

**IN THE SUPREME COURT FOR ZAMBIA**

**APPEAL NO. 12/2022**

**AT THE SUPREME COURT REGISTRY**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)



**BETWEEN:**

**MARTHA MUSHIPE** (*T/A Mushipe & Associates and*

**APPELLANT**

*Suing as Executor and Trustee of the Estate*

*of the Late Funny Lungu Yolamu*)

**AND**

**GAUDENSIA ROSSI** (*Suing as Executor and Trustee*

**RESPONDENT**

*of the Estate of the Late Funny Lungu Yolamu*)

Coram : Musonda DCJ, Wood and Mutuna JJS

On 2<sup>nd</sup> March 2023 and 31<sup>st</sup> May 2023

For the Appellant : Mr. P.G. Katupisha of Messrs Milner and Paul Advocates

For the Respondent : Ms. S. Namusamba of Messrs Shamwana and Company

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

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Mutuna JS, delivered the judgment of the court.

Cases referred to:

- 1) **Mwamba v Nthenge, Kainga and Chekwe Appeal No. 17 of 2010**

- 2) **Bidvest Food Zambia Limited and others v CAA Imports & Exports Appeal**  
**No. 56 of 2020**
- 3) **Blackwell v Blackwell (1877) 2 P.D. 72**
- 4) **Grover v Burningham (1850) 5 Exch 184**
- 5) **The Attorney General v Marcus Kampumba Achiume SCZ Judgment No. 2**  
**of 1983**
- 6) **Itowala v Variety Bureau de Change SCZ Judgment No. 15 of 2001**
- 7) **In the Goods of Brown (1877) P.D. 110**
- 8) **In the Estate of Dianah Hubbuck (1905) P.D. 129**

Legislation referred to:

- 1) **The Wills and Administration of Testate Estates Act, Chapter 60 of the**  
**Laws of Zambia**
- 2) **The Legal Practitioners (Practice) Rules 2002**

Works referred to

- 1) **Halsbury's Laws of England (4<sup>th</sup> Ed) Volume 17, paragraphs 707 and 708**
- 2) **Sir Raymond Walton, The Encyclopedia of Forms and Precedents (5<sup>th</sup> Ed)**  
**Volume 42 'Wills and Administration on Wills'**
- 3) **Thomas Jarman, A Treatise on Wills (8<sup>th</sup> Ed) Volume 1**

**Introduction**

- 1) The Appellant in this appeal, Martha Mushipe, is a renowned lawyer, trading under the name and style of Martha Mushipe and Associates. She launches this appeal in her capacity as the executrix and trustee of the estate of the late Funny Lungu Yolamu (the Testatrix), an issue which is being contested, and challenges the decision of the Court of Appeal, in terms of which it dismissed her claim that she is both the appointed counsel and co-executor and trustee of the estate of the Testatrix.
- 2) The appeal brings into sharp focus the art of drafting legal documents and interpretation of clauses in a Will.

**Background**

- 3) The facts surrounding this appeal are by and large uncontested. In 1999, the Testatrix instructed the Appellant to prepare her last Will and final testament. Pursuant to these instructions, the Appellant prepared the draft of the Will and invited the Testatrix to approve and execute it on 8<sup>th</sup> March 1999.



- 4) As is normally the practice, the Appellant as counsel charged with the responsibility of preparing the Will, witnessed the execution of the Will. This was done in the presence of the Testatrix and one Selina Banda, who in the presence of the other two also witnessed the execution of the Will. The significance of the foregoing becomes apparent later.
- 5) The Will named the Respondent and one Kani as executors and trustees of the Will under clause 1. The Testatrix also directed, by the said clause, that in the administration of her estate upon her demise, the two should be assisted by her lawyers.
- 6) On 11<sup>th</sup> May 2000, the Testatrix passed away prompting the Appellant to apply and obtain probate on 11<sup>th</sup> August 2000 naming herself, Kani and the Respondent as co-executors and trustees. The act of including herself and her firm as co-executors and trustees was a unilateral one on the part of the Appellant which she justified by contending that she and her firm were, by implication, appointed as such in the Will. This contention, by the



Appellant, in this appeal we shall deal with in the later part of this judgment.

- 7) The Respondent accepted the Appellant's contention and took up the appointment as co-executor and trustee while Kani refused and declined to take up his appointment. Notwithstanding the objection by Kani, the Appellant proceeded to embark on the exercise of administering the estate of the Testatrix both as co-executrix and trustee and counsel for and on behalf of the estate until differences arose between herself and the beneficiaries of the estate resulting in revocation of her appointment. This prompted the Appellant to commence an action before the High Court claiming fees for professional work done in relation to obtaining probate, as counsel for the estate, and distribution of the estate of the Testatrix as co-executrix and trustee.

#### **Matter before the High Court**

- 8) The action in the High Court was commenced on 29<sup>th</sup> January 2003 and the Appellant sought the following reliefs:

- 8.1 Legal fees in the sum of K309,651,808.70 being 10% of the value of the estate chargeable;
- 8.2 Legal fees in the sum of USD27,000.00 being 10% of the value of the estate chargeable with interest at [the] current bank lending rate with effect from 11<sup>th</sup> August 2000 to date of payment;
- 8.3 The sum of K18,178,150.00 being legal fees in respect of cause number 2000/HP/1264 **Ruth Yolamu v Kani and Rossi** and interest at [the] current bank rate from date of writ to date of payment;
- 8.4 The sum of K23,690,873.00 in respect of cause number **2002/HP/0525 Mushipe and Associates v Cutline Ltd** plus interest at [the] current bank rate;
- 8.5 The sum of K115,004,000.00 being legal and professional fees in respect of the estate of the late Funny Lungu Yolamu, general file for legal services rendered plus interest at [the] current bank rate from date of the writ to date of payment;

- 8.6 An order that the [Appellant] is the legally appointed lawyer for the estate of the late Funny Lungu Yolamu pursuant to the Will dated 8<sup>th</sup> March 1999;
- 8.7 An order that all outstanding debts such as maintenance and rehabilitation of the properties herein and other bills be redeemed by the estate;
- 8.8 An order that Mushipe and Associates continue to collect rentals until all outstanding debts which should include moneys owed to the clients' account;
- 8.9 An order that the letter of revocation dated 24<sup>th</sup> January 2003 is irregular and illegal. An injunction restraining the defendants from interfering and intermeddling, collecting rentals, disposing, selling leasing and subdividing the property aforementioned and or in any way dealing with the estate until the determination of the matter or until further order of the court;
- 8.10 Any other relief that the court may deem fit;
- 8.11 Costs.



- 9) The action was initially commenced against Vutiwe Yolamu, Lina Yolamu and Njeleka Yolamu (sued on her own behalf and as next of kin to Charles Yolamu, a minor). By way of summons for non-joinder and mis-joinder dated 3<sup>rd</sup> September 2003, the said defendants sought an order to be removed from the proceedings as the Appellant's action was premised on a debt allegedly due to her from the estate. The High Court granted the order removing the defendants as parties to the proceedings and in their place ordered that the Respondent be joined as defendant.
- 10) After the Respondent was joined as a party, process was served upon him following which he filed a defence and counter claim. In the defence, he denied liability and counterclaimed the following relief:
- 10.1 An order that the Appellant's appointment as executrix of the estate of the late Funny Lungu is unlawful and, therefore, null and void;
- 10.2 An order that the Appellant is not entitled to charge fees for assisting the executors to administer the estate;

10.3 An order that the Appellant forthwith render an account on the financial state of the estate;

10.4 Damages suffered as a result of the Appellant having failed to properly advise on the affairs of the estate;

10.5 Any other relief the court may deem fit.

### **Decision of the High Court**

11) The matter went to trial and following consideration of the evidence and arguments the trial court held as follows:

11.1 the wording of clause 1 of the Will expressly named the Respondent and one Kani as the executors and trustees of the estate and that these were to be assisted by the Testatrix's lawyers who were not specifically named;

11.2 the fact that the Testatrix's lawyers to assist the executors were not specifically named created an ambiguity;

11.3 the burden of adducing evidence to prove the contention by the Appellant that she was the appointed lawyer lay on her and that the evidence

presented by her reacted against her because it confirmed that the Testatrix had informed her that she had appointed another law firm to represent her in another matter. Further, she conceded under cross examination that she did not have written instructions from the Testatrix appointing her firm to assist the executors and trustees in the administration of the estate;

11.4 the fact, in and of itself, that the deceased had instructed the Appellant to draft the Will, was not sufficient evidence to prove that she was also instructed to assist in the administration of the Will. Where a testator intends to appoint a lawyer to act as executor of the estate, the testator ought to explicitly name the law firm and give clear directions regarding the number of partners to act on the instructions;

11.5 the Appellant trading as Mushipe and Associates was not expressly or by implication appointed as executor



of the estate or lawyers to assist in the administration of the Will.

11.6 the Learned High Court Judge concluded by dismissing the action with the costs. She partially upheld the Respondent's counterclaim.

### **Appeal to the Court of Appeal and decision of the court**

- 12) The Appellant launched an appeal to the Court of Appeal fronting seven grounds of appeal which questioned the finding by the Learned High Court Judge that the Appellant and her firm were not appointed either expressly or by implication as executrix of the estate of the Testatrix or lawyer to assist in the administration of the estate, respectively. The grounds of appeal also challenged the decision by the Learned High Court Judge dismissing the Appellant's monetary claims against the estate.
- 13) After the Court of Appeal heard the arguments and considered the matter, it agreed with the findings by the learned High Court Judge that the Appellant was not appointed executrix and trustee of the estate nor was she

and her firm appointed counsel to assist the executors and trustees in the administration of the estate. It held that the finding of fact by the Learned High Court Judge was supported by the evidence presented.

- 14) In arriving at its decision, the Court of Appeal considered the provisions of sections 5(6) and 3 of the ***Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia***. The former section provides for a testator having the option of appointing one or more persons to be his executors, while the latter defines executor of an estate. The court also considered the manner of appointment of executors by a testator according to the learned author of ***Halsbury's Laws of England (4<sup>th</sup> Ed) Volume 17, para 707***. This text sets out the four ways in which an executor can be appointed, as follows, either: expressly by the testator in the body of the Will; by the exercise of a power of nomination of an executor conferred by the testator by his Will; by implication from the testator's Will, when the executor is



known as an executor according to the tenor of the Will; and, by virtue of statutory provisions.

- 15) The court then explained the instance when it would find that a person was appointed an executor of a Will by implication in accordance with ***Halsbury's Laws of England***. It said that such a situation arises where "*...upon a reasonable construction of [a] 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 court went on to examine clause 1 of the Will and held that it explicitly named two persons as executors and trustees, the Respondent and one Kani.
- 16) The second consideration which the court made was in relation to the contention by the Appellant that she was the appointed lawyer to assist the executors and trustees in the administration of the estate. The court considered the undisputed facts surrounding this issue as follows: it was the Appellant who drew up the Will for the Testatrix and retained it after she drew it up; the Appellant did not



have specific instructions to assist in the administration of the estate; and, there were other lawyers retained to represent the Testatrix in other matters. This latter fact was, according to the court, what created the uncertainty as to which of the Testatrix's lawyers she intended to assist her executors in the administration of her estate.

- 17) The court concluded that the mere fact that counsel is retained to draft a Will does not necessarily imply that he is also appointed legal representative to assist the executors in the administration of the estate. According to the court, a lawyer needs specific instructions to act as such.
- 18) In justifying its conclusion, the court considered the argument by the Respondent that clause 1 provided for counsel to assist the executors and not take over the administration of the estate. It considered this argument in light of the undisputed evidence that upon the death of the Testatrix, the Appellant applied for probate and declared that she and the two executors were named as executors and trustees of the estate. The court held this to

be a deliberate misinterpretation of clause 1 of the Will on the part of the Appellant as she knew that neither she nor her firm were expressly named as executors and trustees of the Will.

- 19) The court described the actions by the Appellant aforestated as contravening the provisions of rules 3(2)(b) and 16(3) of the ***Legal Practitioners (Practice) Rule, 2002*** which recognize a person's freedom to appoint a practitioner of one's choice and bars counsel from acting without instructions from a client.
- 20) Arising from the court's holding in the preceding paragraph, it concluded that the Appellant's claim for fees for services rendered could not be sustained because she imposed herself on the estate. It accordingly held that the grounds of appeal had no merit and dismissed the appeal.

**Appeal to this court and arguments by the parties**

- 21) The Appellant is unhappy with the decision of the Court of Appeal and has launched this appeal fronting 5 grounds of appeal. The grounds of appeal contest the decision by

the Court of Appeal upholding the finding by the Learned High Court Judge that the Appellant was not appointed executrix and trustee of the estate of the Testatrix and neither was she or her firm appointed to assist the executors in the administration of the estate of the Testatrix. As such, she was not entitled to the fees claimed.

- 22) The grounds of appeal also contest the alleged omission by the Court of Appeal to rule on the Appellant's claim for outstanding debt allegedly owed to her by the estate in regard to rehabilitation of house number 1 Leopards Hill road, Lusaka and rentals for lease of flat number 6 Luangwa flats, Kabulonga, Lusaka.
- 23) In her written arguments, the Appellant began by addressing the holding that she was not validly appointed as executrix and trustee of the estate of the Testatrix or as counsel to assist in the administration of the estate.
- 24) The thrust of Mr. Katupisha's argument was that the Appellant had adduced sufficient evidence to prove that she was validly appointed as one of the executors in the Will of the Testatrix. He argued that clause 1 of the Will



makes it clear that the Testatrix intended to appoint the Appellant as executrix of the estate. This, counsel argued, is reinforced by the fact that the Appellant appended her signature to the Will.

- 25) As for the appointment as counsel to assist the executors and trustees in the administration of the estate, Mr. Katupisha argued that this can be inferred from the Will. He also denied the contention that the Appellant led evidence in the two lower courts that the deceased had other lawyers, who by implication, may have been the ones intended to assist the executors in the administration of the estate as per clause 1 of the Will. In addition, counsel stated that the Appellant's appointment as counsel was reinforced by the fact that the Respondent engaged her to act on behalf of the estate in the matter titled **Ruth Yolamu (Suing on her behalf and as next friend of Levy Yolamu - Minor) v Kani and Rossi, cause number 2000/HP/1264.**
- 26) Counsel spiritedly argued that the wording of clause 1 of the Will represents an intention by the Testatrix to appoint

the Appellant as counsel, by implication, to assist the executors in the administration of the estate. He submitted further that the beneficiaries of the estate were also authorized by the Will to appoint the Appellant to act on their behalf by virtue of clause 8 of the Will. The clause reads as follows: "[the] Statutory power of appointment of new trustees of this my Will shall be exercisable by my children".

- 27) Advancing his argument, counsel submitted that the act of assisting the executors is equal to being appointed to the office of executor as long as such appointment is made by a testator in a Will. According to counsel, an executor cannot be assisted by a person who is not similarly appointed executor of the estate. For this reason, he argued, the Appellant was properly and validly appointed by the Testatrix as counsel pursuant to the Will.
- 28) As a consequence of the aforestated appointment, counsel contended, that all the executors including the Appellant drew their mandate from the Will and enjoyed equal power. This, according to counsel, entitled the Appellant to, what



he termed, “*all professional benefits as bequeathed by the [Will of the Testatrix]*”. To justify the foregoing, counsel referred us to clause 6 of the Will which states as follows:

**“6. My trustees and lawyers shall be entitled to charge and be paid out of the residue of my estate, all professional such as legal or other charges for all businesses or acts done by them in connection with the trusts thereof.”**

He also referred us to section 29 of the ***Wills and Administration of Testate Estates Act*** which provides for the court to grant probate to executors appointed by a Will and that such appointment may be express or implied.

- 29) In addition, counsel drew our attention to the finding by the Learned High Court Judge in regard to fees payable to the executors which he argued reinforced the Appellant’s contention that she was indeed appointed as executrix and trustee. He urged us to construe clause 1 in accordance with the principle we laid down in the case of ***Mwamba v Nthenge, Kaing’a and Chekwe***<sup>1</sup>.
- 30) In that case, we quoted a passage from the learned author Kim Lewinson on the need for courts to construe written



agreements in accordance with the objective factual background known to the parties at or before the date of execution of the agreement. To this end, counsel urged us to consider the following facts: the Appellant was the only lawyer who drafted the Will; she had knowledge of the existence and custody of the Will; and, was specifically appointed as executrix and trustee. These facts, he argued, support the Appellant's contention that she was appointed executrix and trustee of the Will. Further, the facts negate the finding and holding, respectively, by the Learned High Court Judge and Court of Appeal, that the Appellant was not the appointed counsel because there was evidence that the Testatrix had other lawyers.

- 31) We were invited to consider a number of cases and ***Halsbury's Laws of England***, (4<sup>th</sup> Ed) Volume 17 on the interpretation of Wills and the four ways in which an executor can be appointed. We have not summarized the cases because they have little or no bearing on the decision we have reached in the later part of the judgment. As for the reference to Halsbury's, the passage is in line with the

reasoning by the Court of Appeal referred to at paragraph 14 of this judgment.

- 32) In his concluding remarks, counsel argued that the findings by both the Learned High Court Judge and Court of Appeal were bereft of a proper consideration of the evidence before the two courts and hence amenable to setting aside. He relied on four of our decisions which set out the principle that an appellate court will not reverse findings of fact 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 can reasonably make. Counsel urged us to allow the appeal.
- 33) At the hearing, we engaged counsel on the Appellant's contention that she was one of the appointed executors and trustees and counsel to assist in the administration of the estate and he made the following concessions:

33.1 clause 1 of the Will does not name the Appellant as one of the executors and trustees but specifically names the Respondent and one Kani;

33.2 the clause does not also name the Appellant or her law firm as the lawyers to assist in the administration of the estate;

33.3 the sources of our laws in Zambia are, among other things, precedent. The Appellant in preparing the Will did not follow such precedent in respect of draftsmanship of clause 1; and,

33.4 if the Appellant had followed precedent in drafting clause 1 of the Will, the matter would probably not have escalated in the dispute before us.

34) In opening the arguments for the Respondent, Ms. Namusamba began by questioning the parameters of the appeal laid before us. She argued that the Appellant is compelled by the order of the single Judge of this court granting leave to appeal, to restrict her arguments to the grounds of appeal which raise points of law of public importance. Our attention was drawn to the decision in



the case of ***Bidvest Food Zambia Limited and others v CAA Imports and Exports***<sup>2</sup> in which we said that where leave is granted on the basis that the appeal raises a point of law of public importance and it is possible to isolate such point of law of public importance in the proposed appeal, this court will confine itself to considering only such point in dealing with the appeal. As long as the other issues in an appeal do not satisfy the threshold of raising a point of law of public importance, they do not qualify for individual separate consideration by the Supreme Court.

- 35) Counsel argued that as a result of our decision in the ***Bidvest***<sup>2</sup> case, we should confine our consideration of the appeal only to the grounds of appeal which raise points of law of public importance. The other grounds of appeal are not deserving of consideration by this court because they have not met the threshold set by the ***Bidvest***<sup>2</sup> case.
- 36) In respect of the grounds of the appeal which challenged the finding that the Appellant was not appointed executrix and trustee and counsel to assist in the administration of the estate, Ms. Namusamba began by quoting at length

from the judgment of the Court of Appeal and agreed with the court that the evidence led before the Learned High Court Judge did not support the Appellant's contention that she was appointed executrix. To this end, she submitted that the two courts went to great length in explaining what constitutes an express and implied appointment as executor with reference to the relevant legal authorities.

- 37) She proceeded to interpret clause 1 of the Will and submitted that it only expressly appointed the Respondent and one Kani as executors and trustees and not the Appellant. In addition, the clause does not name counsel who were to assist the executors in the administration of the estate of the Testatrix, a fact which the Appellant conceded. This was along with acknowledging the fact that the Testatrix had other counsel, namely Shamwana and Company.
- 38) To augment her arguments, Ms. Namusamba referred us to ***Halsbury's Laws of England*** (4<sup>th</sup> Ed) Volume 17 at paragraph 708 which states that where there is only one

individual answering to the name and description of executor, the court will not admit evidence to show that some other person was intended to be executor. She also drew our attention to the case of ***Blackwell v Blackwell***<sup>3</sup> in which the English courts held that the testator must always provide means by which an executor can be identified.

- 39) In concluding her arguments on the issue, counsel requested us to dismiss the argument by the Appellant that her appointment as counsel to assist the executors and trustees in the administration of the estate was also an appointment as executrix. She also argued that the Appellant's contention that she was appointed executrix by virtue of the fact that she was the one who prepared the Will and appended her signature as a witness was untenable.
- 40) In the arguments in reply, Mr. Katupisha restated his initial arguments. The departure to these arguments was as follows:



- 40.1 with reference to section 2 of the **Wills and Administration of Testate Estates Act** which defines executor and the argument that the Appellant was appointed executrix by implication in accordance with this section;
- 40.2 a reference to the English case of **Grover v Burningham**<sup>4</sup> which held the intention of a testator to be the paramount consideration by the court in ascertaining who the executor of an estate is;
- 40.3 a reiteration of the argument that the interpretation which should be given to clause 6 of the Will is that the intention of the Testatrix was that the Appellant should execute the duties of the executors; and
- 40.4 we should consider all the grounds of appeal advanced notwithstanding the argument by the Respondent that our consideration should be restricted to those grounds of appeal which satisfy the test set out in the **Bidvest**<sup>2</sup> case. The reason being that the leave to appeal granted was all encompassing.

- 41) Coming to the issue of the Appellant's appointment as counsel to assist the executors in the administration of the estate, Mr. Katupisha opened his arguments by contending that both the High Court and Court of Appeal acknowledged that the Appellant was properly appointed to act as counsel for the estate. Further, in terms of section 57(1) of the **Wills and Testate Estates Act**, personal representatives who include executors are permitted to charge fees where the Will expressly so provides. Therefore, since clause 6 did make such provision, the Appellant, as duly appointed executrix, was entitled to charge fees for services rendered out of the residue of the estate. Counsel concluded that the services provided to the estate by the Appellant were in line with the provisions of Rule 16(3) of the **Legal Practitioners (Practice) Rules, 2002**.
- 42) In response, Ms. Namusamba began by reviewing the decision of the Court of Appeal in so far as it concluded that the evidence before the High Court revealed that the Appellant proceeded to obtain probate after the death of

the Testatrix without being formally appointed to do so. She referred us to the declaration and oath of executor executed by the Appellant in which she declared she was the named executor of the estate of the Testatrix. She concluded by stating as follows: section 57(1) of the **Wills and Testate Estates Act** prohibits personal representatives from deriving a benefit from the estate through performance of their duties; while clause 6 of the Will expressly authorized the executors and trustees to charge their fees to the estate, the Appellant was not entitled to payment of any of her fees because she was not appointed as executrix or counsel to assist the executors and trustees in the administration of the estate; Rule 16(3) of the **Legal Practitioners (Practice) Rules 2002** specifically prohibits counsel from providing services without instructions from a client, a fact which the Appellant acknowledged in the High Court when she testified that it would be wrong for counsel to send out a bill in respect of work done without instructions; and, the Appellant has failed to demonstrate that the finding by the



High Court Judge on the issue of her appointment as counsel to assist the executors and trustees in the administration of the estate was so flawed that it met the threshold set in the case of the ***Attorney General v Marcus Kampumba Achiume***<sup>5</sup> warranting its setting aside.

43) In the submissions in reply, counsel for the Appellant referred us to section 51(1) and (2) of the ***Wills and Testate Estates Act*** and argued that the section makes provision for a person who wrongly assumed the role of executor to recover fees legitimately earned.

44) Mr. Katupisha then addressed the contention that the Court of Appeal failed to make a pronouncement on the Appellant's claim for a refund of the expenses incurred in the administration of the estate. He listed the Appellant's claims against the estate as follows:

44.1 mesne profits or rental arrears relating to the property known as flat number 6, Luangwa flats, Roan road, Kabulonga, Lusaka which was not part of the estate;

44.2 moneys advanced to the beneficiaries by the firm Mushipe and Associates pending the administration of the estate;

44.3 the sum of K144,600.00 which the Appellant will be compelled to pay on behalf of the estate for renovations to house number 1, Leopards Hill road, a property belonging to the beneficiaries; and

44.4 legal fees in respect of the cases titled ***Ruth Yolamu (Suing on her behalf and on behalf of the Minor Levy Yolamu) v Gaudensia Rossi and Kani, cause number 2000/HP/1264*** and ***Mushipe and Associates v Cutline Limited, cause number 2001/HP/0525.***

- 45) The argument by Mr. Katupisha in respect of the four claims was that in terms of section 52 of the ***Wills and Testate Estates Act***, the Appellant is entitled to recover the amounts claimed because they arise from payments she made on behalf of the estate. The payments, he argued, have nothing to do with the disputed appointment of the Appellant as executrix and trustee and the omission

by the Court of Appeal to make a determination on her claim has the effect of unjustly enriching the estate. Counsel drew our attention to the case of ***Itowala v Variety Bureau de Change***<sup>6</sup> in which this court ordered the refund of moneys to the appellant which were paid in an illegal contract on the ground that it would be unjust enrichment to allow the respondent to hold on to the funds.

- 46) Counsel concluded by urging us to reverse the decision of the Court of Appeal condemning the Appellant to costs because she was, at all material times, acting on behalf of the estate and not her own behalf in the action.
- 47) In response, Ms. Namusamba argued that the claim for rehabilitation of house number 1, Leopards Hill road, in respect of which the Appellant and other beneficiaries were sued by the contractor, AT Tyetye Enterprises, for the sum of K144,600.00, had failed before the High Court and the appeal to this court was dismissed under appeal number 156 of 2010. As for the other monetary claims, she argued that the Learned High Court Judge had found that the



evidence led by the Appellant did not convince her on a balance of probabilities that she was owed money by the estate. Further, on appeal to the Court of Appeal, the Court pronounced itself on the issue and agreed with the finding by the Learned High Court Judge. Most important is the fact that this appeal is anchored on claims for fees for professional services rendered in the absence of instructions from the client.

- 48) In the arguments in reply, Mr. Katupisha contended that it is not in dispute that the beneficiaries of the estate benefitted from the use of flat number 6 Luangwa Flats, Roan road, Kabulonga, Lusaka which belonged to the Appellant. She was, therefore, entitled to recover rentals claimed in respect of that flat.

### **Consideration and decision by this Court**

- 49) In our determination of this appeal, we have considered the record of appeal and arguments by counsel. Ms. Namusamba has argued that we should not consider all the grounds of appeal because the leave to appeal granted

by the single Judge of our court was restricted to only those grounds which reveal that the appeal raised points of law of public importance. Mr. Katupisha argued to the contrary. We have had the opportunity to revisit the decision of the single Judge of this court regarding the leave to appeal which she granted and are of the firm view that the leave to appeal was all encompassing. It did not segregate the grounds that revealed points of law of public importance from those that did not and accepted the Appellant's argument that all the grounds of appeal should be considered by us. We therefore find no merit in the objection raised by Ms. Namusamba and accordingly dismiss it.

- 50) We now turn to consider the appeal and shall deal with it by identifying and determining the issues which arise from the grounds of appeal. The first two issues are as follows:
- 50.1 Whether or not by clause 1 of the Will the Appellant was, by implication, appointed executrix and trustee of the estate of the Testatrix;



50.2 Whether or not by clause 1 of the Will the Appellant was by implication appointed counsel to assist the executors and trustees in the administration of the estate of the Testatrix.

- 51) In determining these two issues, we begin by setting out the content of clause 1 of the Will of the Testatrix which is at the heart of this dispute. The clause reads as follows:

**"I appoint Mr. Kani of plot No. 26 Nalikwanda Street, Woodlands, Lusaka, and Mr. Rossi of Ndeke Motel, Lusaka to be executors and trustees of this Will who will be assisted by my lawyers."**

- 52) The arguments by Mr. Katupisha in support of the contention by the Appellant that she was appointed, by implication, as executrix and trustees are as follows:

52.1 the wording of the clause is clear to that effect;

52.2 the Appellant was the one who drafted the Will and was custodian of the Will;

52.3 the Appellant having been appointed lawyer to assist the executors stood on the same footing as the named executors; and,



52.4 the Appellant witnessed the execution of the Will by the testatrix and as such, she was appointed executor.

53) To say that the arguments are bereft of reasoning is an understatement. The view that we have taken is that they are so ridiculous, that we were surprised that counsel, while conceding that the latter three arguments had no support of any legal authorities, still ventured to advance them. We are of the firm view that clause 1 is clear as to its intention that it needs no complicated interpretation as contended by the Appellant. The intention of that clause and indeed the Testatrix, is expressed to be that the two and only the two, namely, the Respondent and one Kani, were to be the executors and trustees of the estate of the Testatrix and leaves us in no doubt that no one else was intended to be a third executor. The clause does not even suggest the possibility of a third executor.

54) In giving an example of a situation where a person can be appointed executor by implication, the Learned High Court Judge referred to the English case of *In the Goods of*

**Brown**<sup>7</sup> and quoted the clause in the Will which fell for interpretation as follows:

**"I appoint my said sister Susannah Brown my executrix, only requesting that my nephews, Frederick Poynder and John Arthur Beddone, will kindly act for or with this dear sister."**

This clause, while not expressly appointing the two nephews, Frederick Poynder and John Arthur Beddone, as executors, was held to appoint the two co-executors by implication. We are persuaded by the decision and see a clear distinction between that clause and clause 1 of the Will of the Testatrix because the former mentions two other people as appointed as well, albeit not expressly, while clause 1 does not mention the Appellant at all.

- 55) Our holding aforestated is reinforced by the Appellant's evidence under cross examination in the High Court where she admitted that clause 1 specifically appoints the Respondent and one Kani as executors and that her name is not mentioned as such co-executor. She still insisted that her appointment was by implication although she gave no explanation to justify the assertion.



- 56) The Learned High Court Judge also explained that where there is a latent ambiguity in the appointment of an executor, extrinsic evidence to show who the testator intended to appoint as executor may be received by a court. She demonstrated this by the use of the English case of ***In the Estate of Dianah Hubbuck<sup>8</sup>***, where a testatrix appointed as executrix a person described in her Will as "*my granddaughter*", evidence was admitted for purposes of explaining the latent ambiguity which arose from the fact that at the date of the Will and at the date of the death of the testatrix, the testatrix had three granddaughters. The Learned High Court Judge found that there was no ambiguity in clause 1 requiring extrinsic evidence to be adduced because there is an express appointment of the two executors unlike in the ***Dianah Hubbuck<sup>8</sup>*** case which was vague as regards the particular granddaughter appointed.
- 57) As for the second argument, that since the Appellant was the one who drafted the Will and was its custodian, therefore, by implication, she was one of the executors, the



view we take is that not only does this argument defy legal precedent, it also fails to realise that there was no connection between the instructions given by the Testatrix to prepare the Will and those regarding the administration of the estate as the Learned High Court Judge found.

- 58) The Court of Appeal upheld this finding by the Learned High Court Judge because the appointment of executors was totally separate from the instructions to prepare the Will.
- 59) Our holding in the preceding paragraph is reinforced by the fact, and as Mr. Katupisha agreed, that the appointment of counsel as executor must follow a specific precedent. In this regard, we referred Mr. Katupisha to ***The Encyclopedia of Forms and Precedents*** (5<sup>th</sup> Ed) Volume 42 'Wills and Administration', which at page 94, sets out a standard clause for "*Appointment of named partner in firm of solicitors to be executor*" as follows:

**"I appoint (names of partners) [both or all] of (address of firm) solicitors ('my Trustees') to be the executors and trustees of this my will"**

This precedent attests to the fact that where counsel, as in this case, the Appellant, is being appointed executor or trustee in a Will, he/she must specifically be named, along with his/her partner, if it is the desire of the Testator to appoint both. The name and address of the firm should also be indicated in the clause.

- 60) The foregoing is to be distinguished from a general clause appointing an executor such as clause 1. The ***Encyclopedia*** states, in regard to such general appointment, that all that is required is to state the name or names of the executors and trustees and their addresses as the Appellant did in clause 1. It sets out the precedent of such a clause at page 92 as follows:

***“I appoint (full true name) of (address) and (full true name) of (address) (‘my Trustees’) to be the executors and trustees of this my will”***

It is apparent from the foregoing that the Appellant preferred and adopted the general clause.

- 61) The third argument by the Appellant was that since she was appointed counsel to assist the two executors and trustees, she stood on the same footing as the two and was

indeed an executrix and trustee of the estate herself. We will deal with the contention of appointment as counsel to assist in the administration of the estate later as we discuss the second issue. At this stage, our determination is limited to establishing whether indeed an appointment can be made of an executor by virtue only of that executor being appointed as counsel to assist in the administration of the estate.

- 62) In our determination of the question before us, we begin by recapping the evidence led by the Appellant under cross examination in which she conceded that she was not specifically named in clause 1 as executrix but that two other persons were named as such. Further, in our engagement with Mr. Katupisha, he failed to refer us to a legal authority which supported the contention by the Appellant. This all points to an unmeritorious argument.
- 63) An executor can be appointed in one of the four ways we have set out earlier in paragraph 14 of this judgment. This was the finding by the Learned High Court Judge which was upheld by the Court of Appeal. The mode of



appointment does not suggest an automatic appointment arising out of an appointment as counsel to assist the executors in the administration of the estate.

64) We have gone to great length in setting out the finding by the Learned High Court Judge on instances when an appointment can be inferred from the circumstances of the case. At the expense of repetition, these are instances where, though not expressly named as executor, it can be inferred that the Testator intended appointing a person as executor. This is not the line of argument Mr. Katupisha took but merely sought to justify the appointment by virtue only of the alleged appointment as counsel to assist the executors in the administration of the estate. This is not acceptable as we have said because it has no supporting legal authority.

65) The last argument by Mr. Katupisha was that the Appellant was appointed executrix and trustee by implication because she witnessed the execution of the Will. The Appellant did indeed witness the execution of the Will as is apparent from the record of appeal. It is

important here to state that it is a formality and requirement of the law that a Will be attested to by two witnesses. Thomas Jarman, Esq. writing in ***A Treatise on Wills***, 8<sup>th</sup> edition, Volume 1 at page 134 states as follows:

**“It follows from what has been above stated that the will must be signed by or for the testator, and his signature must be acknowledged, before either of the witnesses signs. The signature must be made or acknowledged in the presence of the witnesses simultaneously, and not at different times, and they must themselves subscribe their names in the presence of the testator, though not necessarily in the presence of each other.”**

The testator must, therefore, sign the Will in the presence of the witnesses who should also ascribe their signatures to the Will in his presence.

- 66) Our section 6 of the ***Wills and Administration of Testate Estates Act*** states in the relevant parts as follows:

**“6. (1) A will shall be valid if it is in writing and –**

**(a) is signed at the foot or end, by the testator or by some other person in the testator’s presence and by his direction and**

**(b) the signature referred to in paragraph (a) is made or acknowledged by the testator in the presence of two**

**witnesses present at the same time who have also signed at the foot or end of the will ...”**

The conclusion to be drawn from the passage in **A Treatise on Wills** and section 6 of the **Wills and Administration of Testate Estates Act** is that the act of witnessing the signature of the testator or duly appointed agent is a confirmation that the testator or his duly appointed agent signed the Will, thereby, validating it. The act does not signify the appointment of the witness as an executor or such intention.

- 67) In answer, therefore, to the first issue, we hold that the Appellant was not appointed executrix and trustee, expressly or by implication, of the estate of the Testatrix. She, as the Court of Appeal correctly held, imposed herself on the estate.
- 68) Coming to the second issue of whether or not the Appellant was appointed counsel to assist in the administration of the estate, Mr. Katupisha's arguments were that the appointment is implied from clause 1 of the Will. He also repeated the earlier argument that the Appellant was



counsel to the Testatrix and prepared the Will. She was, thus, appointed as counsel.

- 69) In determining this issue, we begin by revisiting the finding by the learned High Court Judge on this issue which was upheld by the Court of Appeal. The Judge found that if the Testatrix intended to instruct the Appellant as her counsel she should have specifically stated so. She also found that the Appellant admitted in cross examination that she did not have specific instructions in this regard and was informed by the Testatrix at the time of drafting the Will that Shamwana and Company had acted for the Testatrix in another matter. The significance of this latter finding is that the reference to "*lawyers*" in clause 1 of the Will could have been any one of the lawyers the Testatrix had instructed at the time in a number of matters and not only the Appellant.
- 70) A review of the Appellant's evidence in the High Court confirms the finding by the Learned High Court Judge. It also reveals that the Appellant did acknowledge that as counsel she could not act for a client without specific

instructions. She appeared to draw her conviction that she was instructed from the mere fact that she was the custodian of a number of documents belonging to the Testatrix. We shall come to this point later.

- 71) The Court of Appeal upheld the finding by the Learned High Court Judge and held that a legal practitioner is barred by the ***Legal Practitioners (Practice) Rules, 2002*** from impairing a persons' right to appoint counsel of choice and to offer services without instructions from a client.
- 72) The specific rules which the Court of Appeal referred to were Rules 3(2)(b) and 16(3). Rule 3(2) provides that:

**"3. (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"**

And Rule 16(3) reads:

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

These two provisions of the ***Legal Practitioners (Practice) Rules*** bar counsel from impairing a client's

right to engage counsel of choice. They grant to the client the right to choose counsel and bar counsel from acting where there are no instructions.

- 73) The Appellant clearly breached these two rules because she imposed herself on the estate both as executrix and its counsel. She denied the estate, through the executors, its right to choose counsel to represent it and the Testatrix her right to have her estate administered by executors of her choice.
- 74) We have dismissed the argument by the Appellant that she derived her instructions from the act of being custodian of a number of important documents belonging to the Testatrix including the Will. Time immemorial, counsel, bankers, accountants and doctors have been used by their clients and patients as custodians or vaults for the storage of important documents such as Wills and title deeds to properties, to name but a few. This is a practice which stems from the position of trust and confidence in which the clients and patients hold the professionals and not any provision of the law. The trust and confidence, does not



suggest that, in the event of a dispute arising which relates to one of the documents in their custody, it is only that particular counsel, in the case of the legal profession, who has instructions to act.

- 75) The inescapable conclusion we must reach following our consideration in the preceding paragraphs is that the Court of Appeal did not err when it upheld the finding by the Learned High Court Judge that the Appellant was not appointed counsel to assist the executors in the administration of the estate.
- 76) The position we have taken is reinforced by our holding, which Mr. Katupisha conceded that the fact, in and of itself, that the Appellant drafted the Will does not further authorise her to administer it as counsel to the executors and trustees. There has to be specific instruction given to counsel in accordance with Rule 16(3) of the **Legal Practitioners (Practice) Rules, 2002** as the Court of Appeal held. In addition, the Appellant's own evidence to the effect that there were other lawyers who acted for the

Testatrix reinforces just how uncertain the reference to "*my lawyers*" in clause 6 is.

- 77) The next consideration is the issue arising from the contention by the Appellant that the Court of Appeal omitted to pronounce itself on to the claims by the Appellant as reflected in paragraph 44 of this judgment.
- 78) We must agree with Ms. Namusamba that the Court of Appeal did indeed pronounce itself on the claim. This is apparent from its decision, regarding ground 6 of that appeal which contended that the Learned High Court Judge erred both at law and in fact when it dismissed all the Appellant's monetary claims. The Court of Appeal dismissed the Appellant's claim on the basis that she was not entitled to recover those moneys because she imposed herself on the estate. The Appellant's contention is, therefore, lacking in merit as there was a clear pronouncement on the issue.
- 79) The matter, however, does not end here because as we will show later, although the Appellant did indeed impose herself on the estate, she may be entitled to recovery of

some of the costs she expended on the estate. To this extent, a dismissal of her claim by the Court of Appeal based solely on the want of instructions is a misdirection.

80) The Learned High Court Judge made a more robust approach to the claim when she held that the Appellant did not lay before her sufficient evidence to prove her claim. Ms. Namusamba referred us to the record of proceedings in the High Court and concluded that the evidence led by the Appellant did not sufficiently prove her claim.

81) On his part, Mr. Katupisha referred us to various payment vouchers and receipts, prepared by the Appellant's law firm in respect of payments allegedly made by her firm on behalf of the estate and reconciliations and a lease agreement. These documents exceed five hundred folios in number. On the other hand, the evidence-in-chief by the Appellant which was supposed to explain and justify these claims and folios is in one and half folios and does not explain the claims nor did it take the Learned High Court Judge through the more than five hundred folios



specifically explaining each document and justifying the claim it related to. For this reason, we cannot fault the Learned High Court Judge for arriving at the decision she did in relation to the evidence.

- 82) At the expense of repetition, a plaintiff is compelled by law to prove his or her case to the satisfaction of the court if he or she is to have judgment. In so doing, the plaintiff is compelled to lead evidence, vice voce and documentary, which properly explain the case. In the case with which we are engaged, while the Appellant laid before the High Court voluminous documentary evidence, she omitted to explain it to the satisfaction of the court. She must suffer the consequence of her default.
- 83) Mr. Katupisha made reference to section 52 of the ***Wills and Administration of Testate Estates Act*** and argued that on the basis of this section, the Appellant is entitled to recover all costs she incurred in administering the estate and the professional charges. The section states as follows:

***“52. (1) Where any probate or letters of administration are revoked, all payments made in good faith to any executor or administrator under that probate or letters of administration before revocation shall, notwithstanding the revocation be a legal discharge to the person making the payment.***

***(2) The executor or administrator who acted under any revoked probate or letters of administration may retain and reimburse himself out of the assets of the deceased in respect of any expenses incurred or fees paid out by him which any person, to whom probate or letters of administration are afterwards granted, could have lawfully incurred or paid.”***

This section under subsection (2) provides for reimbursement of expenses incurred by an executor during his appointment upon the revocation of his appointment. We are thus of the firm view that the Appellant is entitled to recover all the expenses she incurred in the administration of the estate up to the time the probate was revoked.

- 84) These expenses include, fees paid to court in obtaining probate and fuel expenses incurred while traveling in pursuit of administering the estate. This award arises from the fact that it is not disputed that the Appellant did obtain

probate and performed some of the duties of an executor. It must be distinguished from her disputed claims in the five hundred plus folios upon which she did not lead convincing evidence entitling her to judgment. The entitlement to reimbursement does not include payment of the professional charges because, as counsel, the Appellant can only recover those fees incurred in services rendered pursuant to a client's instructions. In this case, no instructions were given to her and as such she cannot recover professional fees. Our Legal Practitioners scale of fees does not also provide for counsel recovering fees on a quantum merit basis.

- 85) As for the costs of these and the proceedings in the two courts below, Mr. Katupisha argued that since the Appellant was suing on behalf of the estate, she should not bear them but that these should be borne by the estate. Ms. Namusamba did not address us on the issue. The starting point is a recognition of the fact that although the Appellant contends in the pleadings that she is suing in her capacity as executrix and trustee of the estate, the



probate granted to her has since been revoked. This was prior to institution of the proceedings in the High Court. The significance of this is that at all material times she acted on her own behalf and not that of the estate in respect of the proceedings before the Courts. Any condemnation of costs would, therefore, be directed at her and not the estate.


## **Conclusion**

- 86) In our introductory remarks we described the Appellant as a renowned lawyer. The Court of Appeal, in its judgment described her as “... *a seasoned and senior member of the legal profession [who] upcoming lawyers look up to for inspiration ...*”. This is the esteem with which the Appellant is held in the profession.
- 87) During our engagement with Ms. Namusamba, we asked her what lessons, if any, she had learned from this matter having dealt with it from the court of first instance. Her response was that as counsel, she needs to be more cautious when dealing with her clients in the execution of


their instructions and ensure, in particular, that the client's instructions are clearly understood and reflected in any documents she prepared.

- 88) Mr. Katupisha, on his part, while acknowledging that precedent is of paramount importance in the preparation of Wills, admitted that if the Appellant had referred to the appropriate precedent, she would not have encountered the problems she now faces.
- 89) These are wise words from both Ms. Namusamba and Mr. Katupisha which we hope the Appellant will embrace if she is to maintain the esteem with which she is held by the profession.
- 90) The inevitable outcome of our decision is that all grounds of appeal lack merit except that the Appellant is entitled to claim the expenses we have set out at paragraph 84 of this judgment. The matter is, therefore, remitted to the Deputy Registrar for assessment of those expenses only. For avoidance of doubt, these include the fees paid to court by the Appellant in respect of the probate and cost of travel in pursuit of executing her duties as executrix in

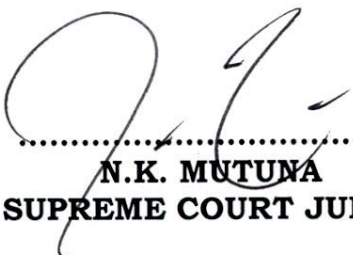
accordance with the probate she obtained during the life of the probate. We accordingly uphold the decision of the Court of Appeal and dismiss this appeal. The costs will be the Respondent's, in this and the other two courts, and payable by the Appellant. They shall be taxed in default of agreement.



.....  
**M.C. MUSONDA SC**  
**DEPUTY CHIEF JUSTICE**



.....  
**A.M. WOOD**  
**SUPREME COURT JUDGE**



.....  
**N.K. MUTUNA**  
**SUPREME COURT JUDGE**