

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
(CIVIL JURISDICTION)**

2021/HPF/163

BETWEEN:

MARTHA FWAMBO

*Suing as an interested party of the
estate of Pethius Fwambo Siame*



1st PLAINTIFF

MATHEWS MWANZA

*Suing as an interested party of the
estate of Pethius Fwambo Siame*

2ND PLAINTIFF

AND

CHISHIMBA LISA MULENGA

*Sued as an interested party of
the estate of Pethius Fwambo Siame*

1st DEFENDANT

FOSTINA PHIRI

*Sued as an interested party of the
estate of Pethius Fwambo Siame*

2ND DEFENDANT

**Before the Hon. Mrs. Justice R. Chibbabbuka on the 4th day of March,
2024.**

For the Plaintiffs: Ms T. Bulaka, Messrs TMB Advocates

For the Defendants: Mr. J. Zulu, Messrs Japhet Zulu Advocates

JUDGMENT

Cases referred to:

1. *Charity Oparaocha v Winfrida Murambiwa* (2004) ZR 141
2. *Madison General Insurance Company Limited vs Avril Carnhill and Micheal Kakoma*
Appeal No. 19/2017
3. *Khalid Mohamed vs The Attorney General* (1982) Z.R 49
4. *Emma Mainza, Hellen Mainza Munyumbwe (Suing as Administrators of the estate of
Creed Mainza Malawo) and Others vs Magness Gowera Siwale and Another* Appeal No.
160/2020
5. *Sablehand Zambia Limited vs Zambia Revenue authority* (2005) ZR 109
6. *Sithole vs The State Lotteries Board* (1975) ZR 106
7. *Isaac Tantameni C Chali (Executor of the Will of the late Mwalla Mwalla) vs Liseli Mwalla*
(single woman) 1997 S.J 22.

8. *Kalumba Kashiwa Mwansa and Mwenya Kalindo Mwansa (suing as Administrators of the estate of the late Tom Mpofu) vs Kenneth Mpofu (sued as Administrator of the estate the late Tom Mpofu) and Attorney General SCZ Judgment No. 34 of 2018*
9. *Kajimanga vs Chilanga Appeal No. 50 of 2014.*
10. *David Ojah Malembe vs Thomas Ndonyo SCZ Judgment No. 22 of 2012*

Legislation referred to:

The Rules of the Supreme Court of England, 1999 Edition

The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia

The Lands Act, Chapter 184 of the Laws of Zambia

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

The Intestate Successions Act, Chapter 59 of the Laws of Zambia.

1.0 Introduction

This matter was commenced by way of Originating Summons and Affidavit in Support of Originating Summons on 30th March, 2021. The reliefs claimed were outlined as follows:

1. An Order to set aside the application of appointment as Administratrixes made by the defendants on 19th March, 2021 under non-contentious probate procedure or alternatively to set aside any letters of Administration granted thereof.
2. An Order that the plaintiffs be appointed as the Personal Representatives of the estate of Pethius Fwambo Siame (deceased);
3. An Order that the dependents of Pethius Fwambo Siame, namely; Dainess Siame, Sally Mabudu, Deon Banda and Evelyn Banda are entitled to 30% of the estate;
4. An Order that the residential plot in Chawama, Kuomboka Lusaka/SLN-0003/2453 does not form part of the estate of Pethius Fwambo Siame;
5. An Order to sell the assets for purposes of payment of liabilities and distribution of the estate; and
6. Any other reliefs that the Court may deem fit.
7. Costs connected and incidental to these proceedings.

The Originating Summons further posed the following questions:

1. Whether the plaintiffs are eligible to be appointed as Personal Representatives of the estate of Pethius Fwambo Siame?
2. Whether the dependants are entitled to 30% of the estate of Pethius Fwambo Siame?
3. Whether the Plot in Chawama Kuomboka, Lusaka/SLN-0003/2453 forms part of the estate of Pethius Fwambo Siame?
4. Whether the plaintiffs are entitled to an Order to sell assets of the estate? and
5. Whether the plaintiffs are entitled to costs connected and incidental to these proceedings.

In response to the above claims, an affidavit in opposition was filed on 30th April, 2021.

Owing to its contentious nature, this matter could not be decided solely on affidavit evidence and therefore by the powers vested in this court by *Order 28 rule 8 sub-rule 1* of the *Rules of the Supreme Court of England, 1999 edition*, this matter was continued as if it had been begun by way of writ of summons, and the affidavits filed herein stood as pleadings.

Further, the parties herein on 7th December, 2022 entered into a Consent Judgment, wherein the parties agreed, among other things, that the defendants be maintained as administratrixes, and the plaintiffs be appointed as co-administrators of the estate of Pethius Fwambo Siame. The parties also agreed that the two children of the deceased, Mwalimu Fwambo Siame and Judy Fwambo Nayame, have 80% share of the estate, made up of 50% as their primary share, 20% as the share that devolves to them by virtue of the deceased having not been survived by a Spouse and 10% being half of the 20% that ought to have devolved to the deceased's parents. That the remaining 20% of the estate shall only be distributed after determination of whether or not Dainess Siame, Sally Mabudu, Deon Banda and Evelyn Banda were dependants of the deceased. The parties agreed that the following would be the issues to proceed to trial for determination by this court:

- i. Whether Dainess Siame, Sally Mabudu, Deon Banda and Evelyn Banda were the deceased's dependents and therefore entitled to 20% share of the deceased's estate;
- ii. Whether or not property number S/LUSAK/SLN 0003/2453, a residential plot situate in Kuomboka drive, Chawama, Lusaka belonged to the deceased and hence forms part of his estate;
- iii. Whether or not the deceased's estate has a liability of K7,500.00, which is to be paid before distribution of the estate.

The three preceding questions are the issues to be determined by this court, and hence this court will consider only the evidence and submissions relating to the same.

2.0 The plaintiff's affidavit evidence

The plaintiffs' case, as per the affidavit in support filed on 30th March, 2021 is that they are the siblings of the deceased who died intestate on 1st February, 2021 at Kakoma village. That the deceased was not survived by parents but had dependants who depended on him for their general welfare prior to his death. The plaintiffs are now guardians and representatives of the interests of the said dependents who have been completely left out by the defendants from the estate and whose interest the defendants do not recognize. The defendants have no other interest in the estate besides representing the interests of the minor children. To the best of their knowledge, the deceased, at the time of his death, left property no. L/CHIBO/1324695, a refrigerated truck registration no. ALV 1270, Madza Titan, a Genset, an incubator, one desktop computer, one laptop, solar batteries and an inventor, a bed and mattress, an air conditioner machine, 2 turkeys, 20 chickens and 3 ducks.

Further that the deceased, at the time of his demise, owed one Derrick Chakaina K7,500.00 together with ground rent and rates for his immovable property. That they are yet to advertise to call upon any person who the deceased may have owed, to properly ascertain the estate's liabilities. That the defendants when applying for letters of appointment as administrators did not

make a full and complete disclosure of the facts regarding the estate of the deceased, and they never listed any of the dependants. The defendants further made an inaccurate inventory by claiming that plot no. Lusaka/SLN-0003/2453, Kuomboka, Chawama belonged to the deceased when it did not. The dependants are entitled to 30% of the estate while the children are entitled to 70%.

3.0 The Defendant's affidavit in opposition

The defendants filed an affidavit in opposition on 30th April, 2021 wherein they stated that the 1st defendant is the mother of Mwalimu Fwambo Siame and the 2nd defendant is the mother of Judy Fwambo Nyambe who are the children of the deceased herein. That the deceased had no dependants prior to his death because "Sally Mabudu was raised by her late grandmother, Judith Nayame, and upon her death Sally was taken, together with her 10% share of a dependant, by the 1st plaintiff. The affidavit further disclosed that Dainess Siame is the deceased's grandmother who is above the age of being considered a dependant according to the law. Deon and Evelyn Banda are the children of Mirriam Fwambo who were never dependent on the deceased for their general welfare. The deceased left properties outlined in the defendants' inventory because as of October, 2020, the 2nd defendant was staying with the deceased and was privy to all the properties he owned.

