

**IN THE COURT OF APPEAL OF ZAMBIA** CAZ Appeal No. 015/2021  
**HOLDEN AT LUSAKA**  
**(Civil Jurisdiction)**

**BETWEEN:**

**CLARA CHIMFWEMBE** (In her capacity **APPELLANT**  
as Executrix of the Estate of the late  
Donald Chimfwembe)



**AND**

**HELLEN MUTALE CHIMFWEMBE** **RESPONDENT**  
(In her own and on behalf of Mwansa  
Chimfwembe, Kafwimbi Chimfwembe,  
Mumbi Chimfwembe & Donald Chimfwembe  
Jnr. being beneficiaries of the Estate of the late  
Donald Chimfwembe)

**CORAM** : Chishimba, Sichinga and Ngulube JJA  
On 26<sup>th</sup> March, 2024 and 6<sup>th</sup> August, 2024

For the Appellant: Mr. C. Changanu of Mmes. D. Findlay &  
Associates

For the Respondent: Mr. M. Phiri of Messrs. Mwansa, Phiri,  
Shilimi & Theu Legal Practitioners

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## **JUDGMENT ON CROSS-APPEAL**

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**Chishimba JA, delivered the Judgment of the Court.**

**CASES REFERRED TO:**

- 1) Charity Oparaocha v Winfrida Murambiwa (2004) Z.R. 141

**LEGISLATION CITED:**

- 1) The Intestate Succession Act Chapter 59 of the Laws of Zambia

**1.0 INTRODUCTION**

- 1.1 The cross appeal by the Respondent, is against the Judgment of the Hon. Mrs. Justice P. K. Yangailo, dated 30<sup>th</sup> October, 2020, in which she found the Will by the late Donald Chimfwembe null and void. Thereafter, revoking the grant of probate issued to the respondent and proceeded to hold that Rebecca Makhumalo, is the step child of the deceased, and is a beneficiary entitled to the children's share of the deceased's estate.
- 1.2 The main appeal was heard on 19<sup>th</sup> January, 2023. We then adjourned the matter for judgment. However, in our judgment dated 28<sup>th</sup> March, 2023, we inadvertently omitted to consider the cross-appeal. The respondent accordingly applied for leave to correct an omission in the Judgment of the Court, namely the omission to consider the cross-appeal. In a ruling dated 23<sup>rd</sup> October, 2023, we ordered that the appeal be re-opened for consideration of the cross-appeal pursuant to **Order 13 Rule 8(1) of the Court of Appeal Rules**. Hence this judgment on the cross-appeal.

## **2.0 BACKGROUND**

- 2.1 The respondent, who was the plaintiff in the court below, issued a writ of summons against the appellant endorsed with several claims, one of which sought a declaration that Rabecca Makhumalo Chimfwembe is not a beneficiary and child of the late Donald Chimfwembe as alleged in the purported will dated 19<sup>th</sup> November, 2016.
- 2.2 When given a copy of the Will, the respondent and her siblings were not satisfied with its contents on the basis that the signature of the deceased appeared strange to them, being familiar with it; in clause 3 the person named therein is “Rabecca Chimfwembe” which was not correct because she believed that the said name was in reference to the step daughter of the deceased, and daughter of the appellant, who is known as “Rabecca Makhumalo”. The said Rabecca Makhumalo is neither a biological daughter of the deceased nor did he ever adopt her as such.
- 2.3 Further, clause 4 referred to the wife, parents and children of the deceased to share his pension monies, but only named the children together with “Rabecca Chimfwembe” and Natasha Chimfwembe. Clause 5 provided that Stand No. 471 of 11063, Chilenje, Lusaka be held in trust for his children

being Rabecca and Natasha Chimfwembe until they attain majority age when title can be changed to their names. The said Rabecca Chimfwembe was not a minor at the time the Will was said to have been executed.

### **3.0 DECISION OF THE COURT BELOW**

3.1 The Court below, having found that the signature on the Will differed materially from the sample signatures, determined that the deceased was not the one that appended his signature on the purported Will contrary to **section 6(1)(a) of the Wills and Administration of Testate Estates Act Chapter 60 of the Laws of Zambia**. The Court below held that the Will was null and void, and proceeded to revoke the grant of probate issued to the appellant. The Court below directed that the estate of the deceased be administered in accordance with the provisions of the **Intestate Succession Act Chapter 50 of the Laws of Zambia**, with the Administrator General as administrator of the estate.

3.2 In addition, the Court held that Rabecca Makhumalo, who is a step-child of the deceased, is a beneficiary and entitled to the children's share of the estate of the deceased.

### **4.0 CROSS-APPEAL**

4.1 The respondent has cross-appealed and advanced one ground of appeal couched as follows:

- 1) *The court erred in law and in fact when it ruled that Rabbecca Makhumalo is the step child of the deceased, is a beneficiary and entitled to the children's share of the deceased's estate when in fact the said Rabbecca Makhumalo does not qualify as a child of the deceased in accordance with the laws on intestacy.*

## **5.0 RESPONDENT'S HEADS OF ARGUMENTS**

5.1 The respondent filed heads of argument, on cross-appeal together with a supplementary record of appeal on 16<sup>th</sup> February, 2021. Counsel contended that Rabbecca Makhumalo does not fall within the definition of a child under **section 3 of the Intestate Succession Act** which states that:

*"child" means a child born in, or out of marriage, an adopted child, a child who is conceived but not yet born;*

5.2 As Rabbecca Makhumalo was neither born during the subsistence of the marriage between the deceased and the appellant, nor out of the said marriage, having already been in existence at the time the deceased married the appellant, she does not come within the definition of a child. That this fact takes her out of the definition of a child. The only way she could come within the definition is if she were adopted, which is not the case.

5.3 Counsel contended that for a child to be entitled, that child must be born when the couple is married, but such child being a child of one of the couples fathered by someone else during the tenure of the couple's marriage. As Rabbecca Makhumalo's father is still living, she is excluded from the estate of the late Donald Chimfwembe who did not adopt her legally, and was not born during the subsistence of the marriage between the deceased and her mother.

5.4 Counsel submitted that the law on intestacy and succession, does not cover step children as beneficiaries to an estate as in this case. The said Rabbecca Makhumalo, would only be entitled if it was her mother or biological father who had passed on. The Court below, having found that Will was invalid, should not have gone further to declare her as a beneficiary because her inheritance lies with her biological father. An adoption, if it had taken place, would have removed her from the ambit of her biological father into that of the deceased.

## **6.0 ARGUMENTS BY THE APPELLANT**

6.1 At the hearing of the appeal, Learned Counsel for the appellant, Mr. Changano, informed the Court that he did not

wish to respond to the arguments on cross-appeal, but attempted to raise an issue with the cross-appeal.

## **7.0 DECISION OF THIS COURT**

7.1 We have considered the cross-appeal together with the arguments by learned counsel. Rabbecca Makhumalo is the daughter of the appellant and a Mr. Makhumalo. She was born prior to the marriage of the appellant with the deceased and is not the biological daughter of the deceased. She was thus a step daughter of the deceased.

7.2 The respondent argued that being a step child and having been born prior to the marriage of the appellant and deceased, Rabbecca Makhumalo is not a beneficiary of the estate of the deceased in terms of the **Intestate Succession Act**.

7.3 The issue for determination is whether Rabbecca Makhumalo, a step child of the deceased is a beneficiary entitled to the share of deceased's estate.

7.4 **Section 3 of the Intestate Succession Act** defines child as meaning:

*"... a child born in, or out of marriage, an adopted child, a child who is conceived but not yet born;"*

7.5 This means that a child is one who is:

- i) born during the subsistence of a marriage;
- ii) born outside of a marriage or wedlock;
- iii) conceived by the parties to that marriage but not yet born; or
- iv) adopted by the parties to the marriage.

7.6 It is not in issue, that the child in issue was born prior to the marriage between the appellant and the deceased, and from another man, who is said to be alive. There was no evidence adduced to show that Rabbecca was adopted by the deceased for purposes of being classified as a beneficiary of the deceased estate. Therefore, she does not come anywhere near being a child of the deceased. The closest she comes to be a beneficiary of the estate of deceased is, if she was dependant of the deceased.

7.7 We have analysed the evidence adduced in the lower Court. That Rabbecca Makhumalo came to live with her mother and deceased upon their marriage. That she was neither a biological daughter of the deceased nor did he adopt her as such. The deceased died intestate on 26<sup>th</sup> January, 2018. According to PW1, Rabbecca Makhumalo, at the time of execution of the revoked Will was 25 years old. We refer to page 205 of the record of appeal.



7.8 At the date of the demise of deceased, she would have been at least 27 years old. There is no evidence adduced on record showing that Rabbecca Makhumalo was living with the deceased at the time of his death, or that she was wholly dependant on the deceased or incapable of maintaining herself.

7.9 We have also considered whether Rabbecca could be considered a dependant pursuant to **Section 3** of the said Act. **Section 3 of the Act Intestate succession** defines a dependant in the following terms:

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

- (a) a person living with that deceased person; or*
- (b) a minor whose education was being provided for by that deceased person; and who is incapable, either wholly or in part of maintaining himself;*

7.10 In the case of **Charity Oparaocha v Winfrida Murambiwa** <sup>(1)</sup>, the Supreme Court held that the respondent was a dependant within the meaning of **section 3 of the Intestate Succession Act**. This was because the evidence on record showed that she lived in a flat in Kabwata, which she and the deceased rented and that he actually maintained her as his wife as per the letter written by the Nigerian High Commissioner. This

decision is distinguishable and inapplicable to the circumstances of this case before us.

7.11 *In casu*, the respondent Hellen Chimfwembe, testified that there are two families, five children from her father's first marriage and a step daughter, Rabbecca Makhumalo, who came with the appellant when she married the deceased. As at the date of the demise of the deceased, she was an adult over 25 years of age. There being no evidence that Rabbecca was maintained by the deceased person and living with the deceased person, we hold that she is not a beneficiary entitled to the children's share of the estate of the deceased. Neither was she a dependant. The lower Court therefore erred in law and fact by holding that Rabbecca Makhumalo is a beneficiary entitled to the children's share of the deceased estate.

7.12 The said Rabbecca Makhumalo being neither a child nor a dependant of the deceased, we hold that she is not entitled to benefit from the estate of the deceased.

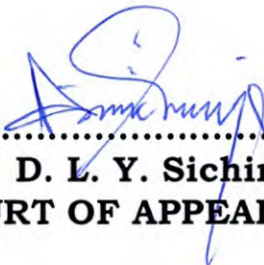
## **8.0 CONCLUSION**

8.1 For the above stated reasons, we find merit in the cross-appeal and accordingly uphold it. We set aside the decision of the Court below to the effect that Rabbecca Makhumalo is a beneficiary entitled to the children's share of the estate of the

deceased. We substitute it with the holding that Rabecca Makhumalo, is not a beneficiary entitled to the share of the deceased because she is not a child or dependant of the deceased. We make no order as to costs because the cross-appeal was not defended.



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**F. M. Chishimba**  
**COURT OF APPEAL JUDGE**



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**D. L. Y. Sichinga SC**  
**COURT OF APPEAL JUDGE**



.....  
**P. C. M. Ngulube**  
**COURT OF APPEAL JUDGE**