

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

2024/HPF/794

**IN THE MATTER OF: ORDER 30 RULE 12 (a) (c) (g) OF THE HIGH
RULES CHAPTER 27 OF THE LAWS OF
ZAMBIA**

**IN THE MATTER OF: SECTION 6 OF THE WILLS AND
ADMINISTRATION OF THE ESTATE, ESTATES
ACT CHAPTER 60 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: THE ESTATE OF THE LATE NATHANIEL
BANDA WHO DIED INTESTATE ON 9TH
DECEMBER 1999**

**IN THE MATTER OF: SECTION 4, 19 OF THE INTESTATE
SUCCESSION ACT CHAPTER 59 OF THE LAWS
OF ZAMBIA**



**IN THE MATTER OF: AN APPLICATION FOR AN ORDER DECLARING
THAT NATHANIEL BANDA DIED INTESTATE**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER TO
PURPOTED EXECUTORS TO RENDER AN
ACCOUNT OF THE ESTATE OF THE LATE**

**IN THE MATTER OF: AN ORDER FOR DISTRIBUTION OF THE
ESTATE TO THE BENEFICIARIES**

BETWEEN:

**MASAUO BANDA (Suing as administrator of the
estate of the late Nathaniel Banda)**

APPLICANT

AND

YOTAM BANDA

1ST RESPONDENT

PATRICIA BANDA

2ND RESPONDENT

**MAUREEN BANDA
NEWTON BANDA
MULANJE BANDA**

**3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT**

Before the Honourable Mrs. Justice T.S. Musonda

For the Applicant: Mr. H.B. Hantumbu of Messrs Muleza Mwiimbu & Company

For the Applicant: Mr. D. Banda of Messrs JMP Associates

RULING

Legislation referred to:

- (1) The Supreme Court Rules (White Book), 1999 Edition**
- (2) The Limitation Act 1939**
- (3) The High Court Rules Chapter 27 of the Laws of Zambia**
- (4) The Intestate Succession Rules, 2023**
- (5) The Intestate Succession Act Chapter 59 of the Laws of Zambia**

Cases referred to:

- (1) Odile Luokombo Chelemu v. Chana Chelemu & Others, CAZ Appeal No. 294 of 2021**
- (2) Chikuta v. Chipata Rural Council, (1974) ZR 241 (SC)**
- (3) Lt. General Geojago Robert Chaswe Musengule v. Attorney General, (2009) Z.R 359**
- (4) Nicholas Longworth v. James M. Hunt and Others, (1966) QBD 128**
- (5) Sablehand Limited v. Zambia Revenue Authority, (2005) Z.R 109**
- (6) Brenda Muzyamba v. Martha Muzyamba Sinabbomba & 21 Others, SCZ Appeal No. 11 of 2019**

- (7) **Makuku Farms Limited & Another v. Richard Kalinda & Ors, CAZ Appeal No. 70 of 2020**
- (8) **Kalumba Kashiwa Mwansa & Another v. Kenneth Mpofu & Another, SCZ Appeal No. 61 of 2015**
- (9) **Hanif Mohammed Bhura v. Yusuf Ibrahim Issa Ismail, SCZ Appeal No. 146 of 2013**
- (10) **Sithole v. The State Lotteries Board, (1975) Z.R 106**
- (11) **Standard Chartered Bank Zambia PLC v. Kambindima Wotela & 164 Others, SCZ Appeal No. 1 of 2014**
- (12) **Ntombie Zibwele Siwale v. The Registrar of Lands and Deeds & Others, SCZ Appeal No. 133 of 2012**
- (13) **Stanslous Sumbulelu & Others v. Alex Sinyangwe & Another, CAZ Appeal No. 202 of 2019**
- (14) **Shadreck Bella v. Mpundu Kamwanya Bella, SCZ Appeal No. 11 of 2010**

Other works referred to:

- (1) **Halsbury's Laws of England, 4th Edition Reissue, Vol. 28**
- (2) **Black's Law Dictionary (10th deluxe ed. 2014) (Bryan A. Garner ed.)**

1. INTRODUCTION

1.1 By way of Originating Summons dated 1st October 2024, the Applicant, **Masauso Banda**, sought the following reliefs:

- (i) **An Order declaring that the purported Will of one Nathaniel Banda dated 30th March 1992 is null and void;**

- (ii) **An order for the reverse of transfer of the properties' titles of Nathaniel Banda to the 1st Respondent and Neddy Banda is null and void;**
- (iii) **An order declaring that the Respondents have been intermeddling in the estate of the late Nathaniel Banda;**
- (iv) **An order of delivery by the Respondents to the Applicant of documents of title to properties listed attached herewith situated in Eastern Province that form part of the estate;**
- (v) **An order of interim injunction restraining the Respondents from any further administering the estate of the late Nathaniel Banda pending the final hearing and or until further order of this court;**
- (vi) **An order for the Respondent to render an account of the estate from 9th December 1999 to date;**
- (vii) **An order of sale and distributions of estate to the beneficiaries;**
- (viii) **Further or other relief that the court may deem fit and proper under the circumstances; and**
- (ix) **Costs of the action herein.**

1.2 The application was supported by an affidavit and skeleton arguments.

1.3 In response, the Respondents, **Yotam Banda, Patricia Banda, Maureen Banda, Newton Banda, and Mulanje Banda**, on 22nd October 2024, filed summons seeking an order to dismiss the action for want of jurisdiction. The application was made pursuant to **Order 14A Rules 1 and 2, and Order 33 Rule 3 of the Rules of the Supreme Court of England (1999 Edition)**, as read together with **Sections 4(3), 15, and 20 of the Limitation Act, 1939.**

1.4 The application was supported by an affidavit and skeleton arguments.

1.5 The Applicant opposed the Respondents' application through an affidavit in opposition and skeleton arguments, both dated 6th February 2025.

2. THE RESPONDENTS' CASE IN SUPPORT OF THE APPLICATION

2.1 The Respondents' case, as set out in the affidavit sworn by the 1st Respondent, Yotam Banda, on behalf of the other Respondents, is summarized as follows:

2.2 The late Nathaniel Banda was known as Nathaniel Huga Banda, "the Deceased".

2.3 The deceased, whose estate is at the center of this suit, passed away on 9th December 1999. At the time of the deceased's death, the Applicant, Masauso Banda, was of majority age.

2.4 The Applicant, acting with Abishai Banda, successfully applied for and obtained Letters of Administration from the High Court at Ndola for the estate of the deceased, which were granted on 30th March 2022.

2.5 By the time the Applicant and Abishai Banda applied for Letters of Administration, it had been 23 years since the deceased's passing in 1999.

2.6 The Applicant initiated the action against the Respondents on 1st October 2024, approximately 24 years and 10 months after the deceased's death.

2.7 The Respondents assert that actions claiming a share of the deceased's estate are subject to a limitation period of twelve (12) years from the date of the deceased's death.

2.8 The Court lacks jurisdiction to hear and determine actions brought before it after the expiration of the prescribed limitation period.

- 2.9 Considering that the action is statute-barred, no prejudice will be suffered by the parties if the action is dismissed, as they had 144 months to commence the action from the date of the deceased's death. Conversely, proceeding to hear the matter would render the Court's decision invalid due to lack of jurisdiction.
- 2.10 Further, declaratory reliefs are contentious, and cannot be granted on Affidavit evidence.

3. THE APPLICANT'S CASE IN OPPOSITION

- 3.1 The Applicant's case, as set out in the opposing affidavit, is as follows:
- 3.2 The Respondents' assertions regarding the identity of the deceased and his death on 9th December 1999, at a time when the Applicant had attained the age of majority, are not in dispute.
- 3.3 Furthermore, it is not disputed that this action was commenced on 1st October 2024, 24 years, and 10 months after the deceased's demise.
- 3.4 Additionally, it is not disputed that the Applicant and his brother, Abishai Banda, applied for Letters of Administration in 2023.
- 3.5 However, the application was made following the family's discovery that the deceased's purported Will was not, in fact, a Will, and had been used by the Respondents to deprive other beneficiaries from their entitlement under the deceased's estate.
- 3.6 According to the Applicant, the 39 or more deprived children of the deceased could not have reasonably known that the Will was a fraud, as it was fraudulently obtained.
- 3.7 The Applicant conceded that he commenced an action against the Respondent on 1st October 2024. However, the said action was discontinued. Furthermore, the discontinuance of that action does not preclude the commencement of the present action.

- 3.8 Contrary to the Respondents assertions, the limitation of 12 years is applicable to claims made against the estate by third parties.
- 3.9 In this case, the beneficiaries, including the Applicant, only discovered the fraud and illegality perpetrated by the Respondents in 2022. Upon discovery, they promptly took steps by applying for Letters of Administration, which was subsequently granted by the High Court.
- 3.10 Furthermore, the Applicant contends that there is no time bar regarding rendering of accounts, management, or distribution of the deceased's estate. The Respondents' contrary assertion on this issue is a misdirection.
- 3.11 Additionally, contrary to the Respondents assertion, this Court has jurisdiction to hear and determine the main matter, as the relevant time only began to run from the time of discovery of the alleged fraud and illegality on the part of the Respondents.
- 3.12 The parties will be prejudiced if the matter is dismissed, considering that 39 or more children of the deceased and beneficiaries have not received their share of the estate to date.
- 3.13 The Applicant further asserts that the Respondents exclusively shared the estate among themselves, to the detriment of other beneficiaries. This is another reason why the dismissal of the main matter will highly prejudice the Applicant and other children of the deceased, depriving them of their rightful inheritance.
- 3.14 The Applicant asserts that the process is not contentious, as he has presented evidence demonstrating that the document used by the 1st Respondent, Yotam Banda, in defrauding beneficiaries, purporting to be the deceased's Will is invalid.
- 3.15 Considering that the 1st Respondent conceded that the estate has been administered the estate based on a document that is not a valid

Will, an account must be rendered to the beneficiaries for the entire duration of their administration of the deceased's estate.

4. THE RESPONDENTS' SKELETON ARGUMENTS IN SUPPORT OF THE APPLICATION

- 4.1 It was argued that the action's viability is contested due to its staleness, citing **Sections 4(3), 15, and 20** of the Limitation Act 1939.
- 4.2 Based on the above provisions, it was argued that the Applicant being of majority age at the time of the deceased's passing, he had a 12-year window to bring claims from 9th December 1999. This window closed on 8th December 2011, rendering the action commenced in 2024 time barred.
- 4.3 The Applicant, as a beneficiary, had ample opportunity to commence the action in a timely manner and cannot claim ignorance or excuse for failing to do so. Since the action was brought after the prescribed period, it is statute-barred, depriving the Court of jurisdiction. Therefore, the action should be dismissed with costs awarded to the Respondents.
- 4.4 It was further contended that the Applicant's delay in bringing the action constitutes acquiescence, providing an additional basis for dismissal, alongside the action being statute-barred. **Halsbury's Laws of England, 4th Edition Reissue, Vol. 28 paragraph 607** was cited in support of the submission.
- 4.5 The case of **Odile Luokombo Chelemu v. Chana Chelemu & Others (1)** was cited, where the Court held that actions claiming rights in the estate of the deceased must be brought within twelve years from the time the right of action accrued. Further, **Section 15** of the Limitation Act was relied upon, emphasizing that the right to action accrues immediately after the deceased's demise.

- 4.6 It was additionally contended that the matter, concerning the administration of the deceased's estate, should have been commenced by originating summons under **Order 30 Rule 12** of the High Court Rules. However, the claims in this matter cannot be properly determined through Affidavit evidence. The case of **Chikuta v Chipata Rural Council (2)** was cited, emphasizing that the mode of commencement affects jurisdiction. It was argued that a trial judge lacks jurisdiction to grant declaratory reliefs in a matter commenced by originating summons when it should have been commenced by writ of summons.
- 4.7 Furthermore, even if the matter were brought within time, the declaratory relief sought by the Applicant could not be granted due to the improper mode of commencement. The case of **Lt. General Geojago Robert Chaswe Musengule v. Attorney General (3)** was cited, where Justice Mwanamwambwa, as he then was, emphasized that the Court will not pass a declaratory judgment casually, lightly, or easily. He further stated that the declaratory relief should be granted for good cause, on proper principles and considerations.
- 4.8 It was contended in conclusion that before the declaratory relief is granted, the Court ought to vet the evidence after robust tests which is only tenable after conducting a trial. In accordance with **Order 30** of the High Court Rules, matters commenced by originating summons are disposed of in chambers on affidavit evidence, therefore trial cannot be had to test the veracity of the evidence.
- 4.9 In conclusion, the Court was urged to dismiss the matter for being stale, and the Applicant be condemned to costs.

5. THE APPLICANT'S SKELETON ARGUMENTS IN OPPOSITION TO THE APPLICATION

- 5.1 It was argued that the call for administrators to render an account cannot be statute-barred, as it is a fundamental duty of administrators to account for the estate to beneficiaries when called upon. **Section 19 (1)** of the Intestate Succession Act, Chapter 59 of the Laws of Zambia, was cited, which mandates administrators to render an account to the court, highlighting the ongoing nature of this responsibility.
- 5.2 It was contended that the 1st Respondent fraudulently assumed control of the deceased's estate, claiming to be the appointed administrator. However, he has failed to render an account or produce an inventory of the estate.
- 5.3 Furthermore, the 1st Respondent engaged in selling several estate properties without the beneficiaries' consent or Court's authority.
- 5.4 This was contrary to **Section 19(2)** of the Intestate Succession Act, which requires prior authority of Court for such transactions.
- 5.5 It was argued that the 1st Respondent's actions were unlawful and intended to deprive beneficiaries of their rightful shares.
- 5.6 Furthermore, citing **Section 43(2)** of the Intestate Succession Act, it was argued that the letters of administration relied upon by the Respondents, issued by Local Court are null and void because the estate's value exceeds fifty kwacha, exceeding the Local Court's jurisdiction.
- 5.7 The deceased's estate, accordingly, had no valid administrators until the discovery of the fraudulent misrepresentation by the Respondent regarding the purported Will.

- 5.8 The Respondents were intermeddlers who acted without lawful authority, and as such, they should render an account of the estate's administration.
- 5.9 It was contended that dismissing the matter would legitimize illegality and perpetuate injustice against the estate and its beneficiaries.
- 5.10 The Court was urged to exercise its authority to order the intermeddlers to render an account of the deceased's estate. It was re-emphasized that there is no statutory time limit for administrators to render such an account.
- 5.11 On whether this matter is statute barred, it was submitted that it is not in dispute that the deceased died 23 years ago, and that his estate was being administered by the 1st Respondent and Neddy Banda purportedly under a Will (exhibit "MB5").
- 5.12 Reference was made to **Section 4 (3)** of the Limitation Act 1939, which provides that, no action shall be brought by any person to recover land after the expiration twelve years from the date on which the right accrued to him, or if it first accrued to some person through whom he claims to that person.
- 5.13 It was submitted that the notes further guide that, the period of limitation specified in the part were the above provision falls, are subject to the provisions of **Part II** of the Act, which provide for an extension of time in terms of disability, acknowledgement, part payment, fraud, or mistake.
- 5.14 It was submitted that **Section 26 (c), Part II** of the Act states that:

Where, in the case for any action for which a period of limitation is prescribed by this Act, either-

(c) the action is for relief from the consequence of a mistake.

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable due diligence have discovered it.

- 5.15 The case of **Nicholas Longworth v. James M. Hunt and others (4)** was cited, wherein it was held that in equitable proceedings seeking relief based on fraud, the lapse of time, though governed by equitable principles, is applied in analogy to statutory limitation. Accordingly, time begins to run not from the occurrence of the fraud, but from the moment it is discovered.
- 5.16 Based on the foregoing, the basis of administration of the deceased's estate by the 1st Respondent was the Will which is fraudulent and an illegality.
- 5.17 Further, **Order 18/8(1)** of the Rules of the Supreme Court, was cited which provides that, a party must in any pleading subsequent to the statement of claim plead specifically any matter, for example the expiry of any relevant period of limitation, fraud or any fact showing illegality.
- 5.18 In this case, the Applicant had successfully demonstrated illegality and fraud on the part of the Respondents.
- 5.19 The Limitation Act 1939 is inapplicable due to the discovery of the fake Will in 2022, which marked the starting point for the limitation period.
- 5.20 It was reiterated that the Applicant and 39 other children were deprived of their rightful entitlement based on a falsified document.

- 5.21 The 1st Respondents' and Neddy Banda's actions were fraudulent and illegal, falling within exceptions to the statute of limitations computation.
- 5.22 Accordingly, entertaining the Respondents' application would perpetuate their illegality, to the detriment of beneficiaries.
- 5.23 Considering the foregoing, the Applicant had demonstrated fraud and illegality in the Respondents' management of the estate, unlawfully denying other beneficiaries their rightful shares. Under the circumstances, lay persons lacked technical expertise to ascertain the purported Will's validity.
- 5.24 Ultimately, it was submitted that the present application lacks merit and should be dismissed with costs.

6. THE HEARING

- 6.1 Counsel for the Respondents further argued that the originating process, including the endorsement and supporting affidavit, lacked specific pleadings of fraud. It was contended that the Applicant's awareness of the Will and the 1st Respondent's administration together with the late Neddy Banda, afforded him a 12-year window to initiate the action, which he failed to do. It was argued that the allegations of fraud, not having been pleaded in the first place, were an afterthought and could not be raised at this stage.
- 6.2 Counsel cited the case of **Sablehand Limited v. Zambia Revenue Authority (5)**, where the Supreme Court held that fraud must be clearly and distinctly alleged in proceedings. Considering that the originating process lacked specific allegations of fraud, and fraud cannot be inferred or implied.
- 6.3 Counsel reiterated that the main matter was statute-barred, due to the expiration of the limitation period. Consequently, the Court lacks jurisdiction to hear it, warranting dismissal.

- 6.4 In response, Counsel for the Applicant highlighted two key exceptions to the Limitation Act 1939, fraud and illegality.
- 6.5 Counsel emphasized that the Applicant's reliefs include seeking an interpretation of the purported Will, which formed the basis of the 1st Respondent's administration of the deceased's estate.
- 6.6 It was argued that the skeleton arguments and affidavit in support of the originating summons, sufficiently demonstrate discrepancies in the purported Will. Notably the difference between the signature on the Will and the deceased's National Registration Card (NRC), raising questions about the Will's authenticity.
- 6.7 Furthermore, while the Applicant and other beneficiaries were aware of the Will's existence, as laypersons, they could not verify its authenticity.
- 6.8 Counsel urged the Court to dismiss the Respondents' application, and instead order the 1st Respondent to render an account of the deceased's estate.
- 6.9 In response, Counsel for the Respondent argued that the issue regarding the different signatures, on the Will and NRC, was merely an opinion without basis, as no expert report from a handwriting specialist was provided.
- 6.10 It was emphasized that determining the validity of a Will is the prerogative of a competent Court, not Counsel. Furthermore, there was no evidence to show that the alleged unopposed application for letters of administration, was brought to the 1st Respondent's attention.
- 6.11 Counsel reiterated that the matter was statute-barred, emphasizing that the Applicant's delay in bringing the action was fatal. Consequently, the Court lacks jurisdiction to hear the matter due to the expiration of the limitation period.

6.12 Furthermore, the Applicant's failure to act within the prescribed time frame cannot be attributed to anyone else, and the Court should dismiss the matter accordingly.

7. ISSUES FOR DETERMINATION

7.1 Having considered the rival affidavits, skeleton arguments and oral submissions, there are two issues for determination:

- (i) Whether the Applicants' action should be dismissed for want of jurisdiction on account of being statute barred.
- (ii) Whether the Applicants' action is properly before Court having been commenced by originating summons.

8. ANALYSIS AND DETERMINATION

Issue 1: Whether the Applicants' action should be dismissed for want of jurisdiction on account of being statute barred

8.1 I have considered the rival submissions under this head. The starting point is consideration of **Section 4 (3), 15, and 20** of the Limitation Act 1939, on which the Respondents' application is anchored. The provisions state:

4. Limitations of actions to recover land:-

(3) No action shall be brought by any other person to recover any land after expiration of twelve years from the date on which the right of action accrued to him or, if it is accrued to some person through whom he claims to that person.

15. Administration to date back to death. For purposes of the provision of this Act relating to actions for recovery of land and advowsons an administrator of the estate of

the deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased and the grant of letters of administration.

20. Limitations of actions claiming personal estates of the deceased person.

Subject to the provision of subsection 1 of the last foregoing section no action in respect of any claim to the personal estate of a deceased person or any share or interest shall be brought after expiration of twelve years from the date when the right to recover the share or interest accrued and no action to recover arrears shall be brought after the expiration of six years from the date on which interest became due.

- 8.2 It is certain from the rival submissions that there is no dispute that the deceased passed away on 9th December 1999, and the Applicant commenced his action on 1st October 2024. Therefore, a period of 24 years and approximately 10 months had lapsed since the deceased's death.
- 8.3 It is not in dispute as per **Section 20** of the Limitation Act 1939, that no action in respect of any claim to the personal estate of a deceased person or any share or interest shall be brought after expiration of twelve years from the date when the right to recover the share or interest accrued.
- 8.4 Notably, **Section 20** is subject to **Section 19 (1)** of the Act. It is therefore not a stand-alone provision. **Section 19 (1)** provides as follows:

19. Limitation of actions in respect of trust property

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action-

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

- 8.5 In **Brenda Muzyamba v. Martha Muzyamba Sinabbomba & 21 Others (6)**, the Supreme Court considered the applicability of **Section 20** of the Limitation Act, 1939, which had formed the basis of the trial court's dismissal of the Appellants' action.
- 8.6 The Supreme Court affirmed that actions claiming personal estate are barred only after twelve years.
- 8.7 The Court of Appeal in **Makuku Farms Limited & Another v. Richard Kalinda & Ors (7)** clarified that 'personal estate' means 'movable property'.
- 8.8 In **Brenda Muzyamba**, the Supreme Court provided guidance that, in the case before it, a defence having been raised under **Section 20** of the Limitation Act, 1939, the trial judge had a duty to consider the plea of fraud and to determine whether **Section 19(1)** applied, in light of the allegations of fraud and fraudulent breach of trust.
- 8.9 As guided in the **Brenda Muzyamba** case, **Section 20** of the Limitation Act, 1939, holds personal representatives subject to the same restrictions in claiming the protection of the statute as formerly applied to express trustees. These restrictions now extend,

under **Sections 19(1)** and **31(1)**, to all trustees. The Supreme Court also affirmed that paragraph 1148 of Halsbury's Laws of England confirms that, for the purposes of the Limitation Act, personal representatives are deemed trustees.

- 8.10 I note that **Section 19(1)** of the Limitation Act, 1939, was not expressly cited in the parties' submissions. However, the Applicant has pleaded fraud in relation to the administration of the deceased's estate, acting under the purported invalid Will.
- 8.11 I also recognize that **Section 4(3)**, provides that no person may bring an action to recover land after the expiration of twelve years.
- 8.12 As correctly argued on behalf of the Applicant, the notes under **Part I**, including **Section 4**, make clear that the limitation periods therein are subject to the provisions of **Part II** of the Act, which allow for extension in cases of disability, acknowledgement, part payment, fraud, or mistake.
- 8.13 I also recognize **Section 26** of the Act, which provides for postponement of limitation period in cases based on fraud and mistake. In such cases, the period of limitation shall not begin to run until the discovery of the fraud or mistake.
- 8.14 Therefore, to resolve the dispute between the parties at this preliminary stage, I must scrutinize the originating process.
- 8.15 Specifically, I will examine the Applicant's affidavit in support of the originating summons, together with the originating summons itself, to determine whether fraud has been sufficiently pleaded, as contended by the Applicant, or not, as submitted by the Respondents.
- 8.16 The starting point is the commentary found in notes **18/8/16** and **18/12/18** under **Order 18** of the Rules of the Supreme Court. These

notes provide guidance on the manner in which fraud must be pleaded. The relevant portions are as follows:

Order 18/8/16-

.....Any charge of fraud or misrepresentation must be pleaded with the utmost particularity....

Order 18/12/18-

...Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from facts.

8.17 The explanatory notes referred to above require that fraud be pleaded with utmost clarity and distinctiveness. This position finds support in **Sablehand Limited** (supra), where the Supreme Court held that:

Where fraud is an issue in the proceedings, then a party wishing to rely on it must ensure that it is clearly and distinctly alleged.

8.18 In the present case, the Respondents maintained that the Applicant has not pleaded fraud in the originating process.

8.19 However, paragraph 10 and 11 of the Applicant's Affidavit in Support of Originating Summons is couched as shown below:

(10) That the signature on the purported Will of the deceased and the one on his National Registration Card are different. Now produced and shown to me marked "MB6" true copy of the NRC for Nathaniel Banda.

(11) That I am reliably informed by my Advocates on which I believe to be true that the purported will is fake/otherwise does not qualify to be called a Will.

- 8.20 I note that the word "fraud" is not explicitly mentioned in the aforementioned paragraphs or elsewhere in the originating process.
- 8.21 The Supreme Court of Zambia in **Kalumba Kashiwa Mwansa & another v. Kenneth Mpofu & Another (8)** on page J. 36 said the following:

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.

- 8.22 Consequently, my interpretation is that the absence of the explicit term "fraud" in the pleadings does not preclude consideration of a fraud allegation, provided there are sufficient and distinct facts disclosed by a party that indicate fraudulent conduct by another party. I am also guided by the Supreme Court decision in **Hanif Mohammed Bhura v. Yusuf Ibrahim Issa Ismail (9)** where the Court on page J. 18 held:

Again, we wish to emphasize that the Nkongolo case and the case in casu should not be interpreted to mean that fraud should not be specifically pleaded as required by the rules. Our view is that in specific cases, depending on the peculiar facts of the case, a court cannot ignore the glaring face of fraud or corruption simply because fraud has not been specifically pleaded.

- 8.23 In light of the authorities cited above and the affidavit evidence referred to in paragraph 4.24, I am of the considered view that paragraphs 10 and 11 of the Applicant's affidavit in support of originating summons adequately raise an allegation of fraud. The specific assertion that the signatures on the purported Will and the deceased's NRC are dissimilar, coupled with the claim that the Will is allegedly fake, discloses sufficient and distinct facts indicative of fraudulent conduct.
- 8.24 The Respondents further argue that the Applicant's assertion regarding the difference in signatures on the deceased's NRC and the Will constitutes a mere opinion, as no expert handwriting report was annexed to the Affidavit in Support of Originating Summons to substantiate the claim.
- 8.25 The **Black's Law Dictionary (10th delux ed. 2014, Brayn A. Garner, ed.)** at page 1339, defines the term 'plead' among others, to mean, to make to assert or allege in a pleading. Further, on page 90 it defines the word 'allegation', as:

(1) A declaration that something is true, esp., a statement, not yet proved, that someone has done something wrong or illegal.

(2) Something declared or asserted as a matter fact, esp. in legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved.

8.26 Drawing from the above definition of an allegation, I note that an allegation of fraud in pleadings does not require proof to the requisite standard at the pleading stage as referred to in **Sithole v. The State Lotteries Board (10)**, among others. This view is supported by the Supreme Court's decision in **Standard Chartered Bank Zambia PLC v. Kambindima Wotela & 164 others, (11)** where the Court said the following on page J. 21:

To start with, we wish to state that at the stage that this case reached in the Court below, the Respondent could not have been expected to have proved their allegation of fraud to the required standard....

8.27 I find that the Respondents' argument, that the Applicant's allegation of fraud is a mere opinion due to the absence of an expert handwriting report, is premature and not ripe for consideration at this stage. Similarly, I make no finding on the Applicant's challenge to the validity of the 1st Respondent's letters of administration. That issue, along with others concerning the administration of the estate, will be addressed in the main action.

8.28 In the circumstances, I find that the Respondents' argument that the Applicant's case is statute-barred, is without merit. The originating process discloses allegations of fraud which, would bring the matter within the statutory exceptions to limitation under **Section 19(1)**, relating to fraudulent breach of trust, and **Section 4(3)**, read with **Part II** of the Limitation Act, 1939. I am therefore satisfied that the Applicant has adequately pleaded fraud, and the matter cannot be dismissed at this preliminary stage. The Respondents' application is accordingly dismissed.

Issue 2: Whether the Applicants' action is properly before Court having been commenced by originating summons

- 8.29 The Respondents contended that the trial Judge lacks jurisdiction to grant declaratory reliefs in proceedings commenced by originating summons, particularly where the nature of the dispute requires resolution through a full trial. They relied on the case of **Lt. General Geojago Robert Chaswe Musengule** (supra), which underscored the need for caution in granting declaratory judgments, emphasizing that such reliefs should not be granted casually, lightly, or easily.
- 8.30 It was further argued that declaratory reliefs require thorough testing of evidence, rendering the originating summons procedure inappropriate in the circumstances.
- 8.31 The Applicant did not respond to this procedural objection in the skeleton arguments in opposition.
- 8.32 As correctly argued in the Respondent's skeleton arguments and oral submissions by Counsel, **Order 30 Rule 12** of the High Court Rules, grants the Court authority to determine any questions or matters arising during the administration of a deceased's person estate. It is further not disputed that matters under the ambit of **Order 30 Rule 12** are commenced by originating summons.

- 8.33 In the present case, upon reviewing the Applicant's originating summons, it is without a shred of doubt that the Applicant seeks declaratory reliefs against the Respondents, among other claims.
- 8.34 Given the contentious nature of the dispute, particularly the serious allegations of fraud and illegality raised by the Applicant, the suitability of the originating summons procedure is properly called into question.
- 8.35 In **Ntombie Zibwele Siwale v. The Registrar of Lands and Deeds & Others (12)** the Supreme Court in relation to 'contentious claims' said the following on page J. 24:

We must make it plain that in cases that are highly contentious such as this one, where serious allegations of fraud, forgery, corruption and collusion are made, the standard practice and procedure is that the matter should be commenced by writ of summons.

It is improper to commence a highly contentious case by originating summons.

In view of the fact that this case is highly contentious, it was wrong for the appellant to commence it by originating summons.

- 8.36 Similarly, the Court of Appeal in **Stanslous Sumbulelu & Others v. Alex Sinyangwe & Another (13)** on page J. 24 para. 10.8 and 10.9, held that:

Originating summons is used when it is required by a statute and the cause of action is concerned with matters of law and where there is unlikely to be any substantial

dispute of facts. Therefore, originating summons should not be used if there disputes of facts.

The claim for a declaratory order was misplaced as it is trite law that one can only claim a declaration by writ of summons.

- 8.37 In light of the contentious nature of the case and the serious allegations raised, I agree with the Respondents' submission that the Applicant ought to have commenced the matter by writ of summons. This position also is supported by **Rule 22** of the Intestate Succession Rules, Statutory Instrument No. 38 of 2023, which provides that where a dispute involves contentious issues, the appropriate procedure is by writ of summons accompanied by a statement of claim.
- 8.38 The next question is what should happen to the originating summons, given my finding that the matter ought to have been commenced by writ.
- 8.39 Guidance is found in **Order 28 Rule 8** the Rules of the Supreme Court, which provides that:

8 (1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

(2) Where the Court decides to make such an order, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7 (1) as requires parties to serve a notice specifying the orders and directions which they require and with any other necessary modifications, apply as if there had been a summons for directions in the proceedings and that order were one of the orders to be made thereon.

(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

(4) Any reference in these rules to an action begun by writ shall, unless the context otherwise requires, be construed as including a reference to a cause or matter proceedings in which are ordered under this rule to continue as if the cause or matter has been so begun.

- 8.40 From the foregoing provision, it is evident that the Court has discretion to deem a matter commenced by originating summons as if it had been initiated by writ of summons.
- 8.41 Furthermore, the Supreme Court in **Shadreck Bella v. Mpundu Kamwanya Bella (14)** emphasized that **Order 30 Rule 8** of the High Court Rules, gives the Court discretionary power to decide whether to adjourn a matter from chambers into open court.
- 8.42 Drawing from **Order 28 Rule 8** of the Rules of the Supreme Court and **Order 30 Rule 8** of the High Court Rules, I am satisfied that this is a matter in which I should exercise discretion to direct that it proceeds as though commenced by writ of summons.
- 8.43 This approach is further supported by the decision in **Stanslous Sumbulelu** (supra), where the Court of Appeal endorsed a similar

exercise of discretion. At page J.26, paragraph 10.12, the Court stated:

The lower Court is mandated by law to take control of the proceedings. Since the matter was contentious, the learned trial judge should have simply made an order to deal with the case as though it were commenced by writ....

9. CONCLUSION

9.1 Considering the foregoing, and for avoidance of doubt, I issue the following orders:

- (i) **The Respondents' application to dismiss the Applicant's action for want of jurisdiction, on account of being statute-barred, is hereby dismissed.**
- (ii) **This matter shall proceed as though it were commenced by writ of summons.**
- (iii) **The matter shall be set down for issuance of an order for directions on 22nd September 2025 at 12:45 hours.**
- (iv) **In the circumstances, and considering that this is a family matter, each party shall bear their own costs.**
- (v) **Leave to appeal is hereby granted.**

DATED THIS 5TH DAY OF SEPTEMBER 2025



T.S. MUSONDA
HIGH COURT JUDGE

