five copy

IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO 116/2018**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

JACKSON MOOYA **APPELLANT**

AND

NCHIMUNYA MWEEMBA **RESPONDENT**

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 20th and 27th February 2019

FOR THE APPELLANT: MISS D. NUNDWE OF MESSRS RANCHOLD CHUNGU & CO

FOR THE RESPONDENT: NOT IN ATTENDANCE

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Legislation referred to:

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

This is an appeal against the Judgment of the High Court in so far as it directs that the position of the parties as at 2003 should be the

current position and that the letters of administration in respect of all the surviving administrators of the estate be revoked.

Further that the administrators restore to the estate all the property they had taken and that the Administrator-General takes charge of the estate to render a full account of the distribution by the administrators.

The brief background of the case is that the estate in dispute became intestate in 1997 when the owner, one Mr. Joseph Bulawayo Mweemba died intestate. He died having left five wives each with children as well as property both real and personal.

In 1998, after the memorial ceremony, the family appointed three Co-administrators among them the Appellant, who is a nephew to the deceased. The administrators then went on to distribute the estate to the widows and their respective children as families. The record shows that all the properties comprising the estate were distributed accordingly in exception of a farm and a guest house.

In due course some beneficiaries from two of the families expressed dissatisfaction with the position taken in 1998 that the farm and the guest house be retained as communal properties to all the beneficiaries. They asked the administrators to sell the guest house.

As a result of the dissatisfaction and the demand to sell the guest house, the administrators asked all the families to attend before the Subordinate Court in 2003.

Under the guidance of the Court, the families and the administrators agreed on how the farm and the guest house should be distributed and the agreement was reduced into writing and signed by representatives from each family and the administrators.

This distribution did not however, settle the matter as other family members went to the Local Court where they contested the distribution in 2008. The main bone of contention related to the farm which was designated as a homestead for all the beneficiaries. Some beneficiaries wanted the farm to be distributed and the Local Court gave an order for the sharing of the farm in accordance with Section 5 of the Intestate Succession Act and the demarcations were effected with the assistance of the Surveyor- General.

The Respondent was displeased with the outcome and commenced an action in the Subordinate Court. The Subordinate Court's decision was that the farm be given to only two of the five families. It is that decision that gave rise to the appeal to the High Court.

In the High Court, the matter was heard de novo with witnesses called by both sides. The issues the Court below was called upon to determine were whether there was equitable distribution of the

estate of the late Joseph Bulawayo Mweemba and whether the Defendant should be removed from being an administrator.

After considering all the evidence before her and the submissions by Counsel for the two parties, the learned Judge below went on to review the law on Intestate Succession. She came to the conclusion that the three administrators including the Respondent herein were duly appointed in 1998. She however, found that the administrators did not comply with the provisions of the Act in that they did not distribute the estate equitably. The learned Judge also found that the sharing of the farm and the guest house in 2008 was inconsistent with Section 5 of the Act as the two properties had been designated as common to all the beneficiaries.

According to the evidence before the Court below, the farm was given to two families while the guest house was given to three families. Ultimately, the learned Judge found that all the parties were bound by the 2003 Agreement as a representative from each family and all the three administrators signed it while the 2008 redistribution of the farm and the guest house was instigated by three families who were also parties to the 2003 Agreement.

The learned Judge then reversed the decision of the Subordinate Court that ordered the re-distribution of the farm and the guest house and re-instated the 2003 Agreement as the current position.

The learned Judge further revoked the appointment of the two surviving administrators and ordered that they restore to the estate the property they had acquired from the estate. She referred the matter to the Administrator-General to receive an account and to distribute the estate not distributed.

Aggrieved by the decision of the Court below, the Appellant, who was the Defendant in the Court below; appealed on the following grounds;

1. *That the honourable Court misdirected itself in law when it found that the current position of the parties should be the position that existed in 2003 where all the parties agreed and signed notwithstanding the provisions of Section 5 of the Intestate Succession Act, Chapter 59 of the Laws of Zambia which provides for the proportions of distribution of the estate of the deceased.*
2. *That the honourable Court misdirected itself in fact and law when it revoked the letters of Administration for all administrators with immediate effect and it was a finding which no court on a well balanced view of all the evidence would have arrived at.*
3. *That the honourable Court misdirected itself in fact and law when it declared that all the property that the administrators gave themselves from the estate should be further returned to*

the estate and the matter be referred to the Administrator-General.

In ground one, the Appellant challenges the learned Judge's decision that upholds the 2003 estate sharing agreement by the families on account that it was non-compliant with Sections 5, 7, 8, 9 and 10 of the Act.

The argument is that whereas the said Sections set out the distribution of the estate in percentages to the specified beneficiaries, as well as how specified property ought to be distributed; the 2003 Agreement was not made in compliance with the Act.

It is noted from the record that in the Court below, the dispute centred on the 2003 distribution of the farm to some beneficiaries and the guest house to the others and the 2008 distribution of the farm to all the families in equal proportions.

But in her Judgment, the learned Judge considered the entire estate and came to the conclusion that the administrators had not distributed the estate in compliance with Section 5 of the Act. Having so found, the learned Judge restored the 2003 Agreement on the basis that it was agreed upon by all the beneficiaries as representatives from each family and all the administrators signed the document. She dismissed the 2008 Agreement on account that

it was made at the behest of only three families and it was not reduced into writing.

We accept the position taken by the Court below that the distribution of the estate was not done in compliance with the provisions of the Act. The Appellant has for that reason questioned the decision by the Court below to endorse an Agreement which distributes an intestate estate contrary to the provisions of the Act.

The Act, in the preamble provides as follow;

> ***"An Act to provide a uniform intestate succession law that will be applicable throughout the country, to make adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate to provide for the administration of the estates of persons dying not having made a will; and to provide for matters connected with or incidental to the foregoing".***

What is key from the preamble in our view is the desire to make adequate provision for the stated categories of beneficiaries out of an intestate estate. Section 14 of the Act provides for a penalty against any person who deprives a beneficiary of any property they are entitled to from the estate.

Under Section 42, the Act empowers the Court, upon application by an interested person in relation to a deceased person's estate to inter-alia;

(c) ***Decide how the distribution of the property forming part of the deceased persons estate should be carried out.***

In our view, Section 42(c) clothes the Court before which an application is made with sufficient powers to decide how the estate shall be distributed.

Further Section 13 of the Act provides as follows;

"Notwithstanding anything in this Act, any person entitled to share in the estate may transfer his share in the estate to a priority dependant".

A priority dependant under the interpretation Section of the Act is defined as; **"Wife, husband, child or parent".**

Since the 2003 Agreement was out of the decision of the priority dependants namely the wives and their children, their decision to distribute the estate as they did could not be superseded by the 2008 re-distribution.

Further, in the circumstances of this case which had gone to and from the Courts, the Court below was at liberty to uphold the 2003

Agreement in exercise of its powers under Section 42(c) earlier referred to in this Judgment. So to the extent that the distribution was agreed to by the priority dependants and the same was endorsed by the Court below, the administrators' non-compliance with Section 5 of the Act is cured as the said distribution becomes that of the Court. We would therefore dismiss ground one for the aforestated reasons.

Grounds two and three were argued together as both seek to impugn the learned Judge's order to the surviving administrators to restore any property they had taken from the estate and to revoke their letters of administration. The Appellant denied getting the 25 herd of cattle from the estate as alleged by the Respondent. The Respondent did not call any witness to support his allegation.

On that basis we are of the view that the allegation was not proved on a balance of probabilities and we therefore, discount it as the basis upon which the Court below could order the revocation of the administrators' letters of administration. It was however, the Appellant's failure to account for 31 herd of cattle that raised doubt as to his competency in the administration of the estate.

We however, note that under Section 29 of the Act which provides for circumstances under which letters of administration may be revoked or annulled the Court has wide powers and it is our view that before exercising the said powers on account of the

administrators' failure to distribute the estate in accordance with the Act, the Court ought to have first ordered that such administrator(s) should furnish the Court with an account of the administration of the estate.

In this case, the Court below acted on the evidence of the Respondent and did not order the Appellant to account. It will be noted that under Section 19(c) of the Act, the administrator has no inherent duty to produce an inventory of the estate or to render an account unless the Court so orders of its own motion or on an application by an interested person.

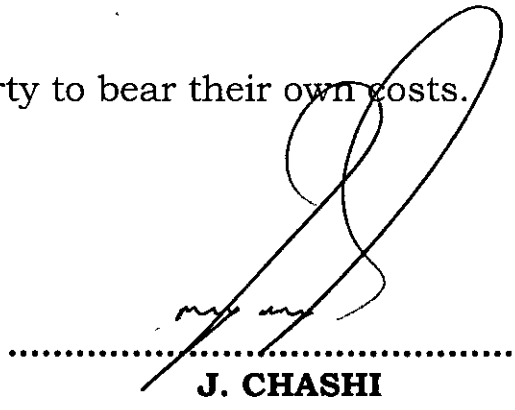
We therefore, take the position that had the Court below made an order to account under Section 19(c) (ii) it would have got a clearer picture of how the estate was distributed and whether or not both surviving administrators, the Appellant inclusive, made themselves beneficiaries of the estate contrary Section 34(1) of the Act which prohibits an administrator from deriving pecuniary benefit from his office.

The order revoking the letters of administration for the Appellant and the other surviving administrators is hereby set aside. We instead order that the Appellant and the surviving co-administrator render an account of how they administered the estate. The account will be rendered to the Court below in a manner and at a time as shall be determined by the said Court.

In view of our order to render an account, the order by the Court below referring the matter to the Administrator General is equally set aside. The Court below will however, be at liberty to issue a fresh order in that respect if after considering the account, it still holds the view that it is necessary to appoint the Administrator-General to take charge of the estate or to make any other order under Section 29 of the Act.

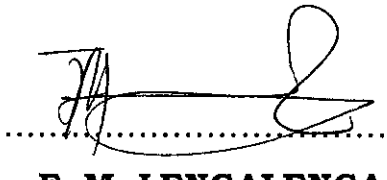
The end result is that the Appeal partially succeeds on grounds two and three but fails on ground one.

We order each party to bear their own costs.



.....

J. CHASHI
COURT OF APPEAL JUDGE



.....

F. M. LENGALENGA
COURT OF APPEAL JUDGE

.....

M. J. SIAVWAPA
COURT OF APPEAL JUDGE