IN THE COURT OF APPEAL FOR ZAMBIA APPEAL NO.140/2017
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: THE INTESTATE SUCCESSION ACT CAP 59 OF THE LAWS Of ZAMBIA

IN THE MATTER OF: THE ESTATE OF THE LATE GEORGE CHIBOMA

BETWEEN:

CHING'ANZE MASENGU ***(Sued in his capacity as Administratorof the Estate of the late George Chiboma)*** **1st Appellant**

INNOCENT CHIBOMA **2nd Appellant**

AND

FRANCIS CHIBOMA ***(Suing in his capacity asthe only surviving beneficiary of the estate of the late George Chiboma)*** **Respondent**

Coram: Mchenga DJP, Mulongoti and Ngulube JJA

On 23rd January 2018 and 18th July 2018

For the Appellants: Mr. M.Z Mwandenga of M.Z Mwandenga and Company

For the Respondent: N/A

J U D G M E N T

MULONGOTI, JA, delivered the Judgment of the Court

Cases referred to:

1. **Charity Oparaocha v Winfrida Murambiwa (2004) ZR 141 (SC)**
2. **The Attorney General v Achiume (1983) ZR 1 (SC)**
3. **Justin Mutale v William Mutale SCZ Appeal No.141/2008**
4. **Minister of Home Affairs and The Attorney General v Lee Habasonda (suing on his behalf and on behalf of the Southern African Center for the Constructive Resolution of Disputes) (2007) ZR 207 (SC)**
5. **Austin Chibwe v Rosemary Chibwe (2001) ZR 1 (SC)**
6. **Patrick Kunda and another v the People (1980) ZR 105 (SC)**
7. **James Onwuka v Joyce Siandwazi and others SCZ Appeal No. 49/2015**
8. **Esther Sitali Ngula v The Administrator General (Suing as Administrator of the Estate of the late Inonge Sitali) SCZ Appeal No. 132/2010**
9. **New Plast Industries v The Commissioner of Lands and The Attorney General (2001) ZR 51 (SC)**

Legislation referred to:

1. **Wills & Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia**
2. **Intestate Succession Act, Chapter 59 of the Laws of Zambia**
3. **The Local Courts Act, Chapter 29 of the Laws of Zambia**
4. **The Births and Deaths Registration Act Chapter 51 of the Laws of Zambia**
5. **The Affiliation and Maintenance of Children's Act Chapter 64 of the Laws of Zambia**

This is an appeal against the High Court decision which found, inter alia, that the respondent, Francis Chiboma, was a son of the late George Chiboma and the sole beneficiary of his estate. Consequently that he should take possession of House No. 17, Undi

Close, Thorn Park, Lusaka and the 2nd appellant to pay him mesne profits for living in the said house and denying him rentals.

At this stage it is necessary to say a little about the background to the appeal. The respondent Francis Chiboma, (the applicant in the Court below) sued the appellants (respondents in the Court below) by originating summons with supporting affidavit. Francis Chiboma averred in his affidavit in support of originating summons that he was the eldest son of the late George Chiboma who died in 1997 and was survived by the respondent, his wife Astridah (the respondent's step mother) and his daughter Ngawa Chiboma (the respondent's half-sister.)

Among the deceased's properties was a house at number 17 Undi close, Thornpark, Lusaka. The 1st appellant who was the deceased's cousin was appointed administrator of his estate. At the time of his father's death the respondent was aged eight and was sent to Ndola to live with his grandparents (the late George Chiboma's parents). In 2005 his grandmother died and later in 2010 his grandfather also died.

He further deposed that in 2012 his stepmother remarried, leaving him as the sole beneficiary as his half sister had also died. However, the administrator deprived him of the only estate his father left namely house number 17 Undi Close and allowed the 2nd respondent to live in the house without paying rentals.

The 2nd appellant filed an affidavit in opposition. He deposed, inter alia, that the respondent is not a child of the late George Chiboma who throughout his lifetime refused responsibility of the pregnancy of Royce Mukwanazi which resulted into the birth of the applicant.

The respondent's mother or indeed Francis himself, never took any steps to convince or compel George to accept him as his child or to provide for him.

He further deposed that at the time of George Chiboma's death, in 1997, there was a valid Will. His wife Astrida Kalokoni Chiboma, Innocent Chiboma, Maximillian Chiboma, Chembe Chiboma, Ngawa Chiboma and the deceased's parents were legatees, per exhibit marked "IC1" of the affidavit.

The house number 17, Undi Close, Northmead Area, Lusaka was bequeathed to Ngawa Chiboma and to his nephews Maximillian Chiboma and Chembe Chiboma, jointly, in equal shares, to be held in trust by his wife Astrida Kalokoni Chiboma.

It was further deposed that the appointment of the 1st respondent as administrator is null and void in view of the Will aforesaid.

Sometime between the years 1999 and 2000, which was about two to three years after George's death, the respondent's mother approached the deceased's sister Rose Chiboma Chanda at her home in Ndola soliciting for assistance with regard to the upkeep of the applicant who was at the time about 10 years old.

The 2nd appellant together with other family members gave support to the applicant thereby taking care of all his needs as if he was a member of the family until he finished his studies at the Copperbelt University (CBU), in early 2015.

Astrida Chiboma remarried sometime in 2012. The house at Number 17 Undi Close, Northmead, Lusaka was surrendered back to the estate pending completion of the outstanding conveyance from the Lusaka City Council to the surviving beneficiaries Maximillian and Chembe.

There was a second affidavit in opposition sworn by one Rose Chiboma Chanda, the elder sister of the late George Chiboma. The affidavit is essentially the same as that of the 2nd appellant except to state that the deponent after learning of the passing of the applicant's mother, she and her husband decided to keep the applicant on humanitarian grounds due to the fact that his mother, had earlier indicated that she and the applicant, had been completely neglected by her family.

That after sometime she took the applicant to her parents in Ndola.

Furthermore, she and her husband together with her young sister Irene Chiboma Karabassis and the 2nd appellant gave support to the

applicant taking care of all his needs as if he was a member of the family until he completed his studies at the CBU in early 2015.

The respondent then filed an affidavit in reply to the affidavit in opposition sworn by the 2nd appellant contending that he was the eldest child of the late George Chiboma and that the 2nd appellant had not provided any proof to dispute this. The controversy surrounding his paternity only arose when he made claims in respect of the property in issue.

In respect of the validity of the Will exhibited, he disputed it as the 1st and 2nd appellants had not exhibited a grant of probate.

Accordingly, the late George Chiboma died intestate and therefore the property that formed part of his estate should devolve on the beneficiaries in accordance with the Intestate Succession Act. Furthermore, that the two purported beneficiaries namely Maximillian and Chembe Chiboma are nephews to the late George Chiboma and are not direct or priority beneficiaries.

The parties also filed arguments and submissions before the High Court which were considered in the Judgment.

The Judge considered the affidavit evidence. She found as a fact that the late George Chiboma had left a house where his surviving spouse had a life interest. However, the surviving spouse had remarried and thus relinquished her interest in the house.

The Judge opined that the first issue to determine was the question of the respondent's paternity. She noted the appellants' arguments that he was kept by the family out of compassion and that if he was the late's son, he ought to have been affiliated to the late George Chiboma by way of **The Affiliation and Maintenance of Children's Act**.

The Judge also considered the respondent's arguments that the **Intestate Succession Act** in its definition of a child, includes a child born out of wedlock.

The Judge, citing **section 52 of the Births and Deaths Registration Act** that:

> ***"No person shall be bound as a father to give notice of the birth of an illegitimate child, and no person shall be registered as the father of such child except on the joint request of the mother and himself and upon his acknowledgement in writing to be the father of the child."***

And also the case of **Charity Oparaocha v Winfrida Murambiwa[1],** where the Supreme Court agreed with the position of the respondent's counsel that despite not acknowledging the children in writing, as required by the Act, the deceased had duly acknowledged them by his actions of getting them Nigerian passports.

