, the spouse or child or both of*

them, as the case may be, shall be entitled equally and absolutely to the personal chattels of the intestate.

9. (1) *Notwithstanding section five where the estate includes a house the surviving spouse or child or both, shall be entitled to that house:*

Provided that-

(a) *where there is more than one surviving spouse or child or both they shall hold the house as tenants in common; and*

(b) *the surviving spouse shall have a life interest in that house which shall determine upon that spouse's remarriage.*

(2) *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.*

In the case of **Gray Nachandwe Mudenda v Dorothy Chileshe Mudenda (2006) Z.R. 57⁽¹⁾** the Supreme Court held inter alia that:

2. *“The duty of an administrator is not to enhance the estate, but to collect the deceased’s estate, distribute it to the beneficiaries and render an account”.*

This principle was restated in the case of **Lindiwe Kate Chinyanta v Doreen Chiwele Judith Tembo SCZ Judgment NO 28 of 2007⁽²⁾**.

5. ANALYSIS

Turning to the facts of this case it is clear that there is no dispute regarding the following facts:

- 1) *That the deceased George Nkhowani died intestate;*
- 2) *That the deceased was survived by one wife and children, who include the Applicant herein;*
- 3) *That the Respondent was duly appointed as Administrator of the estate of the deceased and has been distributing the Estate;*
- 4) *That the Estate includes among others 3 houses – 2 in Chalala and one in Mtendere, some motor vehicles, pension benefits; and*
- 5) *That one house in Chalala is occupied by the widow while one house has been rented out and the children share the proceeds of the rentals on a monthly basis. As a result the Applicant has been receiving his share of K300.*

The foregoing facts not being in dispute I find them as facts of this case.

Now, the issues in contention herein relate to the following:

- 1) *how the houses, forming part of the Estate have been dealt with;*
- 2) *how money from the deceased Pension was distributed; and*
- 3) *failure by the Respondent to render an account for distribution of the Estate.*

1. The houses

The Applicant claims that the manner in which the distribution of houses was done was erroneous. It was submitted that allowing the widow to pick one house was contrary to the law. That the law provides that where there are more than one house, one house shall devolve to the widow and children and such house shall be held in common. That there is no provision of the law that allows the surviving spouse to own the said house in exclusion of the children. Clearly, this is the position of the law as provided in Section 9 of the Intestate Succession Act. However, the said provision further goes to provide that the surviving spouse shall have a life interest in the house. Also that where the Estate comprises more than one house "*the surviving spouse or the child or both*" shall determine which house shall devolve upon them and the others shall form part of the Estate. From the foregoing it is clear that either the surviving spouse or the child or both may decide which house devolves on them to be held in common. The law does not state that this decision ought to be made jointly by the spouse and child(ren). The law is deliberately couched in such a manner. Had the drafters of the law intended that the decision was to be a joint decision the wording would have been "and" and not "or". In this case the liberty was given to the surviving spouse to determine which house would devolve to her and the children to be held in common. Further, no evidence has been put before the Court to state that the house is not held in common by the surviving spouse and the children. According to the affidavit evidence the surviving spouse actually surrendered the better located house in order to allow the children rent it out for income to share. From this I deduce that the surviving spouse resides in this house. Clearly, the mischief that was being cured in ensuring that there is a house that devolves to the surviving spouse and children was to avoid them being destitute in the event that even a dwelling house is claimed as part of the general estate of the deceased. That is

why a surviving spouse is granted a life interest in a dwelling house only extinguished if they remarry. **I therefore find that there was no error in allowing the surviving spouse to choose a house which she would occupy.**

2. Distribution of the pension and rendering of account

There is a claim by the Applicant that he has been denied his share of the pension payout which forms part of the Estate of the deceased. The evidence of the Respondent as contained in the affidavit in opposition has attempted to render an account of how the distribution of the pension payments was used by the Administrator. The basic explanation is that the pension was drawn out by the deceased before he died to meet some of his medical expenses. That whatever was left of it at the time of his death was used to meet funeral expenses. Clearly, this explanation by the Respondent has not been satisfactory to the Applicant. It is for that reason that he has sought the Court's intervention to order that the Respondent, in her capacity as Administrator of the Estate, render an account for the distribution of the Estate. Section 19 (c) of the Intestate Succession Act clothes the Court with jurisdiction not only to order the Administrator to produce on oath in court the full inventory of the estate of the deceased but also to render to the court an account of the administration of the estate. **I will therefore order that the Respondent, being the Administrator of the estate of the late George Nkhowani produce on Oath in Court a full inventory of the deceased's estate within 60 days of receipt of this Order.**

Further regarding an order that the distribution of the estate take into account the age and educational needs of the applicant I will so accordingly order. However, I will be prompt in stating that the Applicant cannot just make general and sweeping demands for his tertiary educational needs to be met. He needs to clearly state what these needs are. He also ought to be considerate of the needs of all other beneficiaries as he makes his demands.

Before I conclude I also wish to touch on the issue of the motor vehicles. Section 8 of the Act (cited above) clearly states how personal chattels ought to be dealt with. Personal chattels are described in Section 3 of the Act as:

*“clothing, articles of personal use or adornment, furniture and furnishing, appliances, utensils and all other articles of household use or decoration, simple agricultural equipment, hunting equipment, books, **motor vehicles** and consumable stores but does not include chattels used for business purposes, money or securities for money;”*

It is therefore the duty of the Administrator to ensure that the surviving spouse and children all draw an equal benefit from the vehicles that form part of the Estate.

6. CONCLUSION

From the foregoing the Application by the Applicant succeeds as it relates to the Administrator being ordered to render an inventory and account and to

take into account the age and educational needs of the Applicant. The Orders are as contained in the body of the Judgment.

Owing to the nature of the case I will order that each party bears its own costs.

Leave to Appeal is granted.

Delivered at Lusaka this 10th day of February, 2020.



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C. LOMBE PHIRI
JUDGE