

**IN THE HIGH COURT FOR ZAMBIA
FAMILY AND CHILDREN'S COURT DIVISION
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2023/HPF/355

IN THE MATTER OF:

**THE RESPONDENTS TO RENDER AN
ACCOUNT OF THE ESTATE OF THE
LATE ALEX PHIRI**

IN THE MATTER OF:

**ORDER 30 RULE 1, 12(G) AND 13 OF
THE HIGH COURT. CAP 27 OF THE
LAWS OF ZAMBIA**

IN THE MATTER OF:

**SECTIONS 4 AND 19(1) OF THE
INTESTATE SUCCESSION ACT, CAP 59
OF THE LAWS OF ZAMBIA**



AND

IN THE MATTER OF:

**SECTIONS 6 OF THE ADMINISTRATOR-
GENERAL ACT, CHAPTER 58 OF THE
LAWS OF ZAMBIA**

BETWEEN:

TOMAIDA SAKALA (*suing as Administratrix
to the estate of the late Alex Phiri*)

APPLICANT

AND

**GIDEON PHIRI
CAROL PHIRI
ALEX LUMAMBA**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

*Before the Honourable Mrs. Justice M.M. Bah-Matandala
Dated this 5th February, 2024.*

*For the Applicant: Mrs. C. M. Katenegwa – Legal Aid Counsel, Messrs. Legal
Aid Board
For the Respondents: In Person*

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 Administrator General Act, Chapter 58 of the Laws of Zambia*
- (iii) *The Intestate Succession Act, Chapter 59 of the Laws of Zambia*

CASES REFERRED TO

- (i) *Prisca Lubunga vs. Obby Kapango & Others (Appeal No. 216/2016)*

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 6th July, 2023 and amended the Originating Summons, Affidavit in Support and Skeleton Arguments filed with leave of Court on the 23rd August, 2023 in which the Applicant now seeks against the Respondents the following reliefs;

- i) *That the Respondents herein produce their letters of Administration appointing them as Administrators to the Estate of the late Alex Phiri.*
- ii) *That in the event the Respondents produce their letters of Administration;*

- a) *That the Respondents herein produce a full inventory of the Estate of the late Alex Phiri and render an account before this Court as to how the Estate has been administered.*
 - b) *An order that the Respondents distribute the Estate of the late Alex Phiri to the rightful beneficiaries in accordance with the Law.*
 - c) *An order to revoke the letters of Administration in the event that the Respondents fails to render proper account of their administration of the estate of the late Alex Phiri;*
- iii) *Alternatively, should the Respondents fail to produce letters of administration;*
- i) *An order declaring the Respondents as intermeddlers in the Estate of the late Alex Phiri and subsequently;*
 - ii) *An order that the Respondents pay back to the Estate of the late Alex Phiri for all income*

that was to be distributed to the rightful beneficiaries of the estate.

- iv) An injunction to restrain the Respondents and any other person from interfering and/or depriving the Applicant in any way from benefitting from the estate of the late Alex Phiri.*
- v) Any other reliefs that the Court may consider fit.*
- vi) Costs of and incidental to this action.*

2.0 AMENDED AFFIDAVIT IN SUPPORT

- 2.1 The Summons were supported by an amended affidavit filed on 23rd August, 2023 and deposed to by the Applicant.
- 2.2 The gist of the Applicant's affidavit evidence was that she is a surviving spouse and one of the Administratrix of the estate of the late Alex Phiri the deceased herein who died on 15th January, 2023 as evidenced by the notice of death marked as "TS1"
- 2.3 The Applicant deposed that the deceased was survived by a widow herself and five children. The eldest child being

Margaret Phiri who is the other Administratrix of the deceased estate.

2.4 The Applicant stated that on 31st January, 2023 she was appointed together with the 1st Respondent as Administratrix by the Local Court for the estate of the deceased.

2.5 The Applicant stated that upon discovery that the aforementioned probate from the Local Court was not valid by reason that the estate had a higher value of more than K50.00, the family of the deceased held a meeting wherein the Applicant and the first-born daughter namely Margaret Phiri were appointed to become the Administrators of the estate in issue. Subsequently the two obtained letters of Administration from the High Court as evidenced by the Probate Letters of Administration dated 21st June, 2023 and marked as "TS2."

2.6 The Applicant deposed that the estate of the late Alex Phiri comprised of two properties namely stand number S/LUSAK/SLN_0007/1666 and stand number

S/LUSAK/SLN_0007/1683 situated in the city and province of Lusaka.