They are not only representing the interests of the minor children but theirs too. That it is not true that they did not make a full disclosure regarding the deceased's estate and that the reason they never listed any dependants was because they are none. That it is not true that the deceased only owned one immovable property because he also owned plot no. S/Lusaka/SLN 0003/2453 situate in Kuomboka, Chawama as evidenced by an offer letter given to the deceased on 1st October, 2019, and which was reprinted on 12th April, 2021. That there are no dependants entitled to 30%, if anything they are entitled to 10%.

4.0 The Plaintiffs' Affidavit in Reply

In reply to the defendants' affidavit, the plaintiffs filed an affidavit in reply on 22nd December, 2022 wherein they deposed that Dainess Siame was maintained by the deceased immediately prior to his death and she was even living with him from 2017 up to the point of his death and was therefore his dependant. Dainess Siame started living with the deceased after the demise of her daughter, Judith Nayame who was the mother to the plaintiffs and the deceased. The defendants were the deceased's ex- girlfriends who had a strained relationship with the deceased for a long time until his demise.

Sally Mabudu aged 15, Deon Banda aged 8 and Evelyn Banda aged 6 were all minors who were maintained by the deceased immediately prior to his death and whose education was being provided by the deceased. That the defendants were not part of the lives of the deceased and his family and hence not privy to any maintenance responsibilities of the deceased. The 2nd defendant was not staying with the deceased but merely took her child to visit the deceased in October, 2020 for two weeks only and she was nowhere near the deceased after the two weeks visit. The deceased lived with his grandmother and two uncles until the time of his death.

The offer letter exhibited was obtained on 12th April, 2021, two months after the death of the deceased and a few days after the appointment of the defendants as administratrixes. The purported offer letter has no serial and receipt numbers. Any offer that is issued after the death of a person is only released, after following the appropriate procedure, in the name of that person's personal representatives and not the deceased. A search on the land records, both at Lusaka and Ndola land departments shows no invitation to treat documents, no receipts and no reference number for the property. There are no inspection reports from the council and the Ministry of Lands, and the person who purported to produce the offer letter, Vanessa Seyuba, is an officer from Ndola office and not Lusaka office as shown on the offer letter.

That they have not seen any inspection reports, invitation to treat, application letter, receipts, police reports, affidavits, or advertisements of any kind regarding the reprinting of an offer. The information regarding properties is all entered in the ZILMIS system which picks up all information from application letters, inspection reports, surveys, sketch plans, receipts and particular dates pertaining to the property. An offer letter was obtained to a property which was not in exclusive possession and use of the deceased, and over structures which were never constructed by the deceased. When structures were erected on the property, the deceased was a minor, and that there is no proof in the system that the offer letter was issued earlier than 12th April, 2021.

That the property in question belonged to the plaintiffs' mother who had it for over 12 years without disturbance from any person. At the time of the demise of their mother, the property in question was not yet on title. Between 2003 and 2005, the property in question was in open possession and use by Ernest Chikashi, who initially built the foundation, foundation trench, concrete and septic tank. There was no one who legally had title to the property and so Mr. Chikashi possessed it as his own. His possession of the property was open and intentional. In 2005, the late Judith Nayama purchased the property from Mr. Chikashi at K9,000.00, following which their mother possessed the property openly and reconstructed the foundation and built 4 flats on it. At the time of purchase and reconstruction, the deceased was a minor.

In 2008, their mother put their sister, Leah Fwambo to live in one of the flats on the property with her family as her husband could not provide her accommodation. The other flats were rented out by their mother who collected the rentals. Their mother left two properties, one in Kamwala South and the property in issue. Kamwala South property is owned jointly by her children, while the property in issue was split in the following percentages, children 70%, parents 20% and dependants 10%. The rentals from the property were issued to the beneficiaries in those percentages, with the children sharing the 70% equally. The 20% was for their grandmother, which was managed by the deceased who she lived with. The 10% to the dependants was used to partially

settle education needs for the said dependants mentioned in the matter and the deceased would meet the outstanding education and maintenance expenditures.

On 31st May, 2017, their mother died and on 5th June, 2017, the deceased and the plaintiffs were appointed administrators of the estate, following which the deceased and beneficiaries agreed that the deceased should stay at one of the flats to watch over the welfare of the tenants and collect rentals on behalf of the other beneficiaries and also resolved to take steps to formalize the possession and use of the property with government agencies but the same was never completed. The deceased later moved to his property in Chibombo in 2019 but he continued to collect rentals and distribute the same to the beneficiaries. The flat that the deceased had occupied was rented out and rentals distributed to each beneficiary. The property in question did not belong to the deceased. Their mother was survived by 5 children, namely, the deceased, Pethius Fwambo Siame, Martha Fwambo, Mathews Mwanza, Leah Fwambo and Mirriam Fwambo. She was also survived by her mother, Dainess Siame, and two dependants.

5.0 The Plaintiffs' Witness Statements

5.1 The witness statements of Martha Fwambo, Mathews Mwanza, Leah Fwambo and Dainess Siame were all filed on 24th February, 2023. The said witness statements are materially similar. According to the said witness statements, the defendants were the deceased's ex-girlfriends. At the time of his death, the deceased survived by two children, Mwalimu Fwambo Siame and Judy Fwambo Nayame. The deceased was further survived by 4 dependants, namely Dainess Siame, his 75 years old grandmother, Sally Mabudu, his 15 years old niece, Deon Banda, his 8 years old nephew and Evelyn Banda, his 6 years old niece, who were all dependent on the deceased for their general welfare prior to his death. The deceased was not survived by parents.

Prior to his death, the deceased was residing at property no. L/CHIBO1324695, Chibombo with their grandmother, Dainess Siame, and two uncles, namely Humphrey and Clifford Siame. Dainess Siame had lived with the deceased from 2017, following the death of Judith Nayame, until the time of his death, and even took care of the deceased when he was ill. The defendants had a strained relationship with the deceased and were not present at the time of his death. Sally Mabudu, Deon Banda and Evelyn Banda are all minors who were maintained by the deceased. The present case regarding Sally Mabudu relates to her share as the deceased's dependant and not a dependant of their late mother. The deceased provided for the educational and other maintenance of his dependants. The defendants were not part of the deceased's daily life and hence not privy to the deceased's responsibilities. Fostina Phiri was not staying with the deceased but merely brought her child to visit the deceased in October, 2020 for two weeks, and is not privy to the history of the land known as S/Lusaka/SLN/0003/2453. The disputed property never belonged to the deceased but was their mother's property, and that the structures on the property were built while the deceased was still a child with no income.

The offer letter to the disputed property was obtained on 12th April, 2021, two months after the death of the deceased and a few days after the appointment of the defendants as Administratrixes. The purported offer letter has no serial and receipt numbers, and since it was issued after the deceased's death, it should have been issued in the names of the estate's personal representatives. The defendants were required to write a letter to the Commissioner of Lands and submit inspection reports from the council and the application letter for the disputed property. Upon accessing the documents, the Ministry of Lands carries out an inspection report on the ground to ascertain any existing interest after which an

invitation to treat to the property specifying the terms and conditions is issued.

A search on the land records, both at Lusaka and Ndola land departments shows no invitation to treat documents, no receipts and no reference numbers for the property. There are no inspection reports from the council and the Ministry of Lands, and the person who purported to produce the offer letter, Vanessa Seyuba, is an officer from Ndola office and not Lusaka office as shown on the offer letter. An offer letter always has receipt and serial numbers, and a reprint is not given a new date. When an offer letter is lost, the parties must obtain a police report, swear an affidavit, advertise in the newspaper and government gazette then submit the documents to the Ministry of Lands for a duplicate copy. To be given the offer letter, the defendants must produce the original receipt or certified true copy to the Ministry of Lands. The receipt from the Lusaka Water and Sewerage Company exhibited at page 6 of the defendants' bundle of documents is for plot no. 2443/98 and not S/Lusaka/SLN 003/2453. The police report on page 7 of the defendants' bundle of documents shows a police report obtained on 8th April, 2021 which reveals that the defendants reported that they had lost the offer letter for the plot in dispute when in fact no documents belonging to the deceased were ever in their custody.

That they have not seen any inspection reports, invitation to treat, application letter, receipts, police reports, affidavits, or advertisements of any kind regarding the reprinting of an offer. The information regarding properties is all entered in the ZILMIS system which picks up all the information from application letters, inspection reports, surveys, sketch plans, receipts and particular dates pertaining to the property. An offer letter was obtained to a property which was not in the exclusive possession and use of the deceased and over structures which were never constructed by the deceased. When structures were erected on the

property, the deceased was a minor, and that there is no proof in the system that the offer letter was issued earlier than 12th April, 2021. That the property in question belonged to Judith Nayame who had it for over 12 years and that at the time of her demise, the property in question was not yet on title. Between 2003 and 2005, the property in question was in the possession of Ernest Chikashi, who initially built the foundation, foundation trench, concrete and septic tank. There was no one who has legally had title to the property and so Ernest Chikashi possessed it as his own.

In 2005, the late Judith Nayama purchased the property from Mr. Chikashi at K9,000.00, following which their mother possessed the property openly and reconstructed the foundation and built 4 flats on it. In 2008, their mother put their sister, Leah Fwambo to live in one of the flats on the property with her family as her husband could not provide accommodation for their family. The other flats were rented out by their mother who collected the rentals. Their mother left two properties, one in Kamwala South and the property in issue. The Kamwala South property is owned jointly by her children, while the property in issue was split in the following percentages, children 70%, parents 20% and dependents 10%. The rentals to the property were issued to the beneficiaries in those percentages, with the children sharing the 70% equally. The 20% was for their grandmother, which was managed by the deceased who she lived with. The 10% to the dependants was used to partially settle education needs for the dependants mentioned in the matter and the deceased would meet the outstanding education and maintenance expenditures.

On 31st May, 2017, their mother died and on 5th June, 2017, the deceased and the plaintiffs were appointed administrators of the estate, following which the deceased and beneficiaries agreed that the deceased should stay at one of the flats to watch over the welfare of the tenants and collect rentals on behalf of the other beneficiaries and also resolved

to take steps to formalize the possession and use of the property with the government agencies but the same was never completed. The deceased later moved to his property in Chibombo in 2019 but he continued to collect rentals and distribute the same to the beneficiaries. The flat that the deceased had occupied was rented out and rentals distributed to each beneficiary. The property in question did not belong to the deceased. The remaining beneficiaries of their mother's estate are ready and willing to give the deceased's estate his share of the rentals.

5.2 On 24th February, 2023, the plaintiffs filed a witness statement of Ernest Chikashi who stated that he is the former occupant of the disputed property herein which he bought from a Mr. Chirambo. He was in possession of the property from 2003 to 2005 when he sold it to Judith Nayame, the plaintiffs' deceased mother, for K9,000.00. At the time of the sale, the deceased was merely a boy with no income of his own. The property in issue is a statutory improvement area and basically has no documentation to it. The government later legalized the area and started processing title deeds. When he purchased the property, it was bare land and he built the foundation, foundation trench, concrete and septic tank. The plaintiffs' mother reconstructed the foundation and built 4 flats on the property. He knows the plaintiffs' and deceased's family as he has lived in Chawama for many years.

5.3 The witness statement of Paul Chilala, equally filed on 24th February, 2023, is that he was a friend of the plaintiffs and deceased's mother, Judith Nayame, from 2001 until the time of her death. Sometime in February, 2006, Judith Nayame requested him to assist her with the procedure of obtaining title deeds with regards to her properties, including the property in dispute which, according to the information on the documents he had been shown, she had bought from Mr. Ernest Chikashi who had in turn purchased it from Mr. Chirambo. The property was part of a farm occupied by Mr. Chirambo Senior. Judith Nayame

gave him the letter of sale. He started the process by seeing Mr. Chirambo who advised him to see the secretary of the committee, Mr. Mumba. Mr. Mumba advised him to be attending meetings that would be called and chaired by Mr. Proud Chirambo, the son to the owner of the farmland. He did as advised up to the time he was told to start paying survey fees to the council for legalization of the subdivision of the farm. The process took long because those who bought the plot were slow in paying. In 2014, he left Lusaka for Gwembe with the process still ongoing, and he gave the documents, which included receipts from the committee, to the deceased herein who he later discovered had stopped attending the committee meetings. At the time he left, the house was complete to habitable level and he left Leah staying in the house. The structures on the property were built by the late Judith Nayame and not the deceased herein.

6.0 The Defendants' Witness Statements

- 6.1** The 1st defendant's witness statement, filed on 6th March, 2023, is that she and the deceased met and started dating towards the end of 2014, they met in Chilabombwe when the deceased was working for Zambia Revenue Authority, operating at Kasumbalesa Border. On 9th June, 2016, she gave birth to their son, Mwalimu Fwambo Siame. The deceased died intestate on 1st February, 2021 at Kakoma Village and was survived by two children, Mwalimu Fwambo Siame and Judy Fwambo Siame. Prior to his death, the deceased was residing at his property known as L/CHIBO/1324695 in Chibombo, Central Province. On 24th March, 2021, she and the 2nd defendant obtained letters of administration from the Ndola probate registry of the High Court.

At the time of his death, the deceased left movable and immovable property which included property no. L/CHIBO/1324695 and property no. S/LUSA/SLN 003/2453. The plaintiffs commenced an action against

her and the 2nd defendant, claiming inter alia that the property S/LUSAK/SLN 003/2453 did not belong to the deceased and should not form part of his estate as it belonged to their late mother, Judith Nayame who died on 31st May, 2017. The plaintiffs have not produced evidence that the property in question formed part of their mother's estate. The defendants' bundle of documents on pages 4, 5 and 6 contain an offer letter, Zesco electricity receipt and a water receipt for the property S/LUSAK/SLN 0003 /2453 all in the deceased's name. She requested for a reprint of the documents for the properties L/CHIBO/1324695 and S/LUSAK/SLN-0003/2453 when the dispute arose as the documents relating to the said properties were lost.

That on 7th December, 2022, the parties herein entered into a consent judgment where it was adjudged that property no. L/CHIBO/1324695 belongs to the deceased's estate and should be distributed to his children. The deceased had no dependants whom he maintained or was living with prior to his death. Sally Mabudu was raised by her late grandmother, the late Judith Nayame, and upon the said Judith's death, she was taken, together with her 10% share as a dependant of Judith's estate, by the 1st plaintiff. Dainess Siame was the deceased's grandmother, and Deon and Evelyn are the children of Mirriam Fwambo and were not living or maintained by the deceased.

- 6.2** The 2nd defendant's witness statement, filed on even date, is that she met and started dating the deceased in July, 2014. On 27th January, 2016, she gave birth to their daughter, Judy Fwambo Siame. Sometime in late 2020, she cohabited with the deceased at his farm property No. L/CHIBO/1324695, Chibombo and during the time, the deceased never stayed with anyone as a dependant. At the time of his death, the deceased was survived only by his two children, Judy Fwambo Siame and Mwalimu Fwambo Siame. That the deceased told her that he sent the money he generated from the sale of clothing at his Kitwe Edinburg

shop to his mother, Judith Nayame, to keep and later use to purchase a plot for him. That when his mother found the plot, being property no. S/LUSAK/SLN 0003/2453, the deceased sent her his National Registration Card so that she could purchase the land for him, in his name.

In 2014 while she and the deceased were dating, the deceased began building flats on the property, adding to the two flats that he found on the land. At a meeting convened after the funeral, the deceased's sisters alleged that he gave them the property in question and the children were only given the farm property in Chibombo. She and the 1st defendant were granted letters of administration on 24th March, 2021 at the Ndola probate registry of the High Court. At the time of his death, the deceased left movable and immovable property which included property no. L/CHIBO/1324695 and property no. S/LUSA/SLN 0003/2453. The plaintiffs commenced an action against her and the 1st defendant, claiming inter alia that the property S/LUSAK/SLN 0003/2453 did not belong to the deceased and should not form part of his estate as it belonged to their late mother, Judith Nayame who died on 31st May, 2017.