The Judge reasoned that in the case before her the circumstances tended to provide prima facie evidence that the respondent was recognized as the son of the late George Chiboma, despite him not being acknowledged in writing. She observed that the appellants had not denied that the respondent was sent to live with the

deceased's parents and that his sister Ireen paid for his education till he completed his studies at the CBU.

The Judge wondered why they would go to such lengths to support a stranger. She also expressed surprise that the appellants asked a third party Rose Chiboma Chanda to swear an affidavit about how the respondent ended up with their parents and not Ireen Chiboma Karabassis who paid for his education. The Judge refused to consider the affidavit of Rose Chiboma Chanda on the ground that she had no *locus standi* in the matter.

She found that there was no evidence that the late denied paternity of the respondent. She deduced that the appellants were denying him now because he had opted to assert his rights over the house.

The Judge then concluded and found as a fact that the respondent was a son of the late George Chiboma and was recognized by his grandparents.

Regarding the validity of the Will, she noted that the respondent disputed its validity because the appellants had not exhibited the grant of probate to evidence the title of the executor and the validity of the Will.

She opined that when a testator leaves a Will, they appoint an executor, who derives his title under a Will if so appointed.

She noted that it is not sufficient to be appointed an executor, as one had to accept the appointment by way of obtaining a grant of probate.

Citing **section 35 of the Wills and Administration of Testate Estates Act** that:

> ***"Probate of a Will when granted shall establish the Will and evidence the title of the executor upon the death of the testator."***

The Judge concluded that the Will, had not been evidenced as it had not been probated and thus had no legal effect.

Commenting on **Order 46 (3) of the Rules of the Supreme Court** relied upon by the appellants, the Learned Judge stated that the

appellants ought to have taken steps to compel the executors (Pastor) of the Will to prove it, especially that they knew they were disputing its existence. The Judge acknowledged that she had taken note of **section 5 of the Wills and Administration of Testate Estates Act** on the non challenge of the Will by the appellants and the argument that the testator had power to dispose of any property by way of a Will.

She reiterated that in *casu,* the testator appointed an executor who had not proved the Will of the testator. The appellants rejected the senior Pastor of Northmead Assemblies of God Church to be the executor of the Will.

Additionally, that this knowledge was in the power of the appellants and ***"they are the ones who ought to have asked that this matter be commenced against them. However, they went ahead and filed affidavits in opposition, meaning that they waived whatever defects they want to contend now."***

The Judge reasoned further that the deceased having died in 1997, it is presumed the administrator was aware of the existence of the Will and he ought to have taken steps to have the administratorship revoked in line with **section 29 (1) (c) of The Wills and Administrator of Testate Estates Act**, which was not done.

Thus the Judge opined that considering also the fact that the said Will had not been proved, the letters of administration are still valid.

The Judge found that the late George Chiboma died intestate and his estate was subject to the **Intestate Succession Act**. The Judge found as a fact that the 1st respondent was appointed administrator but had abrogated his duties under **section 19 (1) of the Intestate Succession Act**.

She also found that that appellant's argument that the purported letters of administration being granted by the Local Court were invalid as that Court lacked jurisdiction where the value of the estate exceeded K50,000.00 as the restriction on jurisdiction did

not apply to matrimonial and inheritance claims per **section 5 (1) of the Local Courts Act**.

Having found the respondent to be the son of the late and beneficiary of his estate, the Judge, on that basis, revoked the appointment of the 1st appellant as administrator and ordered that the respondent himself be appointed administrator. Further that the 2nd appellant should deliver possession of house number 17, Undi Close, Thornpark, Lusaka, to the respondent.

The claim for *mesne* profits was allowed and so was the claim for damages for loss of use. The Court observed that from the time his step mother re-married and his sister died, the respondent would have been entitled to rentals, if the house had not been used by the two respondents (appellants) herein as a family house, which it clearly was not. The Court directed that the Deputy Registrar works out the appropriate measure of damages due to the applicant for loss of use.