- 2.7 The Applicant further stated that the aforesaid properties were registered in both the Applicant's name and that of the deceased as shown in the letters of offer from the Ministry of Lands and Natural Resources evidenced as "TS3" and "TS4"
- 2.8 It was deposed further that after the death of the deceased the property of the estate namely S/LUSAK/SLN_0007/1666 was registered in the Applicant's names and the other namely S/LUSAK/SLN_0007/1683 was registered in the Applicant's names and in trust for the five (5) children as evidenced by the letters of offer for the two properties as marked "TS5" and "TS6" respectively.
- 2.9 The Applicant states that the 1st and 2nd Respondents are intermeddling with the estate of the deceased by collecting rentals from stand number S/LUSAK/SLN_0007/1666 without the consent or authority of the Administrators. The said property is said to earn in rentals K4,000.00 monthly rentals.

2.10 Further, that the 3rd Respondent is occupying stand number S/LUSAK/SLN_0007/1683 without consent or authority from the Administrators and that the property has potential to earn K1,500.00 in monthly rentals.

3.0 ISSUES OBSERVED

3.1 There are issues that were observed herein which I wish to comment on before I determine the Applicant's case and these are as follows;

- i) *That the Applicant had sought an interim injunction against the Respondent as stated in the amended Originating Summons. It was observed that the Applicant did not move the Court to hear the said application as a separate action. Therefore, the relief sought will be considered in main matter.*
- ii) *The second issue I wish to highlight is that on 23rd August, 2023 leave was granted to amend the Originating Summons and I had also in turn granted the Respondents leave to file their response on or before the 11th September, 2023.*

The Parties were informed that the Court will be not give any further extension of time. The matter was thereafter scheduled for hearing for the 12th October, 2023.

- iii) On the 12th October, 2023 when the matter came up for hearing, the Applicant had filed and served the Respondents the amended Originating Summons, the Affidavit in Support of the Originating Summons, Skeleton Arguments in support of the Application.*
- iv) The Applicant further filed an affidavit of service as proof of service on the 5th of October, 2023. Despite being served, the Respondents did not appear for the hearing and did not file their response either as directed.*
- v) The Court upon being satisfied that the Respondents were served and that they did not file their response, proceeded to hear the matter in their absence.*

vi) *The Applicant was allowed to give her testimony on oath and call witnesses pursuant to Order 30 rule 8 of the High Court Rules Cap 27 of the Laws of Zambia. Two witnesses were called and their testimony and the affidavit evidence have been considered herein.*

4.0 HEARING

4.1 At the hearing as stated only the Applicant appeared. Counsel for the Applicant informed the Court that the Applicant was relying on the filed documents.

4.2 The Applicant was further granted leave to give sworn evidence and call any other witness in support of the Application

5.0 SUMMARY OF THE EVIDENCE BY THE WITNESSES

5.1 The summary of the affidavit evidence and testimony by the Applicant was that upon the death of the Applicant's husband, the deceased on 15th January, 2023, she was appointed as one of the other Administratrix in relation to the estate of the deceased.

- 5.2 The estate of the deceased comprised of two properties in Lusaka namely S/LUSAK/SLN_0007/1666, and S/LUSAK/SLN_0007/1683 situated in Lusaka along Mungwi Road.
- 5.3 The Applicant stated that since the death of the deceased, the Respondents have taken over the properties aforesaid and including the matrimonial property namely S/LUSAK/SLN_0007/1683.
- 5.4 The Applicant further stated that the properties in issue where registered in the names of both the Applicant and the deceased as evidenced by the offer letters from the Ministry of Lands and Natural Resources marked as "TS3" and "TS4" collectively.
- 5.5 Further the Applicant stated that upon being appointed by the family with the daughter of the family, namely Margarete Phiri, Probate Letters of Administration were issued by the High Court marked as "TS3".
- 5.6 The Applicant stated that despite being appointed as Administratrix, the Respondents have intermeddled in the property in issue. The Respondents are said to have been

collecting rentals since the death of the deceased in January, 2023 and occupied the matrimonial home. Consequently, the Applicant informed the Court that it has been difficult for her as the Administratrix to effectively distribute the estate and that none of the children as the beneficiaries have benefitted from the properties which she and the deceased acquired before his death.

5.7 The Applicant also stated that the Respondents also got all the household goods belonging to the estate.

5.8 The Applicant prays for rentals received by the Respondents since January, 2023 so as to distribute the estate. The rentals were said to be from property namely S/LUSAK/SLN_0007/1666 of K4100.00 per month and that the 3rd Respondent has occupied property namely S/LUSAK/SLN_0007/1683 being the matrimonial house should vacate.

5.9 The summary of the evidence from the second witness namely Memory Sakala Nonde, the sister to the Applicant was that the Applicant is the surviving spouse and was appointed Administratrix of the estate of the deceased.

5.10 She stated that despite the Applicant being the Administratrix, the deceased family have not allowed her to perform her duties as one of the Administrators. The deceased family have told the Applicant that she is not entitled to the property.

5.11 The witness said that the Applicant and other beneficiaries have been deprived of rentals and or access to the properties of the estate. The Respondents have taken charge of the properties in issue situated along Mungwi Road behind Ross fuel station in George Compound of Lusaka.

5.12 The witness stated also that the estate has other beneficiaries being the five (5) children of the deceased. She informed the Court that the five (5) children are born from different mothers wherein, the Applicant only had one child with the deceased aged 5 years old. She said the eldest child was the one appointed together with the Applicant as Administratrix and she aged 19 years old.

5.13 The witness informed the Court that the deceased had two children with his divorced first wife wherein one of them is

the other Administratrix and had two (2) other children with another woman whom he did not marry. The said children live with their mothers.

5.14 Further the witness informed the Court that at the time of the deceased's death the Applicant was the surviving spouse and lives with her child.

6.0 SKELETON ARGUMENTS IN SUPPORT

6.1 The Applicant is aggrieved by the intermeddling acts of the Respondents and has relied on section 6 of the Administrator General's Act Chapter 58 of the Laws of Zambia which provides as follows;

6(1) when a person dies, whether or without Zambia, leaving property within Zambia, any person who, without being duly authorised by law, or without the authority of the Administrator-General or District Secretary ; takes possession of, causes to be moved or otherwise intermeddles with any such property, save in so far as may be urgently necessary for the preservation thereof, shall be guilty of an

offence; and any person taking any action in regard to any such property for the preservation thereof shall forthwith report particulars of the property and of the steps taken to the Administrator-General; and if he fails so to report, he shall be guilty of an offence."

- 6.2 Further Applicant submitted that the Respondents have as provided in the aforesaid provision intermeddled with the properties of the deceased estate and now seeks the indulgence of this Court to help remedy the acts by the Respondents who have continued to deprive the beneficiaries by collecting rentals and occupying the matrimonial property.
- 6.3 The Applicant submitted that she is the legally appointed Administrator together with the daughter of the deceased and the Respondents have made their work as the Administrators difficult, hence seeking the indulgence of the Court to remedy the said challenge.
- 6.4 Further, the Applicant stated that the law provides for priority beneficiaries in section 5 of the Intestate

Succession Act which speaks of the widow, children, parents to the deceased and dependents. Therefore, it was submitted that near relatives are to benefit from the deceased estate only when the priority beneficiaries are deceased or where there is no spouse and there are no children, parents or dependents. It has been stated therefore that the Respondents are near relatives and should not deprive the actual beneficiaries of what is to devolve to them.

6.5 It has been submitted that in the current situation the Respondents have deprived the rightful beneficiaries and have in fact intermeddled with the estate. The Applicant prays that she be granted the reliefs sought.

7.0 ANALYSIS AND CONSIDERATION

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

7.2 The beginning point is order 30 rule 8 of the High Court Rules Cap 27 of the laws of Zambia which provides as follows;

"In every cause or matter where any party thereto makes any application at chambers, either by way of summons or otherwise, he shall be at liberty to include in one and the same application all matters upon which he then desires the order or directions of the Court or Judge; and upon the hearing of such application it shall be lawful for the Court or Judge to make any order and give any directions relative to or consequential on the matter of such application as may be just; and such application may, if the Judge thinks fit, be adjourned from chambers into Court, or from Court into chambers."

7.3 Order 30 Rule 12(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-

“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.*

7.8 The Applicant has also stated that the estate has property being the matrimonial property being S/LUSAK/SLN_0007/1683 and the other property as S/LUSAK/SLN_0007/1666 being on rent. The said properties were said to be co-owned by the deceased and the Applicant as evidence by the letters of offer marked as

- (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."*

7.4 The aforesaid provisions cited gives this Court jurisdiction to enquire into the issues raised herein.

7.5 The prayer by the Applicant is that by virtue of the death of the deceased being her husband, she is the surviving spouse. And since the deceased died intestate she was rightly appointed as an Administratrix together with the daughter of the deceased of the estate herein. The Applicant has the duty to administer the estate in accordance with the provision of the law under section 19 of the Intestate Succession Act which provides as follows,

"TS5" and indeed, there is evidence that the deceased died intestate as evidenced by the probate letters of Administration marked as "TS3" dated 21st June, 2023.

7.9 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(d) of the Intestate Succession Act as stated by the Applicant and there is an order or priority list of beneficiaries which is as follows;

"5(d) no spouse, children or parents, or dependents the estate shall be distributed to near relatives in equal shares;"

7.10 Therefore, the Respondents being near relatives are not beneficiaries of the estate but the Applicant being a surviving spouse is entitled to benefit from the estate and has a life interest on the matrimonial property being S/LUSAK/SLN_0007/1683.

7.11 Further the Applicant as an Administratrix has the duty and responsibility to distribute the estate to other beneficiaries. The Applicant is therefore entitled to take charge of the properties of the estate.

7.12 The evidence on the record indicates that the Respondents have been getting rental for property S/LUSAK/SLN_0007/1666 and occupying property S/LUSAK/SLN_0007/1683 the matrimonial property thereby depriving the beneficiaries of the estate. The law under section 6(1) of the Administrator General's Act chapter as cited by the Applicant qualifies the Respondents as intermeddlers of the estate and can be prosecuted nevertheless I must hasten to mention that is a civil proceeding action which is determined on a balance of probabilities.

7.13 It is my considered view therefore, that in these proceedings having had established that the Respondents are only but near relatives that they are not yet in the priority order to benefit from this estate and consequently whatever benefit they have derived from the estate ought to be paid back, given back and or vacate the premises they are occupying.

7.14 The Respondents are not priority in the list of beneficiaries provided under the law and are not entitled to collect rentals and or occupy the matrimonial property as is the case herein.

7.15 Further the evidence provided by the Applicant is that the property in issue was jointly owned by the deceased and the

Applicant and that at the time the Applicant was appointed as one of Administratrix, she proceeded as one of her duties to have property No. S/LUSAK/SLN_0007/1666 registered in her name and property No. S/LUSAK/SLN_0007/1583 registered in the Applicant's name and in trust for the five (5) children as evidenced by the offer letters for the two properties marked as "TS5".

7.16 Therefore, it is my considered view that the Respondent's actions of collecting rentals from the properties in issue and occupying the other since January, 2023 is against the provisions of the law since they are not beneficiaries of the estate. I must hasten to state that their actions amount to intermeddling in an estate of the deceased. Section 5(b) of the Intestate Succession Act is instructive on who the persons recognised as beneficiaries are entitled to an estate of deceased person. The Respondents who are said to be only near relatives of the deceased are not beneficiaries in the instant case since there are others in priority of them.

7.17 The Respondents do not have a greater priority interest to benefit from the residue of the estate as compared to the

Applicant and the five (5) children. The next priority beneficiaries are the parents and defendants if any.

7.18 Given the evidence on the record it my view that only beneficiaries listed in the priority of the law are entitled and the Respondents are not. It for this reason that having established that there is no contention that the Applicant is the surviving spouse, therefore she and the children hold a greater interest of benefitting from the estate against the Respondents.

7.19 And there is also no evidence that any of the Respondents was or is an Administrator to justify the collection of rentals and or occupying the matrimonial property. Therefore, the Applicant and the daughter remain they rightful Administrators of the estate.

7.20 I also wish to state that the Applicant has failed to establish that the rentals were collected in respect of the matrimonial home save for the evidence that it was occupied by the Respondents. Consequently, the request for rentals on S/LUSAK/SLN_0007/1683 fails for that reason.

7.21 Further I wish to state that in relation to S/LUSAK/SLN_0007/1666 it devolved to the Applicant upon the death of the deceased and

she has henceforth become the sole owner of it. She has the right to deal with it as she desires as was stated in the case of *Prisca Lubunga vs. Obby Kapango & Others* that¹;

'an owner of land under a certificate of title has bestowed upon him/her a bundle of legal rights. Those rights include the right to quiet and exclusive possession, the power of control of use, enjoyment of land and the unfettered power of disposition of the land.

7.22 Having found as such, I accordingly grant the reliefs sought by the Applicant being as followings;

- i) *That Respondents are ordered in respect of property S/LUSAK/SLN_0007/1666 to stop receiving rentals and to pay back rentals received from January, 2023 to the date of the judgment upon assessment by the Registrar to the Applicant as the owner of the property.*
- ii) *The Respondents are ordered in respect of property S/LUSAK/SLN_0007/1683 to give vacant possession to the estate for the benefit*

of the Applicant and the beneficiaries of the estate within 30 days with effect from the date of the judgment.

iii) I make no order as to costs in view of the fact that the Respondents did not defend the action.

8.0 Leave to Appeal is granted

Delivered at Lusaka, this 5th day of February, 2024.

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

