

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

2016/HP/1321



BETWEEN:

CYNTHIA ZIMBA

PLAINTIFF

AND

YAMMIE ZIMBA (sued in her capacity as Administratrix
of the estate of the late Kanyuka Zimba)

1ST DEFENDANT

MARGARET ZIMBA (sued in her capacity as Administratrix
of the estate of the late Kanyuka Zimba)

2ND DEFENDANT

For the Plaintiff: Mrs R.P. Bwalya – Lisutu Chambers

For the Defendants: Mr M. Chileshe – Eric Silwamba, Jalasi & Linyama Legal Practitioners

RULING

CASE REFERRED TO:

1. Chikuta v. Chipata Rural Council (1974) Z.R 241
2. Chansa Chipili & Powerflex (Z) Limited v. Wellington Kashimike Wilson Kalumba (2012) 3 ZR 483 (S.C)

LEGISLATION REFERRED TO:

1. The High Court Act, Chapter 27 of the law of the Laws of Zambia

2. The Intestate Succession Act, Chapter 59 of the Laws of Zambia
3. The Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia
4. Matrimonial causes Act, No 20 of 2007
5. White Book 1999 Edition

This action was commenced by way of Writ of Summons and Statement of Claim in which the plaintiff is claiming the following:

1. For an order that the plaintiff and Niza Zimba (minor) are beneficiaries of the estate of Kanyuka Zimba
2. That the defendants produce an inventory and account of the estate of Kanyuka Zimba as was distributed to the beneficiaries
3. That the plaintiff be given her entitlements as a surviving spouse under the estate as provided by law
4. That Niza Zimba be given her entitlement as a dependant under the estate as provided by law
5. That letters of administration be revoked if it is found that the defendants misappropriated the funds belonging to the estate
6. That the plaintiff be appointed Administrator/Co-administrator of the estate
7. Interest on amount claimed
8. Costs
9. Any other relief that the court may deem fit

The defence filed a conditional memorandum of appearance which was endorsed on 26th July, 2016. On 18th August, 2016, they filed Summons to set aside originating process *videlicet* Writ of Summons and

Statement of Claim for irregularity pursuant to Order 6 Rule 1(2) as read with Order 30 Rules 12 and 13 of the High Court rules, Chapter 27 of the Laws of Zambia on the following grounds:

- (i) The high Court of Judicature is wanting in jurisdiction as the plaintiff has invoked the wrong mode of commencement. The plaintiff should have commenced her action by Originating Summons pursuant to Order 30 Rules 12 and 13 of the High Court Rules, Chapter 27 of the Laws of Zambia
- (ii) In any event, claims 1, 2, 3, 4, 5 and 6 are statute barred. The defendants will rely, inter alia, on the provisions of section 5 of the Intestate Succession Act, Chapter 59 of the Laws of Zambia and Part III, in particular section 22 of the Wills and Administration of the Testate Estates Act, Chapter 60 of the Laws of Zambia
- (iii) In any event, the claim in paragraph 3 is incompetent as the plaintiff is not the surviving spouse of Kanyukaimba (deceased). The defendants will rely on section 36(1) of the Matrimonial Causes Act, No. 20 of 2007
- (iv) The purported Writ of Summons is incompetent as it is not duly endorsed with the plaintiff's full address in terms of the High Court Rules; S.I No. 27 of 2012.

The Summons is supported by an affidavit sworn by the 1st defendant and it exhibits among other documents proceedings between the plaintiff and the deceased for judicial separation in the High Court of Zambia (marked "YZ1"); Letters of Administration appointing the defendants as joint Administratrix.

