

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

2023/HPF/063

IN THE MATTER OF:

**ORDER 30 RULE 12 (C)((F) (E) (G) AND
13 OF THE HIGH COURT. CAP 27 OF
THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF:

**SECTIONS 5(2) AND 19(1) AND OF
THE INTESTATE SUCCESSION ACT, CAP
59 OF THE LAWS OF ZAMBIA**

BETWEEN:

LIMPO KALUMBA

APPLICANT

(suing in her capacity as mother and next of kin to Mwiinga Hamoonga and Nchimunya Hamoonga)

AND

TINA HAMOONGA

1ST RESPONDENT

(Sued in her Capacity as Administrator of the Estate of the late Victor Hamoonga))

JEAN HAMOONGA

2ND RESPONDENT

(Sued in her Capacity as Co-Administrator of the late Victor Hamoonga))

***Before the Honourable Mrs. Justice M.M. Bah-Matandala
Dated this 30th April, 2024.***

For the Applicant:

*Mrs. B. M Mulenga – Messrs National Legal Aid Clinic for
Women*

For the Respondents:

Ms. M. Nsofu & Ms. T Bili – Messrs. AD & David

J U D G M E N T

LEGISLATION AND OTHER WORKS REFERRED TO:

- (i) The High Court Rules Chapter 27 of the Laws of Zambia*
- (ii) The Intestate Succession Act, Chapter 59 of the Laws of Zambia*
- (iii) The Intestate Succession Rules 2023*

CASES REFERRED TO:

1. *Jackson Mooya & Nchimunya Mweemba: Appeal No.116/2018*
2. *J v C (1970)*
3. *Emmanuel Mponda v Mutale I. Mponda (SCZ Appeal No. 199/2015)*
4. *Musweu v Musweu*
5. *Re McGrath (Infants)*

1.0 INTRODUCTION

1.1 This is a Judgment on an action commenced by the Applicant by way of Originating Summons and supported by an affidavit filed into Court on even date of 14th February, 2023 and seeks against the Respondents the following reliefs;

- i) *An order for the Respondents to produce on oath in Court the full inventory of the estate of the late Victor Hamoonga*
- ii) *An order for the Respondents to render to the Court an account of the administration of the estate of the late Victor Hamoonga*
- iii) *For an order of the distribution of the estate of the late Victor Hamoonga*

- iv) An order for the Applicant to receive the minor's Mwiinga Hamoonga and Nchimunya Hamoonga's shares of the estate of the late Victor Hamoonga*
- v) Any other reliefs the Court may deem fit; and*

2.0 AFFIDAVIT IN SUPPORT OF THE APPLICATION

- 2.1 The Summons were supported by an affidavit filed on 14th February, 2023 and deposed to by the next of kin to the minor children namely Mwiinga Hamoonga and Nchimunya Hamoonga who will now be referred to as 'the children' hereinafter. The gist of the Applicant's affidavit evidence was that Applicant is mother and next of kin to the minor children herein.
- 2.2 She averred that the deceased Victor Hamoonga who died intestate on 30th June, 2021 was her divorced husband whom she had married 2013 and from whom she had the two children herein.
- 2.3 The deponent averred that the Respondents are the deceased widow and sister respectively and that the two were duly appointed administrators by this Court.

- 2.4 The Applicant indicated that apart from the 1st Respondent who is the surviving spouse, the deceased was survived also by his mother and two other children. The Applicant does not know if there are dependents surviving the deceased herein.
- 2.5 The deponent has listed some of the known assets of the estate as being; the matrimonial home in Lusaka, a farm in Lusaka West, a flat in Kanyama, a house in Matero East, two motor vehicles (a canter and Pajero), Terminal benefits from Napsa and Napsa Contributions
- 2.6 The Deponent averred that she has engaged the Respondents herein in her capacity as the mother of the children to be advised on what constitutes a true picture of the estate of the deceased.
- 2.7 Further she has stated that the Respondents have refused to update her or render an account of how the estate has been administered since June, 2021 to date despite numerous efforts to engage them individually and through their advocates.

- 2.8 The Applicant indicated that she since only received the NAPSA contributions for Nchimunya Hamoonga amounting to K98,000.00 while the share for Mwiinga Hamoonga has been withheld by the Respondents without regard to the Applicant as his mother and one who is said to be mandated by law to receive and hold the child's share until he ceases to be minor.
- 2.9 The Applicant alleged that the Respondent further received a sum of K700,000.00 from NAPSA but that they have not declared the same to the Applicant or rendered account of how the said money has been or will be distributed to the intended beneficiaries. The deponent mentioned that this information was given to her through an inquiry made at NAPSA after the receipt of Nchimunya Hamoonga's share of the deceased's NAPSA contribution payment.
- 2.10 The Applicant further stated that the Respondents have not indicated the liabilities forming part of the estate and how they intend to administer the rest of the estate of the deceased to all the intended beneficiaries.

2.11 Consequently, the Applicant has stated that as a mother and next of kin to the children, she is deeply concerned about the manner in which the Respondents are administering the estate and that they have refused or failed to give her the updates of the rest of estate.

2.12 The Applicant therefore prays that the Respondents should render an inventory of the estate of the deceased and also render an account of how they have administered the estate to date. She further prays that the Respondents be ordered to distribute the estate to the intended beneficiaries.

3.0 THE AFFIDAVIT IN OPPOSITION TO THE APPLICATION

3.1 The deponents have confirmed that they were duly appointed as administrators for the estate in issue and were not aware that the Applicant was ever married to the deceased not until the commencement of these proceedings.

3.2 It was submitted that the contrary to the aforesaid assertion by the Applicant, she was known to the

Respondent as the mother of Mwiinga Hamoonga, who is the son to the deceased.

3.3 Further it was deposed that the 1st Respondent was the only known wife of the deceased and that she got married to the deceased on 3rd January, 1999. The two remained married until the demise of the deceased on 29th June, 2021.

3.4 The deponents indicated that the deceased had doubted the paternity of Nchimunya Hamoonga although he did not do a paternity test and he took up the responsibility of the said child regardless. The Respondent mentions that the family still wishes for the DNA test to be conducted on the said child to confirm paternity of the child.

3.5 The deponent further indicated that the deceased died on 29th June, 2021 and not 20th June, 2021 as alleged by the Applicant.

3.6 The deponents mentioned that the Mwiinga Hamoonga has been since the age of about 1 year and 2 months been in the custody of the deceased and the 1st Respondent until at the time the deceased died. The Respondents

averred that the deceased had been granted custody of Mwiinga Hamoonga on the ground that the Applicant was mentally unstable and was of no fixed abode. Further that she has had no financial capacity to look after Mwiinga Hamoonga.

3.7 The Respondents further stated that as a family they had decided that in the best interest of the child, Mwiinga Hamoonga remains in the custody of the 1st Respondent for the reasons which I shall not restate herein but I have taken consideration as stated in the affidavit in opposition to the Application.

3.8 The Respondents averred that the estate has a canter and a Suzuki and not a Pajero as stated by the Applicant. Further that the house in Matero belongs to the deceased's mother and the same has been regarded as family property hence it does not form part of the estate herein.

3.9 The Respondents mentioned that all efforts to resolve the matter of custody by family have failed due to the action by the Applicant of insulting the deceased's family.

3.10 The Respondents averred that the child Mwiinga Hamoonga has been in the custody of the 1st Respondent and by that reason they have held the child's share of the estate as the Administrators and or his guardian and will continue to do so until he ceases to be a minor or until the Court otherwise directs. The Respondent indicated that the same was a directive from NAPSA; that the child's share be given to the guardian of the child.

3.11 The Respondents averred that the deceased's NAPSA contributions were obtained and shared amongst all beneficiaries of the deceased's estate in accordance with the law obtaining under the Intestate Succession Act. It was alleged that despite the questionable paternity of the child Nchimunya Hamoonga, the Applicant was given that child's share in the sum of K98,000.00 whereas the Respondents hold the share for Mwiinga Hamoonga. The said share was held for the purpose of using the same as school fees, clothing, food and all other necessities required for the child's upbringing.

4.0 REPLY BY THE APPLICANT

- 4.1 The Applicant avers that she was duly married to the deceased in 2007 under customary law and later divorced by the Local Court in Matero as shown in the exhibit marked 'LK2" a copy of the Divorce Certificate. The Applicant mentions that the family of the deceased knew that she was married to the deceased and that she subsequently got divorced in 2013.
- 4.2 The Applicant mentions that to the best of her knowledge, the deceased had accepted that he was the father of Nchimunya Hamoonga and at no point did he request that the child be subjected to a paternity test. She said that the Deceased was providing for the said child financially and that when the Applicant sued for child support at Matero Local Court, the deceased was ordered in a Judgment dated 31st August, 2016 to maintain both the children as per exhibit marked "LK3" a copy of the Judgment.
- 4.3 The Applicant nonetheless submitted that she is not averse to subjecting the child in issue to a paternity test at the expense of the estate.

- 4.4 In relation to the contention that the Applicant has been hostile to the Respondents, she submitted that contrary to the said assertion she alleges that it the Respondents who are the ones who have been hostile to her and have not given her any information regarding the extent of the estate and its distribution.
- 4.5 The Applicant maintains that the Respondents ought to give an inventory of the estate and render account of the same in the interest of all the beneficiaries of the estate.
- 4.6 The Applicant indicates that Mwiinga Hamoonga was only in the custody of the deceased and the 1st Respondent when the deceased requested to have custody of the child aged 8 years at the time and following numerous back and forth cases on child maintenance as shown in exhibit marked "LK4" a Certificate of Judgment on Child Maintenance and Custody delivered by the Local Court in 2010. The Applicant maintains that she had been granted full custody of the children herein by the Chilenje Local Court Judgment pertaining to custody of the children as already indicated earlier.

- 4.7 The Applicant maintains that she is of fixed abode and indicated that she was only at one point in time of no fixed abode because the deceased had sold the matrimonial house. The aforesaid become one of the reasons the child was taken by the deceased.
- 4.8 Also, the Applicant stated that she has never been declared mentally unstable by any medical practitioner.
- 4.9 The Applicant submits that the child Mwiiinga Hamoonga has preferred to be in the custody of the 1st Respondent only because of school being near the home of the Respondent. The Applicant has mentioned that the issue of custody was resolved in the sense that the child was to be enrolled in a boarding school and as such he would choose where he wanted to be during holidays.
- 4.10 The Respondent has refuted the allegations that the child in issue is afraid of her and that she has not been violent towards the deceased and or at meetings held for the family. The Applicant avers that it is in fact the 1st Respondent who had instructed the child not to see Applicant and thus the child started only to see the

Applicant in secrecy because the 1st Respondent would not authorize him.

4.11 The Applicant submitted that there is no evidence that the Respondents were given custody or guardianship of the child.

5.0 SKELETON ARGUMENTS IN SUPPORT OF THE APPLICATION

5.1 The Applicant to begin with is relying Order 30 rule 12(c) (f)(g)(e) of the High Court Rules Cap 27 of the Laws of Zambia which provides as follows;

“ 12. The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested under the trust of any deed or instrument in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law of a deceased person or as cestui que trust or as claiming by assignment or otherwise under any such creditor or other person as aforesaid may take out an originating

summons for such relief of the nature or kind following, as may be specified in the summons and as the circumstances may require, that is to say, the determination, without an administration by the Court of the estate or trust, of any of the following questions or matters so far as the same arise in the course of the administration or performance of such estate or trust:

- (c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;*
- (e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees;*
- (f) the approval of any sale, purchase, compromise, or other transaction;*

Originating summons to deal with matters arising out of trusts

(g) the determination of any question arising in the administration of the estate or trust.”

