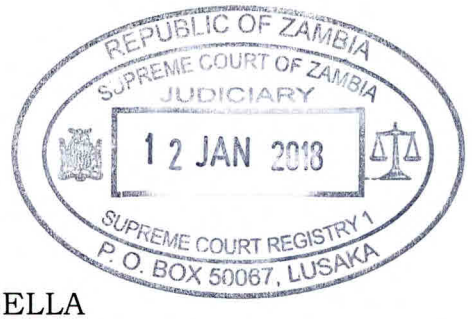
IN THE SUPREME COURT OF ZAMBIA **APPEAL No. 11/2010**

HOLDEN AT LUSAKA **SCZ/8/124/2009**

(Civil Jurisdiction)



BETWEEN:

SHADRECK BELLA APPELLANT

AND

MPUNDU KAMWANYA BELLA RESPONDENT

CORAM: Mwanamwambwa D.C.J., Wood and Musonda JJs
On 11th July 2017 and 10th January 2018

For the Appellant: *In person*

For the Respondent: *Legal Aid Board*

J U D G M E N T

Mwanamwambwa, D.C.J, delivered the Judgment of the Court.

Legislation Referred to:

1. ***Intestate Succession Act* Chapter 59 of the Laws of Zambia**
2. ***High Court Rules* Chapter 27 of the Laws of Zambia**
3. ***Rules of the Supreme Court* (White Book), 1999 Edition**

Cases Referred to:

1. ***Fenias Mafemba v Sitali*, SCZ Judgment No. 24 of 2007**
2. ***Rosemary Bwalya & Others v Mwanamuto Investments Limited*, SCZ Judgment No. 8 of 2012**

For convenience, we shall refer to the Respondent as the Applicant, which is what she was in the Court below.

This is an appeal from a judgment of the High Court delivered in chambers on 1st June 2009. By that judgment, the High Court declared that the Applicant had been lawfully married to the late Evans Bella ("the deceased") and was, therefore, entitled to a share in the estate of the deceased in accordance with the Intestate Succession Act Chapter 59 of the Laws of Zambia ("the Act").

The facts are that the deceased died intestate in 2007. Subsequently, the Appellant was appointed Administrator of the deceased's estate. In February 2008, the Applicant commenced action in the Court below. She commenced the action by way of Originating Summons, seeking the following reliefs:

(i) A declaration that she was lawfully married to the deceased under customary law;

(ii) A declaration that the deceased divorced his first wife at the Boma Local Court and, therefore, she is not entitled to a share in his estate;

(iii) A declaration that another administrator be appointed, preferably the Administrator General and Official Receivers;

(iv) A declaration that the Applicant's last two children, namely **META BELLA**, a female born in 2006, and **MPUNDU KAMWANYA BELLA**, also a female born in 2007, are children of the deceased and, therefore, entitled to a share in his estate.

In her Affidavit in Support of Originating Summons, the Applicant had exhibited a document titled '***Marriage Agreement***' (see **page 26** of the Record) to back her claim that she was lawfully married to the deceased. The document certifies that "*Mr. Evans Bella and Ms. Mpundu Kamwanya [have] been married (come together as husband and wife) on this date of 15th April 1996*". It also shows that the Appellant's family paid K150,000-00 to the family of the Respondent.

The Court below directed that the matter proceed by way of submissions.

The Applicant augmented her Affidavit in Support of Originating Summons by submitting that, in terms of section 3 of the Act, **META BELLA** and **MPUNDU KAMWANYA BELLA** were children of the deceased. Therefore, they were entitled to a share in his estate.

In response, the Appellant submitted that there was no dispute that **META BELLA** and **MPUNDU KAMWANYA BELLA** were children of the deceased. According to him, the issue for determination by the Court below was whether the Applicant was validly married to the deceased under any customary law.

After considering the application before her and the submissions filed by both parties, the learned trial Judge delivered judgment in chambers. She noted that there was no dispute regarding the issue of the two children being part of the deceased's estate. That there were only two issues which the Court below had been called upon to determine. The first issue was whether the Applicant was validly married to the deceased under customary law. The second was whether the deceased had divorced his first wife, as alleged by the Applicant.

Regarding the first issue, the learned trial Judge noted that the '***Marriage Agreement***' relating to the Applicant and the deceased was not rebutted by the Appellant. Therefore, she formed the view that the Applicant had been lawfully married to the deceased under the Lozi customary law. Accordingly, the Court

below ordered, *inter alia*, that the Applicant be granted her share of the estate of the deceased in accordance with the Act.

The Appellant was not happy. He appealed on five grounds. These are as follows:

1. *The Court below erred in fact and in law when it proceeded with this matter on the basis of submissions and affidavit evidence when there are many triable issues and the parties ought to have been heard.*
2. *The Court erred in fact and in law in regarding the two children of the [Applicant] from other men as children of the deceased within the definition in the Intestate Succession Act, Cap. 59 when the Act encompasses only children forming children of the family between husband and wife.*
3. *The Court erred in law and in fact to recognize an unsigned piece of paper dated 3rd June, 2008, well after the deceased had died, and unsigned by the purported relatives of the deceased whose names appear thereon, thereby lacking authenticity and credibility.*
4. *The Court erred in law when it regarded the [Applicant] as having been married under customary law when the parties' custom does not recognize as valid marriage a paper stating that there was agreement of marriage, as customary law of marriage involves procedures and various payments by the parents of the man to the*

parents of the woman, and the father of the man is alive, lives in Lusaka and only came to meet the [Applicant] in December 2007, nine (9) months after the death of the deceased.

5. *The Court erred by not ordering submissions by the Applicant first, which the Appellant could then answer. Therefore, it erred in holding that the Appellant did not challenge the validity of the marriage merely because the Appellant's disputing of the marriage was not done with the same force as the [Applicant's] claim.*

We note, at this point, that the Appellant has not made the issue of the deceased's first wife a subject of this appeal. Therefore, we shall confine our pronouncements to the issue of whether or not the Applicant was validly married to the deceased.

So far, no Heads of Argument have been filed by the parties. Nevertheless, we have carefully considered the issues raised in this Appeal.

In ground 1 of the appeal, the Appellant's contention, as we understand it, is that this matter involves many triable or contentious issues which ought to have been resolved in open court. That the learned trial Judge erred when she proceeded to

dispose of the matter in chambers on the basis of submissions and affidavit evidence.

We have perused the Record of Appeal. **Page 58** of the Record shows that on 8th December, 2008, the matter came up in chambers in the Court below. Mr. Kalokoni, who was Counsel for the Appellant then, applied that the matter go to trial "*so that oral evidence is adduced to handle this case*". There is no indication, on the Record, that a ruling has ever been delivered on that application. There is also no indication that the matter was ever adjourned into open court. What we see is that, entirely on the basis of affidavit evidence and submissions made by the parties, the Court below disposed of the matter in chambers.

The procedure for adjourning matters commenced by way of Originating Summons from chambers into open court is provided in **Order 30 rule 8** of the High Court Rules Chapter 27 of the Laws of Zambia, as read together with **Order 28 rule 8(1)** of the Rules of the Supreme Court of England (White Book) 1999 Edition. Order 30 rule 8 of the High Court Rules provides as follows:

> ***"In every cause or matter where any party thereto makes any application at chambers... it shall be lawful for the Court or Judge to make any order and give any directions relative to or consequential on the matter of such application as may be just; and such application may, if the Judge thinks fit, be adjourned from chambers into Court, or from Court into chambers."***

And Order 28 rule 8(1) of the White Book states the following:

> ***"Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."***

It is clear that both **Order 30 rule 8** of the High Court Rules and **Order 28 rule 8(1)** of the White Book leave it in the discretion of the court whether or not to adjourn a matter from chambers into open court. However, as we stated in the case of ***Rosemary***

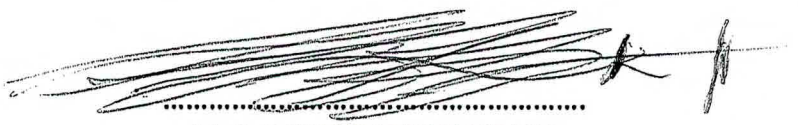
Bwalya & Others v Mwanamuto Investments Limited (2), discretionary power must be exercised judiciously.

We note from the Record of Appeal that the Appellant has questioned the authenticity of the document titled '***Marriage Agreement***', which is central to the Applicant's assertion that she was validly married to the deceased. He bases his reservations on the fact that the document was not signed by the Applicant, her parents, the deceased or the supposed relatives of the deceased. That the document does not demonstrate a valid customary law marriage as guided by this Court in ***Fenias Mafemba v Sitali (1)***. It has further been contended by the Appellant that the '***Marriage Agreement***' bears dates which suggest that the marriage may have been purportedly contracted after the deceased's death.

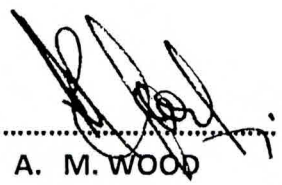
Given the Appellant's misgivings with regard to the validity of the marriage between the Applicant and the deceased, we agree with the Appellant that the case *in casu* raises triable or contentious issues which ought to have been resolved in open court. We take the view that the failure on the part of the learned trial Judge to exercise her discretion to adjourn the matter into

open court was a misdirection. Therefore, we find merit in ground 1 of the appeal and allow it.

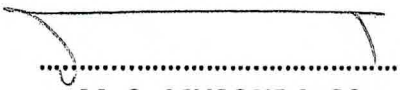
With regard to grounds 2, 3, 4 and 5 of the appeal, we take the view that these would be best dealt with if the matter were first tried in open court, as provided by **Order 30 rule 8** of the High Court Rules and **Order 28 rule 8(1)** of the White Book. It would be untimely for us to interrogate these grounds without the parties having been heard in open court, as contended by the Appellant. In the circumstances, we hereby send this matter back to the High Court for retrial. Each party to bear own costs.



M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



A. M. WOOD
SUPREME COURT JUDGE



M. C. MUSONDA, SC.
SUPREME COURT JUDGE