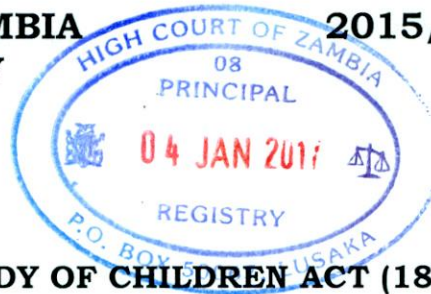


IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA

(Civil Jurisdiction)



2015/HP/2328

IN THE MATTER OF: THE CUSTODY OF CHILDREN ACT (1891)

IN THE MATTER OF: THE GUARDIANSHIP OF INFANTS ACT (1886)

IN THE MATTER OF: SECTION 32 OF THE INTESTATE SUCCESSION ACT  
CHAPTER 59 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: SECTION 9 (2) OF THE HIGH COURT ACT AND  
ORDER 30 RULE 11 (e) OF THE HIGH COURT  
RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: AN APPLICATION FOR AN ORDER FOR THE LEGAL  
GUARDIANSHIP OF TWO MINORS NAMELY;  
DOROTHY MWAGOMBA AND PRISCILLA  
MWAGOMBA

BETWEEN:

BERNADETTE MASUMBA

1<sup>st</sup> APPLICANT

BEYETA N'GANDU

2<sup>nd</sup> APPLICANT

AND

ACKIM MWAGOMBA

1<sup>st</sup> RESPONDENT

ELINA MWAGOMBA

2<sup>nd</sup> RESPONDENT

RHODIA MALAMBO MWAGOMBA

3<sup>rd</sup> RESPONDENT

(Sued in their capacity as co-administrators of the estate  
of the late James Munthali Mwagomba)

**CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC**

*For the Applicants:* Mrs. F. Muchiya of Messrs Barnaby  
Chitundu & Advocates

*For the 1<sup>st</sup> Respondent:* N/A

*For the 2<sup>nd</sup> Respondent:* Ms. B. Mwiinga of Messrs Legal Aid  
Board

*For the 3<sup>rd</sup> Respondent:* N/A

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**J U D G M E N T**

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***Cases referred to:***

1. *Deijil Van Deijil* (1996) 4 SA 260 R
2. *Stoyke v. Stoyke* SCZ No. 6 of 1968
3. *Robert Simeza (as Executor) and 3 others v. Elizabeth Mzeche*  
(2011) 3 ZR 290

***Legislation referred to:***

1. *The Guardianship and Custody of children Act (1891) of the  
United Kingdom*
2. *British Acts Extension Act Chapter 10 of the Laws of Zambia*
3. *Intestate Successions Act, Chapter 59 of the Laws of Zambia*
4. *High Court Act Chapter 27 of the Laws of Zambia*
5. *The United Nations Convention of the Rights of Children (1989)*

The legend of this case is that the Applicant on 4<sup>th</sup> December, 2015 launched proceedings against the Respondents by mode of originating summons seeking for the following reliefs:

- (i) *An Order appointing the Applicant as the legal guardian of the two minors namely Dorothy Mwagomba and Priscilla Mwagomba;*
- (ii) *An order compelling the Respondents to distribute the share of the said minors under the estate of their later father to the Applicants;*
- (iii) *A declaration that the Applicants are entitled to receive and keep in trust the share of the two minors under the estate of their father;*
- (iv) *Further and any further relief the Court may deem fit;*
- (v) *Costs of and incidental to this action.*

The originating summons was supported by an affidavit deposed to by the 1<sup>st</sup> Applicant. The summary of which is that the 1<sup>st</sup> Applicant a 46 year old single parent currently employed as a teacher at St. Monica's basic School in Lusaka is the guardian of the two children namely Dorothy Mwagomba (female) born on 20<sup>th</sup> December, 2002 and Priscilla Mwagomba (female) born on 18<sup>th</sup> December, 2008.

The said minor children are the children of her late sister Priscilla Musenge Mwagomba as evidenced by the deceased's medical certificate of death marked as exhibit BM1. She died on 17<sup>th</sup> April, 2011. The father of the minors being the late Mr. James Munthali

Mwagomba who died intestate on 1<sup>st</sup> April, 2014 who was married to her sister.

Following her sisters' death, her husband requested the 1<sup>st</sup> Applicant to look after Priscilla Mwagomba who was then aged 2 years and assumed responsibility and has been providing all the necessities of life and at the time of filing this matter the minor was doing grade II.

In January, 2014 her late husband granted her young sister Mrs. Beyeta N'gandu custody of the minor infant Dorothy Mwagomba in a letter dated 16<sup>th</sup> January, 2014 produced as exhibit "BM2".

That the Applicants have been keeping and providing the necessities of life to the named minors.

The late Mr. Mwagomba had four children, 2 with the Applicants sister and 2 from a previous marriage or relationship. Following the demise of Mr. James Mwagomba the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were appointed as administrators of his estate vide exhibit "BM3".

That upon obtaining an order of appointment the Respondents under cause No. 2014/HP/918 where they sought among other things an order for interim injunctions restraining the widow from claiming a share in the property of the deceased acquired before he married her which proceedings. She also applied to be joined as a party.

That the Court through its Ruling dated 2<sup>nd</sup> September, 2014 dismissed her application for joinder. The Ruling ordered that the

widow be joined as administrator and further that the Administrator General tries to resolve the matter amicably.

The Meeting flopped because the Respondents insisted that she was not lawfully appointed as a legal guardian and as such she had no authority to receive the shares of the minors.

The 1<sup>st</sup> Respondent, the brother to the deceased insists that the share of the children should be kept by him as administrator and that he should be granted custody of the minors.

At no material time did the Respondents ask for the custody of the children until the Bank of Zambia computed the terminal benefits of its employee the deceased Mr. Mwangomba.

She believes that the Respondents are not interested in the well being of the said minors apart from the inheritance. It was deposed that the youngest minor namely **Priscilla Mwangomba** considers her as the mother following her mothers' death.

That the consent to look after the children was given to them by the deceased Mr. Mwangomba as aforesaid.

She concluded by praying for an order of legal guardianship of the minors educational and to declare the Applicants as the persons legally entitled to receive and keep in trust for the benefit of the minors the share of their inheritance from the fathers estate without interference from the Respondents.

The application was opposed by a joint affidavit deposed to by the Respondents. The summary of which was that following the death

of Mr. Mwangomba they were appointed administrators as evidenced by exhibit "AM2".

The deceased left 4 children whose mothers have since died. The 3<sup>rd</sup> Respondent is the surviving spouse of the intestate who did not have children with deceased.

Prior to the marriage with the 3<sup>rd</sup> Respondent, the deceased contracted a traditional marriage with Priscilla Mwansa who is the mother of Dorothy Mwangomba and Priscilla Mwangomba. That under Ngoni custom a payment of **malobola** has to be made. That the late Mr. Mwangomba paid the said malobola in full and as such he was entitled to the children of the marriage.

That upon the death of his wife Priscilla Mwansa on 17<sup>th</sup> April, 2011 both the family of the late wife and then surviving husband agreed to allow the Respondent to take custody of the children of the marriage namely Dorothy and Priscilla who were minors and could not stay with the father who by then was a widower and had no one else to look after the children. The death certificate was exhibited as "AM3".

That the 1<sup>st</sup> Applicant upon being granted the custody of the children demonstrated that she was incapable to take care of the children as she transferred the custody of one of the minors to the 2<sup>nd</sup> Applicant.

That for a long time prior to his death the other children of the deceased **ELINA MWAGOMBA** and **ELIZABETH MWAGOMBA** had

been persuading the father to bring back the other minors to the matrimonial home but to no avail due to the disharmony at home between the deceased Mr. Mwangomba and the 3<sup>rd</sup> Respondent who had been taken into marriage.

That following the Ruling of the Court alluded to by the Applicants; the 1<sup>st</sup> Respondent opened a fixed deposit bank account for the 2 minor children at Barclays Bank Mutaba Branch in the sum of K80, 000 as evidenced by exhibit AM1.

That a dispute has now erupted between the personal representatives of the estate and the applicants herein who are demanding at all costs to take control of the minors money in the fixed deposit account to which the 1<sup>st</sup> Applicant is a signatory with the personal representatives.

That following the demise of Mr. Mwangomba, the 1<sup>st</sup> Applicant was paid a sum of K52,507.80 on behalf of the minor children. The same was to be invested in Bank of Zambia Kwacha Trust Fund established for the employees at Bank of Zambia. The 1<sup>st</sup> Applicant has instead put the money in her personal account without accounting to anyone.

