

GT

IN THE COURT OF APPEAL FOR ZAMBIA CAZ Appeal No. 160/2019
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **THE ESTATE OF THE LATE PASCAL CHISHIMBA**

AND

IN THE MATTER OF: **AN APPLICATION FOR AN ACCOUNT AND THE
DISTRIBUTION OF THE ESTATE**

AND

IN THE MATTER OF: **THE INTESTATE SUCCESSION ACT CAP 59 OF THE
LAWS OF ZAMBIA**

B E T W E E N :

FREDDY CHISHIMBA (Sued as administrator of the estate
of the late PASCAL CHISHIMBA)

APPELLANT

AND

PASCAL CHISHIMBA JUNIOR (Suing by his Mother and
Next friend VIVIAN MULONDA.

1ST RESPONDENT

MUTALE MABVUTO CHISHIMBA

2ND RESPONDENT

CORAM : Kondolo, Chishimba and Mulongoti, JJA
17th November, 2020 and 22nd January, 2021

For the Appellant : Messrs Patrick Kasonde & Co.

For the Respondents : Mr. E. Sichone National Legal Aid Clinic for Women

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. Mweempe v. Attorney General & Others (2012) Vol. 12
2. Zulu v Avondale Housing Project Limited (1982) ZR 172.
3. Monica Siakondo (suing in her capacity as administrator of the late Edith Siakondo) v. Fredrick Ndenga (2005) ZR 22

4. Clement H. Mweempe v. Attorneys General and Others 2012 vol ZLR
5. Mohammed v. Attorney General 1982 ZR
6. James Chungu v. Nyokasi Chitaya, Chibombo District Council & The Attorney General CAZ Appeal No. 14 of 2017

LEGISLATION AND OTHER WORKS REFERRED TO:

1. The Intestate Succession Act, Chapter 59 of the Laws of Zambia

1.0 INTRODUCTION

- 1.1 This is an appeal arising from a Judgment of the High Court delivered by Justice Y. Chembe sitting at Ndola.

2.0 FACTUAL BACKGROUND

- 2.1 The brief facts of the matter are as follows; the respondents commenced an action against the appellant seeking the following reliefs namely that;

(a) The appellant be ordered to account for the monies received on behalf of the estate of the deceased.

(b) The appellant distributes the estate to the beneficiaries in accordance with the Intestate Succession Act.

(c) The appellant be ordered to transfer House No. 9 Ndola Road and House No. 47 Francis Mukuka Road.

- 2.2 In the affidavit in support of the Originating Notice of Motion, the 2nd respondent a son of the late Pascal Chishimba, deposed that the appellant was appointed as administrator of the estate of his deceased father. Despite the administrator receiving the

sum of ZMW58, 000.00 from the deceased's employers, the administrator had not distributed the money to the beneficiaries and the 2nd respondent had not received any benefit from his late father's estate. A mere sum of ZMW3,000.00 was given to Mercy Chishimba, his step sister from the said sum of K58, 000.00.

2.3 It was stated that the appellant was in possession of all of the deceased's properties including all household goods on the pretext of disposing of them and then distributing the money to the beneficiaries. Hence the claim to the court for an order that the administrator transfers the two properties belonging to deceased to the beneficiaries, namely House No. 9 Ndola Road and House No. 47, Francis Mukuku Road.

2.4 The 1st appellant a minor was represented by his mother (next of kin/ friend), who swore an affidavit on his behalf. She stated that she bore a son with the deceased who was entitled to benefit from the estate of the late Pascal Chishimba. The administrator had agreed to make provision for the child and that the only issue was the amount to be given. The 1st appellant produced the birth record of her son as proof that he was an entitled beneficiary.

- 2.5 At trial the respondents called 3 witnesses. PW1 was the 1st Respondent's mother. She testified that she co-habited with the deceased between 1994 and 1999 and the deceased had paid her family bride price. The 1st Respondent was born in 1998 and that the deceased died intestate on 31st May, 1999.
- 2.6 She stated that the appellant, an administrator, took all of the deceased's household goods leaving only a few items. When she attempted to withdraw money from an account jointly held with the deceased, she discovered that the appellant, in his capacity as administrator, had seized control of the account. Discussions held with the deceased's family did not yield any fruit.
- 2.7 PW1 testified further that the late Pascal Chishimba had 3 other children apart from the 1st appellant. In addition, that the said Pascal Chishimba owned two properties, one was sold by the owner/vendor of the plot to recover an outstanding balance on the property. The other house was offered by the deceased's employer, for sale to the administrator who refused/declined to purchase it. She went on to state that the appellant received repatriation allowance and other benefits as well as the sum of ZMW6000.00 from the deceased's employers.

- 2.8 PW1 maintained that her child did not receive any share from the estate of his late father. She however conceded that the deceased's employers had given her the sum of ZMW1400.00 after she had requested for financial assistance from them.
- 2.9 Simon Chibuye (PW2) testified that the late Pascal Chishimba had given him the bride price money to pay on his behalf to Vivian Mulonda's parents. He confirmed that he did indeed pay her parents accordingly. He further confirmed that the 1st Respondent is the deceased's child.
- 2.10 Michael Mulenga, (PW3) the deceased's nephew testified before the court that he often visited his late uncle Pascal Chishimba on several occasions. The 1st respondent's mother was residing with Pascal Chishimba. His uncle had informed him that he had intended to marry the 1st Respondent's mother. He added that a child was born to the couple named Pascal Chishimba JR.

3.0 **DECISION OF THE LOWER COURT**

- 3.1 The court below held that Pascal Chishimba died intestate on 31st of May 1999. The court found that there was sufficient

evidence before her showing that the 1st appellant was a child of the deceased. She relied on the birth certificate on record and the evidence of PW3, a relative of the deceased. The court further held that, Pascal Chishimba Junior was a bona fide beneficiary of his father's estate.

3.2 The lower court found as a fact that the appellant had received the deceased's benefits in excess of ZMW55, 000.000. The court further found that there was no evidence that the estate was distributed to the Respondents at all. The lower court further found that the deceased did not in fact own any houses and dismissed the claim by the respondents that the house's 9 Ndola Road and No. 47 Francis Mukuka Road should be transferred to the beneficiaries.

3.3 The court stated that under **Section 19 of the Intestate Succession Act**, an administrator is mandated to account for the estate if an interested party so requested. The court below consequently, ordered the appellant to provide a full inventory on oath of the entire estate of Pascal Chishimba and to render an account within 60 days. The court further ordered that the estate be distributed to the beneficiaries including the 1st appellant in accordance with the **Intestate Succession Act**.

4.0 **GROUND OF APPEAL**

4.1 The appellant being dissatisfied with the decision of the lower court raised the following grounds of appeal namely that;

- (i) The learned trial Judge erred in law and in fact by making an Order that the estate of the late PASCAL CHISHIMBA be distributed among the beneficiaries including the 1st Applicant (Pascal Chishimba Jr) without any medical evidence to prove that the said Pascal Chishimba Jr was indeed the son to the late Pascal Chishimba and therefore a beneficiary to the estate. The Court further erred by ordering that the appellant should render an account of the estate without actually proving the 1st respondent's interest in the estate.*
- (ii) The trial Court erred in law and fact by relying on the evidence of purported cohabitation between the deceased and the 1st respondent's mother as proof of the 1st respondent's paternity, and thereby erroneously declaring him a beneficiary to the deceased's estate against the weight of evidence.*
- (ii) The trial Court erred in law and fact when she rejected the appellant's plea that the matter of paternity between the 1st respondent and the appellant be settled using scientific method of DNA testing as the only way to prove the 1st respondent's paternity. Instead the Court angrily chased the appellant out of Court and refused to hear his submissions.*

5.0 **HEADS OF ARGUMENTS BY THE PARTIES**

5.1 The appellant filed into court heads of arguments dated 30th August, 2019. It was contended that the lower court erred when

she proceeded to hold that the 1st respondent was the deceased's child without a DNA test ascertaining paternity. That the court should have allowed the application by the appellant to conduct a DNA test to scientifically prove whether the alleged child was the late Pascal Chishimba's son.

5.2 It was argued that contrary to the lower court's averments, the appellant had explained that his Counsel had been indisposed and could therefore not attend court when the matter came up. Instead the Court rejected the explanation and stated that he had opted to walk away from the court room insisting on a DNA test to be conducted and that no reasons were availed for the absence of this lawyer. It was submitted that the appellant had no reason to believe or disbelieve the 1st respondent as he did not know her or the child. Therefore, only a DNA test would have been conclusive regarding the paternity of the 1st respondent.

5.3 The appellant contended that his insistence on conducting a DNA test infuriated the lower court. Police Officers were called to court premises. That a complaint was subsequently made to the Judicial Complaints Authority. The court below did not record what truly transpired on the date scheduled for trial.

- 5.4 It was further contended that only a DNA test would have conclusively proved the paternity of the 1st respondent. That cohabitation is not proof that the 1st respondent was the deceased's child. In addition, that Vivian Mulonda lied both in the Local Court and the Magistrate Court that she was the deceased's widow. We were referred to submissions made by Mrs. Kunda, then Counsel for the appellant, in the Subordinate Court. The said proceedings appear at page 30 of the record of appeal.
- 5.5 The appellant argued that the issue of the child was never raised in the Local Court or the Subordinate Court. That the 2nd respondent only raised the issue of the child after her claims to entitlement as a widow had failed. This was contended to be a mere afterthought.
- 5.6 The appellant argued that the 1st respondent had raised falsehoods in the Local Court as well as the Subordinate Court. The arguments were equally raised in the lower court. The appellant submitted that he would recognize the 1st respondent as the deceased's child provided he is scientifically proven by DNA test to be a biological child of the deceased.

5.7 The appellant submits that failure of a defence does not entitle a plaintiff to automatically succeed in a case. We were referred to the holding of the court in ***Mweempe v. Attorney General & Others*** ⁽¹⁾ in support of this argument. The mere fact that the appellant did not file an affidavit in opposition did not entitle the respondents to judgment in their favor. The court needed to seriously consider the issue whether without a DNA test, the issue of paternity could be resolved. Consequently, the child's interest and entitlement to the estate had not been proved, and the court below should not to have declared him a beneficiary of the estate in issue. We were urged to make an order that a DNA test be conducted to prove paternity.

5.8 The appellant reiterated that the record of proceedings in the court below did not capture what had transpired at trial when he was asked to leave the court room. Further, the appellant maintained that he would be willing to pay the 1st respondent his dues once it is proved via DNA testing that he is the deceased's child. In addition, that it is only after a DNA test is carried out that an account regarding the estate of the deceased would be rendered to the 1st respondent.

- 5.9 It was submitted, that should the DNA test prove that the late Pascal Chishimba is not the deceased's child, he would painfully have to refund the sum of ZMW1400.00 that he obtained from the deceased's employers. We were urged to uphold the appeal.
- 5.10 The 1st respondent in her heads of arguments dated 12th November 2020, submitted that the respondent in its writ of summons and statement of claim pleaded the claims for rendering of an account and distribution of the estate, to the beneficiaries contrary to the contentions by the appellant. The arguments therein are misconceived, as the court did determine all the issues in dispute as held in the ***Zulu v Avondale Housing Project Limited*** ⁽²⁾.
- 5.11 As regards the administration of estates of persons who die intestate, the case of ***Monica Siakondo (suing in her capacity as administrator of the late Edith Siakondo) v. Fredrick Ndenga*** ⁽³⁾, was cited where the court stated that such estates ought to be administered under the provisions of the **Intestate Succession Act Chapter 59 of the Laws of Zambia**.
- 5.12 As regards the duties and powers of an administrator, **Section 19 (1) (c) (i) and (ii)** of the said act was cited which includes the

rendering of an account of the administration of the estate. It was therefore argued that the lower court was on firm ground in ordering that an account be rendered of the deceased's estate. It is contended that the arguments by the appellant that they ought to have been proof of the 1st respondent's interest in the estate before making the order to render an account is a gross misconception.

5.13 In response to grounds two and three, it is submitted that the respondent was recognized as a widow at the funeral and there is proof by way of birth record that the deceased is the biological father to the 1st respondent, who additionally had included the child on the list of children with his employers.

5.14 As regards the appellant's non participation in the proceedings below, the 1st respondent submits that he had disregarded his opportunity of participating in the trial and rudely insisted on DNA testing of the child in issue, without making the necessary application.

5.15 It was submitted that the 1st respondent did prove its case as required and stated in the cases of ***Clement H. Mweempe v. Attorneys General and Others*** ⁽⁴⁾ and ***Mohammed v. Attorney General*** ⁽⁵⁾. **Section 3 of the High Court Act** on the

administering of law and equity concurrently and the determination of all matters in controversy was referred to.

5.16 It was in conclusion submitted that taking into consideration the circumstances of this case which was commenced 16 years ago, no prejudice would be occasioned if the 1st respondent is given a share of the deceased's estate. The appeal ought to be dismissed for being frivolous and lacking merit with costs.

6.0 **DECISION OF THE COURT**

6.1 We have carefully considered the appeal, evidence adduced before the lower court, the authorities cited and the heads of arguments filed by the Learned Advocates. The three grounds of appeal raised by the appellant raise two issues for determination namely;

(i) Whether the 1st respondent was/is entitled to benefit from the estate of the late Pascal Chishimba; whether he is a beneficiary.

(ii) Whether the appellant should render an account of the deceased's estate to the 1st appellant.

6.2 Before we deal with the two issues raised by the appellant, we will deal with the contentions by the appellant of the fact that he was 'chased' from the court room by the Learned trial Judge.

6.3 We have perused the record of proceedings in the lower court appearing at page 130 of the record of appeal. When the matter

came up for hearing, Counsel for the appellant was not before court. Contrary to the assertions in the heads of argument, no explanation was offered for the non-attendance of the Learned Counsel. The record will further show that the court below stated that notices for the date of trial were issued two months prior to the trial date. The court below informed the appellant that the matter would proceed with or without Counsel for the appellant and gave the appellant two options namely; to sit and hear the evidence and cross examine the witnesses or to leave the court room.

6.4 The appellant insisted on conducting a DNA test. Thereafter learned trial judge told him to leave the court room. She proceeded to hear the evidence by the witnesses and at the close of the Plaintiff's case, she reserved Judgment.

6.5 We are of the view that the proceedings on the record clearly indicates what had transpired on the date of trial. No explanation was offered for the non-attendance of Counsel for the appellant. The appellant opted to leave the court room. We are of the view that the issues that have been raised in the heads of arguments by Counsel for the appellant as to what transpired, are not supported by the record of proceedings. This

Court is restricted to what appears on the record. The issues raised, in our view amount to giving evidence at the bar. This is frowned upon by the Courts.

6.6 We now turn to the 1st issue raised by the appellant regarding the paternity of the 1st respondent. We note that in arriving at her conclusion, the lower court considered the evidence by PW2 and the birth record which indicates or shows that Pascal Chishimba is the 1st appellant's father.

6.7 The record will show that this evidence was not rebutted by the appellant. It is trite that in civil matters, a Plaintiff need only prove his case on a balance of probabilities. This principle of law has been espoused in a plethora of authorities including our decision in ***James Chungu v. Nyokasi Chitaya, Chibombo District Council & The Attorney General*** ⁽⁶⁾.

6.8 We are satisfied that the lower court was entitled to conclude and find that the 1st respondent was the deceased's child from the evidence that was before her. We agree with the view taken by the lower court at page 130 of the record of appeal where she guided that the appellant had ample time to produce DNA results as part of their evidence. Further, we note that there was

no formal application requesting for any DNA test by the appellant despite their insistence on the same.

6.9 We are therefore of the view the lower court cannot be faulted for holding that the 1st respondent was the deceased's child given the undisputed evidence before her.

6.10 We now turn to the issue of rendering an account. **Section 19 of the Intestate Succession Act** is explicit regarding rendering of accounts by an administrator. **Section 19 (1) (c) of the Intestate Succession Act** stipulates that;

(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

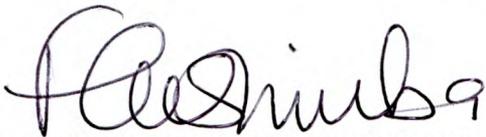
(ii) to render to the court an account of the administration of the estate.

6.11 We are of the view that the lower court having found that the 1st respondent was the deceased's child and that the estate of Pascal Chishimba had not been distributed by the administrator; properly ordered that an account of the administration of the estate be rendered to the respondents and that the estate be distributed to the beneficiaries.

6.12 Having found no merit in the grounds of appeal, we dismiss the appeal for lack of merit. Costs to the respondents to be taxed in default of agreement.



.....
M. M. Kondolo, SC
COURT OF APPEAL JUDGE



.....
F.M. Chishimba
COURT OF APPEAL JUDGE



.....
J. Z. Mulongoti
COURT OF APPEAL JUDGE