The plaintiffs have not produced evidence that the property in question formed part of their mother's estate. The defendants' bundle of documents on pages 4, 5 and 6 contain an offer letter, Zesco electricity bill receipt and a water bill for the property S/LUSAK/SLN 0003 /2453 all in the deceased's name. On 7th December, 2022, the parties herein entered into a consent judgment where it was adjudged that property no. L/CHIBO/1324695 belongs to the deceased's estate and should be distributed to his children. The deceased had no dependents whom he maintained or was living with prior to his death.

7.0 The Trial

7.1 The Plaintiff's Case

At the trial, the plaintiffs called six witnesses.

7.1.0 PW1's Testimony

PW1's Evidence is Chief

PW1 was Mathew Mwanza, the 2nd plaintiff herein. He relied entirely on his witness statement, and prayed that this court orders that the property in question before this court was never for the deceased but that it belonged to his mother, Judith Nayame. He prayed further that Dainess Siame, Sally Mabudu, Evelyn Banda and Deon Banda be declared to be dependants of the deceased, and for the payment of K7,000.00 owed to Mr. Derrick Chakaina.

Cross examination of PW1

In cross examination, PW1 replied as follows: there is no document in the plaintiffs' bundle of documents that shows that the property belonged to Judith Nayame, and the offer letter on page 4 of the same bundles is in the deceased's name and not Judith Nayame's. It is not true that the Local Court guided that the property in question belongs to the deceased. The list of the properties that belonged to his late mother has not been submitted before court. Apart from the offer letter, there is no other document that shows that the document belongs to any other person.

The offer letter is a reprint after the original letter was lost. The police report at page 7 of the defendants' bundle of documents explains the loss of the letter issued in the deceased's name. Sally Mabudu Deon Banda and Evelyn Banda are in school but he has not produced any receipts showing that the deceased used to pay their school fees, or any other proof that they were provided for by the deceased. It is not true that the deceased only lived with his uncle, a Caretake, towards the end of his life. It is not true that Fostina Phiri joined the deceased at his farm to nurse him. Dainess Siame was not merely a visitor.

Re-examination of PW1

PW1 was not re-examined.

7.1.1 PW2's Testimony**PW2's Evidence in Chief**

PW2 was Martha Fwambo, the 1st plaintiff herein. She relied entirely on her witness statement and prayed that this court declares that the property in dispute belonged to Judith Nayame and not the deceased herein, and that the deceased had dependants, being Dainess Siame, Sally Mabudu, Evelyn Banda and Deon Banda.

Cross examination of PW2

In cross examination, she replied as follows: there is no document before court to show that the property in question belonged to Judith Nayame. The only document before this court is the offer letter which shows that the property belonged to the deceased. At the time of his death, the deceased lived with his grandmother at the farm. The other dependants lived in his other house, in Kuomboka. There are no receipts on record to evidence that the deceased paid school fees of the three children. There is no evidence on record to show that the deceased owed Derrick Chakaina money, and the said Derrick is not among the plaintiff's witnesses.

Re-examination of PW2

In re-examination, PW2 clarified that the deceased was the one looking after their late mother's property, and was looking after the dependants but when he relocated to his farm, he only went with her grandmother. At the time of his death, he was staying at his farm

7.1.2 PW3's Testimony**PW3's Evidence in Chief**

PW3, Ernest Chikashi, relied on the witness statement filed before court.

Cross examination of PW3

When crossed examined, PW3 replied that he has not produced any document to show that he was the owner of the property in question nor has he produced any document to show that the property was sold to Judith Nayame. There is no contract of sale of the property or receipt of payment of the sum of K9,000.00. The offer letter exhibited at page 4 of the plaintiffs' bundle of documents is in the deceased's name. The owner of the property is the deceased.

Re-examination of PW3

PW3 was not re-examined.

7.1.3 PW4's Testimony**PW4's Evidence in Chief**

PW4, Paul Chilala, relied wholly on his witness statement filed before court.

Cross examination of PW4

In cross examination, he stated that he has not produced any document to show that the property in question belonged to Judith Nayame. The offer letter shown at page 4 of the plaintiffs' bundle of document is in the deceased's name.

Re-examination of PW4

PW4 was not re-examined

7.1.4 PW5's Testimony**PW5's Evidence in Chief**

PW5, Leah Fwambo, relied on her witness statement.

Cross examination of PW5

In cross examination, PW5 replied that she has not produced any document before court that shows that the property in question belonged to Judith Nayame. The offer letter on page 4 of the plaintiffs' and defendant's bundles of

documents is in the deceased's name. The deceased was staying in Chibombo at the time of his death while she was in Lusaka. She was not living with the dependants as they stayed with the deceased in Kuomboka except for Sally who was in boarding school. When he relocated to Chisamba, he left Deon and Evelyn in Kuomboka. The deceased was not living with any of the children in Chisamba. Her grandmother used to live with the deceased in Chisamba. There is no receipt to show that the deceased was paying for the children's school fees. There is no proof that the deceased owed anyone money.

Re-examination of PW5

PW5 was not re-examined.

7.1.5 PW6's Testimony

PW6's Evidence in Chief

PW6 was Dainess Siame. She relied on her witness statement entirely.

Cross examination of PW6

In cross examination, PW6 replied as follows: she stays with her daughter, known as Bana Ruth. Before the deceased's death, she never used to stay with Bana Ruth. She was with the deceased when he fell ill. Deon Banda, Evelyn Banda and Sally Mabudu were not staying in Chibombo as they were in school. There is no receipt that the deceased was paying the children's school fees. The house belonged to Judith Nayame though there is no document to that effect before court.

Re-examination of PW6

In re-examination, PW6 clarified that she had not just travelled to go and see the deceased but was staying with him.

That was the case for the plaintiffs.

7.2 The Defendants' case

The defendants called two witnesses.

7.2.0 DW1's Testimony

DW1's Evidence in Chief

DW1 was the 1st defendant herein. She relied entirely on her witness statement.

Cross examination of DW1

When cross examined, DW1 replied as follows: she lived with the deceased in 2017 for one year but moved out when she left for work. At the time of the deceased's death, she was not in a relationship with the deceased as her relationship with the deceased had ended in July, 2018. She did not regularly visit the deceased's house between July, 2018 and the time of his death but she knows that no dependants were living with the deceased as she used to communicate with the deceased. The deceased told her he was not living with any person. 3 days prior to the deceased's death, his grandmother went to the farm. There was an uncle to the deceased who used to help out though he lived on his own farm.

Her testimony that the deceased was not paying school fees for any dependant is based on her knowledge and what the deceased told her. Further that there is no receipt as evidence that the deceased paid any school fees for dependants. She cannot state when exactly the deceased told her what she was testifying before court as they talked many times. She knows that the property in question was not listed as part of Judith Nayame's properties because she was there when the administrators of that estate were appointed and the deceased showed her his order of appointment from the Local Court, which had an inventory list attached to it.

The offer letter for the property in Chibombo, exhibited at page 2 of the plaintiffs' bundle of documents, has serial and receipt numbers. The offer letter for the disputed property, exhibited at page 4 of the plaintiffs' bundle of documents, does not have serial and receipt numbers. She informed the police that the offer letters on pages 2 and 4 were lost and proceeded to the Ministry of Lands to obtain reprints of the letters. She had requested for the documents

from the family but Leah Nayame, PW5, told her on phone that the documents were lost hence her report to the police. She did not communicate with the plaintiffs as they had blocked her number. She did not apply to compel the plaintiffs to furnish the documents because she did not think of that. The reprint was done from Ndola. She did not obtain copies for the invitation to treat, receipt, sketch plan and inspection report because the Ministry could only generate the offer letter at the time.

The process to obtain the other documents is done in Lusaka while she operates from Ndola. She did not verify the reprint from the Lusaka office because the plaintiffs' advocates had, sometime in 2021, said that they would conduct a search at the Ministry of Lands, which search yielded nothing. Later, she could not verify because she was stopped from executing her duties as Administrator. The Ministry of Lands issues a certified copy of the lost documents. The reprinted offer letter was certified by signature of the Commissioner for Lands. The document does not have a stamp from the Ministry of Lands. She was not aware that all documents issued by the Ministry of Lands are supposed to be stamped. She was not aware that there were two flats on the property when the deceased purchased it.

She does not know how the deceased acquired the property but she knows that while conducting a clothing business in Kitwe, the deceased asked his mother to find him a piece of property. The deceased used to send his mother money which she later used to purchase land in Kuomboka for and on his behalf. He told her he had purchased bare land. The electricity bill on page 5 of the defendants' bundle of documents is dated 24th January, 2023, while the water bill on page 6 of the same bundle is dated 25th January, 2023. She did not get utility statements issued on dates before the deceased's demise because the statements and receipts contain the same information. She was not aware that when one loses an offer letter, an affidavit must be sworn and that she was supposed to advertise that the document was lost. The system picks out the information as contained on the original. The Ministry of Lands is answerable

on why the system did not pick out the serial and receipt numbers. She does not know the date of the first offer as she has never seen it.

When the offer letter is reprinted, it picks the date of the reprint and not the original date. When asked why the printed offer for the Chibombo property has the date of 2018, she stated that the document on record was submitted by the plaintiffs, as the one she had reprinted has a date in 2021. She was not aware that the plaintiff produced before this court what they obtained from Ministry of Lands. She has no proof that the Chibombo property was reprinted on the same date as the property in dispute.

Re-examination of DW1

DW1 was not re-examined

7.2.1 DW2's Testimony

DW2's Evidence in Chief

DW2 is the 2nd defendant herein. She relied wholly on her witness statement.

Cross examination of DW2

When cross examined, she replied that she dated the deceased from 2014 to June, 2016. She was not living with the deceased prior to his death but she was aware that he was not staying with anyone as she went to his home in September, 2020. She went there because she and the deceased got back together and he invited her and their child to go and see where he was staying. It is not correct that she only stayed at the deceased's home for two weeks but it was 2 months. She left the deceased house at the month end of October, 2020.

She was in Kitwe at the time of the deceased's death. She was not there when he bought the property but when she started dating the deceased, there were already two flats on the property and he was building two more. She does not know when PW5 started living in the flats, but at the time she started dating the deceased, PW5 was living in one of the flats. The deceased did not tell her

why PW5 was living in the flat. She was with DW1 when she went to obtain the police report and when DW1 called PW5 to ask for the documents. She was also with DW1 when she went to obtain the reprints at Ministry of Lands but they did not find out when the original offer letter was issued.

She and DW1 did not weigh the option of coming to Lusaka where the original offer letter was issued to verify. Other than the offer letter, the only documents relating to the land she has seen are the electricity and water bills. She did not attempt to go to Zesco or Lusaka Water to obtain bills issued prior to 12th April, 2021. Her evidence on how the deceased bought the property is based on what the deceased told her. She has met Dainess Siame who she knows was living in Mbala prior to the deceased's death. She knows where Dainess lived because she talked to her on the phone when she was at the farm in 2020. She did not talk to Dainess between November, 2020 and February, 2021, and she did not visit the deceased between this period but merely spoke to him on phone.

Re-examination of DW2

DW2 was not re-examined.

That was the case for the defence.

8.0 Submissions

8.1 The Plaintiffs' Submissions

The plaintiffs filed submissions on 14th July, 2023 wherein counsel argued that PW3's testimony was that the disputed property was within the statutory improvement areas and that is why it had no documents. When the government legalized the area, PW4 testified that he paid survey fees and attended meetings to process documents on behalf of the plaintiffs' late mother. That he left the documents with the deceased to continue with the process but that the documents are no longer there. Counsel argued that it is undisputed that the property was purchased by the deceased's late mother. What is in dispute however is whether she obtained money from the deceased to purchase

the said property. That the evidence on how the property was paid for is hearsay but it does corroborate the plaintiff's evidence in so far as it states that the plaintiff's late mother is the one who found and purchased the disputed property. That the plaintiffs' evidence has shown that the deceased's mother purchased the property from Ernest.

Counsel submitted further that information regarding documents relating to land is stored safely in a book or electronic register in accordance with *Section 16 of the Land and Deeds Registry Act* and hence there is no reason why the defendants would obtain a reprint of an offer letter without knowing the date of issuance of the original offer letter or without obtaining a copy of the document certified by the Registrar. There was no record that the purported offer letter was issued prior to 12th April, 2021. That the plaintiff's evidence has demonstrated further that there was also no information on when the council and the Ministry of lands conducted inspections to determine or ascertain the interests on the ground. DW1 and DW2 testified that they do not know the date of the purported original offer and so it is illogical for the defendants to have obtained the purported offer letter without establishing when the original offer was issued or if it was issued at all. That the defendants should have been prudent enough to come to Lusaka to check the documents and ascertain for sure.

As regards the utility receipts, counsel argued that the same relate to different properties as they have different property numbers. Counsel argued further that the commencement of this action is what provoked the defendants to proceed and obtain a police report and purported reprint of the offer letter. That the defendants proceeded to obtain the purported reprinted offer letter on 12th April, 2021, after the death of the deceased, and provided it before this court to prove that the deceased was offered the disputed property prior to his death.

That the defendants failed to follow the procedure in the *Lands and Deed Registry Act*. Counsel referred to *Regulation 12 of the Lands and Deeds Registry*

Regulations for the argument that a person who requires a certified copy of any document for judicial purposes may apply to the Registrar. That the defendants should have applied for a certified copy of the offer letter and not obtained a reprint if it really existed. That the reprinted offer has no reference number, receipt number and official stamp contrary to *Section 18* of the *Lands and Deeds Registry Act* and as such there is no due proof that the purported offer letter was issued by the Ministry of Lands. That the plaintiff's evidence regarding the absence of the application letter, receipt and invitation to treat was undisputed by the defendants and the defendants gave no evidence to the contrary. That *Section 21* of the *Lands and Registry Deeds Act* provides that registration does not cure any defect in any instrument registered or confer upon it any effect or validity, while *Section 25* of the same *Act* provides that a certified copy of a document under the hand of the Registrar is admissible as evidence of its contents in all courts of justice in Zambia. That according to *Section 26* of the *Lands and Deeds Registry Act*, the purported offer letter ought to have been certified by the Registrar.

Counsel submitted that according to *Section 33* of the *Lands and Deeds Registry Act*, a certificate of title is conclusive evidence to land and hence an offer letter cannot be used as irrefutable evidence of ownership. That DW1 and DW2's evidence comprises mostly of hearsay.

As regards the question relating to dependants, counsel argued that the plaintiffs' evidence is clear that the deceased paid for the education of the minors mentioned herein. The defendants were not privy to the deceased's family arrangements regarding the maintenance and education of Sally, Deon, and Evelyn as they were not in relations with the deceased prior to his death, and they did not produced any call records to show that they indeed spoke to the deceased on the phone after their relationships with the deceased ended.

That Dianess Siame had lived with the Defendant since 2017 and was living with the defendant immediately prior to his death and was thus his dependant. Counsel relied on the case of **Charity Oparaocha vs Winfridah**

Murambiwa¹ to buttress the argument that oral evidence is admissible to prove whether a person was a dependent or not. Counsel further relied on the case of **Madison General Insurance Company Limited vs Avril Carnhill and Micheal Kakoma**², for the argument that there is no rule of law that requires a person to adduce documentary evidence to prove his or her position in a civil matter.

As regards the claim that the estate is indebted to the Derrick Chakaina in the sum of K7,500.00 counsel argued that it is within the court's power to rule that the estate settles all the liabilities owed by the deceased as per the law.

In conclusion counsel prayed that this court holds that the disputed property does not form part of the deceased's estate, that Dianess Siame, Deon Banda, Evelyn Banda and Sally Mabuda are dependants of the deceased and that estate of the deceased has a liability of ZMW7,500.00.

8.2 The Defendants' Submissions

The defendants filed submissions on 25th July, 2023 wherein counsel argued that it is generally the persons who initiate civil proceedings who must prove their case. For this argument, counsel relied on the case of **Khalid Mohamed vs The Attorney General**³. Counsel argued that it follows therefore that the plaintiffs herein bear the burden to prove this case in order to be entitled to any relief sought against the defendants.

As regards whether the property in dispute belonged to the deceased and hence forms part of his estate, counsel argued firstly that the plaintiffs' submissions relied heavily on the provisions of the *Lands and Deed Registry Act* as read together with the *Lands and Deeds Regulations* when the property in dispute was merely on offer and not yet on lease or certificate of title and as such is not yet subject to the *Lands and Deeds Registry Act*. For this argument, counsel referred this court to *Section 4 subsection 1* of the *Lands and Deeds Registry Act*. That since no lease has been signed with the President nor a certificate of

title issued, the land in issue is not yet a subject of registration under the *Lands and Deeds Registry*. The land is still a subject of alienation under the *Lands Act*. Counsel argued further that the offer letter exhibited on pages 4 of both the plaintiffs' and defendants' bundles of documents clearly shows that the property in issue belongs to the deceased and thus forms part of his estate.

That the plaintiffs have failed to prove that the land does not belong to the deceased, who was the registered owner, and have further failed to produce even a single document to prove that the property belonged to any other person than the deceased. Counsel referred this court to the case of **Emma Mainza, Hellen Mainza Munyumbwe (Suing as Administrators of the estate of Creed Mainza Malawo) and Others vs Magness Gowera Siwale and Another**⁴ wherein the appellant who had been offered land by the Ministry of Lands was held to have an interest in the land albeit inchoate. That similarly, the plaintiffs have not produced any offer in favour of any person, including Judith Nayame, while the defendants have produced an offer letter in favour of the deceased. That the plaintiffs had the burden to call witnesses from the Ministry of Lands to deny the authenticity of the offer letter which they did not, but corroborated its existence by including it in their bundles of documents and all the plaintiff witnesses testifying that the effect of the letter was that the property belonged to the deceased. Counsel referred to the cases of **Sablehand Zambia Limited vs Zambia Revenue authority**⁵, and **Sithole vs The State Lotteries Board**⁶ for the argument that the plaintiff did not distinctly plead fraud in any of their pleadings, and did not at trial lead any evidence to prove fraud. Further, the plaintiff did not call any witnesses from the Ministry of Lands to disown the offer letter and thus the issue of fraud falls off.

Counsel referred to *section 4 of the Statutes of Frauds 1677* for the argument that land transactions must be evidenced in writing. That PW3 failed to provide any documentary evidence to support his testimony. Further that the offer letter issued to the deceased shows that there was a direct offer by the Commissioner of Lands and as such there is no previous owner of the land and

that explains why PW3 failed to produce any documentary evidence to show that he owned the land in question. The plaintiffs have failed to produce the inventory of Judith Nayame's estate to show that the land in question was listed amongst her properties or even call a tenant to testify that they paid rentals to and recognized Judith Nayame as the landlady for the property in question. The plaintiffs failed to ever challenge the deceased over the initial offer that was issued to him during his life or why the utility bills were in his name.

As regards the second issue, counsel argued that since the plaintiff are not themselves claiming to be dependants, they have no locus standi to sue on behalf of the alleged dependants as they have not sued in a representative capacity of the said dependants. Counsel relied on *Order 14 rule 1* of the *High Court Rules* and the case of **Isaac Tantameni C Chali (Executor of the Will of the late Mwalla Mwalla) vs Liseli Mwalla (single woman)**⁷. In the alternative, counsel relied on the definition of 'dependant' as defined under *Section 3* of the *Intestate Succession Act, Chapter 59* of the *Laws of Zambia*. He relied on the case of **Charity Oparaocha** case for the argument that the definition of the word dependant is conjunctive and hence as regard Dainess Siame, the plaintiffs must prove that she was not only maintained by the deceased but that she was living with him immediately prior to his death. As regards the other minor dependants, the plaintiffs must prove that they were all maintained by the deceased and that he provided for their education and they are wholly or in part incapable of maintaining themselves. That the *9th edition* of **Black's Law Dictionary** defines the word maintenance as:

"financial support given by one person to another."

That the plaintiffs have failed to prove that the deceased provided any financial support to the purported dependants, and that he provided, in any way, for the educational needs of the minor dependants. That the plaintiffs have failed to prove that the parents of the minor dependants are incapable of providing for the educational needs of their children. The evidence of DW2, who lived with

the deceased for two months shows that Dainess Siame was not living with the deceased.

As regards the third issue, counsel submitted that not only was the issue of the deceased owing a debt of K7,500.00 not pleaded, but the same was not proved. That none of the plaintiffs' witnesses gave evidence of the alleged debt, and that the plaintiffs failed to call the alleged creditor as a witness. Further that the alleged creditor ought to have been joined to prove his claim against the estate. In conclusion, counsel prayed that the plaintiff's claims be dismissed with costs.

8.3 The Plaintiffs' Submissions in Reply

The plaintiffs filed a reply to the defendants' submissions on 15th August, 2023 wherein counsel argued that although the defendants have submitted that the plaintiffs must prove their allegations, it was their considered view that so must the defendants prove their allegation that the offer letter dated 12th April, 2021, obtained two months after the deceased's death, was a reprint. That procedure on land application process is provided in the *Lands and Deed Registry Act* and not the *Land Act* which is the only *Act* that establishes a registry for land. That the *Lands and Deeds Registry Act* does not stipulate that it exclusively regulates land that is on lease or on title. That *Section 4 subsection 1* refers to a document that grants an interest in land, and the offer letter does grant that. It is illogical for the defendants to argue that the offer letter they claim is in the lands system is now not subject to the *Lands and Deeds Registry Act*, and that by *Section 9* of that *Act*, the land register does not store documents only on lease or title but all documents relating to land other than customary. That if the letter is not subject the *Act*, then it will not be in the system.

That the plaintiffs' evidence is clear that the property in dispute was an illegal settlement and when the government issued a policy to legalize the area, the plaintiffs' mother sought PW4's help to do that. That PW4 testifies that he left

the documents with the deceased, who was an administrator of his mother's estate, to continue the process. That its questionable how the defendants managed to obtain an offer letter in the deceased's name in the absence of an application and receipts. That the purported offer letter has no serial and receipt numbers and no Ministry of Lands stamp.

As regard the electricity and water receipts, that the same have different property numbers. There is no evidence that the uncertified offer letter was received prior to 12th April, 2021 and hence the **Emma Mainza** case is inapplicable herein as that case relates to a genuinely obtained offer. In response to the submission that the deceased showed DW1 his appointment as an administrator of his mother's estate and the inventory, counsel urged this Court to take judicial notice of the procedure in the Local Court, that it is not a court of record and hence there is no procedure for inventory. That the plaintiffs called credible witnesses.

As regards the question on dependants, counsel argued that the plaintiffs being administrators of the estate of the deceased by virtue of the Consent Judgment have locus standi to bring issues or matters that relate to the estate, including that of the deceased's dependants. That the **Madison Insurance** case is instructive in that in civil matters, a party can prove an issue by oral evidence provided the court finds that the testimony is credible. That it is unusual that there will be a receipt for every necessity that the deceased purchased for the dependants, and that it is not unusual for there not to be documentary evidence for books, school bags and other school requirements. That the plaintiffs are witnesses who lived with the deceased as opposed to the defendants who only claim to have only spoken with him on phone.

As regards the question of whether the deceased was indebted in the sum of K7,500.00, counsel argued that the affidavit clearly shows that the deceased was indebted and that the name of the creditor has been fully disclosed. In conclusion counsel submitted that the plaintiffs' evidence is credible and prayed that the reliefs sought are granted.

9.0 The Decision of the Court

I am indebted to counsel for the submissions and arguments. I have carefully considered the same.

The undisputed fact of this case is that:

1. The property in dispute, known as S/LUSAK/SLN 0003/2453, Kuomboka, Chawama, Lusaka was purchased by Judith Nayame, the plaintiffs and deceased's mother.

The facts in dispute are:

1. Whether Judith Nayame purchased the property no. S/LUSAK/SLN 0003/2453, for and on behalf of the deceased and hence it forms part of his estate;
2. Whether or not Dainess Siame, Sally Mabuda, Deon Banda and Evelyn Banda are dependants of the deceased and hence entitled to 20% of the deceased's estate;
3. Whether or not the deceased's estate has a liability of K7,500.00, which is to be paid before distribution of the estate.

Whether Judith Nayame purchased the property no. S/LUSAK/SLN 0003/2453, for and on behalf of the deceased and hence it forms part of his estate;

I must at the onset address the submission by the defendants' counsel that since the property in dispute was not yet on lease and had no certificate of title issued to it, the provisions of the *Lands and Deeds Registry Act*, do not apply to it at all. The short title of the *Lands and Deeds Registry* provides as follows:

“Act to provide for the registration of documents; to provide for the issue of Provisional Certificates of Title and Certificates of Title; to

provide for the transfer and transmission of registered land; and to provide for matters incidental to or connected with the foregoing.”

The defendants allege that the deceased was offered the land in question by the Commissioner of Lands, which is the first process in the transfer of land from the President to an individual. Counsel cannot therefore allege that the *Lands and Deeds Registry Act* does not apply to this case, when they are alleging an offer by the Commissioner of Lands for land was made to the deceased.

Now returning to the determination of the first issue, as stated in my findings above, it is not in contention that the property known as S/LUSAK/SLN 0003/2453 was purchased by Judith Nayame. My finding is predicated on DW1's evidence in cross examination and DW2's evidence in her witness statement, which she adopted at trial, that the deceased informed them that the property in dispute was purchased by his mother Judith Nayame from the money he generated from selling clothes in Kitwe. This evidence, in my opinion, substantiates PW3's evidence that he sold the land to Judith Nayame. What is in contention however is whether Judith Nayame purchased the land on her own behalf or for and on behalf of the deceased, her son. The plaintiffs' evidence is that the land was initially an unplanned settlement which their mother purchased on her own behalf in 2005 when the deceased was just a minor. The defendants allege that Judith Nayame purchased the land for and on behalf of the deceased, and was later offered the land by the Commissioner of Lands as per the offer letter contained on pages 4 of both the plaintiffs and defendants' bundles of documents, which offer letter the plaintiffs have in their evidence and submissions vehemently alleged were not genuinely obtained. In essence the plaintiffs are alleging fraud in the manner the offer was procured, and hence the defendants have urged me not to consider the plaintiffs' allegation on the basis that the plaintiffs have not distinctly pleaded fraud and did not at trial lead evidence to prove the same.

The law indeed is that fraudulent conduct must be distinctly pleaded and proved as was held in the **Sablehand Zambia Limited** case. In the case of

Kalumba Kashiwa Mwansa and Mwenya Kalindo Mwansa (suing as Administrators of the estate of the late Tom Mpofu) vs Kenneth Mpofu (sued as Administrator of the estate the late Tom Mpofu) and Attorney General⁸ the Supreme Court stated at pages J36 to J37 is that:

“what can be discerned from the above authorities is that an allegation of fraud must be distinctly pleaded and proved. This does not necessarily mean that the word 'fraud' must be mentioned in the Statement of Claim or other originating process. What the law simply requires is that the originating process must give distinct particulars of the allegation of fraud. If a party has neither pleaded fraud nor outlined facts that disclose fraud but has adduced evidence of fraud at trial and that evidence has not been objected to, the Court is required to consider that evidence. The Court must, however, bear in mind that an allegation of fraud must be proved to a standard which is slightly higher than proof on a balance of probabilities, but lower than proof beyond reasonable doubt.”

A perusal of the originating process reveals that while the affidavit in support of the originating summons does not give distinct particulars of the allegations of fraud, the affidavit in reply to the defendants' affidavit in opposition outlines facts that disclose fraud. The plaintiffs have alleged that the reprinted offer letter has no serial and receipt numbers and has not been stamped with the Ministry of Lands stamp. Further that the procedure used in obtaining the said alleged offer letter is questionable in that there are no reports, invitation to treat, application letter, receipts, police reports, affidavits, or advertisements of any kind regarding the reprinting of an offer. The information regarding properties is all entered in the ZILMIS system, which picks up all information from application letters, inspection reports, surveys, sketch plans, receipts and particular dates pertaining to the property and so the reprinted offer letter would have the same details as the lost one.

The affidavit in reply further alleges that an offer letter was obtained to a property which was not in exclusive possession and use of the deceased and over structures which were never constructed by the deceased in any way or at all. In addition to this affidavit evidence, the plaintiffs have further made these allegations in their evidence and went on to further allege that the defendants reported to the police that documents that were never in their possession were lost, which evidence was not objected to. Premised on the above, though the word 'fraud' was not used, the plaintiffs have basically alleged fraudulent conduct on the part of the defendants in the manner they obtained the reprinted offer letter. By questioning why, the offer letter has no serial and receipt numbers, Ministry of Lands stamp, and why it bears the date of 12th April, 2021, the plaintiffs are questioning whether the same was even properly issued by the Ministry of Lands. These allegations, having being raised in the affidavit in reply, and having been given as evidence without objection, I am by law mandated to consider the evidence.

Going back to the question of whether Judith Nayame purchased the property on behalf of the deceased, DW2 has alleged that the deceased informed her that he was sending monies to his mother to enable her find and purchase land for him. Even if I were to accept the evidence that such a conversation took place, there is no evidence that money was actually sent to the deceased's mother as alleged. DW2's uncorroborated statement is not enough to establish that the deceased is the owner of the property. The other evidence produced herein is that of the reprinted offer letter and receipts from utility companies. Can these sufficiently establish the deceased as the owner of the property in dispute?

It is trite law that a certificate of title is conclusive evidence of ownership of land as affirmed in the case of **Kajimanga vs Chilanga**⁹ However, where a certificate of title has not been issued but a valid offer made by the Commissioner of Lands, the offeree establishes an interest in the land. In *casu*, the defendants have produced a purported reprint of an offer letter which the

plaintiffs have challenged with for reasons I have highlighted earlier in this judgment. I am reminded, as per the **Kalumba Kashiwa Mwansa** case above that the standard of proving fraud is higher than on a balance of probability as the allegations are criminal in nature.

I have carefully reviewed the reprinted offer letter and note that it indeed does not contain a serial number, receipt number and stamp. A serial is a unique number or combination of letters and numbers that is used to identify and track an item, in this case a document. A receipt number is a number assigned to a specific receipt issued to acknowledge successful payment. The authors of the **9th edition of Black's Law Dictionary** define receipt as:

“written acknowledgment of the receipt of money, or a thing of value.”

The offer letter exhibited in this matter as being the offer letter for the property in dispute does not have the serial and receipt numbers by which it can be successfully tracked and to signify that complete payment was made. If compared with the offer letter exhibited on page 2 of the plaintiffs' bundle of documents for the Chibombo property, the same has both the serial and receipt numbers. As a matter of fact, in the second sentence of the offer letter for the Chibombo property the Commissioner of Lands acknowledges payment for the offer letter by referring to a receipt number. In the purported reprinted offer letter, no receipt number has been referred to. The fact that an offer letter must contain serial and receipt numbers, as well as that government issued documents are always stamped is so notorious that the need to adduce evidence of its existence is unnecessary, and hence I accordingly take judicial notice of the same.

I further take judicial notice of the fact that when a document is reprinted, it will bear the exact same details as the original document, including the date. I accept the evidence that the reprinted offer letter ought to have bore the date it was originally issued and not the reprint date. Accordingly, in light of the

foregoing, I am not convinced, that the purported offer letter was genuinely obtained and can be relied on as evidence of the deceased's ownership of the property in dispute.

As regards the receipts from the utility companies, the same cannot be used as evidence as to ownership of a property. In any case, the receipts have different property numbers from each other and from the property in dispute. The Zesco token receipt is for plot no. 12237 Kuomboka, Kafue Road, while the water receipt is for plot no. 2443/99, Chawama. According to both parties, the property in dispute is S/LUSAK/SLN 0003/2453. In light of the discrepancies in plots numbers and there being no explanation tendered to this court for the discrepancies, I cannot accept the evidence of the two utility receipts as evidence of the deceased's ownership of the property in issue.

Further, the evidence of PW3 that the plot in question was initially a statutory improvement area and hence had no documentation and that he is the one who sold the land to Judith Nayame was not sufficiently disproved in cross examination. Additionally, the evidence of all the plaintiffs' witnesses that the structures on the property were erected by Judith Nayame was equally not sufficiently disproved. The defendants' evidence on the other hand as regards the structures is marred with inconsistencies in that DW1 testified that the deceased informed her that the land his mother purchased for him was bare land, while DW2 testified that the same deceased told her that the land came with two flats. Further DW2 testified that when she started dating the deceased in 2014, which according to her is the same year he started building on the property, PW5 was already staying in one of the flats on the property. What I find odd is that the deceased, whom the defendants claim shared so much information with them, failed to tell DW2 why PW5 was staying in one of the flats. I find the plaintiffs' evidence that in 2008, their mother allowed PW5 to live in one of the flats on the property with her family as her husband could not provide her accommodation to be a more believable explanation.

Premised on the above, I find the plaintiffs' evidence to be more plausible than that of the defendants, and accordingly hold that Plot no. S/LUSAK/SLN-0003/2453 did not belong to the deceased and hence it does not form part of his estate.

Whether or not Dainess Siame, Sally Mabuda, Deon Banda and Evelyn Banda are dependants of the deceased and hence entitled to 20% of the deceased's estate.

The second issue for consideration is whether or not the deceased was survived by dependants who are entitled to a share of his estate. I must first address the defendants' arguments that the plaintiffs have no locus standi to sue on behalf of the alleged dependants as they have not sued in a representative capacity of the said dependants. I opine that this issue ought to have been raised much earlier in the matter and not at submission stage, and in any case, one of the duties of an administrator, as per *Section 19 subsection 1 (b)* of the *Intestate Successions Act*, is to effect distribution of the estate in accordance with the rights of the persons interested in the estate under the said *Act*. The plaintiffs and defendants herein are co-administrators of the deceased's estate and therefore it is in the best interest of the estate that the question of whether or not the named persons are dependants is answered.

Reverting to the question at hand, the *Intestate Succession Act*, under *Section 3*, defines dependant, in relation to a deceased person, as:

"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;

For a person to qualify to be a dependant, the requirements above must be satisfied. The mere fact that the deceased was rendering assistance to his relatives prior to his death cannot make such relatives his dependants. The Supreme Court in the case of **David Ojah Malembe ve Thomas Ndonyo**¹⁰ reaffirmed that:

“Rendering assistance to relatives does not place automatic obligations on one after death.”

In *casu* the plaintiffs are alleging that Dainess Siame, Sally Mabuda, Deon Banda and Evelyn Banda are dependants of the deceased. As regards the minors, Sally Mabuda, Deon Banda and Evelyn Banda, the plaintiffs are alleging that the three children’s educational and general needs were catered for by the deceased even though they did not live with the deceased. While indeed the **Madison Insurance** case provides that there is no rule of law that requires a claimant to adduce documentary evidence to prove his or her position in a civil matter, the plaintiffs could have elaborated more on when and how the minors came to be dependants of the deceased, and who their parents are. The plaintiffs could have explained further where the parents of the minors are, that is whether deceased or alive. If the minors’ parents are alive, whether they are incapable of maintaining the minors.

Further even without producing the documentary evidence before court, the plaintiffs could have highlighted particular instances when the deceased performed acts of maintenance towards the children. The plaintiffs could have further stated the names of the schools the children attend, the fees and other payments, if any, they pay and elaborated how the deceased handled this responsibility. No such evidence was given by the plaintiffs, save for the general statement that the deceased maintained the minors’ educational needs and welfare. As a matter of fact, the plaintiffs have in their affidavit in reply acknowledged that the minors listed as dependants herein are also dependants under Judith Nayame’s estate and are entitled under that estate to 10% which is used to partially settle their educational needs. The evidence that the

deceased used to meet the outstanding educational and maintenance expenditures has not been proved. I am not satisfied on the preponderance of the evidence that Sally Mabuda, Deon Banda and Evelyn Banda were dependants of the deceased.

As regard Dainess Siame, the plaintiffs allege that she started living with the deceased in 2019 when he relocated to his farm until his death. This evidence has been contested by the defendants who allege that Dainess Siame only moved to the farm 3 days prior to the deceased's death. The **Khalid Mohamed** case is instructive that he who alleges must prove. The plaintiffs have not proved that indeed Dainess Siame lived with the deceased from 2017 to the time of his death. The plaintiffs allege that the deceased lived with Dianess Siame and his two uncles on the farm and so they had an option of calling the said uncles as witnesses but they opted not to. Further, DW2, who the plaintiffs allege only stayed with the deceased for a period of two weeks in October, 2020, alleges that during her stay, the deceased's grandmother was not residing at the farm. DW2's evidence has not been disproved in anyway by PW6 who did not testify as to where she was at the time DW2 visited. In addition, the plaintiffs, in their affidavit in support of the originating summons and witness statements, allege that Dainess Siame is a beneficiary under her late daughter, Judith Nayame's estate and hence in my opinion is capable of maintaining herself.

Whether or not the deceased's estate has a liability of K7,500.00, which is to be paid before distribution of the estate.

The issue in contention herein is whether the estate of the deceased is indebted to one Derrick Chakaina in the sum of K7,500.00. One of the duties of an administrator as per *Section 19 Subsection 1 (a)* is;

"to pay the debts and funeral expenses of the deceased and pay estate duty if estate duty is payable"

It is clearly established that the estate of a deceased person must ensure that the debt owed by the deceased is ascertained and paid. In casu, the plaintiffs allege that the deceased's estate owes Derrick Chakaina the sum of K7,500.00. However, no evidence of this debt was tendered before court. The plaintiffs could not even at the very least call the said alleged creditor to testify to the deceased's alleged indebtedness. The plaintiffs have failed to prove that the deceased's estate is indebted to Derrick Chakaina in the sum of K7,500.00.

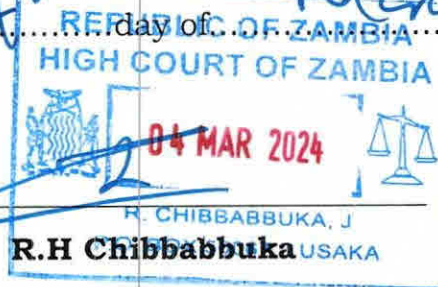
The net result of this judgment is that:

1. Property No. S/LUSAK/SLN 0003/2453, did not belong to the deceased and hence it does not form part of his estate. In view of the foregoing and in accordance with *Clause 5* of the Consent Judgement, all rentals realised from Property No. S/LUSAK/SLN 0003/2453 held in escrow by Messrs Japhet Zulu Advocates must be paid to the estate of Judith Nayame forthwith;
2. Dainess Siame, Sally Mabuda, Deon Banda and Evelyn Banda were not dependants of the deceased and hence are not entitled to 20% of the deceased's estate;
3. The debt of K7,500.00 by the deceased to Derrick Chakaina has not been proved.

Since the plaintiffs have only partly succeeded in their claims, the parties herein shall bear their own costs.

Leave to appeal is hereby granted.

Dated at Lusaka this..... day of 2024



R.H Chibbabbuka
HIGH COURT JUDGE