A further sum of K71, 772.44 was received from Zambia National Pensions Scheme Authority on behalf of the minors and she has declined to transfer the same to Barclays bank account where the personal representatives are signatories – see exhibit “AM5”.

That the 1<sup>st</sup> Applicant has children and other dependants and keeping the children's money in her personal account is detrimental to the welfare of the children.

It was deposed that in the event of any eventuality the money intended for the children will or may not benefit the children.

The 2<sup>nd</sup> Respondent who is the blood sister to the said Children is now of age and desirous to take care of her siblings at the matrimonial home left by the father.

That attitude of the Applicants has caused divisions amongst the children of the same family.

It was finally deposed that the application for guardianship of the children be dismissed as the Applicants interest at hand is money and not for the natural love for the children.

The 3<sup>rd</sup> Respondent filed an affidavit in support of the Application. The essence of which is that she confirms that indeed the late Mr. Mwangomba (her husband) in January, 2014 and 16<sup>th</sup> June, 2014 granted the custody of the children Dorothy to 1<sup>st</sup> Applicant and Priscilla to 2<sup>nd</sup> Applicant who have been attending to all the needs of the children. At the material time no one complained about the arrangement.

She deposed that she has reasons why the Mwangomba's family cannot get the children now after the fathers' death namely:



- (i) There are 2 houses left by the late husband which are being rented by the Mwagomba family but nothing is being given to the 2 minors.
- (ii) The 2<sup>nd</sup> house has also not benefited the minors in anyway.
- (iii) That family took everything from the husband's house and never gave anything to the 2 minors.
- (iv) That the 1<sup>st</sup> Respondent withdrew K40, 000 from her late husband's account and did not give a share to the 2 minors.

She finally deposed that the best interest of the children lies in the Applicants keeping the children and not Mr. Mwagomba's family that if the children's custody were to be given to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the children will suffer.

That the Applicants are well placed to look after the interests of the minors being teachers it will be easy for them to handle the education of the minors.

The Applicant filed an affidavit in reply. The essence of it of which was that she admits the 3<sup>rd</sup> Respondent was also appointed as administrator of the estate by a Ruling dated 2<sup>nd</sup> September, 2014 under cause No. 2014/HP/918. She admits that the late Mr. Mwagomba paid a sum of K220.00 as bride price for marriage of her late sister but did not pay the **malobola** which is a payment for children under Ngoni customary law.

That her parents have denied having received the malobola payment apart from the bride price aforesaid.

She denied having been granted the custody of both children but for one **Priscilla** who was 2 years old at the time. She denied receiving any money from the late Mr. Mwangomba, never remitted any money for the maintenance of the 2 minors and in the information given to her by the 3<sup>rd</sup> Applicant the late had no problem with her husband over the custody of the 2 minors.

She stated that the estate has not been distributed and denies having received the share of the minors. She deposed that she attended a meeting at Kwacha Trust Fund where I learnt that the 1<sup>st</sup> Respondent had falsely sworn an affidavit claiming that he was the guardian of the 2 minors – see exhibit “BM1” and had actually been paid some money. The Trust informed her that investigations would be launched to determine the legitimate guardian.

That she was given K52, 000 as a share for the 2 minors and registered as a recipient of monthly allowances. When the 1<sup>st</sup> Applicant learnt about it he demanded the custody of the child and the money which she declined to give him.

She admits receiving a sum of K68, 000 from NAPSA from which she intends to buy a house once the portion of the 2 minors are given from the estate.

It was deposed that she has been informed the 1<sup>st</sup> Respondent is actually a Pastor who has converted one of the estate houses into a church thus depriving the beneficiaries that include the 2 minors of income.

It is her belief that the Respondent withdrew all the money belonging to the deceased just prior to his death and has never accounted for the same.

At the time of hearing and upon agreement by the parties, I made orders as to the filing of the submissions. I only received the submissions in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Applicant.

The summary of the submissions were that before the expiry of the late Mr. James Munthali Mwangomba who died intestate on 1<sup>st</sup> April, 2014 he had directed that the two children of the family namely **Dorothy Mwangomba** born on 20<sup>th</sup> December, 2002 and **Priscilla Mwangomba** born on 18<sup>th</sup> December, 2008 be left in the custody care and attention of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants respectively who were the sisters by sanguinity to the late Priscilla Musenge who was married to the said Mr. Mwangomba.

After the death of the said Mr. Mwangomba the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were appointed co-administrator and administratrix of the estate who have since refused to recognise the Applicants as guardians of the two minors and they have refused and neglected to distribute the share of the inheritance of the 2 minors claiming that the 2 minors are not legal guardians.

It was submitted that the **Guardianship of Infants Act and the Custody of Children Act**<sup>2</sup> applies to Zambia by virtue of Section 2 of the **British Acts Extension Act of Zambia**<sup>3</sup>. It was his submission that the said Acts make provisions for grants of orders for Guardianship of infants.

He pointed out that Section 2 of the Guardianship and Custody of Children Act, 1891 provides that:-

*“For the purposes of this Act the expression “parent” of a child includes any person at law liable to maintain such child or entitled to his custody and “person” includes any school or institution”*

It was further pointed out that Section 3 of the same Act provides as follows:-

*“Where in any proceedings before the Court of competent jurisdiction the custody or upbringing of an infant or the application of the income thereof is in dispute, the Court in deciding that question shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claims of the father or any right at common law possessed by the father in respect of such custody, upbringing, administration or application is superior to that of the mother or the claim is superior to that of the father”*

Learned Counsel made reference to the case of ***Deijil v. Van Deijil (1996) 4 SA 260 (R)*** where Young J had this to say regarding the phrase ‘*In the interest of the child*’ and he stated that the interest of the child means the welfare of the minor and the term welfare of the minor must be taken in the widest sense to include economic, social, moral and religious consideration.

Counsel then called in aid the case of ***Stoyke v. Stoyke SCZ No. 67 of 1998*** where it was held that in considering the welfare of the children, it is not monetary or physical comfort that should be considered but rather the moral and religious welfare of the children and their physical wellbeing.

It was his submission that the Applicants have demonstrated that they have been looking after the concerned minors Priscilla was 2 years at the time she was taken into custody and she is now in grade 2 at St. Monica's Basic School, whilst Dorothy was taken into the custody of the 2<sup>nd</sup> Applicant when she was 12 years.

Counsel then made reference to Section 32 (1) (2) and (3) of the Intestate Successions Act<sup>4</sup> which provides that:-

- (1)A Court may appoint any person to be the guardian of a minor;*
- (2)A Court may direct the transfer to or direct the sale of the property or any part of the property of the minor;*
- (3)A guardian appointed under this Act shall be entitled to represent the interests of the minor in any proceedings in Court relating to the administration of the estate in which the minor has a share”*

Learned Counsel then made reference to Section 9 (2) of the High Court Act which provides that:-

*“The jurisdiction vested in the Court shall include the judicial hearing and determination of matters in difference, the*

*administration or control of property or persons and the power to appoint or control guardians of infants and their estates and also keepers of the persons and estates of idiots, lunatics and such as being of unsound mind are unable to govern themselves and their estate”*

In his view the proviso confers jurisdiction on the Court to appoint the Applicants as legal guardians of the two minors namely **Priscilla Mwagomba and Dorothy Mwagomba** and to entrust the said guardians with the responsibility to administer and control the estate of the minors. On the foregoing he urged the Court to grant the Applicants an order for guardianship of the two minors to the Applicants.

It was his further submission that the mere fact that the Respondents are the administrators of the estate does not entitle them to keep the share of the 2 minors. In any event, Counsel went on, the Respondents have not disclosed any basis to withhold the share of the 2 minors.

Learned Counsel then placed before the Court **The United Nations Convention of the Rights of Children**<sup>5</sup> which has since been domesticated in Zambia which provides as follows under Article 3 (1):-

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law, administrative authorities and legislative bodies, the best interests of the child shall be a primary consideration”*

Learned Counsel finally concluded by inviting the Court to grant the Applicants a joint order for legal guardianship of the two minors under the estate of their late father and further the Respondents to transfer all funds held by the on behalf of the said minors to the Applicants.

I did not receive any submissions from the Respondents. I am indebted on the very helpful researchful industry of the Learned Senior Counsel for the Applicants.

Gleaning the affidavits in support, in opposition and in reply of the application, the following facts are common cause and they are not in dispute and so I find:-

- (1) That the deceased **Mr. James Muthali Mwagomba** was married to **Mrs. Priscilla Musenge** and had 2 children between them namely **Dorothy Mwagomba (female)** who was born on 20<sup>th</sup> December, 2008 and **Priscilla Mwagomba** who was born on 18<sup>th</sup> December, 2002.
- (2) That the Applicants namely **Bernadette Masumba** and **Betty Ng'andu** were sisters to the late **Priscilla Musenge Mwagomba**.
- (3) That **Mr. James Muthali Mwagomba** died intestate on 1<sup>st</sup> April, 2014 and Priscilla Musenge died on 17<sup>th</sup> April, 2014.
- (4) **That before his demise Mr. James Muthali Mwagomba** granted the custody and care of the minor children namely

**Dorothy Mwangomba** and **Priscilla Mwangomba** unto the 1<sup>st</sup> and 2<sup>nd</sup> Applicants.

- (5) That both minors have before and upon the demise of both Mr. and Mrs. Mwangomba have been under the care custody and protection of the 2 Applicants.
- (6) That the 2<sup>nd</sup> Respondent was lawfully married under customary law to the late Mr. Mwangomba and support the Applicants to be granted legal custody and guardianship of the 2 named minors.
- (7) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the duly appointed Administrator and administratrix of the estate of the said Mr. Mwangomba.
- (8) That the estate of the deceased Mr. Mwangomba includes some real property in form of houses, terminal benefits and Kwacha Trust Fund from the Bank of Zambia where the deceased was working and benefits from National Pensions Scheme Authority (NAPSA).
- (9) That the 1<sup>st</sup> Respondent does not want and has not recognised the Applicants as legal guardians entitled to receive the due benefits due to the minors in their deceased' fathers estate and has refused to account for any funds that have come his way by virtue of being the administrator of the estate.



(10) Both Applicants are teachers by profession.

It has been deposed by the 1<sup>st</sup> Respondent that the Applicants are only interested in the benefits accruing to the infants and not the welfare of the minors. The affidavit evidence clearly settles the fact that the minors have at all material times been in the care and custody of the Applicants who have been providing all necessaries of life to the minors.

(1) WELFARE OF CHILDREN

In the case of ***Deijil v. Deijil***<sup>1</sup> Young J, pronounced himself on the meaning of the term “interest of child”. He stated that the interest of the child means the welfare of a minor and the term welfare must be taken in the widest sense to include economic, social, moral and religious considerations.

Though I am not strictly bound by judicial precedents emanating from foreign jurisdictions, I however accept that the pronouncement is a correct statement of the law and I adopt his Lordships pronouncement and I adopt it as my very own.

In our jurisdiction, it was observed in the case ***Stovke v. stovke***<sup>2</sup> that in considering the welfare of the children, it is not monetary or physical comfort that should be considered but rather the moral and religious welfare of the children and their physical well being.

Most recently the Court of final resort faced with a similar situation had occasion to instructively and authoritatively pronounce themselves in the case of ***Robert Simeza (as Executor) and 3***

**others v. Elizabeth Mzeche**<sup>3</sup> where Her Ladyship Chibesakunda Acting Chief Justice (as she then was) put it this way:-

**“Holding No. 2**      *The Court should robustly defend children’s rights*

**Holding No. 3**      *If the Courts have to err they have to err on the side of the welfare of infants”*

At page 296, Her Ladyship went on to observe as follows:-

*“The first appellant must realise that education especially child education is a badge of dignity and personhood. The duties of an Executor means constant practice of self limitation and modesty. We are of the view that this litigation was totally unnecessary and should be paid for by the Appellants not the estate. We say this because if the 1<sup>st</sup> appellants law firm continues receiving legal fees from the estate, that could be the inducement to engage in pointless litigation. We say this because from the beginning there has been no fundamental change to the intent that of resisting to pay school fees.....”*

International law recognises the children’s rights and welfare as demonstrated in the **United Nations Convention of the Rights of Children**<sup>5</sup>, it provides as follows:-

*“In all actions concerning children whether undertaken by public or private social welfare, institutions, courts or la, administrative authorities and legislative bodies, the best interest of the child shall be a primary consideration”*

The Applicants have demonstrated that they have at all material times provided all the necessities of life to the children. Both Applicants are teachers by profession. They have brought up and are bringing up the children. Even though there is no welfare report from the department of social welfare that the children are being catered for well, there is no evidence to the contrary.

These minors have been with their aunties and I have no doubt that emotional bonds between them have been evolved. It will not be in their interest that the minors should be separated from the persons they have come to treat as their very own biological mothers.

I therefore do not have the slightest hesitation to find and hold as I hold that the welfare of the two minors named herein lies with them staying and in the custody of the Applicants.

Learned Counsel traced the authority of the court to grant custody of the children from Section 2 of the Guardianship and Custody of Children Act<sup>1</sup> which provides as follows:-

*“For purposes of this Act the expression “Parent” of a child includes any person at law liable to maintain such child or entitled to his custody and “person” includes any school or institution”*

He also made reference to Section 3 of the above Act which provides as follows:-

*“Where in any proceedings before the court of competent jurisdiction the custody or upbringing of an infant, or the*

*application of any property belonging to an infant, or the application of the income thereof is in dispute. The Court in deciding that question shall regard the welfare of the infant as the first paramount consideration whether from any point of view the claims of the father or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother or the claim of the mother is superior to that of the father”*

Indeed, the application of the said British Act applies to Zambia by virtue of Section 2 of the British Acts, Extension Act<sup>2</sup> which provides as follows:-

*“The Acts of the parliament of the United Kingdom set forth in the schedule to the Act shall be deemed to be of full force and effect within Zambia”*

In our jurisdiction Section 32 (1) (2) and (3) of the Intestate Act<sup>3</sup>, provides as follows:-

- (1)A Court may appoint any person to be the guardian of a minor.*
- (2)A court may direct the transfer to or vesting in the guardian of a minor of any property of the minor and may authorise or direct the sale of the property or any part of the property of the minor.*
- (3)A guardian appointed under this Act shall be entitled to represent the interests of the minor in any proceedings in*

*Court relating to the administration of the estate in which the minor has a share.*

The provisions of the law as regards the jurisdiction and power of the Court to appoint a legal guardian and make necessary orders for the protection of minors need no further investigations.

Indeed Section 9 (2) of the High Court Act<sup>4</sup> provides as follows:-

*“The jurisdiction vested in the Court shall include the judicial hearing and determination of matters in difference, the administration or control of property or persons and the power to appoint or control guardians of infants and their estates and also keepers of the persons and estates of idiots, lunatics and such as being of unsound mind are unable to govern themselves and their estates”*

Having carefully looked at and evaluated the affidavit evidence of the litigants, I am satisfied that this is a fit and proper case to grant the reliefs being sought by the Applicants in the best interest of the minors namely **Dorothy Mwangomba** and **Priscilla Mwangomba** and I do hereby make the following orders:-

- (1) I appoint **Bernadette Masumba** and **Beyeta Masumba N'gandu** as joint legal guardians of the named two minors.
- (2) I declare and order that the said **Bernadette Masumba** and **Beyeta Masumba Ng'andu** are the persons legally entitled to

receive the share of the two minors under the estate of their later father.

- (3) I **DIRECT** that the Respondents do transfer all funds justly due to the 2 minors as beneficiaries of the estate of their father **MR. JAMES MUTHALI MWAGOMBA** to the just appointed Legal guardians within 30 days from the date hereof.
- (4) I further direct that the issues of ascertaining the inventory of the extent of the estate and account be dealt with on application by either parties before the Learned Deputy Registrar in default of agreement.
- (5) Ordinarily the successful litigants harvest the costs of litigation unless good cause is shown why the same can be given and the unsuccessful litigant suffers the wasted costs. The costs however are in the discretion of the Court; but in exercising its discretion the Court should exercise the discretion judiciously.

In the case in casu, the 1<sup>st</sup> Respondent is related to the minors by sanguinity, being a brother to the late Mr. James Munthali Mwagomba and as such he is the uncle to the vulnerable minors named herein. The Court should proceed with caution lest it acrimonises the relations of the Applicants and the Respondents.

On the authority of **Robert Simeza (as Executor) and 3 others v. Elizabeth Mzeche**<sup>3</sup> I would have ordered the 1<sup>st</sup> Respondent to personally incur the costs.

I have also factored in the fact that an Administrator does not ordinarily incur personal liability unless he conducts himself in such an outrageous manner to the detriment of the beneficiaries.

In my view the justice of the case is that the costs of this action up to this Judgment date shall be paid from the estate, however should any further costs be unreasonably incurred due to intransigency or non co-operation of the 1<sup>st</sup> Respondent or the 2<sup>nd</sup> Respondent the issue of costs shall follow the event, either before this Court or before the Learned Deputy Registrar.

Leave to appeal to the Court of Appeal is hereby granted.

Delivered under my hand and seal this <sup>20<sup>th</sup></sup>..... day of January, 2017



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**Mwila Chitabo, SC**  
**Judge**