

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

2020/HP/0071

BETWEEN:



PHILIP MBEWE

PLAINTIFF

AND

ATTORNEY GENERAL

DEFENDANT

*Before the Hon. Mrs. Justice M.M. Bah- Matandala,
On the 8th day of September, 2025.*

*For the Plaintiff: Mr. M. Machiya & Mr. L. Zulu Messrs. Equitas Legal
Practitioners*

*For the Defendant: Mr. N. Mwiya Principal State Advocate Attorney General's
Caspers.*

RULING

Legislation Referred to:

- 1. The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*
- 2. Rules of the Supreme Court of England (White Book) 1999 Edition*

Cases Referred to:

- 1. Sonny Paul Mulenga & Vismer Mulenga v Chainama Hotels Ltd & Others (SCZ Judgment No. 15 of 1999)*
- 2. Zambia Revenue Authority v Post Newspapers Ltd (SCZ Judgment No. 18 of 2016)*
- 3. Swain v Hillman [2001] 1 All ER 90.*
- 4. Access Bank (Z) Ltd v Wade Adams Piling & Foundation (Z) Ltd (CAZ/08/151/202)*
- 5. Attorney General v Marcus Achume (1977) Z.R. 1 (S.C.)*

1.0 INTRODUCTION

1.1 This is a ruling on two interrelated applications before this Honourable Court.

- 1.2 The Plaintiff, Phillip Mbewe, has applied for leave to issue a Writ of Possession to enforce the Judgment of this Court delivered on 23rd July 2024.
- 1.3 On the other hand, the Defendant, represented by the Attorney General, has raised preliminary issues, arguing that the Court is functus officio following the filing of an appeal and that jurisdiction now vests in the Court of Appeal.
- 1.4 The Defendant relies on affidavits sworn by Counsel Mwiya, Principal State Advocate, and supporting skeleton arguments and authorities.
- 1.5 The Plaintiff opposes, submitting that the Defendant has been dilatory and should not be permitted to frustrate enforcement of judgment.

2.0 BACKGROUND

- 2.1 On 23rd July, 2024, this Court entered judgment in favour of the Plaintiff. The Defendant subsequently filed an Exparte Summons for Leave to Appeal and Stay of Execution, which was granted on 8th October 2024.
- 2.2 On 23rd October 2024, the Defendant filed a Notice of Appeal and Memorandum of Appeal before the Court of

Appeal. Several applications for extension of time to file the Record of Appeal and Heads of Argument were made and granted, the last being on 9th June 2025. On 9th July 2025, the Record of Appeal was settled.

2.3 Meanwhile, the Plaintiff, citing inordinate delay, applied on 14th February 2025 to discharge the stay of execution. On 30th May 2025, this Court discharged the stay.

2.4 On 16th June 2025, the Plaintiff applied for leave to issue a Writ of Possession. The Defendant objected by filing an affidavit in support of a Notice of Motion to raise preliminary issues dated 15th August 2025, arguing that the Court had no jurisdiction to entertain the Plaintiff's application in view of the subsisting appeal.

3.0 ARGUMENTS BY THE PARTIES

3.1 Counsel argued that there is no valid opposition to the Plaintiff's application for a writ, and that the Defendant had slept on their rights.

3.2 It was submitted that the Plaintiff is entitled to the fruits of his judgment and should not be prejudiced by the Defendant's failure to prosecute its appeal diligently.

- 3.3 Reliance was placed on the principle that justice delayed is justice denied, and that discharging the stay order was proper given the laxity exhibited.
- 3.4 The Defendant argued that once the Notice of Appeal and Memorandum of Appeal were filed on 23rd October 2024, this Court became functus officio, save for matters incidental to the appeal. The discharge of the stay order by this Court on 30th May 2025 was argued to be irregular, as jurisdiction had already shifted to the Court of Appeal. In support of this position Counsel cited the ***Court of Appeal Act No. 7 of 2016*** and relied on authorities including: ***Sonny Paul Mulenga & Vismer Mulenga v Chainama Hotels Ltd & Others (SCZ Judgment No. 15 of 1999)***¹. ***Zambia Revenue Authority v Post Newspapers Ltd (SCZ Judgment No. 18 of 2016)***². ***Swain v Hillman [2001] 1 All ER 90***³.
- 3.5 It was submitted that without a stay, the appeal would be rendered an academic exercise, as the Plaintiff would already have obtained vacant possession. Reliance was placed on ***Access Bank (Z) Ltd v Wade Adams Piling & Foundation (Z) Ltd (CAZ/08/151/2024)***⁴.

4.0 ISSUES FOR DETERMINATION

4.1 The issues for determination are as follows;

- i) *Whether this Court retains jurisdiction to entertain the Plaintiff's application for a Writ of Possession in light of the pending appeal.*
- ii) *Whether the discharge of the stay of execution on 30th May 2025 was valid.*
- iii) *Whether the Plaintiff is entitled to immediate enforcement of the judgment despite the pending appeal.*

5.0 ANALYSIS

5.1 On the first issue, it is trite that once a Notice of Appeal is filed, the High Court becomes functus officio on matters touching on the merits of the appeal. Reference is made to the case of ***Attorney General v Marcus Achiume (1977) Z.R. 1 (S.C.)***⁵, where the Supreme Court held that *the filing of an appeal divests the lower*

court of jurisdiction except on matters incidental to execution or stay.

5.2 In the present case, the Defendant duly filed a Notice of Appeal on 23rd October 2024. Consequently, jurisdiction to determine substantive matters shifted to the Court of Appeal. However, without the Court being aware of the aforesaid information, it discharged the stay order on 30th May 2025, which order is closely intertwined with the pending appeal and the Court ought not have done so.

5.3 On the second issue, while the Plaintiff is entitled to the fruits of Judgment, the Law recognises that such entitlement must be balanced with the right of appeal. The Supreme Court in ***ZRA v Post Newspapers Ltd (supra)***⁶ clarified that an appeal does not per se operate as a stay, but once leave and stay have been granted, they subsist until vacated by a Court of competent jurisdiction. As of 30th May 2025, the appeal was already before the Court of Appeal, thereby raising serious jurisdictional concerns.

5.4 On the third issue, the Defendant has demonstrated that the appeal is arguable, with reasonable prospects of success, as it challenges the order for vacant possession under **Section 16(1)(ii) of the State Proceedings Act**. The Court in **Swain v Hillman (supra)** emphasised that an appeal should have a “real” rather than fanciful prospect of success. In that case, I find that the Defendant’s grounds meet this threshold.

6.0 CONCLUSION AND ORDERS

6.1 In light of the foregoing, I make the following findings:

- i) *The filing of the Notice and Memorandum of Appeal on 23rd October 2024 divested this Court of jurisdiction over matters touching directly on execution of the judgment.*
- ii) *The order of 30th May 2025 discharging the stay of execution was made without jurisdiction and is therefore set aside.*
- iii) *The Plaintiff’s application for leave to issue a Writ of Possession cannot be*

sustained at this stage, as it offends the principle of functus officio.

iv) The matter is properly before the Court of Appeal, and any issues relating to stay or execution should be addressed there.

6.2 Finally, the Plaintiff's application for leave to issue a Writ of Possession is hereby dismissed for want of jurisdiction. The Defendant's preliminary objection succeeds.

6.3 Costs to abide the outcome of the appeal.

Delivered at Lusaka this 8th day of September, 2025.



M.M. Bah-Matandala
HIGH COURT JUDGE



**IN THE HIGH COURT OF ZAMBIA
FAMILY AND CHILDREN'S COURT DIVISION
(Civil Jurisdiction)**

2023/HPF/446

IN THE MATTER OF

**SECTIONS 3 AND 5 (1) (D) OF THE
INTESTATE SUCCESSION ACT CAP
59 OF THE LAWS OF ZAMBIA**

IN THE MATTER OF

**SECTION 19(1) (B) AND (C) OF THE
INTESTATE SUCCESSION ACT OF
THE LAWS OF ZAMBIA**

IN THE MATTER OF

**THE ESTATE OF THE LATE
DONALD DAVIES MUYUYA**

AND

IN THE MATTER OF

**IN AN APPLICATION FOR THE
ACCOUNT AND DISTRIBUTION OF
THE ESTATE OF THE LATE
DONALD DAVIES MUYUYA**



BETWEEN:

NTITIMA HARRY MUYUYA

1ST APPLICANT

KALIMA MUYUYA

2ND APPLICANT

PENELOPE MUYUYA

3RD APPLICANT

(All suing in their capacity as beneficiaries in the estate of the late Donald Davies Muyuya)

AND

MIRRIAM MUSONGO MUYUYA

RESPONDENT

(Sued in her individual capacity as well her purported capacity as administratrix of the estate of the late Donald Davies Muyuya)

***Before the Honourable Mrs. Justice M.M. Bah-Matandala
Dated this 8th September, 2025.***

For the Applicant:

Mr. L. Njunga – Messrs. Mutemwa Chambers

For the Respondents:

Mr. L. Chilingala- Messrs. Kalokoni & Co.

J U D G M E N T

Legislation and Other Works Referred To:

- 1. The High Court Rules Chapter 27 of the Laws of Zambia*
- 2. The Intestate Succession Act, Chapter 59 of the Laws of Zambia*
- 3. The Intestate Succession Rules 2023*

Cases Referred To

1. *Lindiwe Kate Chinyanta vs Doreen Chiwele & Judith Tembo (SCZ) No. 28 of 2007*
2. *Rodney S. Kapenda vs. Enoch K. Chiliya (APP194/2021).*
3. *Monica Siankando vs Ndenga (SCZ 188/2003)*

Other References

- (i) *Reagan Blankfen Gates Company Law and Practice in Zambia 1st Edition 2017 at page 134.*

1.0 INTRODUCTION

1.1 This Judgment is on an application which was commenced by the Applicants by way of an amended Originating Summons and supported by an affidavit filed into Court on even date of 3rd June, 2024.

1.2 The Applicants are seeking, inter alia the following reliefs;

- i) *A declaration of beneficiary status;*
- ii) *Orders compelling an inventory and accounts;*
- iii) *Directions for disposal and distribution of estate property;*
- iv) *Ancillary relief regarding any property already disposed of;*
- v) *A fresh joint grant of letters of administration;*

vi) *Damages for mental stress and anguish;*
and

vii) *Costs*

- 1.3 The Respondent is the surviving spouse and step-mother to the Applicants. It is common cause that the deceased died intestate on 23rd May 2016 and is survived by eight (8) children, four with the Respondent and four, including the Applicants, from a previous relationship.
- 1.4 The estate alleged by the Applicants comprises: House No. 2, Chainama Road, Olympia Park (main house and servant's quarters); a farm at 10 miles; an unfinished house at Mungule; livestock at Mungule farm; chicken run and a Toyota Hilux, registration AAR5120.
- 1.5 The Respondent opposed the application, deposing that:
- i) The Olympia Park house has been and is the current matrimonial home;
 - ii) The 10 miles farm was customary land jointly acquired with the deceased and only pursued for conversion post 2016;

- iii) The Mungule plot and its unfinished house were purchased by her, in her name in February, 2016;
- iv) The livestock does exist and are held by a cousin to the deceased both pre and post death of the deceased;
- v) The chicken run enterprise is hers; and
- vi) The Toyota Hilux belonged to the deceased albeit unserviceable for years.

1.6 The Respondent has however deposed that the once upon letters of administration issued by the Lusaka Boma (Local Court) to the 1st Applicant and herself in 2017 (renewed in 2022) were revoked on 21st March 2023 at the instance of the 2nd Applicant, such that there is presently no administrator for the estate in issue.

1.7 The Respondent does not dispute the Applicant's status as beneficiaries.

2.0 ISSUES FOR DETERMINATION

2.1 The pleadings and arguments establish the following issues:

- (i) Whether the Applicants and Respondent are beneficiaries of the deceased's estate;*
- (ii) Whether the Respondent must render a full and accurate inventory and account of the estate;*
- (iii) What property forms part of the estate for distribution and whether any sales or constructions were lawful;*
- (iv) The status of the letters of administration previously issued by the Lusaka Boma Local Court;*
- (v) Whether a fresh grant of probate should issue and to whom;*
- (vi) Whether damages for mental stress and anguish are awardable in these proceedings; and*

(vii) *Consequential orders, if any (including preservation and costs).*

3.0 THE LAW APPLICABLE

3.1 In relation to who the beneficiaries are, the Intestate Succession Act (herein after referred to as “ISA”) defines a ‘child’ to include a child born in or out of marriage, adopted child conceived but not yet born.

3.2 Section 5(1) prescribes the distributive scheme where there is a spouse and children: 20% is to the surviving spouse; 50% is to the children (allocated according to age/educational needs); 20% is to parents; and 10% is to dependents, subject to adjustment in appropriate cases.

3.3 Notwithstanding Section 5, where the estate includes a house, the surviving spouse or child (or both) are entitled to that house; the spouse holds a life interest determining upon remarriage. Where there is more than one house, the spouse and or child will be designated one with the remainder forming part of estate.

- 3.4** The ISA does not apply to land which at the time of death of the intestate had been acquired and held under customary law. The rights in such land are thus outside the ISA's distributive regime.
- 3.5** In an intestacy estate, the Court may grant letters of administration to interested persons as per Section 15 of ISA. Which provides that where there is a life interest, not fewer than two individuals may be appointed. And Section 16 of ISA states that Administrators must;
- i) Pay debts and or expenses,
 - ii) Distribute in accordance with the ISA,
- 3.6** When required, produce on oath a full inventory and render an account. And critically, the sale of the estate property requires Court authority under Section 19(2) of the ISA.
- 3.7** The Supreme Court has further guided in the case of ***Lindiwe Kate Chinyanta vs Doreen Chiwele & Judith Tembo (SCZ) No. 28 of 2007***¹ where the Court affirmed that an administrator's duty is to collect, account and distribute and not to inherit or treat estate assets

personal. The Court of Appeal has repeatedly applied Section 19 of the ISA, holding that purported sales of the estate property without prior leave of the Court are illegal, unenforceable and liable to be set aside in the case of **Rodney S. Kapenda vs. Enock K. Chiliya (APP194/2021)²**.

3.8 The law provides in relation to property not forming part of the estate where an asset was not owned by the deceased at death and it is not available for distribution under the ISA and as provided under the case of, **Monica Siankando vs Ndenga (SCZ 188/2003)³**, the Supreme Court held the ISA “*could not apply to a house that did not form part of the deceased’s estate, as the deceased had not purchased the property in issue.*”

3.9 The ‘Court’ under the ISA includes the High Court, Subordinate and a Local Court. The ISA also provides for transfers to the High Court where appropriate. Thus, a Local Court grant of probate is not per se void for want of jurisdiction; it may, however have limitations, which may be superseded or revoked.

4.0 THE ANALYSIS AND DETERMINATION

4.1 In determining the issue of beneficiary status; reference is made to Section 3 of the definition and Section 5 of the scheme of distribution. In this regard I find that indeed as conceded by the Applicants, being the (biological children) and the Respondent (surviving spouse), they are beneficiaries of the deceased's estate. As such a declaration is accordingly ordered.

4.2 The evidence in determining the second issue on the duty to account and render inventory shows prolonged administration without formal Court supervised accounting pursuant to **Section 19(1)(c)(i) to (ii)**, and as guided by Lindiwe Chinyata and the subsequent Court of Appeal authority, the Respondent (and any person who has held themselves out in the role of administrator) must produce a sworn full inventory and account of administration.

4.3 The next issue for determination is what forms part of the estate and how to deal with the sales and constructions in an estate.

- i) *The Olympia house No. 2 Chainama Road is estate property in accordance to Section 9 of ISA and provides that a surviving spouse is entitled to a life interest in the house, determining upon remarriage.*
- ii) *Any additions or constructions for example a shop built or the extension of flats undertaken after the death required the leave of this Court if entailed dealing with the estate property beyond ordinary preservation. Any commercial use of the premises shall henceforth be subject to account to the estate.*
- iii) *The Toyota Hilux (AAR5120) is a vehicle which belonged to the deceased; it's running state is immaterial. It is thus estate property and must be inventory preserved pending distribution.*

- iv) *The Toyota Mark II (ZAF 4276B) is a vehicle which was offered by ZAF in December 2023 to the deceased, which was years after his death and was purchased by the Respondent with her own funds. Based on the case of **Monica Siankando vs. Ndenga**, the vehicle never vested in the deceased and does not form part of the estate.*
- v) *The Livestock left by the deceased upon his death forms part of the estate and must be inventoried. Persons currently in custody of the livestock are to cooperate with the administrators hereinafter.*
- vi) *The land in 10 miles was at death of the deceased under customary tenure and the steps towards conversion were only taken post 2016, after the death of the deceased. By Section 2(2) (a), such customary land is excluded from the ISA distributive regime. Its devolution is governed by applicable customary law; conversion after*

death and cannot retroactively import it into the ISA estate. To the extent herein said, the income derived from use of the land post-death, any net proceeds applied to the household may be considered in equity at distribution, but the land itself is out with ISA.

vii) Mungule plot and unfinished house therein (purchased in February 2016) by the Respondent as evidenced an agreement of sale in her name was predating the deceased's death. Therefore, unless cogent contrary proof is adduced that the deceased was the beneficial owner, the asset does not form part of the estate. The onus lies on those asserting its inclusion. The structure's presence on customary land reinforces the conclusion under Section 2(2)(a) of ISA.

viii) The chicken run and its business therein, if it was an enterprise established and operated as the Respondent's separate undertaking (including before death, it is not, without more,

an estate asset. Thus, that said, where fixtures are affixed to the Olympia house, they follow the land; and any post-death profits applied for household maintenance should be disclosed in the account. The final treatment will be taken at the distribution stage upon a full inventory.

- ix) Any sale or encumbrance of the estate property undertaken without prior Court authority contravenes Section 19(2) ISA and is liable to be declared null and void. The authorities emphasize that leave must be obtained before even making an offer. Any such transactions shall be identified in the inventory and are, pending further order, set aside in principle, with parties at liberty to move on the consequences as necessary.*
- x) The issue to do with the letters of administration granted by the Local Court, to the 1st Applicant and Respondent were revoked on 21st March, 2023 as such the prayer by the Applicants to*

revoke the same have been overtaken by events and is dismissed as moot, without making a finding of invalidity.

- xi) The estate has a life interest in accordance with Section 9 of the ISA and as such circumstances not fewer than two individuals may be appointed under Section 16 of the same Act.*
- xii) Therefore, given the family dynamics and to foster checks and balances, I am satisfied that a joint grant to the Respondent and at least two Applicants is appropriate. The Court further has power under the 2023 Intestate Succession Rules to require bond where necessary.*
- xiii) Further, it is my understanding that the ISA has distributive and administrative character in nature. And as such claims for general damages for mental distress are sound in tort or contract and are not ordinarily awardable in probate or intestacy proceedings in the absence of a separate actionable wrong. There is no distinct*

cause of action which was pleaded or proved on the record. The prayer for damages is therefore refused.

4.4 Therefore, in consideration of the reasons aforesaid, I order as follows;

- 1) *The Applicants and the Respondent are beneficiaries of the estate of the late Donald Davies Muyuya the deceased within the meaning of Sections 3 and 5 of ISA.*
- 2) *Within 90 days of this order, the Respondent and the administrators appointed shall file and serve:*
 - a) *A sworn full inventory of all assets and liabilities as at the date of death; and*
 - b) *A full account of administration to date, including*
 - i) *any income derived from the estate assets,*
 - ii) *any sales, encumbrances or constructions at the Olympia property,*

iii) *the status and location of livestock,
and*

iv) *any proceeds from use of estate
chattels pursuant to Section 19 (1)*

3) *The inventory shall clearly distinguish assets
excluded from the ISA estate, including:*

a) *The Toyota Mark II (ZAF 4276B) acquired
post- death by the Respondent;*

b) *The Mungule plot and unfinished house
(if purchased by the Respondent in
February 2016 in her name); and*

c) *The 10 miles customary land (to be dealt
with under applicable customary law);*

d) *Pending further order, no sale, lease,
encumbrances, structural alterations or
commercial expansion of the estate
property shall be undertaken without
prior leave of this Court. Any
contemplated sale shall be supported by
a valuation, plan of distribution and an*

application under Section 19(2) shall be made.

e) In relation to the status of the Olympia property;

i) The Respondent holds a life interest in House No. 2 Olympia Park, subject to Section 9 of ISA.

ii) The shop erected by Kaseba Muyuya and any flat extension works commenced post-death are subject to account. Until distribution, any continued operation (if any) shall be on terms that monthly accounts and not net proceeds (after reasonable maintenance) are paid to an estate account to be opened by the Administrators within 30 days.

iii) The keys to the servant's quarters taken by the 1st and 2nd Applicants shall, within 7 days, return to the

administrators to any locked room therein at the Olympia property to facilitate inventory and access.

iv) Pursuant to Sections 15 to 16 of the ISA, Letters of Administration shall issue jointly to:

a) The Respondent (surviving spouse)

b) The 1st and 2nd Applicants (Ntitima Harry Muyuya and Kalima Muyuya).

They shall take the prescribed oath(s) and subject to the ISA Rules, 2023, each shall provide such Administrators Bond before a Deputy Registrar within 21 days.

v) Further within 120 days of this order, the administrators shall file a proposed scheme of distribution consistent with Section 5 (noting the spouse's life interest under Section

(9), together with an application for leave to sell under Section 19(2) where necessary to effect equality or realize value.

vi) Any past sale or encumbrances of estate property without prior Court authority is set aside in principle for want of compliance with Section 19(2), subject to liberty to apply on consequences and third-party positions upon disclosure in the account.

vii) The prayer for damages for mental stress and anguish is dismissed

viii) The Local Court letters having been revoked on 21st March, 2023, results in the prayer being dismissed as moot. For the avoidance of doubt, administration henceforth proceeds under this Court's grant.

ix) *Given the family nature of the matter and the need for cooperative administration, costs shall be in the estate.*

4.5 CONCLUSION

The application succeeds in part to the extent set out above. The Court looks to the party's as joint administrators to comply strictly with their statutory obligations of fidelity, candor and mindful that the duty of an administrator is 'not to inherit the estate but to collect the deceased's assets, distribute to beneficiaries and render an account.

5.0 Leave to Appeal is granted

Delivered at Lusaka this 8th day of September, 2025.


M.M. Bah-Matandala

JUDGE HIGH COURT

