

IN THE SUBORDINATE COURT OF THE FIRST CLASS

2017/CRMP/LCA/0056

FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA

BEFORE MRS J. S. CHIYAIKA

(Civil Jurisdiction)

IN THE MATTER BETWEEN:

BRIDGET NAKOMBE

PLAINTIFF

AND

HARRIET MKANDAWIRE

DEFENDANT



JUDGMENT

REFERENCE

STATUTES

1. The Intestate Succession Act, Chapter 59 of the Laws of Zambia
2. The Local Court Act, Chapter 29 of the Laws of Zambia.

CASE LAW

1. Mafemba v Sitali (2007) ZR 215 SC
2. Charity Oparaocha v Winfrida Murambiwa (2004) ZR 141 SC

OTHER WORKS

1. Mushota Lillian, Family Law in Zambia Cases & Materials (Lusaka, University of Zambia Press 2005)

The matter comes an appeal from the local court. The defendant appealed over the decision of the Local Court on the following grounds:

1. The lower court erred in law and in fact by ordering that she shares rentals from the house and profits from the school with a young girl who was just impregnated by her husband and does not know how they acquired the said property.
2. The Local court should have just ordered her to support the child. The plaintiff is not a widow.

The defendant bears the burden to prove on a balance of probabilities that she is entitled to her claim in the grounds of appeal.

The court heard the matter de novo. The plaintiff testified and called 2 witnesses.

PW1 was **Bridget Nakombe**. She got married to the late Joseph Botha in 2013. This was after he had impregnated her. The deceased died in 2015. They had one child. She used to stay with the deceased. She produced exhibit BN 1 as proof that she was married to the deceased. The defendant was appointed as the administrator. She has not got given her 10% entitlement as a widow and part of the 50% share for the child which the court ordered. The defendant only gave her K250.00 in January 2017.

When cross examined by the defendant, she stated that she was married to the deceased for 1 year and 7 months. She was married and it was not just that the deceased merely wanted to get away with the defilement. It is the defendant who re-started the school after the deceased died. The defendant is the one who renovated the school. it is true that the defendant started giving her money from January 2016.



PW2 was **Michael Sinkombe**. He is the biological father to the plaintiff. The plaintiff was married to the deceased. This was after he impregnated the plaintiff. He charged the deceased for damage and dowry. The deceased paid K4,500.00. The plaintiff sued at the Local Court where it was ordered that they share the property. The defendant started giving the plaintiff K250.00 monthly for the child but eventually stopped due to financial constraints.

When cross examined by defendant, he stated that the plaintiff used to stay in a room at the school. The K4,500.00 paid was for the marriage.

PW3 was **Doris Sikombe**. She is the biological mother to the plaintiff. The plaintiff was married to the deceased in 2013. The deceased was charged K20,000.00 as 'Nsalamu' (dowry) and he paid through the documents before court. She stayed with him for 1 year and 7 months. The deceased died in 2015. As a widow, the plaintiff was cleansed. The defendant was appointed as the administrator. The court ordered that the plaintiff be given 10% of the share of the estate and 50% to the child. The defendant only paid K250.00 to the child for 5 months. The defendant indicated that she had no money.

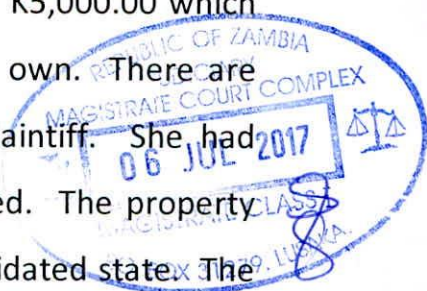
When cross examined by the defendant, she stated that the plaintiff is in a better position to explain the payments of K250.00.

The defendant testified and called 1 witness. **DW1** was **Harriet Mkandawire**. She got married to the late Botha in 1990. The deceased was a teacher. In 1995, they bought a house in Mandevu. She turned the house into a school. In 2004, they were advised by the council to put up better structures. They built 7 rooms, staff room, deceased's office and hers. They used to stay within the same premises.

In 2009, half of the pupils left as they could not pay the workers. They bought a house in Mandevu where they shifted to.

In 2013, the deceased impregnated the plaintiff. The plaintiff was a school girl at the school. The plaintiff moved in and stayed with the deceased in a room at the school. The plaintiff went away with some of the property she found and the one that was acquired with the deceased.

The deceased died on 27th January 2015. At the time of his death, the school had gone down as the primary section had ceased. Although she has continued to run the school, there is no profit. She needs to pay ground rent of K5,000.00 which was accumulated by the deceased. She has 5 children of her own. There are other 3 children outside marriage of which one is for the plaintiff. She had promised to give the 3 children K250.00 each but she has failed. The property that is there consists of flats with 13 rooms. They are in a dilapidated state. The rentals range from K200.00 to K300.00 per month. As an administrator, she has failed to share the resources as ordered by the local court because she is also suffering.



When cross examined by the plaintiff, she stated that she was told by Victim Support Unit that she should give each of the 2 children a flat.

DW2 was Tapson Banda. He is the son to the plaintiff. The deceased only paid money for damage and not dowry for the plaintiff. The plaintiff was a school going child and therefore he was scared of being taken to court.

When cross examined by the plaintiff, he stated that there was no marriage. The deceased got the plaintiff from her home so as to avoid being taken to police since she was a school girl.

DW3 was **Bright Chima**. He was the go in between the plaintiff and the deceased. The plaintiff was at the school for the defendant. She was impregnated by the deceased. They charged the deceased K10,000.00 for damage and K16,000.00 for dowry. He personally paid K5,000.00 as damages for defilement.

When cross examined, he stated that he was the one that asked for the plaintiff. There was a marriage.

I have taken due and careful consideration of the evidence at hand. The following facts are not in dispute. The defendant was married to the deceased in 1990. They had 5 children together. They acquired 2 houses during the subsistence of their marriage namely where the school is and the matrimonial home. They also acquired a block of flats which have 13 rooms. In 2013, the deceased impregnated the plaintiff. The plaintiff moved in and stayed with the defendant in a room within the school. They had 1 child together. There are other children from the divorced second wife. The deceased died in January 2015. The defendant was appointed as an administrator of the deceased's estate. She used to give K250.00 each to plaintiff's child and the other children for the divorced second wife. The plaintiff sued in the local court for the distribution of the deceased's estate.

Having considered the evidence, the first issue I must determine is whether the relationship between the plaintiff and the deceased could be construed as a marriage. The action having commenced in the Local court is viewed as a customary law marriage. This is supported by Section 12(1) of the Local Court Act which provides that:

"Subject to the provisions of this Act, a Local Court shall administer

- a. African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law."

I have taken into consideration that there is no evidence regarding the tribe for the plaintiff and the deceased. However, it will be noted that customary law marriages in Zambia have one thing in common which are the payments done before the marriage to signify that the marriage is valid. According to Lillian Mushota in her book Family Law in Zambia, at Page 80 "A marriage is not considered valid in spite of consent from the parents if marriage payments have not been made at the various stages in the marriage process."

The plaintiff testified that she got married to the deceased in 2013 after she was impregnated. She alleges that she is a widow and therefore entitled to the estate. She produced BM1 which are documents showing that the deceased was charged damages and made part payment. This evidence was supported by PW2 and PW3 who are the biological parents to the plaintiff. The defendant rebutted this evidence and stated that the deceased merely paid damages in order to avoid being charged with defilement and that there was no marriage.

I have taken into consideration the documents before me and the evidence of DW3. DW3 was the go in between the plaintiff's family and the deceased. He personally paid K5,000.00 for damages to the plaintiff's family. Although he agreed that there was a marriage between the 2 when challenged by the plaintiff, I do not agree with him for the following reasons: he pointed out before court that no dowry was paid; the plaintiff rightly pointed out when producing BM1



that the deceased was charged damages of which the documents relate to; the document BM1 reads in part as follows:

"Case to settle is at K26,000.00 rebased. That is before marriage payments."

An analysis of the above simply indicates that the amount of K26,000.00 was merely for damages for the pregnancy which had to be paid before the marriage took place. BM1 clearly indicates that K12,000.00 was paid out leaving a balance of K14,000.00. There is no indication that dowry was paid by the deceased. I therefore find that no dowry was paid.

In the case of Mafemba v Sitali¹, the facts in brief were that the parties had stayed together as husband and wife for 14 years and had 2 children. Since the case was initially filed in the Local Court, the relationship was viewed as a customary law marriage. The Supreme court upheld the High Court's decision that Lozi customary law on marriage was not followed by the parties as there was no dowry paid. The court held inter alia:

1. *The appellant high court Judge was on firm ground when he held that the appellant was not a husband to the deceased despite the fact that the 2 stayed together as husband and wife for 14 years and had 2 children.*

Although the above case is based on Lozi customary law, I must state that the issue in both cases is whether dowry and other procedures were followed. In the present case, no dowry was paid and I find that there was no valid marriage. I therefore overturn the Local court's decision that there was a valid marriage between the parties as dowry was not paid. The plaintiff is therefore not a widow within the meaning of the Intestate Succession Act.



Having found that the plaintiff is not a widow, the next issue I must determine is whether she is entitled to the share of the estate as ordered by the Local court. It is not in dispute that prior to the death of the deceased, the plaintiff stayed together with the deceased at his place. Could she then be regarded as a dependant? Section 4 of the intestate Succession Act defines the term 'dependant' as:

"dependant" in relation to a deceased person means a person who was maintained by that deceased person immediately prior to his death and who was-

(a) a person living with that deceased person; or..."

The case of Charity Oparaocha v Winfrida Murambiwa² is illustrative on this aspect. This was an appeal against the decision of the High Court regarding the of administration of the estate of the late Dr. Christopher Oparaocha. The court found that although the respondent's marriage to the deceased was found by the learned trial Judge to be null and void, because the late Dr. Christopher Oparaocha had been married to the appellant under the Kenyan Statutory law, the learned trial Judge found that the respondent was a dependant of the deceased and therefore entitled to 10% of the estate. Dissatisfied with the judgment of the High Court, the appellant appealed against the Judgment. The Supreme Court held as follows:

- 1. The respondent went through a traditional ceremony of marriage, which on account of the deceased's statutory marriage to the appellant was declared, rightly so, to be null and void.*
- 2. The respondent was a dependant within the meaning of Section 3 of the Intestate Succession Act.*

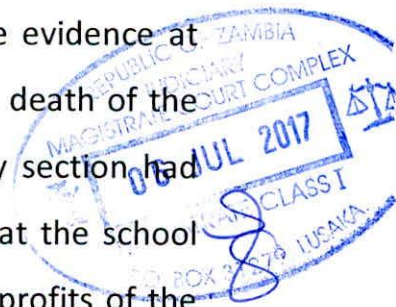
It is thus clear that the plaintiff is a dependant within the meaning of Section 3 of the Intestate Succession Act. Section 5(d) of the Intestate Succession Act provides that:

"ten per cent of the estate shall devolve upon the dependants in equal shares".

It follows therefore that the plaintiff is entitled to 10% of the estate. Although this is so, the plaintiff has not proved to court if at all the deceased had assets accruing to him by virtue of his death or after his death. I have taken note that there is a school, however this does not fall within the meaning of estate as outlined in Section 3 of the Intestate Succession Act. Further, the evidence at hand reveals that this school was started by defendant. After the death of the deceased, the defendant had to start from scratch as the primary section had ceased. Currently she is not making any profits. Having found that the school does not form part of the estate, the plaintiff has no share in the profits of the school.

There is a block of flats, however the unchallenged evidence of the defendant reveals that she and the deceased acquired these before the plaintiff started staying with the deceased. The plaintiff cannot therefore claim a share in the property she made no contribution and which already existed at the time she started leaving with the deceased. I therefore find that although the plaintiff is entitled to 10% of the estate as a dependant, there is no estate of which she can benefit.

As regards the issue of the child, there is no dispute that she is the child of the deceased. I should also state that there are other 2 children born from the divorced second wife. All these children and that of the defendant are entitled to



50% of the estate of the deceased. The only property that forms part of the estate is the block of flats which are on rent. The evidence of the defendant reveals that the flats are in a deplorable state and only gets about K200 to K300 for each of the flats.

I therefore order that the plaintiff's child and that of the divorced second wife be given one flat each of which they will collect rentals. In the alternative, if the defendant as administrator decides to sell the flats, all the 8 children be entitled to 50%, defendant 20% as the rightful widow, 10% dependants living with the defendant and the deceased (plaintiff not inclusive) and 20% to the parents. If there are no parents and dependants as provided for in Section 7(f) of the Intestate Succession Act, the portion of the estate which the parents and the dependants would have inherited shall be shared equally among the defendant and the children.

The appeal therefore succeeds to the extent that the plaintiff is not a widow and not entitled to the estate of the deceased. She

For the avoidance of doubt, I order as follows:

1. The plaintiff is not a widow to the deceased.
2. The plaintiff was merely a dependant.
3. The plaintiff is not entitled to any share of the estate.
4. Each child to be given a flat of which they will collect money. In the alternative if the defendant as the administrator decides to sell the block of flats, 50% of the proceeds be shared equally amongst the 8 children, 20% to the defendant as the rightful widow, 10% dependants living with the defendant and the deceased (plaintiff not inclusive) and 20% to the

parents. If there are no parents and dependants as provided for in Section 7(f) of the Intestate Succession Act, the portion of the estate which the parents and the dependants would have inherited shall be shared equally among the defendant and the children.

DELIVERED IN OEPN COURT THIS

DAY OF JULY 2017

J. SINZALA – CHIYAYIKA

MAGISTRATE CLASS I



