

BETWEEN:

MARTHA MUSHIPE

APPELLANT

(T/A Mushipe & Associates and suing as
Executrix and trustees of the late Funny
Lungu Yolamu)

AND

GAUDENSIA ROSSI

RESPONDENT

(Sued in his capacity as Executors and
Trustees of the estate of the late Funny
Lungu Yolamu)



Coram: Chashi, Chishimba and Sharpe-Phiri, JJA
on 18th January 26th January 2022 and 22nd February 2022

For the Appellant: Mr. P.G. Katupisha of Messrs Milner & Paul legal
Practitioners and Ms. M. Mushipe of Messrs
Mushipe & Associates

For the Respondent: Ms. S. Namusamba of Messrs Shamwana & Co.

J U D G M E N T

Sharpe-Phiri, JA, delivered the Judgment of the Court

Legislation referred to:

1. *The Legal Practitioners Act, Chapter 30 of the Laws of Zambia*
2. *The Wills & Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia*
3. *The Legal Practitioners Rules, 2002, SI No. 8 of 2001*
4. *The Rules of the Supreme Court of England (White Book), 1965 Edition*
5. *Halsbury's Laws of England, 4th Edition, Volume 17*

Cases referred to:

1. *Ndongo V Moses Mulyango, Roostico Banda (2011) Vol. 1 ZR*
2. *Mohamed S. Itowala vs Variety Bureau de Change (2002) ZR 96*
3. *Lipepo and Others vs the People SCZ Judgment No. 20 of 2014*
4. *Costa Tembo vs Hybrid Poultry Farm (Z) Limited (2003) ZR 93*
5. *Sablehand Zambia Limited vs Zambia Revenue Authority SCZ Judgment No. 20 of 2005*
6. *Kuta Chambers (Suing as a Firm) vs Concillia Sibulo (Suing as Administratrix of the Estate of the late Francis Sibulo) SCZ Appeal No. 122 of 2012*

1.0 **INTRODUCTION**

- 1.1 This appeal was brought by the appellant, Martha Mushipe in her capacity as Executrix and Trustee of the estate of the late Funny Lungu Yolamu (‘the testatrix) against the respondent, Gaudensia Rossi and emanates from the judgment of the Hon. Justice A.M Sitali delivered in the High Court on 11th May 2017.

2.0 **FACTUAL BACKGROUND**

- 2.1 The brief facts are that in 1999, the appellant (plaintiff in the lower court) was retained to draft a will for the testatrix. The appellant drew up the will as instructed and which the testatrix executed on 8th March 1999. The appellant and one Selina Banda witnessed the signing of the will.

- 2.2 Pursuant to clause 1 of the will, the testatrix appointed the respondent, Mr. Gaudensia Rossi and one Mr. Kani to be executors and trustees of her will who were to be assisted by the testatrix's lawyers, who were not named in the will.
- 2.3 The testatrix passed away on 11th May 2000 and the appellant proceeded to obtain probate on 11th August 2000 with Mushipe & Associates, Mr. Kani and Mr. Rossi as co-executors and trustees of the estate of the testatrix. The appellant included Mushipe & Associates on her own accord contending that the firm was appointed executors of the will by implication.
- 2.4 Mr. Rossi accepted but Mr. Kani declined to take up the appointment. The appellant proceeded to administer the estate on her own until misunderstandings with the beneficiaries arose wherein her appointment was revoked.
- 2.5 Following the revocation of her executorship, the appellant sought to recover various fees for works allegedly done in her capacity as executor and lawyer of the estate.

3.0 ACTION IN THE HIGH COURT

- 3.1 The appellant commenced an action as a plaintiff in the High Court on 29th January 2003 seeking a range of reliefs associated with her alleged representation of the estate of the testatrix. The respondent was the defendant in the Court below.

3.2 The appellant sought the following reliefs in the Court below:

- i. **Legal fees in the sum of K309,651,808=70 being 10% of the value of the estate chargeable.**
- ii. **Legal fees on the sum of US\$27,000=00 being 10% of the value of the estate chargeable with interest at the current bank rate with effect from 11th of August, 2000 to date of payment.**
- iii. **Legal fees in respect of Cause 2000/HP/1264 Ruth Yolamu (suing on her own behalf and as next friend of Levy Yolamu, a minor) vs Kani and Rossi and interest at bank rate from date of writ to date of payment.**
- iv. **Legal fees in respect of Cause 2002/HP/0525 Mushipe and Associates, Gaudensia Rossi and Kani (suing in their capacity as Executrix/Executors and Trustees of the estate of the late Funny Lungu Yolamu) vs Cutline Limited plus interest at current bank rate from date of the writ to date of payment.**
- v. **An Order that the plaintiff is a legally appointed lawyer for the estate of the late Funny Lungu Yolamu pursuant to a will dated 8th March 1999.**

- vi. An Order that all outstanding debts such as maintenance and rehabilitation of the properties herein and other bills be rendered by the estate.**
- vii. An Order that Mushipe and Associates continues to collect rentals until all outstanding debts which should include the clients' account if in debt have been redeemed or paid through other means.**
- viii. An Order that the letter of revocation dated 24th January 2003 is irregular and illegal.**
- ix. An injunction restraining the defendant or beneficiaries from interfering, meddling, collecting rentals, disposing, selling, leasing, and subletting the properties aforementioned or any way dealing with the estate until the determination of this case or until further Order of the Court.**
- x. Any other relief the Court may deem fit.**
- xi. Costs.**

3.3 The respondent filed a defence and counterclaim against the appellant in the action before the Court below contending that the appellant was not entitled to charge legal fees since she lost the said right when she attested the will of the testatrix.

4.0 RESPONDENT'S COUNTERCLAIM

4.1 The respondent counter-claimed for the following reliefs:

- i. An Order that the plaintiff's appointment as executrix of the estate of the late Funny Lungu is unlawful and therefore null and void.**
- ii. An Order that the plaintiff is not entitled to charge fees for assisting the executors administer the estate.**
- iii. An Order that the plaintiff forthwith render an account of the estate.**
- iv. Damages suffered as a result of the plaintiff having failed to properly advise on the affairs of the estate.**
- v. Any other relief the court may deem fit; and**
- vi. Costs.**

5.0 APPELLANT'S REPLY

5.1 In reply, the appellant insisted that she was lawfully appointed as Executrix and Trustee of the will of the testatrix and that she was lawfully entitled to charge legal fees for work carried out on behalf of the estate.

6.0 DECISION OF THE COURT BELOW

- 6.1 The Judge in the lower Court began by addressing the first question of whether the Appellant was lawfully appointed by the testatrix as executor and lawyer of the estate of the testatrix under the will of 8th March 1999.
- 6.2 The Judge undertook a careful examination of the wording of Clause 1 of the will of the testatrix of 8th March 1999, shown at page 305 of the Record of Appeal, which reads, *'I, appoint Mr. Kani of Plot No. 26 of Nalikwanda Street, Woodlands, Lusaka, Mr Rossi of Ndeke Motel, Lusaka to be executors and trustees of this my will who will be assisted by my lawyers.'*
- 6.3 The Judge observed that the testatrix expressly appointed Mr. Kani and Mr. Rossi as executors of her estate and that the executors were to be assisted by the testatrix's lawyers who were not expressly stated in the will.
- 6.4 The Judge further discerned that the failure to name the lawyers to assist the executors in the administration of the estate created a latent ambiguity. In view of the appellant (plaintiff's) assertion in the statement of claim that she was the appointed lawyer by implication, the Judge stated that the appellant bore the burden of adducing clear evidence to show which lawyers were intended by the testatrix to assist the executors.

- 6.5 The Judge held the firm view that where a testator intends to appoint his lawyers to act as executors of his estate, the testator ought to clearly state the name of the law firm and give clear directions regarding the number of partners who may prove his will.
- 6.6 The Judge considered the appellant's evidence that she believed that Mushipe & Associates were the appointed executors and lawyers because the testatrix had instructed her to draft the will and because the testatrix had handed over the original certificates of title for the two properties which formed part of her estate.
- 6.7 The Judge also considered the evidence of the appellant before her that at the time that she was drafting the testatrix's will, the appellant was aware that she was not the only lawyer representing the testatrix. The appellant had confirmed that the testatrix had informed her that she had retained Shamwana & Company to represent her in another matter.
- 6.8 The Judge further considered that the appellant had expressly admitted in cross-examination that she did not have instruction in writing from the testatrix appointing Mushipe & Associates to assist the executors. The Judge held that although the testatrix had instructed the appellant to draft her will, that was not sufficient evidence to establish further instructions from the testatrix to assist the executors to administer the estate.

6.9 The Judge found that the appellant had not proved that the testatrix had or intended to appoint the appellant as executor of her estate or the firm of Mushipe & Associates as lawyers to assist the executors in the administration of the estate. The Judge stated that if the testatrix intended to do so, she would have expressly stated so in the will.

6.10 The Judge held that the appellant trading as Mushipe & Associates was not expressly or by implication appointed as executor of the estate nor was she or the firm of Mushipe & Associates appointed as lawyer for the estate. She dismissed all the claims and condemned the appellant to costs.

7.0 THE APPEAL

7.1 Being dissatisfied with the judgment of the High Court, the appellant filed this appeal advancing seven grounds of appeal:

- i. The learned trial Judge erred in law and in fact when she disputed the appointment and status of the appellant as co-executor and lawyer of the estate of the late Funny Lungu Yolamu without taking into consideration the overwhelming evidence before Court to the effect that the appellant was duly appointed by the testatrix as co-executor, trustee and lawyer, which appointment was stated in the “will” by and for the late Funny Lungu Yolamu.**

- ii. The learned trial Judge gravely misdirected herself and seriously erred in both law and facts when she held that to accept the appellant's claim for legal fees would be to allow her to benefit from an illegal act in respect of the two causes in which she unilaterally represented the estate without instructions from appointed executors without taking into consideration the strength of the evidence before Court that the appellant was duly and legally appointed to act in the capacities of a co-executor, trustee and lawyer and as such the appellant was entitled to legal fees for the works she duly undertook.
- iii. The learned trial Judge gravely misdirected herself and seriously erred in law and in facts when she held that the appellant altered the instructions expressly stated by the testatrix in the will when she invited Mr. Rossi as appointed executor to advise if he would be in a position "to assist" as per the said "will" therefore purporting that the appellant had fraudulently acted as executor, trustee and lawyer without taking into consideration that this was enough admission by the Court that the appellant was duly appointed the "testatrix" and that there was no fraud specifically pleaded for by the respondent in his counterclaim.

- iv. The learned trial Judge gravely misdirected herself when she held that the testatrix did not state the name of the lawyers who were to assist Mr. Kani and Mr. Rossi as executors and trustees appointed under the will in the administration of the estate and that the mere fact that the testator instructed the appellant to draft the will and that appellant had original documents in her custody is not sufficient evidence to prove that she also had further instructions to assist the executors to administer the estate without taking into consideration the overwhelming evidence before Court and the fact that the testatrix was the appellant's client before and that the appellant drafted the will which was left in her custody and that the appellant read out the will to the beneficiaries upon the demise of the Testatrix.
- v. The learned trial Judge erred in law and in fact when she held that the appellant was not entitled to be paid the sums of K309,651,808.70 (unrebased) and US\$27,000 respectively being 10% of the value of the estate chargeable and legal fees on the general files as she claims all of which arose from her unauthorized administration of the estate in issue, without taking into consideration that the testatrix's will which was the subject of matter expressly permitted the trustees and lawyers to charge and be paid out of the residue of

the estate and that the Respondent herein had no objection to the Appellant being paid for legal services she rendered to the estate.

- vi. The learned trial Judge seriously erred in both law and fact when she dismissed all the appellant's claims which included redeeming outstanding debt thereby denying her the right to a fair and just trial.**
- vii. The learned trial Judge seriously erred in law and in fact when she awarded costs to the respondent without taking into consideration that this was too harsh for the appellant who had also been denied legal fees and other entitlements and that awarding costs to the respondent was a serious injustice, double punishment and an infringement to the appellant's rights as a Legal Practitioner.**

8.0 ARGUMENTS IN SUPPORT OF THE APPEAL

- 8.1 The appellant's heads of argument were filed on 16th July 2020. In ground 1 and 4 argued together, the appellant submitted that she was duly appointed as executor of the estate of the testatrix by the will she drafted on instructions received from the testatrix.

- 8.2 The appellant argued that the will could not be construed in any other way other than to find that she was duly appointed as executor under the said will. She relied on **Section 3 of the Wills and Administration of the Testate Estates Act** which provides that an executor may be appointed expressly under a will or by implication.
- 8.3 The appellant cited various paragraphs from the learned authors of Halsbury's Laws which illustrate that an executor could be appointed either expressly by the testator in the body of his will or by exercise of a power of nomination an executor conferred by the testator in the will or by implication from the testator's will when the executor is known as an executor according to the tenor.
- 8.4 The appellant further referred to **Blacks Law Dictionary** which provides at page 680 that:

'An executor according to the tenor is one who, though not directly constituted executor by the will is therein charged with duties in relation to the estate which can only be performed by the executor.'

- 8.5 She also cited page 710 of **Halsbury's Laws of England** which states further that:

'Even though the testator may fail to nominate a person in express terms to be his executor, yet if upon

a reasonable construction of his will it appears that a particular person has been appointed to perform the essential duties of an executor, such appointment is sufficient to constitute that person being an executor. The person so appointed is called an executor according to the tenor.'

- 8.6 The appellant further argued that a person appointed according to the tenor of a will need not be expressly named in the will. That according to the afore stated authors, an executor to the tenor of the will need not be directly constituted by the will but only needs to have been charged with duties that relate to the estate which can be performed by the executor. She argued therefore that the testatrix appointed her to draft the will and thus she was, by implication, appointed as executrix of the will to assist the other appointed executors.
- 8.7 The appellant argued ground 2 and 5 together that she was appointed as executrix of the estate of the testatrix and in addition being a legal practitioner by profession, she was entitled to legal fees incurred for the administration of the estate. She relied on **Statutory Instrument No. 8 of 2001** of the Legal Practitioners Act and argued that by virtue of these legal provisions, she was entitled to costs applicable in the administration of estates charged at K400 per hour plus in relation of the application for probate a fee of ten per centum of the gross Zambian estate.

- 8.8 The appellant disputed the respondent's contention that she had no instructions to represent the estate under cause numbers 2000/HP/1264 and 2002/HP/0525. She insisted that the respondent had specifically instructed her to represent the estate in these actions. The appellant further contended that she had sufficient instructions from the testatrix as she had possession of the will.
- 8.9 The appellant also argued that the will of the testatrix expressly entitles the trustees and lawyers of the estate to charge and be paid out of the residue of the estate, for all professional services such as legal and other charges for businesses or acts done by them in connection therewith.
- 8.10 On ground 3, the appellant submitted that since Mr. Kani had refused to take up the role of executor, it was only prudent that she asked the respondent if he could assist with administration of the estate given that she was so appointed as executor under the will and that **Section 30(1) of the Wills and Administration of the Testate Estates Act** allows for appointment of up to 4 executors.
- 8.11 She contended that it was erroneous for the lower court to hold that the context in which she requested the respondent to assist in the affairs of the estate amounted to alteration of the instruction in the will. She argued that the way the lower court had construed the invitation to the respondent purports that

she had acted fraudulently as executor, trustee and lawyer, a conclusion which offends **Order 18(1) of the Rules of the Supreme Court (1965) edition**. She concluded her argument under this ground by stating that the respondent did not plead fraud in the lower court.

8.12 Regarding ground 6, the appellant argued that she was denied a fair hearing when the lower court dismissed her claims for payment of various debts owed to her by the estate. She argued that the lower Court erred when it denied her entitlement to professional fees for the work rendered for the estate.

8.13 In arguing ground 7, the appellant submitted that the lower court was too harsh when it condemned her in costs after it had denied her the benefit of redeeming her legal fees for work done for the estate as entitled to her under **Section 83(1) of the Legal Practitioners Act and Statutory Instrument No. 8 of 2001**.

9.0 ARGUMENTS OPPOSING THE APPEAL

9.1 The respondent argued in rebuttal in the heads of argument filed on 24th January 2022. In response to grounds 1 and 4, the respondent accepted that by virtue of **Section 3 of the Wills and Administration of Testate Estates Act**, an executor may, expressly or impliedly, be appointed under a will.

9.2 The respondent submitted that the relevant portion of the will made it clear who the executors were to be. In this regard, he referred to clause 1 of the will of the testatrix dated 8th March 1999 which reads:

‘I appoint MR. KANI OF PLOT No. 26 NALIKWANDA STREET, WOODLANDS, LUSAKA, MR. ROSSI OF NDEKE MOTEL, LUSAKA to be executors and trustees of this Will who will be assisted by my lawyers.’

9.3 The respondent highlighted that under the provision of the will in issue, the testatrix had expressly appointed Mr. Kani and Mr. Rossi as executors who were to be assisted by unnamed lawyers as assistants to the executors in the administration of the estate.

9.4 He argued that the appellant or her firm were not named as the lawyer in the will and further that the appellant had conceded under cross examination that she was not the only lawyer retained by the testatrix at the time the will was being drafted.

9.5 The respondent contended that the testatrix could not have intended to appoint the appellant or her firm, either expressly or by implication and even though the appellant had custody of certain legal documents of the estate, this did not give credence to any argument of appointment of the appellant’s law firm.

- 9.6 The respondent argued that two executors were appointed and there was no mention that the lawyers, whichever of the testatrix's lawyers, would be co-executors. Further, that the appellant, being the lawyer that drafted the will herself, would have, if the testatrix intended, named the appellant as co-executor with Mr. Kani and Mr. Rossi or specifically stated which lawyers were being referred to, knowing that the testatrix had other lawyers.
- 9.7 The respondent argued that the Judge of the lower Court was on firm ground when she found that the appellant had not been appointed as executor and not specifically named in the will.
- 9.8 The respondent argued grounds 2 and 5 together as they both related to the appellant's claim for legal fees stemming from her assertions that she was appointed as executor and lawyer of the estate. The respondent relied on the submissions made under grounds 1 and 4 above and stressed that the appellant's claim had no basis to charge legal fees as she had no authority to administer the estate in the first place.
- 9.9 In the alternative, the respondents argued that if this Court finds that the appellant was duly appointed as executor of the will, that it finds that by the will, the lawyers were entitled to charge and be paid out of the residue of the estate, not the entire gross value as contended by the appellant.

9.10 Further, the respondent argued that the appellant should be held to a higher standard as a professional who prepared the will which she attested as a witness knowing fully well that a conflict of interest may arise if she stood to get pecuniary benefit as an executor. The respondent relied on **para 738, Vol. 17 of the 4th Edition of the Halsbury's Laws of England** which reads:

'A testator may of course by his will authorize his executor to be paid for professional work, or for work which an ordinary lay executor could have done in person without the assistance of a professional man; but to entitle a solicitor to the latter charges there must be clear words in the will: a direction that he should be paid all usual professional charges is not sufficient. An authority to a professional executor to make professional charges is a legacy, was liable to duty, and will fail if the executor has attested the will; and it cannot receive effect where the estate is insolvent.'

9.11 The respondent further retorted that as the appellant acted without authority from either the will, the duly appointed executors or beneficiaries of the estate, her claim for legal fees must fail as she had no instructions to act. Counsel relied on the case of **Mohamed S. Itowala vs Variety Bureau de Change** where it was held that a party must not be allowed to benefit from an illegal act.

- 9.12 The respondent argued ground 3 of the appeal by stating that the appellant altered the instructions of the will when she asked the respondent who was the appointed executor if he wished to assist with the affairs of the estate and went ahead to obtain probate as executor. In agreeing with the position of the Judge in the lower court, the respondent argued that a literal interpretation of the appointment provision in the will meant that the respondent is the person recognized as executor of the will to be assisted by a lawyer. That the appellant clearly altered the instructions in the will in that regard when she obtained probate as an executor.
- 9.13 In relation to ground 6, the respondent argued that the appellant was accorded a fair hearing in the lower Court as the parties had presented their cases and called witnesses as espoused in the principles of fair trial. The respondent relied on the case of **Lipepo and Others vs the People** and submitted that the lower court was not satisfied that the appellant was entitled to be paid as claimed.
- 9.14 Regarding ground 7, the respondent argued that the Judge was on firm ground when she condemned the appellant to costs as this was in line with the Supreme Court decision in the case of **Costa Tembo vs Hybrid Poultry Farm (Z) Limited** where it held that *‘a successful party is entitled to his costs’*. The respondent had partly succeeded in his counterclaim and the appellant had been unsuccessful.

10.0 ARGUMENTS IN REPLY

- 10.1 The appellant filed further arguments in reply on 26th January 2022. In arguing grounds 1 and 4, the appellant essentially repeated her earlier arguments insisting that a proper construction of the will meant that the lawyer who is to assist in the affairs of the estate as co-executor was a reference to her law firm as she had custody of several documents of the estate.
- 10.2 As to grounds 2 and 5, the appellant argued that she was entitled to recover fees as executor and lawyer for the estate adding that it was not up to the respondent to retain her services on behalf of the estate but that her appointment as co-executor and lawyer for the estate was drawn from the will where she was so appointed by the testatrix.
- 10.3 As regards to ground 3, which the appellants erroneously labelled as ground 4 in their arguments in reply, it was argued that the intention of the testatrix was not to have the lawyers merely assist in the administration of the estate without remuneration. It was submitted that the conclusion in the lower court that the appellant altered the will violated the principle requiring fraud to be specifically pleaded as the same was never raised by the respondent in the court below. She relied on the case of **Sablehand Zambia Limited vs Zambia Revenue Authority** and **Order 8 Rule 1 of the (White Book)**.

10.4 The appellant concluded her arguments in reply by arguing grounds 6 and 7 together. She submitted that the court seriously erred when she disallowed her claim for fees and was too harsh when the lower court went ahead to condemn her in costs. She submitted that the judgment of the lower court did not carry the face of justice as demonstrated in the Supreme Court case of **Kuta Chambers (Suing as a Firm) vs Concillia Sibulo (Suing as Administratrix of the Estate of the late Francis Sibulo)** where it was held that:

‘We have earlier on in this judgment stated that the award of costs should normally be guided by the principle that costs follow the event, the effect being that the party who calls forth the event by instituting suit, will bear the costs if the action fails; but if this party shows legitimate cause by successful suit, then the losing party will bear the costs. However, the vital factor in setting the preference is the judicious exercise of discretion by the court, accommodating special circumstances of the case while being guided always by the ends of justice.’

11.0 DECISION OF THE COURT

11.1 Both Counsel for the appellant and the respondent attended the hearing of the appeal and repeated the arguments contained in their heads of arguments.

11.2 We have considered the arguments of the parties and the judgment being impugned. We shall determine the appeal as argued by the parties, starting with grounds 1 and 4, in which the appellant argued that the Judge in the lower Court erred when she disputed her appointment as co-executor of the will of the testatrix and held that the testatrix did not state the name of the lawyer to assist the executors.

11.3 **The Wills and Administration of Testate Estates Act**, (‘the Act’) deals with the administration of estates of persons who die having made a will. **Section 5(b)** thereof affirms that, ‘*a testator may appoint one or more persons to be his executor.*’ An executor is described by **Section 3 of the Act** as being ‘*a person to whom the administration of the estate of the testator or part of it is entrusted by express or implied appointment under a will.*’

11.4 On the manner of the appointment of executors by a testator, the learned authors of **Halsbury’s Laws of England, 4th Edition, Vol 17, para 707** state as follows:

‘An executor can be appointed either (1) expressly by the testator in the body of his will, or (2) by the exercise of a power of nomination an executor conferred by the testator by his will, or (3) by implication from the testator’s will, when the executor is known as an executor according to the tenor, or (4) by virtue of statutory provisions.’

11.5 The foregoing authority is instructive, that executors can be expressly named by the testator in a will or by implication from the testators will. An executor appointed by implication is said to be called an executor according to the tenor. The appellant cited a plethora of authorities expounding appointments of executors according to tenor. **Halsbury's Laws of England, 4th Edition, Vol 17 para 710** which provides for executors according to tenor was cited as follows:

'Where a testator fails to nominate a person in express terms to be his executor but upon a reasonable construction of his will it appears that a particular person has been appointed to perform the essential duties of an executor, such an appointment is sufficient to constitute that person an executor. The person so appointed is called an executor according to the tenor.'

11.6 The respondent asserted from the foregoing authority that the imputation of executorship could only be applied where a testator has failed to expressly appoint an executor, which was not the position in the present case.

11.7 The consideration of grounds one and four hinge on the interpretation of clause 1 of the will of the testatrix.

11.8 The relevant provision of the said will reads as follows:

‘I appoint Mr. Kani of Plot No. 26 Nalikwanda Street, Woodlands, Mr. Rossi of Ndeke Motel, Lusaka to be the executors and trustees of this my will who will be assisted by my lawyers.’

11.9 The first portion of clause 1 of the will of the testatrix is explicit. It distinctly appoints two persons, namely Mr. Kani and Mr. Rossi to be the executors and trustees of the will of the testatrix. The second limb has a requirement that the two executors were to be assisted by the testatrix’s lawyers. However, the testatrix did not name the lawyer to assist the executors, nor did she specify the extent of this assistance.

11.10 This portion of the Will, which refers to the executors and trustees being *assisted by the testatrix’s lawyers*, has raised controversy, and requires interpretation of the intention of the testatrix as to which lawyer was to assist the executors and to what extent? The appellant insisted that she had received instructions to draw up the will of the testatrix and as such there could be no other lawyer than herself that the testatrix intended to appoint to assist the executors.

11.11 The Judge in the lower Court found that the appellant had failed to substantiate this allegation.

11.12 The evidence on record in the lower Court reveals that the appellant drew up the will of the testatrix and it was signed on 8th March 1999. The appellant then retained possession of the will and other original documentation in relation to the estate until the testatrix passed away over a year later, 11th May 2000. At the time of the testatrix demise, the appellant did not have instructions from the testatrix to assist the executors of the will. There were also other lawyers retained to represent the testatrix and therein creates the uncertainty as to which one of her lawyers the testatrix wanted to assist her executors.

11.13 The appellant's argument that she was the person the testatrix intended to assist the executors because she drew up the will of the testatrix the previous year does not seem logical or plausible given the absence of evidence to substantiate this contention. The mere fact that Counsel is retained to draft a will does not necessarily imply that that person is the appointed legal representative to assist the executors of the will. It is trite that a legal practitioner needs specific instructions to act.

11.14 The respondent also argued that the word 'assist' implied that there was a principal involved who had been tasked to carry out a particular task and that an assistant would merely provide support and not take over the role herself. Therefore, even assuming that the appellant was the lawyer that the testatrix intended to assist the executors, the intention would have been for her to have 'assisted' the executors and not take over as a co-executor of the estate.

11.15 We also observe from the evidence in the court below that soon after the death of the testatrix, the appellant proceeded on her own accord to obtain probate. There does not appear to have been any instructions given to her in this regard. In her application to the Court for probate, she made a declaration in the oath of executor form (page 310 of the record of appeal, Volume 1 dated 26th July 2020) that her firm, Mushipe and Associates together with Mr. Kani and Mr. Rossi, were *named* as executors and trustees in the will of the testatrix. This was a deliberate misrepresentation to the Court by counsel knowing fully well that neither she nor her firm were expressly named as executors and trustees in the will. This is contrary to the **Legal Practitioners Rules, 2002** which we shall make reference to in the next paragraphs.

11.16 Notwithstanding, the will of the testatrix expressly appointed two executors and trustees of the will. Given that there were executors appointed under the will, the necessity for construction of the will to infer other appointments as executors did not arise. We also agree with the Judge below that if the testatrix's intention was to appoint the appellant as executor of the will, she would have named her along with the names of Mr. Kani and Mr. Rossi.

11.17 Given the fact that Clause 1 of the will expressly named Mr. Kani and Mr. Rossi as executors of the will, a proper construction of the second limb of the said Clause imputes discretion on the part of the two named executors to seek assistance from among

several of the lawyers that were engaged by the testatrix for various assignments during her life, and only to be engaged for assistance as and when legal assistance was needed in the course of the administration of the estate. One such instance when the named executors may have required legal assistance was at the point of drawing up an application to obtain probate, at that point, the named executors would have been well within their rights to seek assistance from the appellant or from any other lawyers they may have known to be associated with the testatrix during her life.

11.18 The Judge of the lower court found that the appellant had failed to prove on a balance of probabilities that she was appointed as executor of the estate of the testatrix. The Judge therefore established that the appellant was not appointed as executor of the said estate, expressly or by implication as alleged by the appellant.

11.19 In the case of **Ndongo V Moses Mulyango, Roostico Banda**, the Supreme Court reaffirmed and held that:

‘An appellate Court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts, or that they were

findings which on a proper view of the evidence, no trial Court acting correctly can reasonably make.'

11.20 We have no reason to fault the Judge of the lower court in her finding that neither the appellant nor the firm of Mushipe & Associates were appointed as executor of the estate of the late Funny Lungu Yolamu or as lawyers to assist the executors of the estate. For this reason, we find that ground 1 and 4 have no merit, and we dismiss them accordingly.

11.21 Grounds 2 and 5 contend that the Judge in the lower court erred when she did not allow the appellant's claims for various category of legal fees purportedly accumulated during her representing and acting for the estate as co-executor, trustee, and lawyer.

11.22 Our perusal of the judgment of the lower court shows that the Judge did consider the evidence before her.

11.23 She observed that **Section 57(1) of the Wills Act** permits a personal representative who includes an executor to charge fees in respect of his office where a will expressly provide to that effect. She also recognized that clause 6 of the will permits the trustees and lawyers to charge and be paid, out of the residue of the estate, all professional charges for all businesses or acts done by them in connection with the trusts.