The plaintiff filed an affidavit in opposition in which she avers that she verily believes that this action was not commenced wrongly as commencement by Originating Summons is not mandatory when a matter cannot be fully disposed of in chambers on affidavit evidence and avers that there are triable matters in this action especially in relation to the child Niza Zimba. Exhibited to the affidavit is a Committal Order placing the child in the care of the plaintiff and the deceased. The plaintiff also avers that the Writ is not irregular as she resides within Silverest school and she does not possess an active email or personal postal address. She further avers that the action is not statute barred as it was filed within the allowed time frame and the law does allow for relief to be sought on certain claims even outside the statutory period for commencement of action. The affidavit goes on to disclose that the application to set aside the writ was filed outside the requisite 21 days after which the conditional appearance had become unconditional. The defendant ought to have complied with the orders for directions which had earlier been issued by the Judge on 22nd July, 2016. The plaintiff deposes that she would suffer injustice if the originating process was set aside as the action would not be heard on its merits and justice would be denied. In any event, the defect can be cured at law to allow for the matter to be heard.

I have carefully considered the affidavit evidence as well as the detailed arguments for and against the application to set aside the originating process. Before I address the issues raised in the application, I have to consider whether the said application is irregular on account of the fact that it was filed after the lapse of 21 days. I note that following the said

lapse, the plaintiff did not take any steps, that is to say, she did not file Judgment in default of defence which entails that she sat on her rights. I will thus proceed to consider the application on its merits.

The first ground is as regards the mode of commencement. I have looked at the Orders in issue being Order 6 and Order 30.

Order 6 Rule 1 (1) and (2) provide that;

(1) Except as otherwise provided by any written law or these Rules every action in the High Court shall be commenced by Writ of Summons endorsed with or accompanied by a full statement of claim.

(2) Any matter which under any written law or these rules may be disposed of in chambers shall be commenced by an Originating Summons

Order 30 Rule 12 states that;

The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested under the trust of any deed or instrument in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law of a deceased person or as cestui que trust or as claiming by assignment or otherwise under any such creditor or other person as aforesaid may take out an originating summons for such relief of the nature or kind following, as may be specified in the summons and as the circumstances may require, that is to say, the determination, without an administration by the Court of the estate or trust, of any of the following

questions or matters so far as the same arise in the course of the administration or performance of such estate or trust:

(a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or cestui que trust;

(b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others;

(c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;

(d) the payment into Court of any money in the hands of the executors or administrators or trustees;

(e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees;

(f) the approval of any sale, purchase, compromise, or other transaction;

(g) the determination of any question arising in the administration of the estate or trust.

Order 30 Rule 13 provides that;

Any of the persons named in the last preceding rule may in like manner apply for and obtain an order for-

(a) the administration of the personal estate of the deceased;

(b) the administration of the real estate of the deceased;

(c) the administration of the trust;

(d) any act to be done or step to be taken which the Court could have ordered to be done or taken if any such administration order as aforesaid had previously been made.

The defence referred me to the case of **Chikuta v. Chipata Rural Council** (1) where the Supreme Court stated that:

The Zambian Rules are much more rigid. Under Order 6, rule 1, every action in the court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules. Order 6, rule 2, states that any matter which under any written law or the Rules may be disposed of in chambers shall be commenced by an originating summons. Rule 3 provides for matters which may be commenced by an originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by a writ of summons or by an originating summons. The procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, and to those matters which may be disposed of in chambers. Chamber matters are set out in Order 30 of the High Court Rules.

In light of the foregoing provisions of the law and the above authority, it is abundantly clear that this action ought to have been commenced by way of Originating Summons.

In the second ground, the defence contends that the matter is statute barred. In support of this ground, reliance has been placed on section 5 of the Intestate Succession Act, Cap 59 as well as section 22 of the Wills

and Administration of Testate Estates Act, Cap 60. Section 5 provides for the distribution of estate.

Section 22 of Cap 60 states that;

(1) Except as provided by section twenty-four, an order under this Part shall not be made except on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out.

(2) For the purpose of the exercise by the court of its discretion as to the persons to whom letters of administration are to be granted, a dependant of the testator by whom or on whose behalf an application under this Part is proposed to be made shall be deemed to be a person interested in the estate.

After carefully reading the above provisions, I am of the view that the second ground has no merit. Cap 59 does not provide for any time limit within which a beneficiary can make a claim to the estate of an intestate. My understanding of the section 22 of Cap 60 is that it is a provision pursuant to which a priority dependant can apply for an adjustment to the portion inherited.

There is no claim made by the plaintiff for the adjustment of the portions to be inherited. The plaintiff is claiming her entitlement as well as that of the dependant Niza Zimba in accordance with section 5 of the Cap 59. I therefore do not agree that the claims are statute barred. Section 22 does not apply in this regard.

The third ground is that the plaintiff is not a surviving spouse therefore the claim in paragraph 3 is incompetent. The defence relied on section 36(1) of the Matrimonial causes Act which provides as follows:

Where a party to a marriage dies intestate as to any property while a decree of judicial separation is in operation that property shall devolve as if that party had survived the other party to the marriage.

It was submitted on behalf of the plaintiff that the competency of the plaintiff as surviving spouse is an issue to be determined in the main action and I do quite agree with this submission. In any case, the above provision of the law is very clear; judicial separation does not extinguish the rights of the party in relation to their spouse.

The fourth and final ground is that the writ is incompetent as it is not duly endorsed with the plaintiff's full address. I agree. Statutory Instrument No. 27 of 2012 is couched in mandatory terms. The Physical, postal and electronic address of the plaintiff ought to be endorsed on the writ failing which the writ is irregular. However, it has been submitted by the plaintiff that she does not have an active email address and a personal postal address but in compliance with the requirement of the law, the plaintiff's advocates have supplied the electronic and postal address such that the intent of this law is not defeated for purposes of service and other communication. This is, in my view, a valid argument. Clearly, the defendant will not suffer any prejudice on account of the absence of these addresses. The plaintiff has after all furnished the physical address and the advocate's full address is endorsed on the writ.

Nevertheless, the law is mandatory meaning every litigant is expected to have these addresses. In this regard, the plaintiff resides at a school which no doubt has a postal address, thus, the same could be used. Further, an email address can be easily created.

While I take cognizance of the High Court decisions cited by the defence such as **Freddy Hirsch Group Limited v. Food Lovers Lusaka Limited 2013/HPC/0443** and **Inyatsi Construction Limited v. Pouwels Construction Zambia Limited & Another** which basically set aside the originating process for irregularity due to the failure by the plaintiff to endorse the full address, I am more inclined to adopt the approach of the Supreme Court in the case of **Chansa Chipili Powerflex (Z) Limited v. Wellington Kashimike Wilson Kalumba (2)** which held that *“an irregularity on account of procedure would not be fatal because corrective action can be taken to allow the action to stand so that triable issues can be proceeded with, if that was all that was irregular.”*

As such, this action need not be set aside on the fourth ground. The plaintiff can take corrective action as guided above.

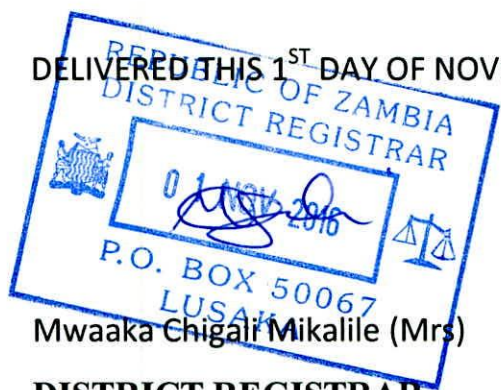
For the avoidance of doubt, I am of the view that the defendants' application is meritorious only as regards the first and fourth ground. But as stated above, the defect in the fourth ground is curable. It is the defect in the first ground that is more serious. The plaintiff as stated in the earlier part of the ruling ought to have commenced the action by way of Originating Summons as provided for by Order 6 Rules 1 and 2

and Order 30 Rules 12 and 13. Since this matter is not properly before court, it ought to be set aside as was held in the *Chikuta* case.

In the circumstances, this action is hereby set aside. Due to the fact that the application was made outside the stipulated time, each party will bear her own costs.

Leave to appeal is granted.

DELIVERED THIS 1ST DAY OF NOVEMBER, 2016



Mwaaka Chigali Mikalile (Mrs)
DISTRICT REGISTRAR