

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2020/HPF/402



BETWEEN:

MARRIEN LOMBE MUBANGA KASEKA

(Suing in her own behalf as widow of the late Justern Tox Kaseka
And as the mother and next of friend of Mwashika Shayne Kuku
Kaseka a minor)

PLAINTIFF

AND

SARAH KASEKA MUKUKA

(Sued in her capacity as Executrix of the estate of the
Late Justern Tox Kaseka)

1ST DEFENDANT

JOE KASEKA

(Sued in her capacity as Executrix of the estate of the
Late Justern Tox Kaseka)

2ND DEFENDANT

MUKOLOBA MWANSA

3RD DEFENDANT

**Before the Honourable Mrs. Justice R. Chibbabbuka on the 16th day of
July, 2025**

For the Plaintiff: Ms. C. Syachika, Messrs Japhet Zulu Advocates

For the Defendant: Mrs. F. Muduya, Messrs Florence Muchiya & Associates

RULING

Cases referred to:

1. *Deijil vs Van Deiji* (1996) 4. S.A 260 (R)
2. *Kaela Kanswe V Evaristo Mfuta* (Appeal No. 69/2023)
3. *Isaac Tantameni C. Chali (Executor of the Will of the later Mwalla Mwalla) Vs Liseli Mwala (single woman)* (1997) S.J 22 (S.C)
4. *Mwanashiku and others V Kemp and Mwanashiku SCZ Judgment Number 4 of 1991*

5. *Mutinta Christine Mwitangeti Mazoka and Mutinta Bumba M'Membe Nee Mazoka (sued as Administratrix of the Estate of the late Anderson Kambela Mazoka) Vs Lundu Mazoka Appeal No. 89/2014*

Legislation referred to:

The Children's Code Act No. 12 of 2022

The High Court Act, Chapter 27 of the Laws of Zambia.

1.0 Introduction

This is an application by the plaintiff, filed on the 25th February, 2025 for an order for maintenance of Mwashika Shayne Kuku Kaseka a child of the family and a refund of the sums used for his maintenance from the time of the deceased's death to date, pending determination of the main matter. The application is made pursuant to *Section 138 (1)* of the *Children's Code Act No. 12 of 2022* as read together with *Order 3 Rule 2* of the *High Court Rules* in the *High Court Act, Chapter 27 of the Laws of Zambia.*

2.0 Plaintiff's Affidavit in Support

The plaintiff filed an affidavit in support on even date where she deposes as follows:

She got married to the late Justern Tox Kaseka in February 1991 under customary law and their customary marriage was duly registered on the 26th September, 2002 under certificate number 01794. Out of her marriage to Justern Tox Kaseka were born two children of the family namely Mwendalubai Justina Kaseka a girl born on the 24th of April, 2008 and now aged 34 years old and Mwashika Shayne Kuku Kaseka a boy born on 7th April, 2008 and now aged 17 years old and therefore a minor. Mwashika Kaseka is currently in grade 12 at Kabitaka school and he has needs such as school fees and daily upkeep needs.

Mwashika Kaseka's father Justern Tox Kaseka, died on the 14th of June, 2020. Before his demise, Justern Tox Kaseka fully provided for Mwashika Kaseka's needs. Mwashika Kaseka's total school and boarding fees for 2025 are ZMW110,144.00 and the total cost for his uniform is ZMW4,807.00. Mwashika Kaseka's monthly up keep needs amount to KMW6,500.00 per month, made up of ZMW2,500.00 for food, ZMW 2,000.00 for groceries, ZMW2,000.00 for pocket money and other expenses.

From the time of the demise of Justern Tox Kaseka in June, 2020, it has been a struggle for her to foot Mwashika Kaseka's school fees and upkeep needs, and this has caused her to be heavily indebted. At the time of Justern Tox Kaseka's death, Mwashika Kaseka was enrolled at Pinewood preparatory school where his school fees for term three was ZMW 8,700.00 which she single-handedly paid with difficulties.

Mwashika Kaseka enrolled at Kabitaka school in 2021 and from the time of Justern Tox Kaseka's demise in June 2020, the total sum money used to maintain Mwashika Kaseka to date is ZMW 450, 466.07, being school fees and transport expenses. This matter was commenced on the 6th of December, 2020 and is still on going. However, Mwashika Kaseka as a minor has immediate needs that require to be met.

The deceased's estate also has NAPSA and other benefits, as stated in the affidavit in support of originating summons, however Mwashika is unable to be funded through them because the defendants have denied access to the benefits by holding on to the deceased's original documents. The total sum required is ZMW 114, 951.00 being school fees and uniform fees and as well as the sum of ZMW 6,500.00 as up keep needs per month. The total sum to be refunded is ZMW 450,466.07.

2.1 The plaintiff's skeleton arguments

In the skeleton arguments, counsel made reference to the following provisions of the law for the jurisdiction this court has to grant an order for the maintenance of Mwashika Shayne Kaseka, a minor and child of the deceased, whose estate is the subject of this matter.

Section 138 (1) of the Children's Code Act No. 12 of 2022 which provides that:

"A guardian or custodial parent of the child may apply to the court to determine a matter relating to the maintenance of the said child and to make an order that a specified person make periodic payments for the maintenance of a child."

Section 139 (1) of the Children's Code Act No. 12 of 2022 which provides that:

"Despite section 137, a court may make an order regarding the provision of education, medical care, housing, clothing and any other area of need for a child of the family."

Counsel contended that as stated in the affidavit filed in support hereof, the plaintiff has been funding the school fees and upkeep needs for Mwashika Kaseka despite him being entitled to a share in the estate of his late father, Mr. Justern Tox Kaseka. That the defendants herein have also denied Mwashika Kaseka access to the deceased's NAPSA and other benefits by holding on to the deceased's original documents. It was counsel's considered view that it is imperative that an order be made for the child's maintenance seeing as this matter is still ongoing while the child has immediate needs that require to be met. For this argument reference was made to *Section 3 (1) of the Children's Code Act No. 12 of 2022* which provides that:

"A child's best interest is the primary consideration in a matter or action concerning the child, whether undertaken by a public or private body."

Further that *Article 3 of the United Nations Convention on the rights of the child* states as that:

“In all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Counsel contended that from the above arguments and the affidavit filed in support hereof, it is evident that it would be in Mwashika Kaseka’s best interest that a maintenance order is granted pending determination of this matter. That the maintenance order will ensure that his educational and daily needs are met. It was argued further that from the time of Juster Tox Kaseka’s demise in June, 2020, the plaintiff has been footing expenses from Mwashika Kaseka with much difficulty and as a result has accumulated debt. That it would therefore be prudent for the plaintiff to be refunded the sums used to maintain Mwashika Kaseka pending conclusion of the matter because the funds for his maintenance were supposed to be derived from the late Justern Tox Kaseka’s estate. Further, that the results of this matter will not be affected by an interim maintenance order being granted to Mwashika Kaseka because as a child of the family, Mwashika Kaseka is duly entailed to a share of the estate of his late father.

It was counsel’s considered view that if the contested Will is found to be valid, Mwashika Kaseka will be entailed to a share under the Will and if the Will is found to be invalid, he will still be a beneficiary entitled to a share as a child of the family. That the will in contention clearly makes provisions for the children of the late Justern Tox Kaseka and Mwashika Kaseka as a child of the family would be duly entitled to a share if the will were to be valid. Alternatively, should the Will be found to be invalid, Mwashika Kaseka will still be entitled to a share of the estate in line with section 5 (1) (b) of the *Intestate Succession Act Chapter 59 of the Laws of Zambia* which provides:

“Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows: fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child’s age or educational needs or both”

Reference was also made to *Order 3 rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia* which provides that:

“Subject to any particular rules, the court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice whether such order has been expressly asked by the person entitled to the benefit of the order or not”

Counsel argued that it is in the interest of justice that the child, Mwashika Kaseka, be provided for from his late father’s estate through an order for maintenance pending determination of this matter and that a refund of the sums used for his maintenance from time of the deceased’s death to date, be awarded to the plaintiff.

On the basis of the foregoing arguments, counsel prayed that this court grant an order for maintenance of Mwashika Shayne Kuku Kaseka and that a refund of the sums used for his maintenance from the time of the deceased’s death to date be awarded to the plaintiff, pending determination of this matter.

3.0 The defendant’s affidavit in opposition

The defendants filed an affidavit in opposition on the 21st March, 2025 deposed to by the 1st defendant Sarah Kaseka Mukuka who avers as follows:

From the time of his passing, the deceased was not in employment having retired in 2007, and as such his financial means were limited to his pension benefits which could not exceed K5,000 per month. At the time of his death, the deceased was incapable of maintaining the named child to the standard that the applicant has portrayed to this Honourable court. The named child was born in 2008, after

her father had already retired thus, the assertion that her father fully provided for his upkeep is not entirely correct as her father only had his pensions benefits and that by the time the minor was of school going age, this pension which was not sufficient to meet the expenses portrayed by the applicant.

From time to time after her father's retirement, her and her co-executrix financially assisted him in meeting his medical, caregiver, motor vehicle, and legal bills as his income was insufficient to cover them as per the copies of the emails and bank transfers evidencing some of these expenses exhibited as "SMKM2". From the time her father retired from employment, the applicant was responsible for paying the school fees for the said child as their father only had his pension benefits at his disposal.

The applicant works for the National Assembly and has the benefits of inter alia, an education allowance for her children. Therefore, she is capable of meeting the needs of the child from her education allowance. This is evidenced by the fact that she has managed to meet the needs of the child from before his passing when he had no income after retirement, save for the pension, and after their father's death on the 14th June, 2020. After the death of their father, she and her husband willingly approached the applicant for assistance in filing the NAPSA documents so that the minor could receive the NAPSA payment. This was done before she commenced this matter before this Honourable court, but she denied their request.

As defendants, they reasonably believe that such benefits are the ones that can assist to meet the needs of the child as opposed to giving the named child an income from the estate which was already distributed by the Testator in his Will. The applicant has also been receiving payment under the Madison Annuity Policy in which she has claimed sole beneficial right to the exclusion of all the other beneficiaries under the estate which amount can be used to meet the needs of the said child.

It is actually the applicant who took the named child to expensive schools as her father was never in any gainful employment or sustainable business after his retirement in 2007. She cannot confirm when the child was taken to the said school by the applicant. However, it was the applicant's duty to ensure that her financial status is capable of sustaining the child before enrolling him at expensive schools. The plaintiff is in gainful employment and is able to pay such amounts of money because she is entitled to an education allowance for her children being 25% of her basic salary.

The plaintiff is challenging the Will in the main matter making it difficult to distribute the estate of their late father or refund the said demanded amount as the Executrixes of the estate need to respect, the wishes of the deceased as contained in his Will. The nature of the main matter, which was commenced by the applicant herein, has made it difficult to refund her any money. The deceased's estate lacks the financial capacity to support a lump sum maintenance payment of ZMW450,000.00 which will significantly deplete the assets of the estate which does not have a lot of money as evidenced by a Bank statement. The bank statement shows that the money in the account stands at K758,656.47 and the same was grown by fixed deposits after the death of their father as can be noted from the account. The said request if granted will also contradict the wishes of the Testator as per his last wishes detailed in his Will.

The estate is currently involved in other legal matters at the Land's Tribunal, which existed before her late father's passing. As a result, these creditors will take precedence in the list of creditors.

3.1 The defendants' skeleton arguments in support of Affidavit

In their skeleton arguments filed on the 21st March, 2025, counsel argued that the application made by the applicant has been made pursuant to *Section 138 (1) of the Children's Code Act Number 12 of 2021*. That it is the duty of this Court to ensure that in any given circumstance the needs of the children are considered

as a priority. That this duty has been emphasised not only in the *Children's Code* but also in *Article 3 (1) of The United Nations Convention of the Rights of Children (1989)*.

Reference was also made to the case of **Deijil vs Van Deiji**¹ where Young J stated that the interest of the child means the welfare of the minor and the term welfare must be taken in the widest sense to include, economic, social moral and religious considerations.

It was counsel's considered view that from the foregoing, it is clear that the court needs to examine the circumstances or facts of each case in order to determine what is in the best interest of the child as the same differs from case to case. That in so doing the court also needs to examine the provisions of the law that grants the child involved the reliefs prayed for. Counsel argued further that, although the court is obliged to act in the best interest of the child, the child should be legally entitled to claim for reliefs sought. For this argument the court was referred to the case of **Kaela Kanswe V Evaristo Mfuta**² where step children of the deceased who sought to inherit from his estate were denied by the court. That the court in denying their prayer held that the said children could not inherit from the father as they were not legally adopted children of the deceased as is required by the *Intestate Succession Act*. Further that the mere fact that they were raised by the deceased was not sufficient for them to claim under his estate as children.

Counsel contended that the applicant seeks to be maintained from the estate of the late Justin Tox Kaseka who died testate. Therefore, the court cannot grant the application being sought solely on the provisions of the *Children's Code* without examining the provisions of the *Wills and Administration of Testate Estate Act, Chapter 60 of the Laws of Zambia (Wills Act)*. That under the *Wills Act*, the testator is empowered with unfettered rights of disposition of Estates which the courts are obliged to uphold. That, departure from the Will however,

can only be made judicially and under exceptional circumstances set out in Section 20 of the Act which provides:

“If, upon application made by or on behalf of a dependant of the testator, the court is of the opinion that a testator has not made reasonable provision whether during his life time or in his will, for the maintenance of the dependant, and that hardship will thereby be caused, the court may, taking account of all relevant circumstances and subject to such conditions and restrictions as the court may impose, notwithstanding the provisions of the will, order that such reasonable provisions as the court thinks fit shall be made out of the testator’s estate for the maintenance of that dependant.”

Reference was also made to the case of **Isaac Tantameni C. Chali (Executor of the Will of the later Mwalla Mwalla) Vs Liseli Mwala (single woman)**³ the court Supreme Court had occasion to pronounce itself on the aforementioned Section 20 as it held inter alia;

“Our conclusion in this appeal which is based on the law as it stands may appear morally hard. But it must be recognised that section 20 Act No. 6 of 1989 is a departure from the long-standing recognition of unfettered right to disposition by the testator of his property. This departure is a limited one as it only confers on the court a justification to depart from the depositions of a testator by providing reasonable provisions for certain of his dependants if it is of the opinion that he had not done so himself. The court’s jurisdiction to make reasonable provision for the dependant only arises if it is of the opinion, that it is satisfied that such provision has not been made by the testator.”

Counsel went on to argued that the Supreme Court in commenting on section 20(1) of the Wills Act, in the case of **Mwanashiku and others V Kemp and Mwanashiku**⁴ it held that:

“in our view, assistance or relatives (or dependants) during one’s life does not necessarily create automatic obligation after one’s death. Wills must be respected unless there are unreasonable or inadequate provisions to those specified in the Will and entitled in law;”

Counsel contended that it is clear from the foregoing that the application must demonstrate before this honourable court that the named minor qualifies to claim for maintenance as envisaged under the provisions of *Section 20 of the Wills Act*. Counsel went on to argue that a thorough consideration of the said *Act* clearly excludes the said minor from seeking for an order for maintenance under the estate of his late father for the following reasons;

1. The applicant has not demonstrated that the Will of the Late Justin Tox Kaseka did not make sufficient provision for the maintenance of the child as no provision of the Will has been cited by the applicant.
2. The applicant has not shown that hardship will be occasioned to the said minor if the order is not granted. In fact, the evidence on record shows that there is no hardship being occasioned to the minor because the applicant has been paying the school fees and meeting all the needs of the child from the time the father died.

It was counsel’s argument that in addition to the above, *Section 22(1)* requires that an application for maintenance of a dependant claiming under the estate of the testator be made within six months from the date on which the grant of probate was made as it provides:

“Except as provided by section twenty-four, an order under this part shall not be made except on an application made within six months from the date on which representation in regard to the testator’s estate general purposes is first taken out”.

That the record will show that the Testator died on the 14th June, 2020 and the 1st and 2nd defendants in this matter were issued with a grant of probate on the

28th July, 2020. Therefore, an application for maintenance of the named child should have been made within a period of six months from 28th of July 2020. Counsel was of the considered view that in light of the above, this court has no jurisdiction to hear and determine this application as it has been brought too late in the day.

Counsel contended that it is also worth noting that the applicant has changed the Will of the Testator but that the 1st and 2nd defendant proved the Will of the Testator. Therefore, the Will of the Testator is can properly said to be valid until proved otherwise and on this basis, counsel was of the firm view that the determination of this application ought to be premised on the provisions of the *Wills Act* and not the *Intestate Succession Act Chapter 59* of the *Laws of Zambia*.

In concluding their arguments, counsel submitted that this is not a proper application in which this court can grant an application for maintenance of a minor pending suit. That the court is only empowered to grant such an order under *Section 20* of the *Wills Act* which the applicant's application has failed to fulfil. Further that the application for maintenance was not made within a period of six months from the time the grant of probate and the applicant has also not demonstrated that hardship will be occasioned to the named child if the order for maintenance is not granted.

On this basis, counsel prayed that the said application be dismissed with costs.

4.0 The hearing

At the hearing, counsel for the applicant, the plaintiff herein, placed reliance on the summons for an order for maintenance, as well as the skeleton arguments.

In opposing the application, counsel for the defendants placed reliance on the affidavit in opposition and skeleton arguments in support. Counsel drew this courts attention to paragraph 12 of the affidavit in opposition as well as exhibit "SKMM3" being the conditions of service for the applicant, and asked the court

to take note that the mother to this child is employed by Parliament and she is entitled to receive an education allowance.

Counsel also made reference to exhibit "SKMM2" in the affidavit in opposition which shows that monies that were being paid by the children to the late for his medical expenses, indicating that even if he were alive, he would not manage to maintain the child to the standard been portrayed by the plaintiff. It was argued further that considering that there is a Will in the matter, the court is bound by the provisions of the said Will.

It was counsel's further argument that under *Section 22* of the *Wills Act*, an application of this nature should be brought before this court within 6 months from the date of representation. That clearly, this application has been brought too late in the day and as such this court has no jurisdiction to entertain it, more so that the plaintiff has already demonstrated capacity to maintain this child from the time the father died.

On the basis of the foregoing arguments counsel submitted that this is not a proper application that can be entertained by this court and as such it should be dismissed.

In reply, counsel for the plaintiff, argued that the court has to consider the best interest of the child and even though the dependents are heavily relying on the education allowance, the child herein, has other needs and expenses that need to be met. Counsel went on to argue that it is also an established fact that both parents of the child must take responsibility for the development of the child and it is therefore unjust for the defendants, to expect the plaintiff to provide for the child alone when there is money in the estate, which can be used for the child.

5.0 The decision of the Court

The plaintiff's application is for maintenance of Mwashika Shayne Kuku Kaseka from the time of the deceased's death to date, pending determination of the main

matter. Reliance was placed on *Section 138 (1) of the Children’s Code Act No. 12 of 2022* which provides that:

“A guardian or custodial parent of the child may apply to the court to determine a matter relating to the maintenance of the said child and to make an order that a specified person make periodic payments for the maintenance of a child.”

Counsel for the defendants has argued that this court has no jurisdiction to entertain this application as it is statute barred. As an issue relating to the jurisdiction of this court has been raised, the same will have to be addressed first. *Section 22 (1) of the Wills and Administration of Testate Estates Act Chapter 60 of the Laws of Zambia* provides that:

“Except as provided by section twenty-four, an order under this part shall not be made except on an application made within six months from the date on which representation in regard to the testator’s estate general purposes is first taken out”.

In assessing this argument, the Supreme Court in the case of **Mutinta Christine Mwitangeti Mazoka and Mutinta Bumba M’Membe Nee Mazoka (sued as Adminstratrix of the Estate of the late Anderson Kambela Mazoka) Vs Lundu Mazoka**⁵ had occasion to examine *Section 22 (1) of the Will and Administration of Testate Estates Act* as it stated that:

“It must be noted that Section 22(1) is found in Part III of the Wills Act and the reference to “this Part” in the section, is reference to “Part III of the Wills Act” under which it falls.

.....
We are of the considered view that the applications envisaged in both sections 22(1) and 24(1), are applications for variation of Wills, as stipulated under Part III of the Wills Act. It should also be noted that

Part III deals with matters relating to family provisions in a Will. It gives power to the court, on an application made by a dependant, to vary a Will where a testator has not made reasonable provisions in his Will for the maintenance of a dependant. This power is conferred on the court by Section 20(1) of the Wills Act which provides that:

“20. (1) If, upon application made by or on behalf of a dependant of the testator, the court is of the opinion that a testator has not made reasonable provision whether during his life time or by his will, for the maintenance of the dependant, and that hardship will thereby be caused, the court may, taking account of all relevant circumstances and subject to such conditions and restrictions as the court may impose, notwithstanding the provisions of the will, order that such reasonable provision as the court thinks fit shall be made out of the testator's estate for the maintenance of that dependant.” Section 21 of the Wills Act goes on to set out the matters which the court should consider when varying a Will.

From the foregoing, it is quite evident that the essence of Part III of the Wills Act under which sections 22(1) and 24(1) fall, is to make provision for variation of Wills. This, therefore, means that the respondent's action can only be subject to the statute bar in section 22(1) or the exception in section 24(1), if this action, can be said to be an application to vary a Will.

In assessing the holding of the Supreme Court in the aforementioned **Mutinta Christine Muitangenti Mazoka** case above, it is evident that the statute bar provided for under Section 22 (1) of the *Wills and Administration Testate of Estates Act* is only applicable where the main action relates to a variation of a Will. In the said **Mazoka** case, the court went on to examine the claims made by the applicant in that matter and found that there was no claim pertaining to the

variation of the Will. In *casu* however, the plaintiff has among reliefs claimed the following under relief x:

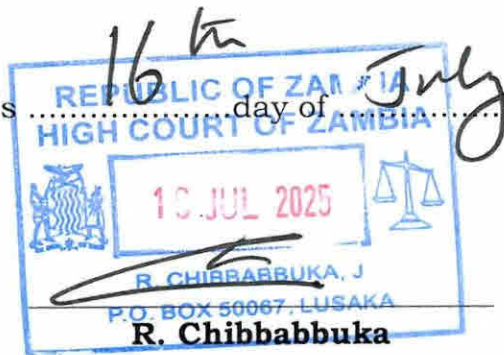
“x. In the alternative to (i) to (iv) above an order for the variation of the Will on grounds that it did not make reasonable provision for the plaintiff and Mwashika Shayne Kuku Kaseka a minor.”

In distinguishing the final holding of the Supreme Court in the **Mazoka** case where it found that there was no claim for variation of the Will, in *casu* it is evident that the plaintiff has applied to vary the Will of the deceased. This places the application for maintenance squarely in the realm of being statute barred as per *section 22 (1)* of the aforementioned *Act*. As such, I agree with counsel for the defendants, that this court has no jurisdiction to entertain the said application for maintenance as it is statute barred. Having so found, it is otiose for this court to address the other issues raised by the parties as this court has no jurisdiction to do so.

This application is hereby dismissed with costs to the defendants to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered at Lusaka this day of 2025



HIGH COURT JUDGE