5.2 The Applicant has also referred to section 19 of the Intestate Succession Act which I will not cite herein and went on to submit that this Court has jurisdiction to order the Respondents to render account of the estate for the reason that the Respondents have not availed to the Applicant the full extent of the estate of the deceased.

5.3 The Applicant therefore prays that it is in the best interest of the beneficiaries that the Respondents are ordered to produce the full inventory of the estate of the deceased so as to ascertain what assets form part of the estate. Reference was made to the case of **Jackson Mooya & Nchimunya Mweemba: Appeal No.116/2018**¹ the Court stated at page 10 as follows:

“...it will be noted that under section 19 (1) (c) of the Act, the Administrator has no inherent

duty to produce an inventory of the estate or to render an account unless the court so orders of its own motion or an application by an interested party.”

The Court further stated at page 10 that:

“we therefore take the position that had the court below made an order to account under section 19(c) (ii) it would have got a clearer picture of how the estate was distributed....”

- 5.4 The Applicant has stated in reference to the aforesaid case that it would only be prudent and in the interest of the minor beneficiaries of the estate for the Respondents to render a full inventory of the estate as well render an account of how they have administered the estate or distributed for the benefit of the Applicant as next of kin to the children and the Court to have a clearer picture of what consists the estate of deceased and how the same has been administered.

5.5 The Applicant has further referred to section 5 (1) and section 5(2) of the Intestate Succession Act which provides:

5(2) In respect of a minor, the mother, father or guardian shall hold his share of the estate in trust until he ceases to be a minor.”

5.6 The Applicant submits that as the mother to the children she ought to receive the share of the children from the estate and in this respect the share of Mwiinga Hamoonga be given to her.

5.7 The Applicant further indicates that since the death of the deceased on 30th June, 2021 the estate has not been distributed to the intended beneficiaries of the estate. The Applicant hereinafter seeks an order from the Court that the deceased estate be distributed after the Respondents have submitted an inventory and rendered an account to the Court. Reference has been made to section 19(1)(b) of the Intestate Succession Act which the Administrators a duty to effect distribution of the estate in accordance with the rights of the persons interested in the estate under the

law. The Applicant thus prays that the Respondents be ordered to distribute the estate in accordance with the law.

6.0 SKELETON ARGUMENTS IN OPPOSITION AND LIST OF AUTHORITIES

6.1 The Respondents in summary have submitted that the request made by the Applicant for them to render account of the estate of the deceased is pre-maturely done and reference has been made to Section 24(2) of the Intestate Succession Act which states in summary as follows;

“The administration of estate is the process whereby the personal representatives collect in the assets of the estate and then meet the debts and liabilities and pay out the legacies and devises before distributing the residue, managing the estate as necessary in the meantime.”

6.2 Therefore, on the basis of the aforesaid, the Administrators being the Respondents herein submitted that they are on track administering the estate for the benefit of the beneficiaries and as such they can only be requested to

render account after distribution of the estate to the beneficiaries and not before that. Consequently, bearing in mind the said, the Respondents submitted that an account of the estate can only be rendered after distribution of the estate is completed.

6.3 Further the Respondents have submitted that they did in fact have a meeting with the Applicant and her family to try and resolve the issues regarding the children but the said meeting was disrupted by the Applicant and her family who disrupted the meetings. Therefore, it has been submitted that as the administrators they are in the process of collecting and gathering the estate as per their obligation under section 19(1) (a).

6.4 The Respondents have alleged and conceded that the Applicant as the custodian of the child namely Nchimunya Hamoonga, she was granted money amounting to K98,000.00 the child's share despite the child's paternity being questionable. And it was also submitted that equally the Respondents were entitled to hold Mwiinga

Hamoonga's share of the estate in their capacity as Administrator, for paying for his upkeep and school fees.

6.5 The Respondent submitted that there is no evidence to establish that there is need for an account of how the administration of the estate has conducted and as such the application is said to have been pre-maturely made and that distribution of the estate has not been completed.

7.0 HEARING

7.1 At the hearing, the Applicant augmented by emphasizing section 5(2) of the Intestate Succession Act which forbids the Respondents withholding Mwiinga Hamoonga's share from the estate. The Applicant submitted that the Respondents being an administrator or living with the child does not make them guardians in default. Reference was made to section 32 of the Intestate Succession Act, which provides for the appointment of a legal guardians of the child and equally section 160 and 161 of the Children's Act No. 12 of 2022 which provides for an appropriate procedure to be follow for one to be appointed as a guardian for a child.

- 7.2 The Applicant therefore submitted that as per provision of section 5(2) cited, the Applicant being the mother to Mwiinga Hamoonga, she has the legal authority to hold the minors' share
- 7.3 In relation to the claim that the Respondents render account in relation to the Administration of the estate of the deceased, reference had been made to section 19(1) of the Intestate Succession Act which clearly indicates the duties of the Administrators and what is cardinal to those duties is to render an inventory as well as an account of the estate of the deceased at any time when called upon by the Court or on any application of an interested party.
- 7.4 In response, the Respondents relied on the filed documents save to refer to section 3 of the children's code Act No. 12 of 2022.
- 7.5 It was stated that the child in issue was staying with the 1st Respondent even before the death of the deceased. This has been the case since the child was only about 1 year old. It was stated that the child has become accustomed to the said environment in which he has lived.

- 7.6 On the other hand, it has been submitted that the Applicant is of no fixed abode and as such she cannot be given custody of the child; it was submitted that doing so would also not be in the best interest of the child.
- 7.7 The Respondents indicate that the child is in the custody of the 1st Respondent and as such it her who should hold on to the share of the child and use it for his own necessities.
- 7.8 As regards the claim that the Respondents should render an account of the estate, the position of the Respondent is that the application was made prematurely in that the estate of the deceased still remains intact and is yet to be distributed to the rest of the beneficiaries.
- 7.9 The Court was urged to consider the best interest of the child as the primary consideration on who should have custody of the child.
- 7.10 In Reply the Applicant has maintained her position that she was the one who had been granted full and legal custody of the children and that the child Mwiinga

Hamoonga, only wants to be the visiting the Applicant and live with the 1st Respondent. She reiterated here claims.

8.0 ANALYSIS AND CONSIDERATION

8.1 Having considered the Applicant's contentions, it is now for this Court to consider whether or not to grant the reliefs sought by the Applicant.

8.2 The beginning point is Order 30 Rule 12 (c) (e) (f) (g) and 13 of the High Court Act Chapter 27 of the Laws of Zambia further provides;

"Rule 12 he executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested under the trust of any deed or instrument in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law of a deceased person or as cestui que trust or as claiming by assignment or otherwise under any such creditor or other person as aforesaid may take out an originating summons for such relief of the nature or kind

following, as may be specified in the summons and as the circumstances may require, that is to say, the determination, without an administration by the Court of the estate or trust, of any of the following questions or matters so far as the same arise in the course of the administration or performance of such estate or trust:

(g) ...the determination of any question arising in the administration of the estate or trust.

“Rule 13 Any of the persons named in the last preceding rule may in like manner apply for and obtain an order for-

(a) the administration of the personal estate of the deceased;

(b) the administration of the real estate of the deceased;

(c) the administration of the trust;

(d) any act to be done or step to be taken which the Court could have ordered to be

done or taken if any such administration order as aforesaid had previously been made.”

8.3 Further reference is made to Order 25 of The Intestate Succession Rules 2023 which provides that;

“A personal representative shall when ordered by the court or on application by a party, render an account on the administration of an estate by filing an affidavit with supporting documents.”

8.4 The aforesaid cited provisions grant this Court jurisdiction to enquire into the issues raised herein. The Applicant has submitted that by virtue of the death of the deceased being the father, the Applicant being the surviving mother to the children, gives her the right to make inquiry into the estate on behalf of the beneficiaries of the estate herein.

8.5 And since the deceased died intestate the Respondents were granted probate letters of administration as the Administrators of the deceased's estate herein even though the said letters of administration were not

exhibited herein. The appointment of the Respondents as administrators is not in contention and so I shall not belabour the issue.

8.6 The Respondents have been said to be the surviving spouse and sister of the deceased respectively.

8.7 The law provides that Respondents have the duty to administer the estate in accordance with the provisions of the law under section 19 of the Intestate Succession Act which provides as follows,

“19(1) The duties and powers of an administrator shall be

(a) To pay debts and funeral expenses of the deceased and pay estate duty if estate is payable

(b) To effect distribution of the estate in accordance with the rights of the persons interested in the estate under this Act

(c) When required to do so by the court, either on the application of an interested party or on its own motion-

- (i) *to produce on oath in court the full inventory of the estate of the deceased; and*
- (ii) *to render to the court an account of the administration of the estate.*

8.8 The Applicant has stated that the estate has other properties which have not been distributed and there has been no inventory provided to the beneficiaries and thus the Applicant now seeks the Respondents to give an inventory of the estate and render account of it.

8.9 The law provides that when one dies intestate, the administrators are appointed to administer the estate on behalf of the beneficiaries listed in section 5 of the Intestate Succession Act and there is an order or priority list of beneficiaries which is as follows;

“ 5(1) Subject to sections eight, nine, ten and eleven the estate of an intestate shall be distributed as follows:

- (a) twenty per cent of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the*

intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;

- (b) fifty per cent of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;*
- (c) twenty per cent of the estate shall devolve upon the parents of the deceased;*
- (d) ten per cent of the estate shall devolve upon the dependants, in equal shares:”*

8.10 Therefrom, the 1st Respondent being a surviving spouse is a beneficiary herein although 2nd Respondent is only but a near relative thus she is not a beneficiary of the estate. On the other the Applicant on behalf of the children, can claim

the reliefs sought pursuant to order 25 of the Intestate Succession Rules and section 19(1)(c)(i)(ii) which proves as follows;

*“(1)The duties and powers of an administrator shall be-
when required to do so by the court, either on the application of an interested party or on its own motion- (i) to produce on oath in court the full inventory of the estate of the deceased;”*

8.11 The provision herein states that when called upon at any stage as administrators, the administrator ought to give an inventory of the estate and or render account of the estate. This can happen at the discretion of the court when the the court deems it necessary or on application of any party with interest in the estate.

8.12 The evidence on the record indicates that the Respondents are the administrators and there is concern by the Applicant; of, lack of full disclosure of the inventory of the estate and or that there is no clear information of the status of the estate’s inventory.

8.13 Further given the evidence on the record it is my view the Respondents have interest in the estate thus being granted the letters of administration. I find that there is nothing established in evidence that necessitates the revocation of the letters of administration granted to the Respondents herein.

8.14 Let me now come to the issue of custody of the child namely Mwiinga Hamoonga. In this regard I shall consider, **Section 144 2 (a) (b) and (c) of the Children's Code Act No. 12 of 2022** provides as follows:

"A court shall, in determining whether or not a custody order should be made in respect of a child in favour of the applicant, have regard to -

- (a) the best interests of the child;*
- (b) the ascertainable wishes of the child;*
- (c) the conduct and wishes of the parent or guardian of the child;"*

8.15 In the case *in casu*, it is clear from the affidavit evidence that the person to whom the custody order is being sought

is a child namely Mwiinga Hamoonga; furthermore, the Applicant is the mother and the 1st Respondent is the step mother and the surviving spouse of the deceased respectively.

8.16 The parents of the child were married at the time when they had the child as shown by the Divorce Certificate exhibited herein. The Applicant submitted that she was legally granted custody of the children when she got divorced from the deceased. Further the Applicant stated that as parents of the child, they agreed to have Mwiinga Hamoonga live with the deceased. The child lived with the deceased until his death on 29th June, 2021.

8.17 Consequently, after the death of the deceased, the child Mwiinga Hamoonga remained in the custody of the 1st Respondent thus the Applicant now seeks to have custody of the child herein for the reason that she is better placed to look after the child and that legally, custody was actually granted to her by the local court. She stated that the 1st Respondent has not been authorized legally to have custody of the child.

- 8.18 Further the record shows that Respondents have held on to the share meant for the child Mwiinga Hamoonga for the reason that they are the administrators and the 1st Respondent has the custody of the child. They have indicated that it would be in the best interest of the child to continue to live in the same place where he is accustomed to and for his share to be used for his welfare.
- 8.19 The Respondents have alleged that it is further in the interest of the child to remain in the 1st Respondent's custody because the Applicant is not of sound mind and the child himself does not want to be with the Applicant but only wishes to visit her instead.
- 8.20 The Applicant contends that she is the mother and ought to receive the share for the child as per the cited provision of section 5(1) of the Intestate Succession Act. She mentions that the child is in boarding school and after all he will be able to choose where he wants to be when on holidays.
- 8.21 With the above stated, my role now is to determine whether granting the application herein to the Applicant is

in the best interest of the child as guided by **section 144 of the Children's Code Act (supra)**. I have further taken time to look at **section 39 of the Children's Code Act (supra)** which provides as follows:

(1) *A child's mother and father, whether married to each other or not, have a duty to protect and provide for the child.*

(2) *Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other, the—*

(a) *mother shall have parental responsibility at the first instance;*

8.22 On the other hand, the law provides for acquisition of parental responsibility by father under section 39 (2) (b) which provides as follows:

“(b) father shall acquire parental responsibility for the child in accordance with section

40” Section 40 further provides as follows;

- “(1) Where a child’s father and mother are not married at the time of the child’s birth —*
- (a) a court may, on an application by the father, order that the father shall have parental responsibility for the child; (b) the father and mother may, by a parental responsibility agreement, provide for the father’s parental responsibility for the child; or*
- (c) the father shall acquire parental responsibility for the child if that father acknowledges paternity of the child or maintains the child.”*

8.23 It is clear from the evidence herein that the 1st Respondent has had the primary custody of the child together with the deceased since he was a toddler whereby the Applicant has had access.

8.24 It would appear that all was well until the deceased died leaving the child with the 1st Respondent which has necessitated for the Applicant as the mother of the child to seek custody of the child.

8.25 And when the child was called to give the Court his view over his custody, the child indicated that he preferred to live with the 1st Respondent because he is used to her and he will be able to visit his mother the Applicant whenever he can.

8.26 I found comfort by looking at the case of **J v C (1970)**² supra, where Lord Mac Dermott aptly explained the meaning of the best interest of the child in the following terms;

“I think the words “shall regard the welfare of the infant as the first and paramount consideration” connote a process whereby, when all the relevant factors, relationship, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be

that which is mostly in the interest of the child's welfare... “

8.27 I have further looked at the Supreme Court's decision in the case of **Emmanuel Mponda v Mutale I. Mponda (SCZ Appeal No. 199/2015)**³ where the court held that:

“it is generally accepted by those who are professionally concerned with children that, particularly in early years, continuity of care is a most important part of a child's sense of security and that disruption of established bonds is to be avoided whenever it is possible to do so”

8.28 I note that in the case at hand that the child established bonds with the 1st Respondent where he is currently residing and when the child was spoken to, he indicated that he prefers to visit his mother when he can but would like to continue to live with the 1st Respondent.

8.29 I have further observed that the Applicant has made efforts to be with the child who only went to live with the deceased due the inability by the Applicant at the time to provide maintenance for the children. Further she stated that there is no medical evidence on the record to support the allegations that she is of unsound mind and so cannot have custody of the child Mwiinga Hamoonga.

8.30 I wish to mention that in fact, the record shows that the Applicant has been given the share of one of children who is in her custody namely Nchimunya Hamoonga whom she is able to look after yet the Respondents claim that she is of unsound mind. This position is therefore conflicting and is unfounded. I therefore dismiss it therefrom.

8.31 This Court is enjoined to take the welfare of the child in question as the first and paramount consideration when determining an application for custody. The learned authors of **Black's Law Dictionary** define the term '*welfare*' as follows:

“Welfare-well-doing or well-being in any respect; the enjoyment of health and common blessings of the exemption from any evil or calamity; prosperity; happiness.”

8.32 Further, in **Musweu v Musweu**⁴, the Court of Appeal guided that the Court should consider all circumstances and assess the suitability of the parties to look after the child, the home environment, the relationship of the child with members of its family, stability and continuity of care among other considerations.

8.33 I have also referred to authorities from other commonwealth jurisdictions which are of persuasive value in our jurisdiction. One of these is the English case of **Re McGrath (Infants)**⁵ where it was held that:

“The dominant matter for consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only.

The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

8.34 From the above cited authorities, it is clear that in this matter this Court is duty bound to make a decision that seeks to protect and promote the best interests of the child in issue by considering all the circumstances of the case.

8.35 Therefore, in applying the above principles to the current case, the question is: is it for the welfare or in the best interests of the child in issue in the current case for this Court to grant custody of the said child to the Applicant?

8.36 In answering this question, this Court has considered the Applicant's undisputed affidavit evidence on record that the child in issue is a male marital child born to her and the deceased. And that the said child is aged 12 years old at the time of trial and that he has been in the care and

custody of the 1st Respondent since he was a toddler although the Applicant had reasonable access to the child.

8.37 Furthermore, the Applicant has shown that she has the capability of providing care for the child while the evidence on the record also shows that the 1st Respondent has the capability of providing care, financial support for the child and to provide a secure, healthy and happy home for the child. This is supported by the child himself.

8.38 The Court notes also that there is no evidence on record showing that in the two years or there about, that the 1st Respondent has exhibited conduct that makes her to be an unfit guardian to the child even if she was not legally appointed to be so.

8.39 Consequently, the conclusion that I have come to is that it will be in the best interests of the child to be placed in an arrangement where the child continues to have access to Applicant as the mother for the reason that it forms part of an integral element for the child's development and well-being to be with the mother. I, therefore, award custody of the child in issue to the 1st Respondent pursuant to

section 143(4) of the Children's Code Act which provides as follows

"(4) where the court makes an order placing a child in the custody of a person, other than a parent of the child, it may include in the order provisions that the court considers necessary for access to the child by the parent of the child."

8.40 I hasten to mention that consequently the 1st Respondent is herein appointed as the legal guardian of the child Mwiinga Hamoonga and further that the 1st Respondent be given the share of the child from the estate of the deceased in her capacity now as the guardian of the child Mwiinga Hamoonga and access to the Applicant.

8.41 Both the custody and access Orders are subject to variation as and when the circumstances may so require and on formal application by either party.

8.42 Consequently, the outcome of the matter is as follows;

- i) Order the Respondents to give an inventory and estimate of the value of all the assets and liabilities at the date of death of the deceased including those that*

may have arisen or become known since the date of judgment and the same be done within 60 days of this judgment before the Deputy Registrar;

- ii) Order the Respondents to render account of the administration of the estate by filing into court an affidavit with supporting documents before the Deputy Registrar with 60 days
- iii) Order that the 1st Respondent is the legal guardian of the child Mwiinga Hamoonga and she shall be the one to receive the share of the said child from the estate of the deceased henceforth.
- iv) Order that the upon the Respondents acting on order granted numbered 1 and 2 hereinbefore, distribute the estate to the intended beneficiaries.
- v) I make no order as to costs in view of the fact that it is a family issue.

9.0 Leave to Appeal is granted

Delivered at Lusaka, this 30th April, 2024.



**M.M. BAH-MATANTALA
JUDGE HIGH COURT**