11.24 The Judge was however of the view that the Appellant's claim for the legal fees to be paid at 10% of the gross value of the estate was at variance with the provisions of the will of the testatrix which permits payment out of the residue of the estate.

11.25 The Judge also held the view that the claims for legal fees arose out of the appellant's administration of the estate as executor, which she undertook on the premise that she, trading as Mushipe & Associates, was appointed as executor of the estate. The Judge held that the appellant's claim was not tenable since she was not appointed as executor of the estate under the will.

11.26 The appellant's action of getting the respondent's co-operation in the administration of the estate with her as co-executor was clearly a grave misrepresentation of the instructions in the will regarding who the executors were.

11.27 We have sought recourse to the **Legal Practitioners Practice Rules, 2002** to assert our position on issues raised in this appeal. Specifically **Rules 3(2)(b) and 16(3)** which provide that:

‘(2) A practitioner shall not do anything in the course of practice or permit another person to do anything on the practitioner's behalf, which comprises or impairs or is likely to compromise or impair any of the following:...

(b) a person's freedom to instruct practitioners of choice.'

Rule 16(3) going further to provide further that:

'A practitioner shall not offer services without instructions from a client.'

11.28 Given that we agree with the findings of the lower Court that the appellant was not appointed as executor, trustee or lawyer of the estate of the testatrix under the will, and in the absence of express instructions retaining her to act for the estate by the duly appointed executors and trustees, it follows that the claims for legal fees in respect of services provided and actions done by the appellant in such capacities when she ought not to have been administering the estate or representing the estate in Court actions are unsanctionable. We find that grounds 2 and 5 are without merit and are dismissed accordingly.

11.29 We would wish to digress and address a related issue to the foregoing pertaining to the conduct of the appellant as a senior member of the Zambian bar. The appellant knowing fully well that the will had 2 named executors, moved swiftly to obtain probate for the executors, including herself as executor contrary to the clear instructions contained in the will.

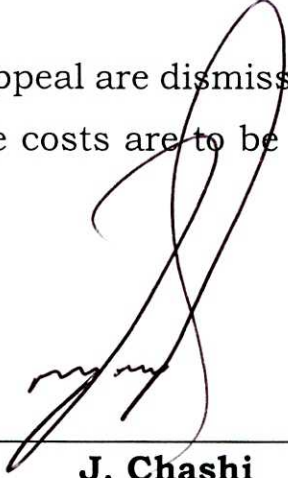
11.30 The appellant further sought co-operation and assistance of the respondent in the administration of the estate when she knew that the instructions in the will left it up to the respondent to either seek assistance from her or any other lawyer known to the testatrix for any legal work that may arise. Not only did she act as an executor, but also acted as lawyer for the estate, charging all manner of fees either under the bracket of being an executor and trustee of the estate or as being a lawyer for the estate.

11.31 The appellant's conduct clearly violated the provisions of **Rules 3(2)(b) and 16(3)** of the **Legal Practitioner's Rules, 2002** as it took away the entrenched right of the named executors to employ Counsel of their choice. The appellant imposed her services against the estate at a fee without receiving instruction to do so. This Court condemns such conduct by the appellant who is a seasoned and senior member of the legal profession that upcoming lawyers look to for inspiration.

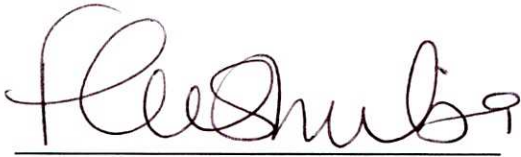
11.32 Given our conclusion under grounds 1, 2, 4 and 5 of the appeal, it follows that ground 3 of the appeal has no prospect of success before this Court as we have taken a firm view in agreeing with the lower Court that the appellant was not a duly appointed executrix nor trustee of the deceased estate neither was she retained by the duly appointed executor and trustees to represent the estate in actions against the estate. Grounds 6 and 7 of the appeal equally fail for the same reasons given above.

12.0 **CONCLUSION**

12.1 All the grounds of appeal are dismissed accordingly with costs to the respondent. The costs are to be agreed and in default to be taxed.



J. Chashi
COURT OF APPEAL JUDGE



F.M. Chishimba
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE