

IN THE HIGH COURT OF ZAMBIA

2017/HPF/0008

AT THE PRINCIPAL REGISTRY

AT LUSAKA

(Civil Jurisdiction)



**IN THE MATTER OF: THE ESTATE OF THE LATE CONSTAIN
MUZIPASI M'TONGA**

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

**IN THE MATTER OF: ORDER 30 RULE 12 OF THE HIGH
COURT RULES CHAPTER 27 OF THE
LAWS OF ZAMBIA**

BETWEEN: -

TISIYE M'TONGA MATONKA

APPLICANT

AND

FRED M'TONGA

1ST RESPONDENT

XAVIER M'TONGA

2ND RESPONDENT

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO
ON 9TH JANUARY, 2018.**

For the Applicant:

*Mr. Linyama – Messrs. Eric Silwamba,
Jalasi & Linyama Legal Practitioners*

For the Respondents:

*Mr. Simwanza – Messrs. Lungu Simwanza
& Company*

JUDGMENT

CASES REFERRED TO:

1. *Gray Nachandwe Mudenda vs. Dorothy Chileshe Mudenda* (2006) ZR 57;
2. *Lindiwe Kate Chinyanta vs. Doreen Chiwele Judith Tembo* (2007) ZR 246;
3. *Phyllis Kakunta Bansa vs. Omas Kope* - 2007/HP/0315;
4. *Constantine Line vs. Imperial Smelting Corporation* (1942) AC 154 at page 174;
5. *Lewanika and others vs. Chiluba* (1998) ZR 79;
6. *Anderson Kambela Mazoka and Others vs. Levy Patrick Mwanawasa and Others* (2005) ZR 138;
7. *Khalid Mohamed vs. The Attorney General* (1982) ZR 49;
8. *Sundi vs. Ravalia N.R.L.R.* (1949-1954) 345;
9. *Monica Siakondo (suing in her capacity as administrator of the estate of the late Edith Siakondo) vs. Fredrick Ndenga* (2005) ZR 22; and
10. *Borniface Kafula and Others vs. Billings Choonga Mudenda* - Appeal No. 202 of 2003 (unreported)

LEGISLATION REFERRED TO:

1. *The Intestate Succession Act Chapter 59 of the Laws of Zambia;*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia;*
3. *The Wills and Administration of Testate Estate Act, Chapter 60 of the Laws of Zambia;*
4. *The Supreme Court Rules 1999 Edition Volume 1, Sweet & Maxwell;*
5. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia;*
6. *The Companies Act, Chapter 388 of the Laws of Zambia;*
7. *Phipson on Evidence, 14th Edition, paragraph 402 at page 50;*
8. *Bullen and Leake Sweet and Maxwell 1975, 12th Edition*

The Applicant, pursuant to ***The Intestate Succession Act***¹ and ***Order 30 Rules 12 of The High Court Rules***², seeks the following reliefs: -

1. A declaration that the Applicant is a beneficiary to the estate of the late ***Costain Muzipasi M'tonga*** in her capacity as a biological daughter;
2. An Order directing the Administrators to reveal the full extent of the Estate of the late ***Costain Muzipasi M'tonga***;

3. *An Order directing the Administrators to provide full and accurate information on how the estate has been/will be distributed among the beneficiaries and what the Applicant is entitled to;*
4. *A mandatory Order directing the Administrators to provide and furnish all documents including statements of accounts relating to the said estate;*
5. *An Order directing the Respondents that the Applicant be awarded her entitlement out of the deceased's Estate as a biological daughter of the deceased;*
6. *Any other relief the Court may deem fit; and*
7. *Costs.*

The application which was commenced by way of Originating Summons, was supported by Affidavit deposed by one **Tisiye M'tonga Matonka**, the Applicant herein. She averred, *inter alia*, as follows: -

1. *That the late **Costain Muzipasi M'tonga** ("the deceased") died intestate in or about August 2005 and was survived by two spouses and thirteen children enumerated below with their respective ages at the time of his demise: -*

Spouses: -

- i. *Miriam Nyasulu M'tonga; and*
- ii. *Jessy M'tonga.*

Children: -

- | | | | |
|------|--------------------------------|---|------------------|
| i. | <i>William Maclean M'tonga</i> | - | <i>40+ years</i> |
| ii. | <i>Fridah M'tonga</i> | - | <i>30+ years</i> |
| iii. | <i>Fred M'tonga</i> | - | <i>30+ years</i> |
| iv. | <i>Jessy M'tonga</i> | - | <i>30+ years</i> |

v.	<i>Elijah M'tonga</i>	-	<i>24 years</i>
vi.	<i>Bubile M'tonga</i>	-	<i>23 years</i>
vii.	<i>Mbalose M'tonga</i>	-	<i>22 years</i>
viii.	<i>Bruno M'tonga</i>	-	<i>21 years</i>
ix.	<i>Tisiye M'tonga</i>	-	<i>20 years</i>
x.	<i>Xavier M'tonga</i>	-	<i>17 years</i>
xi.	<i>Kalumbwana M'tonga</i>	-	<i>13 years</i>
xii.	<i>Leonard M'tonga</i>	-	<i>13 years</i>
xiii.	<i>Taonga M'tonga</i>	-	<i>2 years</i>

2. *That the deceased's estate included but was not limited to the following: -*

Businesses: -

- i. 1000 shares held in Lafarge Cement Zambia Plc;*
- ii. Shares in Muzi Transport Freight and Forwarding Limited operating in Ndola;*
- iii. Shares in Muzi High School situated in Mushili, Ndola;*
- iv. Shares in Zipas High School situated in Kamwala South, Lusaka; and*
- v. Shares in Muzipasi High School situated in Chipata.*

Landed Property: -

- i. Plot No. 8325, Mushili situate in Ndola where Muzi High School is built;*
- ii. Plot No. 14788 situate in Lusaka where Zipas High School is built;*
- iii. Plot No. 4452 situate in Chipata where Muzipasi High School is built;*

- iv. *Plot No. 0744 situate in Kabushi, being business premises opposite Musa Kasonka Stadium from where Muzi Transport operates;*
- v. *Plot No. 39438 Kamwala South situate in Lusaka where ten residential flats are built;*
- vi. *A piece of land near the UTTA bus terminus in town situate in Ndola;*
- vii. *An underdeveloped piece of land near Dag Hammarskjold stadium situate in Ndola;*
- viii. *Plot No. 45 situate in Ndola, which is said to be a subject of subdivision;*
- ix. *Plot No. 156 situate in Ndola opposite Parino building, which is said to have been cancelled for subdivision;*
- x. *Fourteen residential houses dotted around various low cost residential areas situate in Ndola; and*
- xi. *Plot No. 2794 situate in Ndola.*

Motor Vehicles: -

- i. *A fleet of nine passenger transport motor vehicles (buses); and*
- ii. *At least seven private transport motor vehicles.*

Cash at Bank: -

- i. *Bank accounts operated by all the four businesses enumerated in item 1 above; and*
 - ii. *Personal bank accounts operated by the deceased.*
3. *That upon the deceased's demise, the Respondents were appointed Joint Administrators of the estate of the deceased;*
 4. *That searches at the Ministry of Lands, Natural Resources and Environmental Protection has revealed that most of the properties*

aforementioned above have been sold and the title holder have been exchanged;

5. *That the Respondents have informally without any supporting documents been distributing funds purporting to give beneficiaries a share of the estate and to date the Applicant has received K10,250.00 in 2005 and K50,000.00 on 23rd January, 2017;*
6. *That the Applicant was also given a motor vehicle Toyota Celsor plus an amount of K10,250.00 in 2005;*
7. *That the Applicant verily believes that the Respondents have managed to acquire the following assets from the proceeds of the sale of the assets of the Estate: -*
 - i. *Built Kambeba Lodge situate in Ndola on the Copperbelt Province of the Republic of Zambia;*
 - ii. *A Lodge on the Great North Road opposite SOS Children Village;*
 - iii. *A fleet of buses under the name of Fremto Transport;*
 - iv. *Between November 2016 and January 2017, they purchased another lodge (Magodi) along Lumumba Road, near Buseko Market in Lusaka, opposite Bread of Life Church.*
8. *That the Respondents personally confirmed having intermeddled with the deceased's estate by using the proceeds from the sale of the assets to settle their personal loans for the buses they got on credit from Higer Buses Company Limited;*
9. *That the Respondents have failed to account and distribute the deceased's estate equitably, instead they have decided to continue disposing off the estate;*

10. *That the Respondents must render a proper account of the deceased's estate and that the appointment of the Respondents as joint Administrators of the deceased's estate be revoked forthwith.*

The Respondents filed herein an Affidavit in Opposition deposed by one **Fred M'tonga**, the 1st Respondent, who averred *inter alia*, as follows: -

1. *That the averments by the Applicant in relation to the spouses and children of the deceased are true, save to state that Bruno M'tonga is not known as one of the children of the deceased;*
2. **Businesses**
 - i. *That the Respondents have not received any payment of dividends from Lafarge Cement Zambia Plc;*
 - ii. *That with regards to shares in Muzi Transport Freight and Forwarding Limited operating in Ndola; shares in Muzi High School situated in Mushili, Ndola; and shares in Zipas High School situated in Kamwala South, Lusaka, the same was acted on in line with the wishes of the deceased contained in his Will.*
3. *That Muzipasi High School in Chipata was built solely by the 1st Respondent using his own resources and not funds from the estate of the deceased and that the property is held by the Muzi High School Registered Trustees;*
4. **Landed Property**
 - i. *That Plot No. 8325, Ndola is held on title by Muzi Transport Freight and Forwarding Limited, which is operated by the Respondents as per the deceased's Will;*
 - ii. *Plot No. 14788, Lusaka belonged to Muzi High School Registered Trustees and its beneficiaries of which the*

Applicant is not a beneficiary, hence not entitled to make any claim thereof;

- iii. *Plot No. 4452, Chipata belongs to the Muzi High School Registered Trustees and has never belonged to the deceased;*
 - iv. *Plot No. 0744, Kabushi, Ndola was dealt with in accordance with the deceased's Will, as it belonged to Muzi Transport Freight and Forwarding Limited;*
 - v. *That Plot No. 39438, Kamwala South, Lusaka never belonged to the deceased but to William M'tonga, hence it is not part of the estate of the deceased;*
 - vi. *That the piece of land near UTTA bus terminus was repossessed by the Ndola City Council;*
 - vii. *That similarly the underdeveloped piece of land near Dag Hammerskjold Stadium in Ndola was repossessed by the local authority;*
 - viii. *That the Respondents are not aware of anything concerning Plot No. 45 Ndola and Plot No. 156 Ndola;*
 - ix. *That the 1st Respondent is not aware of any fourteen residential houses as claimed by the Applicant, but only seven which were given to the beneficiaries listed below in 2005, as agreed by the family: -*
 - a) *1 x house given to the widow Mrs. Mirriam Nyasulu M'tonga;*
 - b) *1 x house given to the 1st Respondent in Lubuto, Ndola;*
 - c) *1 x house given to Bubile M'tonga in Mushili, Ndola;*
 - d) *1 x house given to Jessy M'tonga in Masala, Ndola;*
 - e) *1 x house given to Frida M'tonga in Masala, Ndola;*
 - f) *1 x house given to Mbalase M'tonga in Mushili, Ndola;*
 - g) *1 x house given to William M'tonga in Mushili, Ndola.*
5. *That the 1st Respondent is not aware of Plot No. 2794, Ndola;*
6. **Motor vehicles**

- i. *There were only six passenger motor vehicles and not nine as alleged by the Applicant. Of the six buses, two buses were given to each widow of the deceased, namely, Mirriam Nyasulu M'tonga and Jessy M'tonga;*
- ii. *Four buses were taken to Muzi High School where they were used to provide transport for students as the school is located in the outskirts of Ndola town;*
- iii. *1 private motor vehicle was given to the Applicant;*
- iv. *1 private motor vehicle was given to the 2nd Respondent;*
- v. *1 private motor vehicle was given to Kalumbwana M'tonga;*
- vi. *1 private motor vehicle was given to Taonga M'tonga;*
- vii. *1 private motor vehicle was being used at Muzi High School in Ndola.*

7. Cash at Bank

As contained in the Will, the deceased only had one personal account and the other accounts were in the following names: -

- i. *Muzi Transport, Freight and Forwarding Limited*
- ii. *Zipas High School*
- iii. *Muzi High School*

- 8. *That the Applicant's averment that searches at the Ministry of Lands Natural Resources and Environment Protection revealed that most of the properties have been sold is calculated to mislead the Court, as it does not take into account property owned by other legal entities and not only the deceased;*
- 9. *That it is not true that the Respondents have been informally distributing funds purporting to give beneficiaries a share of the estate;*

10. *That the sum of K10,250.00 given to the Applicant in 2005 was part of the funds in the deceased's personal account which was a sum given to all beneficiaries who were of age at the time of the deceased's demise as agreed by the family and that the sum of K50,000.00 was given to the Applicant gratis after she complained of going through a rough financial time;*
11. *That the K50,000.00 was from Muzi High School Registered Trustees and its beneficiaries of which the Applicant is not one;*
12. *That as to the allegation that the 1st Respondent has acquired properties from the proceeds of the sale of assets of the estate, the 1st Respondents states as follows: -*
 - a) *That he has been a businessman even before the death of their father Costain Muzipasi M'tonga;*
 - b) *That he built Kambeba Lodge in Ndola and the Lodge on Great North Road, Lusaka with funds from his other businesses;*
 - c) *That even at the time of the deceased's demise, he used to own eight minibuses and other real properties such that he has now grown the businesses, which have nothing to do with the deceased's estate;*
 - d) *That the lodge purchased along Lumumba Road, was purchased for the beneficiaries of Muzi High School Registered Trustees after the sale of Zipas High School as the school business was failing and as a Trustee, he is empowered to invest in any legal business for the benefit of the beneficiaries of which the Applicant is not one and has no claim whatsoever.*
13. *That it is not true that the Respondents have intermeddled with the assets of the estate of the deceased;*

14. *That the 1st Respondent has always been a businessman and has at times borrowed funds from financial institutions using his own assets and not the estate property;*
15. *That in fact the deceased left a lot of liabilities at the time of his demise, which had to be paid for by the businesses which they operate and not from the deceased's personal assets;*
16. *That the Applicant is well aware of the wishes of the deceased, through his Will and creation of the Trust;*
17. *That the action herein is brought in bad faith nearly 12 years after the deceased's demise, when some documents have been misplaced and the distribution of the estate having been concluded;*
18. *That the Applicant is confusing property owned by a Company and a Trust as being part of the deceased's estate, hence this action should be dismissed with costs.*

The Applicant filed herein an Affidavit in Reply on 29th September, 2017, in which she averred *inter alia*, that: -

1. *That the deceased purchased Property No. 4452 and named it Muzipasi High School, which is a combination of his names and which was in an incomplete state at the time of the deceased's death in 2005;*
2. *That upon being appointed Administrators, the Respondents continued with the development of the uncompleted structures on the property in the deceased's name, which fact is confirmed by the family meeting held on 22nd September, 2010 at the late Mr. Dickson M'tonga's residence;*
3. *That the Respondents sold Plot No. 0744 without justifiable cause and the proceeds of the sale were not accounted for by the*

Respondents, however, the 1st Respondent built his personal shops on the property, which he later sold to third parties;

- 4. That in executing the duties of Administrators, the 1st Respondent sold the garage and part of the land where Muzi High School is situated, in order to pay the outstanding debt of K450,000.00 in monthly instalments of K31,000.00 owed by Muzi High School, which was to be completed in twenty (20) months upon a debt that has not been justified at all;*
- 5. That the Respondents must be made to account for the proceeds of the sale of properties, the amounts paid and when the due date of completion of payments as the Deed of Trust does not mention the said property, neither does it support what has transpired to the estate thus far;*
- 6. That Plot No. 39438 Kamwala Lusaka, was built by the deceased for accommodation of employees for Zipas High School;*
- 7. That the deceased left fourteen (14) houses which were shared as indicated, however the 1st Respondent and William M'tonga took advantage of this opportunity and got more properties than the rest of the beneficiaries;*
- 8. That the cash at the bank left by the deceased was mismanaged by the Respondents and there is no mention of Muzi Transport in the said Deed of Trust, hence the Applicant's desire for the Respondents to account for the funds;*
- 9. That at a family meeting held in September, 2010, the 1st Respondent claimed that K200,000,000.00 was left in the deceased's personal account, which amount was not shared equally, as there was an unaccounted amount of K80,000,000. When questioned during the meeting, the Respondents stated that the remaining amount was injected into Muzi High School to help clear the debt without providing any supporting evidence;*

10. *That the deceased had children from different women except the 1st Respondent, Fridah M'tonga and William M'tonga, whose mother is still alive; Xavier and Kalumbwana, whose mother is also alive; and the rest of them, their mothers died;*
11. *That the deceased solely owned properties and did not jointly own the same with any other person;*
12. *That the 1st Respondent sold Zipas High School at K1,000,000.00, which he did not account for, but when queried for an account of the same, he indicated that he used the money to pay the outstanding debts with Higer Buses Limited, where he got some Marcopolo buses on credit for his personal business;*
13. *That after threatening litigation against the 1st Respondent with regard to the account of the proceeds from the sale of Zipas High School, the 1st Respondent gave a selected number of family members an amount of K50,000.00 each except for Jessy M'tonga, Elijah M'tonga and Leonard M'tonga for reasons best known to himself;*
14. *That a post-dated cheque was deposited into the Applicant's account, which she believes was designed to persuade her to withdraw the claim against the Respondents to render an account;*
15. *That at the time of the deceased's death, the Respondents owned no real property, though some real properties were registered in their names by the deceased by virtue of being the eldest children of the family and that it is evident that between the years 2004 and 2005, the Respondents' businesses expanded very quickly;*
16. *That it is not true that the deceased left outstanding liabilities, which forced the Respondents to sell most of the deceased's estate as the Respondents have not produced evidence of such liabilities or rendered an account of the estate;*

17. *That a full account has not been given of how the estate was administered, including the following which were independent of the school buses: -*
- a) Andre Marcopolo - ABH 5990 (60 seater)*
 - b) Mini Andre Marcopolo - ABG (36 seater)*
 - c) Rosa ACH 605*
 - d) Rosa ACH 1620*
 - e) Rosa ACG 8876*
 - f) Rosa ACH 1618*
 - g) Rosa ACE 9102*
 - h) Rosa ACE 9103*
 - i) Rosa ACH 895*
18. *That a large part of the deceased's estate has not been mentioned in the Trust Deed and part of the said estate does not form part of the Will.*

At the scheduled hearing on 4th October, 2017, Counsel for the Applicant Mr. Linyama joined the proceedings 15 minutes late, when the Respondent was submitting. I had proceeded to hear the matter in his absence and put it on record that I would consider the Applicant's Affidavit evidence. In opposing the application, Counsel for the Respondent Mr. Simwanza submitted *viva voce*, that he would rely on the Affidavit in Opposition filed on 12th July, 2017, deposed by one Fred M'tonga. Mr. Simwanza further submitted that the Applicant has lamentably failed to bring evidence to this Court to substantiate her claim and has highlighted the extent of the estate, but failed to provide any proof to show that the said properties listed therein belonged to the deceased, contrary to the maxim of law that *he who alleges must prove*. He also submitted

that the Applicant's Affidavit was full of hearsay and not factual at all. He prayed that the action fails and that the costs be for the Respondents.

The Applicant's Counsel Mr. Linyama applied to file written submissions to augment the Applicant's Affidavits on record, which application was granted. Despite both parties being directed to file written submissions herein, only the Applicant filed her submissions.

In the Applicant's submissions dated 26th of October, 2017, it is argued that the law provides that a Personal Representative must produce on oath in Court the full inventory of the estate of the deceased and to render to the Court an account of the administration of the estate. That the law has further provided how and when such an account can be rendered into Court and as such there is no duty on the part of the Applicant in this matter to prove her claims. That the only burden of proof that the Applicant bears in these proceedings is that she is an interested party clothed with the requisite *locus standi* and that the properties in issue form part of the estate of the deceased.

The Court was referred to **Section 19** of ***The Intestate Succession Act***¹ and **Section 45** of ***The Wills and Administration of Testate Estate Act***³, which provide for the duties and powers of a Personal Representative. **Section 19** of ***The Intestate Succession Act***¹ provides as follows: -

19. (1) *The duties and powers of an administrator shall be-*

- (a) *to pay the debts and funeral expenses of the deceased and pay estate duty if estate duty is payable;*
 - (b) *to effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act;*
 - (c) *when required to do so by the court, either on the application of an interested party or on its own motion-*
 - (i) *to produce on oath in court the full inventory of the estate of the deceased; and*
 - (ii) *to render to the court an account of the administration of the estate.*
- (2) *Where an administrator considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the Court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property. (Counsel's emphasis)*

Section 45 of **The Wills and Administration of Testate Estate Act³**, provides that: -

- 45. (1) The duties and powers of a personal representative shall include-**
- (a) *the payment of the debts and funeral expenses of the deceased;*
 - (b) *if the deceased left a valid will, the distribution of the property disposed of by the will in accordance with its provisions or an order of court made under section twenty.*

(c) when required to do so by the court, either on the application of an interested party or on its own motion-

(i) the production on oath in court of the full inventory of the estate of the deceased; and

(ii) the rendering to the court of an account of the administration of the estate.

(2) *Where a personal representative considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may sell the property in such manner as appears to him likely to secure receipt of the best price available for that property.*

It was Mr. Linyama's submission that the above two pieces of legislation which are couched in similar terms provide the circumstances when a Personal Representative can be called upon and made to produce on oath the inventory of the estate and also render an account of the estate. According to Mr. Linyama, the fact that the Respondents expressly conceded in their Affidavit in Support that they have never received any dividends from Lafarge Cement Zambia Plc, a company in which the deceased held shares and requested the Applicant to follow up the matter with Lafarge Cement Zambia Plc, is a clear demonstration by the Respondents that they have failed to administer the estate in accordance with the law as it is trite law and the duty of the Personal Representative to administer the affairs of the estate in the best interest of the estate and the intended beneficiaries. He contends that the Respondents

have not taken their solemn duty seriously and seek to deter the affairs of the estate to the Applicant.

Mr. Linyama, further submitted that the Respondents expressly conceded in their Affidavit in Opposition that Plot No. 8325, Ndola is held by Muzi Freight and Forwarding Limited and that the same is operated by the Respondents in accordance with the deceased's Will, but the Respondents have never called for a family meeting to discuss the state of affairs of the estate or to render an account of how the estate is being administered, which is contrary to the provision of the law. Accordingly, the Respondents must be made to account for the aforesaid property of the estate.

It is also submitted that the Respondents have expressly admitted that Plot No. 0744, Kabushi, Ndola was dealt with in accordance with the Will, but an account of how the same was dealt with has never been rendered, contrary to the provisions of the above cited law. The Applicant contends that since the deceased built a school on Plot No. 39438 Kamwala South in Lusaka, the Respondents cannot allege that the same did not belong to the deceased without providing evidence to back their allegation.

The Applicant has argued that the Respondents have not adequately protected the estate as can be seen from the properties that were repossessed and as such they have breached their solemn duty to protect the estate. My attention was drawn to **Section 19** of **The Intestate Succession Act**¹ and **Section 45** of **The Wills**

and Administration of Testate Estate Act³. Section 19 of The Intestate Succession Act¹ provides that: -

"Duties and powers of administrator

19. (1) The duties and powers of an administrator shall be-

- (a) to pay the debts and funeral expenses of the deceased and pay estate duty if estate duty is payable;**
- (b) to effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act;**
- (c) when required to do so by the court, either on the application of an interested party or on its own motion-**
 - (i) to produce on oath in court the full inventory of the estate of the deceased; and**
 - (ii) to render to the court an account of the administration of the estate.**

(2) Where an administrator considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the Court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property."

Section 45 of The Wills and Administration of Testate Estate Act³ provides that: -

"Duties and powers of personal representative

45. (1) The duties and powers of a personal representative shall include-

- (a) *the payment of the debts and funeral expenses of the deceased;*
 - (b) *if the deceased left a valid will, the distribution of the property disposed of by the will in accordance with its provisions or an order of court made under section twenty.*
 - (c) *when required to do so by the court, either on the application of an interested party or on its own motion-*
 - (i) *the production on oath in court of the full inventory of the estate of the deceased; and*
 - (ii) *the rendering to the court of an account of the administration of the estate.*
- (2) *Where a personal representative considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may sell the property in such manner as appears to him likely to secure receipt of the best price available for that property."*

The Applicant contends that the distribution of the deceased's seven properties and six motor vehicles that the Respondents alleged were given to the beneficiaries was not done in good faith and in accordance with the provisions of the law, as can be seen from the fact that the Applicant is not among the people on the list to whom the houses were distributed. She further contends that the Respondents have been selective in the distribution process.

The Court's attention was drawn to the case of **Gray Nachandwe Mudenda vs. Dorothy Chileshe Mudenda**¹, where Chitengi, J, as he then was, *inter alia*, held as follows: -

"The duty of an administrator is not to enhance the estate, but to collect the deceased's estate, distribute it to the beneficiaries and render an account."

I was further referred to the case of **Lindiwe Kate Chinyanta vs. Doreen Chiwele Judith Tembo**², where the Supreme Court, *inter alia*, held as follows: -

"...An administrator has legal duties to the beneficiaries and other interested parties including creditors; an Administrator may be called upon by a Court to account for the administration of the estate or for default... The duty of the Administrator is not to inherit the estate, but to collect the deceased's assets, distribute them to the beneficiaries and render an account."

The Applicant referred the Court to the case of **Phyllis Kakunta Bansa vs. Omas Kope**³, where Justice Mutuna held that: -

"...Section 19 (2) of the Act sets out circumstances under which property forming part of an estate of a deceased person may be sold... The said section grants the discretion to the Administrator to decide whether or not to sell property that forms part of a deceased's estate. The discretion is exercisable subject to the authority of the Court..."

The Applicant argues that the express admissions by the Respondents is a clear demonstration that they have failed to administer their solemn duty and has an effect on their part. I was

referred to **Order 27 Rule 2 (2)** of **The Rules of the Supreme Court**⁴, where it is stated as follows: -

"Effect of admissions

An admission, whether made in response to a notice to admit facts or not, is not necessarily binding for all purposes. It is only binding as against the party making it, and if made under this rule is only binding in the action (including an appeal) and semble at a new trial. An admission of facts made without a notice under the rule can expressly be made for the purposes of the action only, or for the purposes of the trial only, and in the latter case would not be effective at a new trial of the same action."

The Applicant also referred this Court to **Order 27 Rule 3 (4)** of **The Rules of the Supreme Court**⁴, where it is stated that: -

"Either by his pleadings or otherwise

Such admissions may be made expressly in a defence or in a defence to a counterclaim, or they may be admissions by virtue of the rules, as where a defendant fails to traverse an allegation of fact in a statement of claim or there is a default of a defence or a defence is struck out and accordingly the allegations of fact in the statement of claim are deemed to be admitted, as held in the case of Caroli v. Hirst (1883) 31 W.R. 839"

It is the Applicant's submission that the Respondents have expressly admitted that some of the properties were not provided for under the Will and thus she contends that such properties which were not provided for under the Will should be dealt with in accordance with **The Intestate Succession Act**¹.

The Applicant submits that the Respondents are in breach of the law by omitting to give the Applicant, who is a biological daughter of the deceased and beneficiary of the deceased's estate, a share of the estate and calls upon this Court to order the Respondents to disclose the extent of the Estate and render an account of the same, for the purposes of redistribution and administration of the estate. To fortify this argument, the Court was referred to **Section 5 of *The Intestate Succession Act***¹, which is couched in the following manner: -

"Distribution of estate

5. (1) ***Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows:***
- (a) ***twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;***
 - (b) ***fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;***
 - (c) ***twenty per cent of the estate shall devolve upon the parents of the deceased;***
 - (d) ***ten per cent of the estate shall devolve upon the dependants, in equal shares;***

Provided that a priority dependant whose portion of the estate under this section is unreasonably small having regard to his degree of dependence on the deceased shall have the right to apply to a court for adjustment to be made to the portions inherited and in that case, Part III of the Wills and Administration of Testate Estates Act shall apply, with the necessary changes, to the application.

(2) In respect of a minor, the mother, father or guardian shall hold his share of the estate in trust until he ceases to be a minor."

The Applicant contends that the Respondents have not distributed the estate in accordance with the provisions of the law cited above and have not indicated to this Court how the distribution was conducted. The Applicant also contends that the Respondents cannot ask the Applicant to provide evidence of the extent of the estate as that is the duty of the Respondents who are personal representatives of the deceased and any attempts by the Applicant to deal with any part of the estate will amount to intermeddling in the affairs of the estate. Further, that it is the Respondents' solemn duty to act in the best interest of the beneficiaries and to protect the estate of the deceased. In support of this contention, I was referred to **Section 65 of *The Wills and Administration of Testate Act*³**, which provides that: -

"Intermeddling with property of deceased prohibited

65. (1) When a person dies, within or outside Zambia leaving property within Zambia, any person who without being

duly authorised by law, takes possession of, causes to be moved or otherwise intermeddles with any such property, except in so far as may be urgently necessary for its preservation, shall be guilty of an offence; and any person taking any action in regard to any such property for its preservation shall forthwith report particulars of the property and of the steps taken to the Administrator-General; and if he fails to do so, he shall be guilty of an offence.

(2) Any person who-

- (a) unlawfully deprives any person of the use of any part of the property of the deceased to which that person is entitled under this Act; or**
- (b) otherwise unlawfully interferes with the use by any person of any property referred to in paragraph (a);**

shall be guilty of an offence and liable on conviction to a fine not exceeding seven hundred and fifty penalty units or imprisonment not exceeding two years or both."

On the alleged Deed of Trust, the Applicant submits that the purported Deed of Trust which appointed the Respondents as Trustees was not registered at the Lands and Deeds Registry as provided under **Section 4** of ***The Lands and Deeds Registry Act***⁵, which provides as follows: -

"Documents required to be registered

- 4. (1) Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge**

upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or "The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910", must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry: Provided that if a document creating a floating charge upon land has been registered under the provisions of section ninety nine of the Companies Act or section thirty-two of the Co-operative Societies Act, it need not be registered under the provisions of this Part unless and until such charge has crystallised or become fixed.

- (2) Any document required or permitted to be registered affecting land, persons, property or rights in any district for which a District Registry has been appointed may be registered either in such District Registry or in the Registry.*
- (3) Upon application to register any document affecting land required to be registered as aforesaid-*
 - (a) The Registrar may order that any document necessary for deducing the title of the applicant for registration to the land thereby affected or any interest therein (hereinafter referred to as a "document necessary to deduce title"), although it may not be a document required to be registered as aforesaid, shall first be produced or its*

absence satisfactorily accounted for, and if such document necessary to deduce title, being a document required to be registered pursuant to the provisions of this Part or of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or "The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910", shall not have been registered as so required by one or other of these laws, the Registrar may order that the same be first registered under this Part, unless such document necessary to deduce title is void in consequence of non-registration as hereinafter provided, in which case the Registrar shall not register the document tendered for registration unless ordered so to do by the Court.

- (b) If any person has in his possession or custody any document or evidence of title affecting the same land to the production of which the applicant or any trustee for him is entitled, the Registrar may order such person to produce the same within a time to be fixed by him at the expense of the applicant for registration and may at the expense of such applicant deal with the same as provided in paragraph a).*
- (c) Any person aggrieved by any order of the Registrar under this subsection may appeal to the Court which may annul or confirm the order of the Registrar with or without modification.*
- (d) If any person disobeys the order of the Registrar made in pursuance of paragraph (b), the Registrar*

may certify such disobedience to the Court and thereupon such person, subject to such right of appeal as aforesaid, may be punished by the Court in the same manner in all respects as if the order made by the Registrar were the order of the Court.

I was also referred to **Sections 5 and 6 of *The Lands and Deeds Registry Act*⁵**, which provides for time within which to register a documents and the effect of not registering a document within the prescribed time. The said sections are couched as follows: -

"Times within which registration must be effected

5. (1) *All bills of sale must be registered within three months of the execution of the same.*
- (2) *All other documents, except probate of a will, required to be registered as aforesaid shall be registered-*
- (a) *in the case of a document executed at the place where it is registered, within thirty days from its date;*
- (b) *in the case of a document executed elsewhere in Zambia, within ninety days from its date;*
- (c) *in the case of a document executed out of Zambia, within one year from its date.*
- (3) *Probate of a will affecting land or any interest in land shall be registered within twelve months of the grant thereof or the sealing thereof under the provisions of the Probates (Resealing) Act, as the case may be.*

Documents to be void for want of registration

6. ***Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void:***

Provided that-

- (i) ***the Court may extend the time within which such document must be registered, or authorise its registration after the expiration of such period on such terms as to costs and otherwise as it shall think fit, if satisfied that the failure to register was unavoidable, or that there are any special circumstances which afford ground for giving relief from the results of such failure, and that no injustice will be caused by allowing registration;***
- (ii) ***the probate of a will required to be registered as aforesaid, and not registered within the time specified in the last preceding section, shall be null and void so far only as such will affects land or any interest in land."***

On the basis of the law cited above, the Applicant contends that the Trust Deed which the Respondents exhibited in their Affidavit in Opposition is ineffective, *null* and *void* and cannot be relied upon by the Respondents that Stand No. 14788 does not form part of the estate in which the Applicant has interest. She further contends that Stand No. 14788, Lusaka should be dealt with in accordance with the provisions of the ***Intestate Succession Act***¹ since the Trust Deed is *null* and *void*.

The Applicant submits that since the Will does not state how other assets of the estate are supposed to be distributed, the Executors

appointed by the deceased in the Will must distribute the portion not provided for under the Will in accordance with the provisions of ***The Intestate Succession Act***¹.

The Applicant submitted that she agrees with the Respondents as they indicated in their Affidavit in Opposition that the property owned by a company does not form part of the deceased's estate as the position at law is that a company is distinct from its members or shareholders. The Applicant referred this Court to **Sections 10, 11 and 22 of *The Companies Act***⁶, which provides as follows: -

"Certificates of incorporation and of share capital

- 10. (1) Where an application for incorporation and the documents referred to in section six have been duly lodged, the Registrar shall, subject to this Act, issue a certificate in the prescribed form stating that the company is, on and from the date specified in the certificate, incorporated and that the company is the type of company specified in the application for incorporation.**
- (2) If the company has share capital, the Registrar shall, at the same time, issue a certificate stating-**
- (a) the amount of share capital of the company; and**
 - (b) the division of the share capital into shares of a fixed amount.**
- (3) The Registrar shall keep a copy of each certificate issued under this section, and this Act shall apply to the copies as if they were documents lodged with the Registrar.**

Incorporation of the company

11. *On and from the date of incorporation specified in the certificate of incorporation, but subject to this Act, there shall be constituted an incorporated company by the name set out in the certificate.*

Capacity and powers of a company

22. (1) *A company shall have, subject to this Act and to such limitations as are inherent in its corporate nature, the capacity, rights, powers and privileges of an individual.*
- (2) *A company shall have the capacity to carry on its business and exercise its powers in any jurisdiction outside Zambia to the extent that the laws of Zambia and of that jurisdiction permit.*
- (3) *A company shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor exercise any of its powers in a manner contrary to its articles."*

On the foregoing law, the Applicant submits that the Respondents are wrong by stating that certain properties are properties which belonged to the companies without taking into account the provisions of the law surrounding the interest of shareholders in a company. She contends that the deceased owned shares in the companies as indicated and he had rights and privileges that come with shareholders of a company. The Court was referred to **Section 70 of The Companies Act⁶**, which provides as follows: -

"Transmission of shares by operation of law.

70. (1) *In the case of the death of a shareholder of a company, the survivor or survivors where the deceased was a joint holder, and the legal personal or representative of the deceased where he was a sole holder or last survivor of*

joint holders, shall be the only persons recognised by the company as shareholders.

- (2) A person (in this section called "the representative") upon whom the ownership of a share devolves by reason of his being the legal personal representative, receiver, or trustee in bankruptcy of the holder, or by operation of law may, upon such evidence being produced as the company may reasonably require-*

 - (a) be registered himself as the holder of the share; or*
 - (b) transfer the share to some other person without first registering himself as the holder of the share.*
- (3) A company shall have the same right, if any, to decline registration of a transfer by the representative as it would have had in the case of a transfer by the registered holder, but shall have no right to refuse registration of the representative himself.*
- (4) The representative shall, prior to registration of himself or a transferee, be entitled to the same dividends and other advantages as if he were the registered holder and to the same rights and remedies as if he were a member of the company, except that he shall not, subject to any order by the court under section one hundred and forty-four, before being registered as a member in respect of the share, be entitled to vote at any meeting of the company.*
- (5) The company may at any time give notice requiring the representative to elect either to be registered himself or to transfer the share, and, if the notice is not complied with within three months, the company may thereafter suspend payment of all dividends or other moneys*

payable in respect of the share until the notice has been complied with."

The Applicant has argued that the Respondents have not taken any steps to notify the companies in which the deceased held shares that they are legally appointed Joint Administrators and Executors in charge of the deceased's estate and therefore, it is wrong for the Respondents to ask the Applicant to follow up the matter with these companies where the deceased held shares, as that is not her duty.

The Applicant submitted that she is aware of the maxim referred to by the Respondents that "*he who alleges must prove*" and that it is trite law that the Burden of Proof lies upon the party who substantially asserts the affirmative of the issue. I was referred to the learned authors of ***Phipson on Evidence***⁷, where it is stated as follows: -

"The Burden of proof lies upon the party who substantially asserts the affirmative of the issues. The rule which applies is Ei qui affirmat non ei qui negat incumbit probation..."

The Applicant referred the Court to the *dicta* of the English Court of Appeal in the case of ***Constantine Line vs. Imperial Smelting Corporation***⁴, where Lord Maugham opined that: -

"In general the rule which applies is Ei qui affirmat non ei qui negat incumbit probation (Proof rest on he who affirms not he who denies). It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

I was further referred to the case of **Lewanika and others vs. Chiluba**⁵, where the Court observed that: -

"The question that occupies my mind is, in this particular case, whose duty is it to prove what is asserted, namely that Luka Kafupi Chabala is the father to the Respondent? Without much ado, the burden is upon the Petitioners who should satisfy the Court that Luka Kafupi Chabala is the father and in doing so they cannot be assisted by the Respondent."

I was also referred to the case of **Anderson Kambela Mazoka and Others vs. Levy Patrick Mwanawasa and Others**⁶, where the Supreme Court reaffirmed the law by holding as follows: -

"On burden of proof, we said in Zulu vs. Avondale Housing Project (1982) ZR 172: There is one observation I wish to make before leaving this subject. Mr. Phiri's general approach has been to allege that the Respondent had not adduced evidence in support of the allegations in the dismissal letter. I have found that the Respondent did in fact adduce such evidence. In the process however I have also pointed out the deficiencies in the Appellant's own evidence. It appears that the Appellant is of the view that the burden of proof laid upon the Respondents and it is on this that I would like to say a word. I think that it is accepted that where a Plaintiff alleges that he has been wrongful or unfairly dismissed, as indeed in any other case when he makes any allegation, it is generally for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of the opponent's case."

The Applicant finally referred this Court to the case of ***Khalid Mohamed vs. The Attorney General***, where the Supreme Court stated as follows: -

"An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to Judgment. I would not accept a proposition that even if a Plaintiff's case has collapsed of its inanity or for some reason or other, Judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a Defendant in such circumstances would not even need a defence. We held in that case that a Plaintiff cannot automatically succeed whenever a defence failed; he must prove his case."

The Applicant contends that she has discharged the burden of proof required in this cause and it is her prayer that her claims are meritorious. She urges the Court to accordingly rule in her favour and cause the Respondents to give an inventory of the Estate and render an account herein. She further prays for costs.

I have considered the case together with the evidence adduced by the parties in their respective Affidavits, the Submissions and Authorities. There are a number of legal issues raised in this case, to which I will return to later in this Judgment. However, the following facts of the case are not in dispute, namely that the Applicant is a biological child and beneficiary of the deceased's

estate. The deceased was survived by two wives and thirteen children who include the parties herein.

It is further not in dispute that the deceased left behind a Will with instructions on how part of his estate must be bequeathed and a Deed of Trust appointing the 1st Respondent and Muzi M'tonga as trustees. This is as per exhibits "FM1" and "FM2" attached to the 1st Respondent's Affidavit in Opposition filed herein on 12th July, 2017.

It is also not in dispute that part of the deceased's estate was not bequeathed in the deceased's Will.

The main issues in dispute, in my view between the parties, are in respect of the properties that were not bequeathed in the deceased's Will; the lack of account of the estate by the Respondents; and the Deed of Trust. The contention by the Applicant being that the Deed of Trust is *null* and *void* for lack of registration; that the properties that were not bequeathed in the deceased's Will must be dealt with in accordance with ***The Intestate Succession Act***¹; that the Respondents provide a full and accurate account of the estate; and that the Applicant be awarded her entitlement out of the relevant portion of the deceased's estate according to ***The Intestate Succession Act***¹.

I will proceed to deal first with the issue raised, namely, that the Deed of Trust is *null* and *void* for non registration as required under the ***Lands and Deeds Registry Act***⁶. If I find so, whether there are any special circumstances warranting the extension of time within

which to register as allowed under that law. **Sections 4, 5 and 6 of *The Lands and Deeds Registry Act*⁶**, which I have quoted above in *extensio* and need not be repeated are instructive on this. The Applicant contends that, in any event, the Deed of Trust is null and void for lack of registration as required by ***The Lands and Deeds Registry Act*⁶**.

It is not in dispute that the Deed of Trust in issue is dated 12th March, 2004 and was not registered at the Deeds Registry. Sometime in August, 2005 the deceased died and the Respondents were jointly appointed Administrators of the deceased's estate. The Law regarding null and void documents that require registration at the Deeds Registry generally is that such documents are unenforceable.

Section 6 of *The Lands and Deeds Registry Act*⁶ has an exception to the rule quoted above, namely, that the Court may extend or authorise the registration of such a document after the expiration of the registration time frame prescribed under the law, if satisfied that the failure to register was unavoidable or that there are special circumstances warranting the same.

I am of the considered view that indeed the Deed of Trust executed on 12th March, 2004 is null and void for want of registration at the Deeds Registry within the prescribed time under the law.

The next issue for consideration is whether the Respondents have shown special circumstances which would enable the Court to Order and authorise its registration out of the prescribed time. The

evidence on record is that the Deed of Trust relates to Plot No. 14788, Lusaka. Plot No. 14788, Lusaka, prior to the demise of the deceased, vested in Muzi High School. Subsequently, but still prior to the death of the deceased Muzi High School was brought under the legal ambit of the Deed of Trust. The deceased, who was the proprietor of Muzi High School, appointed his biological sons, who are Muzi M'tonga and the 1st Respondent herein, to be Trustees under the Deed of Trust for the purpose of holding the property in trust of the beneficiaries, until the youngest child attains the age of maturity which was pegged at 21 years. The named beneficiaries in the Deed of Trust are Taonga M'tonga; Brian M'tonga; and Gimunda M'tonga. The Deed of Trust was executed by the parties, but was never, as already noted, registered in accordance with the law cited above. Other than exhibiting the Deed of Trust in their Affidavit in Opposition, the Respondents have not shown any evidence on record why it was not registered at the Deeds Registry, neither have they advanced any reasons why it should warrant registration outside the timeframe prescribed under the law.

Accordingly, I find that there are no special circumstances that have been canvassed by the Respondents before me, as envisaged under **Section 6** of ***The Lands and Deeds Registry Act***⁶, warranting the ordering of registration of the Deed of Trust out of time. The effect of non-registration as stipulated by **Section 6** of ***The Lands and Deeds Registry Act***⁶ is confirmed in the case of ***Sundi vs. Ravalia***⁸, where it was stated, *inter alia*, that a document that is required to be registered in terms of **Section 4** of ***The Lands***

and Deeds Registry Act⁶ shall be null and void if not registered. For the foregoing reasons, I find that the Deed of Trust, pursuant to which the Respondents are claiming certain properties to be held in trust, cannot be sustained as the Deed of Trust is caught up in the sections I have quoted above and is therefore *null* and *void*.

Having found that the Deed of Trust is *null* and *void*, I order that the properties that are held under the alleged Deed of Trust form part of the deceased's intestate estate and must be distributed in accordance with the provisions of the **Intestate Succession Act**¹.

I will now proceed to deal with the issue regarding the claim made by the Applicant that the properties that were not covered in the deceased's Will must be bequeathed in accordance with **The Intestate Succession Act**¹. As I stated above, it is not in dispute that the deceased left a Will, in which he appointed the 1st Respondent and Muzi M'tonga to take charge of Muzi High School, Zipas High School and Muzi Transport. According to the said Will, the 1st Respondent and Muzi M'tonga were appointed to run the two schools and Muzi Transport. The deceased was specific in his testamentary wishes that the said entities should not be sold. The deceased also instructed in his Will that the amount of K130,000.00 that was outstanding on the six (6) buses that were purchased on credit be paid from the proceeds from the schools' income. He also left instructions for his two wives to take charge of the sale of chickens to the said schools and to be paid by the schools accordingly. The deceased further instructed that the last born child Taonga M'tonga be paid a monthly allowance of

K15,000.00 until he is old enough to be added to the Directorship of the entities. The said Will only made provision for the two schools and Muzi Transport. The deceased in his Will did not bequeath other properties that form part of his estate. Further, other than specifying the K15,000.00 that should be given to Taonga Mtonga; the K130,000.00 liability; and meeting the worker's conditions of service, the deceased in his Will was not specific on how the dividends that will accrue to his estate from the said entities should be distributed.

Section 4 of *The Intestate Succession Act*¹ provides that: -

"Intestacy and partial intestacy

4. (2) ***Any person who dies leaving a will disposing of part of his estate has died intestate under this Act in respect of that part of his estate which is not disposed of in the will."***

From the law cited above, "intestate" includes a person who leaves a Will but dies intestate as to some beneficial interest in his real or personal estate, which have not been bequeathed in a Will. **Section 4 (1) of *The Intestate Succession Act*¹** provides that a person dies intestate under the Act if he has not made a will disposing off his estate at the time of his death. Further, in the case of ***Monica Siakondo (suing in her capacity as administrator of the estate of the late Edith Siakondo) vs. Fredrick Ndenga***⁹, the Court held that when the deceased dies intestate, his estate ought to be administered under the provisions of ***The Intestate Succession Act*¹**.

Accordingly, I find on the evidence on record that other than Muzi High School, Zipas High School and Muzi Transport, the deceased died intestate with regard to the other portion of his estate that were not bequeathed in his Will and that his estate that was not bequeathed in the Will should, therefore, be administered in accordance with the provisions of ***The Intestate Succession Act***¹. According to ***Section 3*** of the said Act¹, an estate comprises all the assets and liabilities of the deceased person and includes his personal chattels for purposes of administration under the Act. The mode of distributing the estate of an intestate is specified in ***Sections 5 to 11*** of ***The Intestate Succession Act***¹.

I now turn to consider the claim by the Applicant that the Respondents provide a full and accurate account of the estate. Under this claim the Applicant alleges that the Respondents have not accounted for the shares that the deceased held in various companies; motor vehicles left by the deceased; bank accounts held by the deceased; land and houses owned by the deceased. The Applicant seeks an order that the Respondents render an account and produce an inventory of all personal property, including shares and money belonging to the deceased.

The Applicant's evidence in support of this claim is to the effect that the deceased owned shares in Lafarge Cement Zambia Plc; Muzi Transport Freight and Forwarding Limited in Ndola; Muzi High School situated in Mushili, Ndola; Zipas High School situated in Kamwala South, Lusaka; and Muzipasi High School situated in Chipata. The Applicant also alleges that the deceased owned

several real properties, fleet of motor vehicles and cash in various bank accounts, which I mentioned above in the summary of the parties' Affidavit evidence. The Applicant submitted that she had on several occasions requested the Respondents to render an account of the estate and to distribute evenly to the beneficiaries, but the Respondents have failed to do so. The Applicant alleged that the Respondents have acquired assets from the proceeds of the sale of some of the assets of the estate and intermeddled with the deceased's estate by using the proceeds from the sale of the deceased's assets to settle their personal loans for the buses that they got on credit from Higer Buses Company Limited. It has also been alleged by the Applicant that several searches at the Ministry of Lands Natural Resources and Environmental Protection revealed that most of the deceased's properties have been sold and title holders changed.

On the other hand, the Respondents contended that they have never received any payment of dividends from Lafarge Cement Zambia Plc and that the Applicant was at liberty to follow up the issue with Lafarge Cement Zambia Plc. The Respondents contend that Muzi Transport Freight and Forwarding Limited, Muzi High School and Zipas High School were acted on in line with the testamentary wishes of the deceased as contained in his Will. On Muzipasi High School situated in Chipata, the Respondents contend that the school was built solely by the 1st Respondent using his own resources and that the property is held by Muzi High School Registered Trustees. With regard to the real properties, the

Respondents contend that some of the properties were dealt with as bequeathed in the deceased's Will and in accordance with the Deed of Trust. They also contend that some properties were repossessed by various authorities and that they are not aware of some properties that the Applicant alleges belonged to the deceased. Out of the fourteen residential properties claimed by the Applicant, the Respondents allege that they are only aware of seven properties, which they distributed to some of the beneficiaries. The Respondents also contend that that there were only six passenger transport motor vehicles, which they distributed to the widows of the deceased and to Muzi High School. It has also been asserted by the Respondents that they were only five private motor vehicles, which they distributed to some of the beneficiaries and Muzi High School. On the bank accounts, the Respondents allege that these were dealt with in line with the deceased's Will.

I have considered the evidence in support of the claim mentioned above. The Respondents produced the deceased's Will marked "FM1" and a Deed of Trust marked "FM2". The said Will gives the 1st Respondent and Muzi Mtonga authority to take charge of Muzi High School; Zipas High School; and Muzi Transport. The Will also authorises the 1st Respondent and Muzi Mtonga to discharge the liabilities incurred by Muzi High School; Zipas High School; and Muzi Transport. The deceased in the said Will mentioned that all the accounts at his bankers should be taken over by his children, but did not specifically mention which children should take over these accounts. Other than discharging the outstanding balance of

K130,000.00 (unrebased) on the buses that he purchased on credit; paying Taonga Mtonga K15,000.00 per month; paying his two wives for any supply of chickens made to the schools; and meeting the employees' conditions of service, the Will is silent on what should be done with the rest of the dividends/profits generated by these entities. The Will also specifically mentions that none of these entities are for sale. With regard to the Deed of Trust, I have already ordered that it is *null* and *void*.

As mentioned above, any asset that was not specifically bequeathed in the Will, must be distributed in accordance with ***The Intestate Succession Act***¹. I have already quoted above in *extensio* the duties of a personal representative both under ***The Intestate Succession Act***¹ and ***The Wills and Testate Act***². The Respondents have not produced a statement of account of the estate but merely asserted in their Affidavit in Opposition what they did with part of the deceased's estate. Accordingly, there is no evidence before me to show an accurate representation of the deceased's estate. Unless a proper inventory and accounting of the estate of the deceased is done with sufficient evidence to show how much of the estate remains to be distributed to the beneficiaries, the matter will not be brought to a proper end.

The Respondents challenged the Applicant to follow up on her claims that the deceased had shares in Lafarge Cement Zambia Plc. It is not the duty of a beneficiary to do this. As can be seen from ***Section 19 (1)*** of ***The Intestate Succession Act***¹, which I quoted above, the law imposes various duties upon an administrator of an

estate including the duty to render an account on the administration of a deceased's estate. I refer to the case of **Lindiwe Kate Chinyanta vs. Doreen Chiwele Judith Tembo**², where the Court found that the duty of an administrator is to collect the deceased's estate and to distribute to beneficiaries and to render an account.

I find therefore that by virtue of the above provisions of **Section 19 (1) (a)** of **The Intestate Succession Act**¹, the Respondents being administrators of the deceased's estate are under an obligation to effect distribution of the estate to the right persons as prescribed and to render an account on the administration of the estate in accordance with the provisions of **The Intestate Succession Act**¹. I order that the Respondents shall hereby render a full account to the Court on the administration of the said estate within three (3) months from the date hereof.

I now turn to address the fourth issue of whether the Applicant should be awarded her entitlement out of the deceased's estate. The Applicant's contention is that the Respondents as administrators have failed or neglected to effect the distribution of the estate according to the law and hence the application for them to render an account and distribute the estate accordingly, while the Respondents contend that the Applicant was given one motor vehicle, K10,250.00 in 2005 and K50,000.00 in 2017.

The said **Section 19** of **The Intestate Succession Act**¹ outlines the duties and powers of an administrator. The administrator in line

with **Section 19 (1) (b)** of **The Intestate Succession Act¹** is legally required to effect the distribution of the estate to the persons having interest in it. **Section 5** of **The Intestate Succession Act¹** provides for the distribution of the estate to various beneficiaries. In this instant case, it is common cause that there were two (2) surviving spouses and thirteen (13) children who are beneficiaries of the deceased. I therefore find that the Applicant, being a child of the deceased, is a beneficiary of the deceased's estate.

The Respondents exhibited a Will and Deed of Trust, on which they base their contention that the Applicant is not entitled to a share of properties mentioned therein. Further, the 1st Respondent alleges that he solely built Muzipasi High School using his own resources and not funds from the estate of the deceased and as such, the Applicant is not entitled to a share of the same. The Respondents admit that four (4) buses and one (1) motor vehicle were taken to Muzi High School for use by the school. They also allege that the lodge purchased along Lumumba Road was purchased for the beneficiaries of Muzi High School Registered Trustees after the sale of Zipas High School.

The Applicant's other contention is that the Respondents have not told the beneficiaries how much was in the deceased's bank accounts and how much was realised from the sale of certain properties forming part of the deceased's estate, which the beneficiaries were legally entitled to. Further, that the Respondents distributed more properties to themselves and have been diverting some assets of the deceased for their personal use, including

funding their personal businesses, to the detriment of the other beneficiaries.

The law is very clear in its provision that an administrator must not derive pecuniary benefits or advantage from his office. In her Affidavit in Reply, the Applicant exhibited a document marked "TMM2" which is a copy of minutes of the deceased's family meeting held on 22nd September, 2010, whose contents have not been disputed by the Respondents. According to the said minutes, the 1st Respondent admitted having received a cheque of K39,000.00 from Lafarge Cement Zambia Plc, but was not aware how many shares the deceased had in the said company and acknowledged having collected a loan for Fremto Transport, his personal business, under Muzi High School. The 1st Respondent further admitted having distributed four houses to himself. He also admitted building Muzipasi High School in Chipata and ten shops at the garage opposite Musa Kasonka Stadium from the deceased's company funds.

In light of the above and the apparent lack of full disclosure by the Respondents, I find that the beneficiaries have not fairly benefitted in terms of the law. **Section 34 of *The Intestate Succession Act*¹**, provides that: -

"Administrator or guardian not to derive benefit

34. (1) *An administrator or guardian shall not derive any pecuniary benefit from his office.*

(2) *If an administrator or guardian purchases, either directly or indirectly, any part of the property of the*

deceased or of a minor for whom he is responsible, the sale may be set aside by the court on the application, made within a reasonable time, of any other person interested in the property sold or in the proceeds of sale."

From the conduct of the Respondents, it is apparent that the deceased's estate has not been managed properly and has not been distributed in accordance with the law. It is also apparent that the Respondents have breached the provisions of the law by financing their personal businesses with proceeds from the deceased's estate.

In view of the above, I now turn to consider whether the Respondents should remain in office as administrators of the deceased's estate. **Section 51 (2) of *The Wills and Administration of Testate Estate Act*³** provides as follows: -

"Revocation of grants and removal

Where it is satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled to it so require, the court may suspend or remove an executor or administrator and provide for the succession of another person to the office of that executor or administrator who may cease to hold office, and for the vesting in that person of any property belonging to the estate."

Section 29 (2) of *The Intestate Succession Act*¹, provides that: -

"Revocation of grants and removal

(2) Where the court is satisfied that proper administration of the estate and the interests of the persons beneficially entitled to them so require, it may-

- (a) *suspend or remove an administrator;*
- (b) *provide for the succession of another person to the office of that administrator who shall cease to hold office; and*
- (c) *provide for the vesting in the successor of any property belonging to the estate."*

The Court is empowered to remove or suspend an administrator from office where it is satisfied that the interests of the estate so require. Whilst I am inclined to do so in this case on account of the conduct of the Respondents, I am cognisant of the fact that any removal or suspension of the Respondents as administrators of the deceased's estate at this stage will cause further delays in the distribution of the estate to the beneficiaries. I therefore order that the Respondents continue in their office as administrators of the deceased's estate. I further order that the Respondents, in producing a full inventory of the estate and rendering an account of the administration thereof, must also include the proceeds of the sale of the properties. I also order that the Respondents should distribute the estate in accordance with the law.

The final issue for determination is the sale of the deceased's real properties by the Respondents without the authority of the Court as prescribed under **Section 19 (2) of *The Intestate Succession Act***¹. These real properties are Plot No. 0744, Kabushi, Ndola and Subdivisions A, B, C, D, E and F of Stand No. 14788, Lusaka. The Respondents have not produced any evidence before me that such authority of the Court was sought and granted on all the real

properties sold by the Respondents. In the absence of such evidence, I am compelled, notwithstanding the inconveniences that may visit the buyers of these properties, to find that all these sales are *null* and *void* for want of the authority of the Court under **Section 19 (2) of The Intestate Succession Act**¹. Any person affected will have to pursue the Respondents for any loss they may suffer by reason of the Judgment herein. The decision that I take is fortified by the case of **Borniface Kafula and Others vs. Billings Choonga Mudenda**¹⁰, in which the Supreme Court stated that: -

"...the provision in Section 19 (2) of the Intestate Succession Act was well intended... The said section places the burden on the administrator to show to the Court that the sale of any property forming part of the estate of a deceased person is, in his or her considered view, necessary or desirable in order for him to carry out his duties."

I am of the firm view that the Applicant has proved her claims on the balance of probabilities and for the foregoing reasons, Judgment is hereby entered in her favour.

For avoidance of doubt, it is hereby Ordered as follows: -

1. That the Deed of Trust is *null* and *void*. Accordingly, all assets provided for therein will be distributed to all the beneficiaries in accordance with the provisions of **The Intestate Succession Act**¹;
2. That other than discharging suppliers and employees' liabilities; and payment of K15,000.00 to Taonga Mtonga as

provided in the Will, all dividends accruing to the deceased's estate from the entities mentioned in the deceased's Will fall within the ambit of intestate estate and will be distributed to all the beneficiaries in accordance with the provisions of ***The Intestate Succession Act***¹;

3. That the Respondents will produce a full inventory of the estate and render an account of the administration therefore, including the proceeds of the sale of any of the deceased's assets within the next three (3) months;
4. Any sale of the deceased's real properties is *null* and *void* and is hereby set aside; and
5. That the Respondents will collect the deceased's estate and distribute to all the beneficiaries in accordance with the provisions of ***The Intestate Succession Act***¹.

Costs are awarded to the Applicant to be borne by the deceased's estate and to be taxed in default of agreement.

Leave to Appeal is hereby granted.

Delivered at Lusaka the 9th day of January, 2018



**P. K. YANGAILO
HIGH COURT JUDGE**