Dissatisfied with the judgment, the appellants raised eight grounds of appeal as follows:

1. ***"The learned trial Judge erred in law and in fact when she found that the respondent was the son of the late George Chiboma.***
2. ***The learned trial Judge erred in law and fact which she held that late George Chiboma died intestate.***
3. ***The learned trial Judge erred in law and in fact when she held that the local court which granted the 1st respondent an order of administration had jurisdiction to do so even if the value of the estate exceeded K50,000.00***
4. ***The learned trial Judge misdirected herself when she held that the appellants had waived whatever defects they wanted to contend with the Will by filing affidavits in opposition.***
5. ***The learned trial Judge misdirected herself which she failed or refused to take into consideration the affidavit of the person who was not a party to the proceedings in the court below***
6. ***The learned trial Judge erred in law and fact when she revoked the order of administration in favour of the 1st appellant on the basis that the respondent was a son of the late George Chiboma and therefore a beneficiary of the estate of the late George Chiboma.***
7. ***The learned trial Judge erred in law and fact when she appointed the respondent as administrator of the estate of the late George Chiboma in place of the 1st appellant.***
8. ***The learned trial Judge erred in law and fact when she granted the respondent the following reliefs:***

a) An order that the 2nd appellant should deliver possession of House Number 17 Undi close, Thornpark, Lusaka to the respondent.

b) An order that the respondent was entitled to mesne profits

c) Directing the Deputy Registrar to work out the appropriate measure of damages due to the respondent for loss of use of House Number 17, Undi close, thorn Park, Lusaka; and

d) Costs follow the event to be taxed in default."

In support of the grounds of appeal, Mr. Mwandenga, who appeared for the appellants, also filed heads of argument.

It is argued in relation to ground one that the late George Chiboma denied paternity of the respondent, which was sufficient evidence that he was not his father. Thus, the trial Judge erred when she found that the respondent was his son and that there was no evidence before her to suggest that he had denied paternity. Furthermore, that the Judge also refused to consider the affidavit of one Rose Chiboma which would have shade some light on the issue.

It was further argued that the fact that Ireen Chiboma Karabassis paid for the respondent's tertiary education, cannot be the basis upon which paternity can be assigned to the late George Chiboma. The fact that Ireen did not swear and file an affidavit to state why she paid for the respondent's education, is therefore immaterial.

Equally, the fact that the deceased's parents kept the respondent is not sufficient evidence to prove paternity. Quoting **section 15 of the Births and Deaths Registration Act**, also cited by the Judge, learned counsel argued that the importance of paternal acknowledgment in writing has statutory recognition.

Regarding the finding that the late George Chiboma died intestate, as contended in ground two, it was submitted that the Judge wrongly premised the finding on the fact that the executors, of the purported Will had not obtained probate to prove its validity. According to Mr. Mwandenga, the validity or otherwise of a Will, has nothing to do with obtaining of probate. The validity of a Will is determined in accordance with **section 6 of the Wills and Administration of Testate Estates Act**.

The reasoning of the trial Judge presupposes that executors named in a Will are duty bound to obtain probate for the Will to be valid. The approach is wrong as executors can decline such appointment.

In this case, a Will was exhibited to the 2nd appellant's affidavit, meaning that he did not die intestate.

We are urged to reverse this finding of fact in line with the case of **The Attorney General v Achiume**[2], that an appellate Court, can reverse findings of fact by a trial Judge, if they are perverse or made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which on a proper view of the evidence, no trial court acting correctly can reasonably make.

In ground three it is argued that the appellants took issue with the fact that the letters of administration which the 1st appellant obtained from a Local Court were void because that Court lacked jurisdiction to issue them as the estate was valued in excess of K50,000.00. However, the Judge erroneously dismissed this argument, relying on **section 5 (1) of the Local Courts Act** which talks about the grades of Local Courts and the jurisdiction that can be given to them by the warrants that establish them.

Counsel opines that the *proviso* means and must be understood to mean that no Local Court can be given jurisdiction to determine matrimonial or inheritance claims of a value greater than one hundred and twenty units. The jurisdiction of the Local Court *viz* succession matters is spelt out in **section 43 (2) of the Local Courts Act**. In addition the Supreme Court in the case of **Charity Oparaocha v Winfridah Murambiwa**[1] dealt with the question of jurisdiction of the Local Courts as follows:

> *"...In consideration this ground of appeal, we have had to ascertain the jurisdiction of the Local Court which appointed the appellant to be the administrator in this case.* ***Section 43(2) of the Act limits the jurisdiction of Local Court in matters of successions to estate whosevalue do not exceed Fifty Thousand Kwacha****. It is clear to us that this provision was enacted at a time when the Kwacha had more value. We say so because going by the current trends very few, if any, would an estate of the value of Fifty Thousand Kwacha and below. It is however on record in this case that the deceased's estate had property within and outside Zambia, which included real property. Clearly, the value of the deceased's estate went beyond the jurisdiction of the Local Court. We agree with Mr. Zulu that probate, in this case, should have been obtained from the High Court.* ***We cannot therefore fault the trial Judge for having found that the appointment of the appellant by the Local Court as administrator of the estate of the deceased was null and void. The consequence of such a finding was cancellation of the Order of appointment post-facto****. The Court has power under section 29(2) of the Act to remove an administrator where it is satisfied*

that proper distribution of the estate and the interest of persons beneficially entitled to them so require."

Furthermore, in **Justin Mutale v William Mutale**[3]the Supreme Court held that:

"...Apart from this, the record shows that this matter was commenced on 10th June 1998 and involved administration/inheritance of the deceased's estate. The Local Courts Act of 1994 was in place and it provided limitation of jurisdiction of the Local Court. Therefore, the Local Court A Grade which heard this case did not have jurisdiction to hear and determine this dispute over a house valued at K900,000. This case, is therefore, caught up by what we ruled in the case of ***Charity Oparaocha v Winfridah Murambiwa***[1] *where we held that:-*

Section 43(2) of the Local Court Act, limited the jurisdiction of the Local Court in matters of succession to estates whose value do not exceed fifty thousand Kwacha."

It is argued that the estate in the present case was clearly above K50,000. Accordingly, the appointment of the 1st appellant as administrator by the Local Court, was null and void.

It was the submission of counsel in ground four that in reference to the position by the appellants that the late George left a Will, the Judge observed that since "***This knowledge was in their power and***

they are the ones who ought to have asked that this matter be commenced against them. However, they went ahead and filed affidavits in opposition meaning they waived whatever defects they wanted to contend now."

According to learned counsel, this approach is wrong and it ignores the fact that the respondent had sued the appellants by originating summons. It is a fact that a respondent or respondents to such proceedings are supposed to file affidavits in opposition to put across their side of the story. They did so and exhibited a Will which the respondent (applicant) should have challenged.

In ground five, it is argued that the Judge erred when she refused to consider the affidavit of Rose Chiboma Chanda, which she did not expunge from the record and in effect considered it when she noted that a third party swore an affidavit regarding the way the respondent ended up with their parents.

Paragraph 3 of that affidavit, shows that the deponent was the late's elder sister and so her evidence was relevant. Ireen Chiboma

Karabassis, who the Judge intimated was better placed to swear the affidavit because she educated the respondent, was, like Rose Chiboma Chanda, not a party to the proceedings. Thus, there was no legal basis upon which the affidavit of Rose Chiboma was not considered.

It was the further submission of counsel, that in accordance with the **High Court Rules and Order 38 Rule 2 of the Rules of the Supreme Court**, proceedings commenced by originating summons, the court is not restricted to considering affidavits sworn by the parties only. It was proper for Rose Chiboma Chanda to make and swear an affidavit. And that **Order 28 of the Rules of the Supreme Court** does not restrict the number of affidavits, neither does it restrict the making of affidavits to the parties to the proceedings. Therefore the Judge misdirected herself when she refused to consider the affidavit of Rose Chiboma Chanda.

The learned counsel argued grounds six and seven simultaneously, as they relate to the revocation of the order of administration of the

1st appellant and the appointment of the respondent as the administrator of the estate of the late George Chiboma.

It is counsel's view that having shown that the late George Chiboma did not die intestate, it was wrong for the Judge to hold that he did and to proceed to make orders under the **Intestate Succession Act**.

The late George Chiboma had a Will and his estate was supposed to be dealt with under the **Wills and Administration of Testate Act**. Counsel further opined that even assuming that the **Intestate Succession Act** applied, it does not provide for revocation of an order of administration on the basis of one being a child, and or beneficiary, as suggested by the trial Judge. That revocation of grants and removal of administrators is provided under **section 29 of the Intestate Succession Act**.

Thus, in line with **section 29 of the Intestate Succession Act**, counsel argued that revocation of the 1st appellant's appointment ought to have been on the basis that it was made through

proceedings that were defective. In this respect, the Local Court had no jurisdiction to issue the order of probate and it was therefore, subject to revocation under **section 29 (1) (a) of the Local Courts Act.**

It was submitted in the alternative, that revocation ought to have been on the basis that the late George Chiboma did not die intestate. Meaning that it is up to the executor to take up the appointment or not. Therefore, the Judge erred in appointing the respondent as administrator of his estate.

It is further argued in ground eight that the order that the appellants should deliver possession of the house to the respondent is against the Will. The house should instead be handed over to the executor for distribution to the beneficiaries of the deceased's estate under his Will. Equally, erroneous is the order that the respondent was entitled to *mesne* profits. According to learned counsel, there was no landlord-tenant relationship between the parties for the appellants to pay *mesne* profits. The same applies to the order that the Deputy Registrar should work out the appropriate measure of

damages due to the respondent for loss of use of the house in question. The damages for loss of use are akin to *mesne* profits which were also awarded, thereby amounting to unjust enrichment of the respondent.

The appellants also contended that costs would not have been awarded had the trial Judge properly analysed the case before her. In addition that the Judge did not give reasons why the adverse orders complained of were made against the appellants.

The Supreme Court decision in the case of the **Minister of Home Affairs and The Attorney General v Lee Habasonda (suing on his behalf and on behalf of the Southern African Center for the Constructive Resolution of Disputes)**[4] was relied upon as authority that every judgment must reveal a review of the evidence, where applicable, summary of the arguments and submissions and findings of fact and reasoning of the court on the facts. Further that in **Austin Chibwe v Rosemary Chibwe**[5], the Supreme Court held that failure to give reasons as to **"why"** and **"how"** makes the

orders a misdirection. The trial Judge misdirected herself when she failed to deliver judgment complete with reasons.

At the hearing of the appeal, Mr. Mwandenga relied on the heads of arguments. He briefly submitted relying on the recent Supreme Court decision in **James Onwuka v Joyce Siandwazi and Others**[7], that the jurisdiction of the Local Court is limited to estates not exceeding the value of K50,000.00.

The respondent did not file any heads of arguments. Upon being satisfied that he was aware of the appeal and the hearing date, we proceeded to hear the appeal and reserved the matter for judgment.

Two months later, we received an application by the respondent's counsel for extension of time within which to file the respondent's heads of argument. The application failed for being misconceived.

We therefore, only have the arguments by the appellant's counsel, to consider. We will consider grounds two, three and four first as what we say here might render the other grounds otiose.

We must hasten to state that the matter raised a lot of contentious issues pertaining to the respondent's paternity and also whether the late George Chiboma died intestate. A copy of the deceased's will was exhibited to the affidavit in opposition sworn by the 2nd appellant as "IC1" at page 53 of the record of appeal. A casual glance at the said Will shows that it was not signed by the deceased, though the 2nd appellant deposed that it was thumb printed. The signatures of the witnesses appear to be missing. To us, these questions could have been resolved through trial. Simply put, the validity of the Will and whether the deceased died intestate, would have been resolved at trial.

In addition, we are alive to the arguments by Mr. Mwandenga that a Will can only be invalidated in accordance with **section 6 of the Wills and Administration of Testate Estates Act**.

Subsection (1) of that section provides that

"A Will shall be valid if it is in writing and

(a) Is signed at the foot or end, by the testator or by some other person in the testator's presence and by his direction; and

(b) The signature referred to in paragraph (a) as made or acknowledged by the testator in the presence of two witnesses present at the same time who have also signed at the foot or end of the Will"

Mr. Mwandenga contends therefore, that the finding by the trial judge that the **"executors of the purported Will have not obtained probate to prove the validity of the Will. That being the case and in terms of section 35 of the Wills Act, the same has not been evidenced as it has not been probated..."** was wrong as it is against section 6 of the Act.

Our perusal of **section 35 of the Wills and Administration of Testate Estates Act** reveals that it provides for the effect of probate on a Will. It simply states that when the probate of a Will has been granted the executor shall have authority to distribute the estate in accordance with the Will. It does not imply nor state that when an executor does not obtain probate the Will is invalidated. As argued by Mr. Mwandenga, a Will can only be invalidated in terms of **section 6 of the Wills and Administration of Testate Estates Act**

and an executor can accept or reject appointment, but this does not invalidate the Will.

It was imperative for the judge to have conducted a trial and to have received evidence from the executors on why they did not take up probate. The witnesses would have been cross examined as to whether they were stopped by the appellants as found by the trial judge. Consequently, the trial judge erred in law and fact to have held that the Will was invalid because the executors did not obtain probate and that the deceased died intestate.

We are alive that this matter was commenced by originating summons and could therefore have been disposed off in chambers, on affidavit evidence. However, where there are contentious issues as in this case, open court trial should be conducted. The Supreme Court, in **Esther Sitali Ngula v The Administrator General (Suing as Administrator of the Estate of the late Inonge Sitali)**[8] observed that:

> ***"The mode of commencement for any action is provided for in the relevant statute and rules, it does not depend on the reliefs sought.***

> ***It is clear that contentious issues require exhaustive evidence, evidence which can be examined and evaluated by the parties as well as the trial court, such evidence would be the basis for findings of fact upon which the verdict may be based. Clearly, the claims enumerated by the respondent cannot be sufficiently dealt with by affidavit evidence alone..."It was pointed out in the case of New Plast Industries[9] that evidence can be written or oral but it has to be tested and evaluated, clearly, that is only possible in an open trial..."***

We are accordingly guided and order that open court trial be conducted in this case. We also note and as argued by counsel, that the judge despite rejecting the affidavit of Rose Chiboma Chanda still ended up referring to it in her judgment. We must state that it was actually wrong for the judge to reject her affidavit on the ground that she was not a party to the proceedings. It is settled law that non parties can swear and file affidavits on behalf of a party as long as they depose on matters within their knowledge. And this is crucial in matters commenced by originating summons which can be disposed off an affidavit evidence without trial. Invariably, we find merit in grounds two, four and five. We order that the matter be remitted to the High Court for trial.

We are equally inclined to allow ground three. We agree with Mr. Mwandenga and the cases he has cited, that the jurisdiction of the Local Court is limited to estates which do not exceed the value of K50,000.00. Ground three also succeeds.

Turning to grounds one, six, seven and eight, we are of the considered view that these grounds are rendered otiose, having ordered open trial to resolve contentious issues as to whether the deceased died intestate or not and paternity of the respondent.

In the circumstances of this case, we order each party to bear own costs in this Court and below. Matter is remitted to the High Court for open court trial.

C.F.R. MCHENGA
DEPUTY JUDGE PRESIDENT

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE