

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

Appeal No. 006/2020

(Civil Jurisdiction)

BETWEEN:

PRISCILLA CHISHIMBA MWANSA

APPELLANT

AND

17 JAN 2022

KALUMBA MWANSA

1ST RESPONDENT

MWENYA MWANSA

2ND RESPONDENT

CORAM: CHASHI, SIAVWAPA, AND BANDA-BOBO, JJA

On 18th May, 27th May and 17th January, 2022.

For the Appellant: Mr. Andrew Kearns & Ms. Kaluba Mwanza of Messrs Willa Mutofwe and Associates.

For the Respondents: Mr. P. Songolo & Mr. Chileleko Simbayi of Philsong and Partners

JUDGMENT

Banda-Bobo, JA delivered the Judgment of the Court

Cases referred to:

1. Charity Oparaocha v Winfreda Murambiwa (2004) Z.R. 141 (S.C.)
2. Base Property Development Limited v Neggie Nachilima Chileshe Appeal No. 211/2015
3. Alfred Kalaba and Another v Steven Kapenda - SCZ Appeal No.58/2014
4. Gray Nachandwe Mudenda v Dorothy Chileshe Mudenda (2006) Z.R. 56
5. Jackson Mooya v Nchimunya Mweemba Appeal No. 116/2018
6. Lumwana Mining Company Limited and Lumwana Property Development Company Limited v Lumwana Plant Hire and Construction Appeal No. 192/2016
7. Martin Nguvulu and 34 Others v Marasa Holding Limited (T/A Hotel Inter-Continental Lusaka) – SCZ Appeal No.108/2016
8. Zulu v Avondale Housing Project Limited (1982) ZR 172
9. The Attorney General v Marcus Achiume (1993) ZR 1
10. Mopani Copper Mines Plc v Andrew Mulenga Agencies Limited – SCZ Appeal No.126/2011
11. Mirriam Mbolela v Adam Bota (Selected Judgment No.26 of 2017)
12. Borniface Kafula and Others v Billings Choonga Mudenda
13. Harry Chinene v Aon Zambia Limited – SCZ Appeal No. 217/2015
14. Sylvester Musonda Shipolo v Shadrick Maipambe – SCZ Appeal No. 01/2016
15. Pamela Mthunzi Zulu v Peter Zulu and Two Others – SCZ Appeal No.218/2012
16. Lindiwe Kate Chinyanta v Doreen Chiwele and Judith Tembo (2007) ZR 246
17. Elias Tembo v Florence Chiwala Salati and Two Others – SCZ Appeal No.200/2016
18. Penelope Chishimba Chipasha Mambwe v Millington Collins Mambwe SCZ Appeal No. 222/2015
19. Tunya Lodge Limited and Another v Essau Syamusale Syamuciliba Nebwe - SCZ Appeal No. 39/2017
20. Investment Bank Plc v Hearmes Mining & Trading Limited and Others – scz Appeal No. 109/2012
21. Savenda Management Services v Stanbic Bank Zambia Limited - SCZ Appeal 37/2017
22. Access Bank (Zambia) Limited and Group Five/ZCON Business Park Joint Venture SCZ/8/52/2014

Legislation referred to:

1. *The Local Court Act Chapter 29 of the Laws of Zambia*
2. *The Intestate Succession Act, Chapter 59 of the Laws of Zambia*

1.0. INTRODUCTION

This is an appeal against the Judgment of Honourable Justice, Mr. M. Chitabo S.C, given in the High Court on 16th April, 2018 in which the

learned Judge held that the letters of administration which were granted to the 1st and 2nd Respondents on 17th November, 2015 were null and void for lack of jurisdiction by the Local Court. He further held that the 1st and 2nd Respondents were at liberty to apply for letters of Administration to the High Court. He also denied the application for an injunction.

2.0. THE BRIEF BACKGROUND

2.1. This matter was commenced on 10th May, 2017 by writ of summons and statement of claim against the Respondents and the following reliefs were sought:

- I. **Whether or not the Local Court has jurisdiction to grant letters of Administration over the estate of deceased which exceeds ZMW50.00 in value;**
- II. **Whether or not the 1st and 2nd Respondents herein are legally and validly appointed Administrators of the deceased;**
- III. **Whether the 1st Applicant herein can apply to this Honourable Court for Letters of Administration over the estate of the deceased following the Order of priority laid down under the Intestate Succession Act;**
- IV. **Whether or not the Respondents herein have intermeddled in the estate of the deceased;**
- V. **To restrain the Respondents and any of their agents from interfering and/or intermeddling in the estate of the deceased;**
- VI. **That the 1st and 2nd Respondents do render an account to this Honourable Court and produce an inventory of all personal property of the administration of the deceased's estate; and**

an Administrator only when the value of the estate is less than ZMW50.00. Counsel argued that the Trial Judge was on firm footing when he arrived at this decision. However, Counsel argued that Learned Trial Judge proceeded to misapprehend the law when he further held that the Order of Appointment of the joint administrators was null and void but proceeded to invoke the provisions of **section 13 of the High Court Act**. Counsel argued that the Trial Court was bound by the doctrine of *stare decisis* and should not have invoked the foregoing section. He contended that the lack of jurisdiction of the Trial Court could not impugn the decision of the Supreme Court in the **Charity Oparaocha Case**¹.

4.3. Additionally, it was Counsel's contention that it was imperative that an Administrator had to request the authority of the Court before selling any property and in support of this principal Counsel referred to the case of **Base Property Development Limited v Neggie Nachililima Chileshe**² and that of **Miriam Mbola v Adam Bota**³. Counsel's contention was that the acts of the 1st and 2nd Respondents in selling the property amounted to an ultra vires act. Counsel argued that the trial court possessed no power to delve into and purport to adjudicate on points of law

Letters of Administration on an Estate which exceeds the value of ZMW50.00 but failed and/or neglected to pronounce on the legal status of the ultra vires acts of the 1st and 2nd Respondents in relation to the deceased's estate during the subsistence of the Letters of Administration granted by the Local Court;

(2). The learned trial Judge erred both in law and fact when he stated that the relief of rendering a true account by the 1st and 2nd Respondents was not claimed and/or pleaded by the Appellant from the Honourable Court, when it is on record that the Appellant did seek the said relief in the pleadings before the Court below;

(3). The learned trial Judge erred in both fact and law when he failed to make pronouncements on the legal status of the properties dissipated by the 1st and 2nd Respondents when they purported to be administering the Estate of the deceased person; and

(4). The learned trial Judge erred in both law and fact when he stated that the 1st and 2nd Respondents can apply for letters of administration to the High Court and that the

Appellant, should she dispute such an application, may oppose it when made, without dealing with the substantial matter before the Honorable Trial Court, being whether the Appellant herein can apply for letters of administration.

4.0. THE APPELLANT'S ARGUMENTS

- 4.1. Counsel for the Appellant Mr. Kearns submitted in ground one that the court below misdirected itself in law and fact when the trial Judge held that the Local Court had no jurisdiction to grant Letters of administration on an Estate which exceeded ZMW50.00 (Fifty Zambian Kwacha) but failed and/or neglected to pronounce itself on the legal status of the ultra vires acts of the 1st 2nd Respondents in relation to the deceased's estate during the subsistence of the Letters of Administration granted by the Local Court.
- 4.2. Counsel for the Appellant argued that the Local Court had no jurisdiction to issue Letters of Administration in favour of the 1st and 2nd Respondents. To buttress his argument, he referred to the Local Court Act which stated that the Local Court could only deal with matters relating to succession, including the appointment of

an Administrator only when the value of the estate is less than ZMW50.00. Counsel argued that the Trial Judge was on firm footing when he arrived at this decision. However, Counsel argued that Learned Trial Judge proceeded to misapprehend the law when he further held that the Order of Appointment of the joint administrators was null and void but proceeded to invoke the provisions of **section 13 of the High Court Act**. Counsel argued that the Trial Court was bound by the doctrine of *stare decisis* and should not have invoked the foregoing section. He contended that the lack of jurisdiction of the Trial Court could not impugn the decision of the Supreme Court in the **Charity Oparaocha Case**¹.

4.3. Additionally, it was Counsel's contention that it was imperative that an Administrator had to request the authority of the Court before selling any property and in support of this principal Counsel referred to the case of **Base Property Development Limited v Neggie Nachililima Chileshe**² and that of **Miriam Mbola v Adam Bota**³. Counsel's contention was that the acts of the 1st and 2nd Respondents in selling the property amounted to an ultra vires act. Counsel argued that the trial court possessed no power to delve into and purport to adjudicate on points of law

already determined by the Supreme Court and settled by statute being section **19 (2) and 43(1) of the Instate Succession Act**. He submitted that the trial Court was bound by the doctrine of *stare decisis* and therefore could not have invoked **section 13 of the High Court Act.**

- 4.4. In ground two Mr. Kearns submitted that the trial Court misdirected itself in law when it held that the Appellants did not specifically plead the relief that the 1st and 2nd Respondents render an account of the estate. Counsel submitted that the record of appeal reveals that the Appellants did request the joint administrators to render an account to the Court and beneficiaries and this was pleaded. It was Counsel's submission that the learned trial judge misdirected himself at law with regard to the nature of the proceedings and the Respondents duty and obligation at law. In affirming the importance of the roles, and the duties and obligations of an Administrator, Counsel referred to the cases of **Alfred Kalaba and Another v Steven Kapenda**⁴ and **Gray Nachandwe Mudenda v Dorothy Chileshe Mudenda**⁵. Further that the learned trial Judge's assertion that "it was not necessary to pronounce itself on this claim as it was not

specifically claimed in the originating summons” was both a misapprehension of the facts on record and was perverse and an unbalanced evaluation of the evidence before it. To buttress his position on pleadings, Counsel referred us to the cases of:

Lumwana Mining Company Limited and Lumwana Property Development Company Limited v Lumwana Plant Hire and Construction⁶ and **Martin Nguvulu and 34 Others v Mara Holding Limited (T/A Hotel Intercontinental Lusaka)⁷**.

It was Counsel’s submission that the claim in issue was pleaded before the trial Court. Further, Counsel argued that the Court below took an unbalanced view of the evidence and pleadings and only addressed the purported flaws contained in the Appellant’s pleadings. Counsel took refuge in the cases of **Zulu v Avondale Housing Project Limited⁸**, **The Attorney General v Marcus Achiume⁹** and **Mopani Copper Mines Plc v Andrew Mulenga Agencies Limited¹⁰** on the principle that the Court can reverse a finding of fact by a trial Court if it is satisfied that the finding in question is either perverse or made in the absence of any relevant evidence or upon misapprehension of facts. Counsel prayed that this Court sets aside the judgment of the Lower Court

on this ground and grant an order that an account should be rendered by the 1st and 2nd Respondents to the Appellant and estate.

4.5. In ground three, Counsel submitted that the learned trial Judge erred both in law and fact when he failed to make any pronouncements on the legal status of the properties dissipated by the 1st and 2nd Respondents while purportedly acting as joint administrators of the estate. He submitted that the evidence on record demonstrates that the 1st and 2nd Respondents purported to sell the property in issue and did not obtain a Court order to do so. Therefore, Counsel argued, that the 1st and 2nd Respondents did not discharge their fiduciary obligation to their fellow beneficiaries. In support of the foregoing, Mr. Kearns referred to the case of **Mirriam Mbolela v Adam Bota**¹¹, **Borniface Kafula and Others v Billings Choonga Mudenda**¹² and **Jackson Mooya v Nchimunya Mweemba**¹³ on the importance of not selling property that forms part of the estate without prior permission or authority of the High Court. Counsel's contention was that the learned trial judge should have declared the acts of the 1st and 2nd Respondents in selling the property as null and void as it was

contrary to the law and that they should have been personally liable to refund the beneficiaries. Reference was made to the case of **Harry Chinene v Aon Zambia Limited**¹⁴ and **Sylvester Musonda Shipolo v Shaderick Maipambe**¹⁵. He submitted that the 1st and 2nd Respondents' conduct amounted to intermeddling. Counsel sought a declaration that the appointment of the 1st and 2nd Respondent as Joint Administrators be revoked and any actions purported to be done by the joint administrators in the sale and dissipation of the property of the estate, be deemed to be unlawful and be reversed in accordance with the law.

- 4.6. In ground four, Counsel submitted that the learned trial Judge in his Judgment failed to apply his mind to the underlying rationale of the Appellants claim that, she was dissatisfied with the administration of the estate, of her late father. Counsel further submitted that the learned trial Judge failed or neglected to weigh all the facts, legal authorities and evidence before him. Mr. Kearns submitted that the learned trial Judge misapprehended the law as to the function of an administrator and what remedies should be applied at law where such an Administrator were found wanting. In support of this principal Counsel referred to the case of **Pamela**

Mthunzi v. Peter Zulu and Two Others¹⁶. In sum it was Counsel's contention that the trial court's findings were either perverse or made in the absence of any relevant findings on the proper view of the evidence which can be reasonably made or inferred from hearing the same. He prayed for reversal of the findings and that this ground be upheld.

5.0. RESPONDENTS HEADS OF ARGUMENTS

5.1. We note that the Respondents filed heads of arguments presented in a haphazard manner. For instance, what they submitted in paragraph 5.0 headed as Legal Arguments, is repeated in what they termed short answers but more in detail. That being the case, we will not repeat what has been duplicated save to say we take on board the legal authorities cited to us. We note that the main thrust under the heading Legal Arguments is centred around jurisdiction, particularly, whether this Court has jurisdiction to entertain this appeal. This argument was aptly argued in the Ex Tempore Ruling of this Court in the Preliminary Issue raised by the Respondents and therefore we shall not consider this argument.

5.2. Counsel for the Respondents in ground one argued that trial judge did not err in fact and law when he held that the Order of Appointment of Administration granted to the 1st and 2nd Respondents were null and void for want of jurisdiction by the Local Court. Counsel submitted that the Court had specific reliefs it was dealing with and that it was not called upon to pronounce itself on the alleged ultra vires acts of the 1st and 2nd Respondents. Further that the grant of Letters of Appointment by the Local Court was not null and void as pronounced by the Supreme Court in the case of **Charity Oparaocha v Winifrida Murambiwa**¹. Counsel contended that the trial court went further to allow the 1st and 2nd Respondents to apply for Letters of Administration from the High Court and was correct to do so.

5.3. Counsel spiritedly contended that there were no ultra vires acts done or any intermeddling by the 1st and 2nd Respondents. He argued that this was because a party who has Letters of Administration duly issued by the Local Court cannot be said to be intermeddling. Further, Counsel argued that the activities conducted by the 1st and 2nd Respondents remain valid until the instrument appointing them is set aside by a Court of competent

jurisdiction. Therefore, Counsel submitted that the trial Judge was on firm ground when he did not comment on the legal status of the estate.

- 5.4. Regarding ground two, Counsel conceded that the relief with respect to rendering of accounts by the 1st and 2nd Respondents was indeed pleaded by the Appellant and ought to have been addressed in the Judgment of the Lower Court. However, Counsel questioned whether or not in the Court's view the Appellant had met the evidential requirement for it to grant the relief sought.
- 5.5. With regard to ground three, it was Counsel's contention that the Local Court correctly exercised its jurisdiction when it granted the 1st and 2nd Respondents an Order of Appointment which was not challenged by the Appellant either by way of transfer or appeal. That the Order of Appointment was valid and therefore the 1st and 2nd Respondents validly distributed the assets of the estate in accordance with law or equity and with the consent of all the beneficiaries.
- 5.6. Lastly, Counsel argued that the trial Judge did not err as alleged in ground four. He submitted that the 1st and 2nd Respondents were Administrators of the estate at the commencement of these

proceedings in the High Court. He argued that the pronouncement that the Order of Appointment from the Local Court was null and void was merely stating that even though the instrument that appointed them was defective, the Respondents were still at liberty to apply for probate in the High Court. He submitted that the Appellant was also at liberty to challenge the appointment of the Respondents if she so desired. Therefore, Counsel's contention was that the Court was merely avoiding the issue of multiplicity of actions seeing that the 1st and 2nd Respondents had already approached the Courts for Letters of Administration. Counsel argued that by virtue of the trial Court stating that the Appellant was at liberty to challenge the 1st and 2nd Respondents appointment, it meant that the Appellant had a right to apply for probate.

- 5.7. In reply, Counsel for the Appellant Mr. Kearns implored this court to invoke its discretion to strike out the Respondents heads of arguments on account that the Respondents failed to file as directed by this court and only managed to file on Friday after 17:00 hours. He cited the case of **Elias Tembo v Florence Chiwala Salati and Two Others**¹⁷ where the Court held that upon

failure to file heads of arguments by a party to the proceedings of an appeal then such a party automatically disqualifies themselves from being heard on the appeal.

5.8. Moving on, Counsel argued that the learned trial Judge erred both in law and fact when after rightly holding that the Local Court had no jurisdiction to grant Letters of Administration on an estate which exceeded the value of ZMW50.00, failed and/or neglected to pronounce himself on the legal status of the ultra-vires acts of the 1st and 2nd Respondents in relation to the deceased's estate during the subsistence of the Letters of Administration granted by the Local Court.

5.9. As regards the issue of limitation of the appellate jurisdiction on matters regarding the provisions of the Intestate Succession Act, Mr. Kearns reiterated his position regarding the issue of *stare decisis* and referred this Court to the cases of Penelope Chishimba Chipasha Mambwe v Millington Collins Mambwe¹⁸ and Tunya Lodge Limited and Another v Esau Syamusale Syamuciliba Nebwe¹⁹.

5.10. Counsel argued that Appellant in its originating process did plead for an account of the administration of the estate of the deceased.

He referred to the case of **Pamela Mtunzi Zulu v Peter Zulu**¹⁶ at page J26-27 where the Court articulated the duties of an administrator to account to the estate and the beneficiaries.

5.11. Mr. Kearns submitted that the fundamental issue of this appeal was whether or not the Respondents were duly and lawfully appointed as Administrators of the estate in question by the Local Court. Counsel referred us back to the case of **Base Property Development Limited v Neggie Nachililima Chileshe**² on the duties of an administrator. He argued that in the present case the administrators did not perform their duties appropriately. He submitted that the trial judge, in order to remedy the issue of the Respondents' lack of authority, proceeded to invoke **section 13 of the High Court Act** to rectify the jurisdictional short comings of the Respondents. To rebut the foregoing, Counsel cited the case of **Savenda Management Services v Stanbic Bank Zambia Limited Appeal**²⁰ to show that rules of procedure were binding on the High Court and were enacted to enable the smooth administration and dispensation of justice. He submitted that the trial Judge should have adhered to these principles for the proper administration of justice and should have addressed all issues in

contention between the parties in their competing positions collectively as a singular set of proceedings and it should have addressed the conduct of the parties, as per the case of **Access Bank (Zambia) Limited and Group Five /ZCON Business Park Joint Venture**²¹

5.12. Counsel prayed that this Court upholds this entire appeal and reverses the judgment of the Lower Court. That the appointment of the Respondents as joint Administrators by the Local Court be declared null and *void ab initio*. Further that the Respondents render an account of the estate and that costs be awarded to the Appellants both for this Appeal and in the Court below.

6.0. AT THE HEARING

6.1. Counsel for the Appellant Mr. Kearns submitted that he would rely on his Heads of Arguments solely including the record of appeal brought before this Court on 14th January, 2020.

6.2. Mr. Songolo, Counsel for the Respondents sought leave of the Court for an adjournment based on the fact that his clients had previously signed a Consent Order regarding the issue before the Court without his knowledge, settling the matter. He however submitted that a few days before this Appeal, his clients advised

him that the parties had in fact not settled the matter and instead instructed Counsel to proceed with this appeal. We proceeded to grant the adjournment with the view that the Respondents needed to be given an opportunity to respond.

7.0. DECISION OF THIS COURT

- 7.1. We have considered the appeal, the evidence in the Lower Court, the authorities cited and the heads of arguments filed by the both Learned Counsel.
- 7.2. In ground one, Counsel for the Appellant argues that the Court misdirected itself in law and fact when it held that the Local Court had no jurisdiction to grant Letters of Administration on an estate which exceeds the value of ZMW50.00 but failed or neglected to pronounce itself on the legal status of the ultra vires acts of the 1st and 2nd Respondents in relation to the deceased's estate during the subsistence of the Letters of Administration granted by the Local Court.
- 7.3. The Respondent, on the other hand, contends that the trial court did not err in fact and law when it held that the Order of Appointment of Administrator granted to the Respondents were null and void for want of jurisdiction by the Local Court and did

not have to handle the alleged issue of the ultra vires acts because the same was not specified in the reliefs sought.

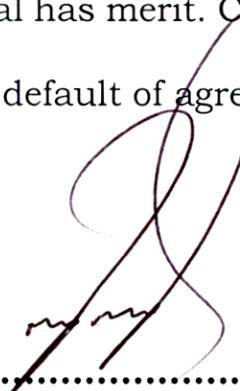
7.4. In our view the issue for determination in ground one revolves around what the consequences are where the court declares that an appointment is null and void. A perusal of the record particularly on page 38 of the record of appeal and page 28 of the judgment, lines 22 shows that the trial Judge declared that the appointment of the 1st and 2nd Respondents as administrators by the Local Court was null and void. We have no difficulties in upholding the learned trial judge's finding. Having so declared, we agree with the Appellant that the trial Judge should have considered whether or not the acts by the 1st and 2nd Respondents in administering the estate under those letters of administration were ultra vires. We are of the view that the trial Judge should have reversed or set aside the acts of the 1st and 2nd Respondents as he had found the letters of administration to be null and void, and by extension the acts of the Respondents in selling the property. More so, that on page 32 of the record of appeal specifically at page J22 lines 5-10 he quoted Lord Denning in the case of **Mcfoy v United Company Limited** on the consequences

of a pronouncement where an act has been declared null and void. Specifically, Lord Denning held that if an act is void then it is a nullity, it is not only bad, it is incurably bad. Having found that the Letters of Administration were null and void, the trial Judge erred when he ordered the Respondents to apply for letters of administration. Rather he ought to have allowed any interested party, which in this case, includes the appellant, to apply for letters of administration to the High Court to enable the estate to be administered in accordance with the provisions of the Intestate Succession Act. Therefore, the selling of the property by the 1st and 2nd Respondents, whose letters of administration were null and void, and whose acts were incurably bad and ultra vires was null and void. This is compounded by the fact that they did not even obtain authority of Court to sell the properties as per the Intestate Succession Action.

7.5. It is our view that this ground has merit and we set aside the portion of the Judgment of the lower Court where it invoked **section 13 of the High Court act**. Further, having found that the letters of administration were null and void, we are of the view that this ground resolves all the other grounds and it would be otiose

to delve into the remaining grounds. It is our view that either party to these proceedings is at liberty to apply for letters of administration from the High Court so that the estate can be properly administered.

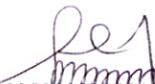
- 7.6. In conclusion, this appeal has merit. Costs below and here for the Appellant to be taxed in default of agreement.



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J. CHASHI
COURT OF APPEAL JUDGE



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M. J. SIAVWAPA
COURT OF APPEAL JUDGE



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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE