

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN**

**JACKSON MOOYA**

**APPELLANT**

**AND**

**NCHIMUNYA MWEEMBA**

**RESPONDENT**

**CORAM: Chashi, Chishimba and Ngulube, JJA**

**On : 21<sup>st</sup> September and 25<sup>th</sup> November 2021**

*For the Appellant:* N/A

*For the Respondent:* N/A

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## **JUDGMENT**

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**CHASHI JA**, delivered the Judgment of the Court.

**Cases referred to:**

- 1. Charity Oparaocha v Winfrida Murambiwa (2004), ZR 141***

**2. Robert Lawrence Roy v Chitakata Ranching Limited (1980) ZR,**

**198**

**3. James Milling Company Limited v Imex International (PTY) Ltd**

**(2002) ZR, 79**

**4. Zambia Revenue Authority v The Post Newspapers Ltd -SCZ**

**Judgment No. 18 of 2016**

**5. BP Zambia Plc v Interland Motors Limited (2001) ZR, 37**

**6. Zambia Telecommunications Company Limited (Zamtel) v**

**Aaron Mweene Mulwanda and Paul Ngandwe (2012) Vol 1 ZR,**

**404**

#### **Legislation referred to:**

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

#### **Rules referred to:**

**1. The High Court Rules, Chapter 27 of the Laws of Zambia**

## **1.0 INTRODUCTION**

1.1 This is an appeal against the Ruling of Hon. Justice C.B.

Maka-Phiri dated 30<sup>th</sup> July, 2020 in which she declined the

Appellant's application for special leave to review her ruling of 11<sup>th</sup> May, 2020.

## **2.0 BACKGROUND**

2.1 The brief facts leading to this appeal are that, on 27<sup>th</sup> February, 2019, this Court delivered a Judgment in which the Appellant who again is the Appellant in the current appeal partially succeeded. In the said Judgment, we confirmed the decision of the court below to uphold the 2003 agreement on the distribution of the intestate estate and that the Order to revoke the Appellant's letter of administration be set aside and that the Appellant and the surviving co-administrator do render an account of how they administered the estate to the Judge in the court below.

2.2 Consequent to our Judgment, the Appellant filed a summons to render an account pursuant to section 19(1) (c) (ii) of **The Intestate Succession Act.<sup>1</sup>** The Judge, in her ruling dated 11<sup>th</sup> May 2020, found that the account rendered in respect to the farm was an affront to the decision of the Court of Appeal

as it was seeking to reopen an issue which had conclusively been determined on appeal.

2.3 As regards, the guest house, she was of the view that it was yet to be conclusively dealt with by the Administrator. With regards to the personal properties, the Judge opined that there was no serious dispute regarding the distribution of the personal properties and any disputes that arose in the subsequent years were resolved by the concerned families.

2.4 However, it was the account rendered in relation to the herd of cattle and other assets that the learned Judge found to be inconsistent with what the Appellant had stated during trial. Consequently, the learned Judge found the account rendered by the Appellant to be devious and showcased the failure by the Appellant as an administrator in performing his duties in accordance with the law.

2.5 All in all, the Judge rejected the account and revoked the Appellant's letter of administration and appointed the Administrator General to take charge of the administration

and equitable distribution of the guest house as the only asset remaining to be distributed.

- 2.6 Disenchanted with the decision of the lower court, the Appellant made an application for special leave to review the Ruling of 11<sup>th</sup> May, 2020. The supporting affidavit stated that, the 2003 distribution was erroneous and contrary to the law which prohibits the Local Court from dealing with estates whose value exceeds K50,000.00 (unrebased).
- 2.7 Secondly, that upholding the 2003 distribution would be unjust, as it would merely serve to enrich certain family members to the detriment of others.

### **3.0 DECISION OF THE LOWER COURT**

- 3.1 After considering the application and arguments, the learned Judge took note of the fact that the issues raised in the affidavit in support of the application were beyond the scope for which this Court referred the matter to the High Court. She opined that it would be a misdirection on her part to consider issues that were beyond the scope of the referral. Thus, it would be an academic exercise to grant the application.

Consequently, the learned Judge, declined to grant the Appellant's application for special leave to review ruling.

#### **4.0 GROUNDS OF APPEAL**

4.1 Dissatisfied with the Ruling of the lower court, the Appellant has appealed to this court and advanced two grounds of appeal couched as follows:

- 1. That the learned Judge erred in law and fact when she declined to grant and hear the application for special leave to review her Ruling dated 11<sup>th</sup> May 2020.**
- 2. That the learned trial Judge erred in law and fact when she failed to resolve the dispute before Court notwithstanding the provisions of Section 5 of the Intestate Succession Act, Chapter 59 of the Laws of Zambia which provides for the proportions of distribution of the estate of the deceased.**

4.2 At the hearing of this appeal, there was no appearance from the Appellant and the Respondent, however, we did take note

of the fact that they both filed into court their written heads of argument, which we have taken into consideration.

## **5.0 ARGUMENTS IN SUPPORT**

5.1 In support of ground one, it was submitted that, the application for special leave to review before the lower court did not fall beyond the scope of the referral. According to the Appellant, this position is based on the facts and evidence as presented in our Judgment of 27<sup>th</sup> February, 2019. We were referred to a portion of the said Judgment, where we stated as follows:

*“So to the extent that the distribution was agreed to by the priority dependants and the same was endorsed by the Court below, the administrators’ non-compliance with Section 5 of the Act is cured as the said distribution becomes that of the Court. We would therefore dismiss ground one for the aforestated reasons.”*

5.2 It was argued that, it is not all the priority dependants that agreed to the 2003 distribution agreement and that the individual members that appended their signatures to the

agreement did not obtain the necessary consent from other family members who were not present for the hearing at the Local Court. Further that the said agreement was never endorsed by the lower court.

5.3 It was further argued that, the local court has no jurisdiction to deal with an estate whose value exceeds K50,000.00, (unrebased) that therefore, the 2003 distribution agreement is erroneous and contrary to the law. In support thereof, Counsel relied on the case of **Charity Oparaocha v Winfridah Murambiwa.<sup>1</sup>**

5.4 In addition, the Appellant contended that, granting the application for special leave to review will not prejudice the Respondent but only serve to ensure that justice prevails.

5.5 In support of ground two, Counsel referred us to section 5 of **The Intestate Succession Act<sup>2</sup>** and submitted that, upholding the 2003 distribution agreement would be unjust and result in an unequitable distribution of the estate.

5.6 We were further referred to pages 72 - 99 of the record containing the valuation reports for the Farm and Guest house

valued at twenty one million one hundred thousand Kwacha (21,100,000.00) and one million six hundred and twenty thousand Kwacha (1,620,000.00) respectively. It was argued that, considering the difference in value of the two properties, the 2003 distribution agreement would only serve to benefit some family members to the detriment of others.

- 5.7 According to the Appellant, the 2008 agreement, in which, it was agreed that each family acquires approximately 162 hectares of the farm and an equal share in the guest house was just and consistent with section 5 of **The Intestate Succession Act**.<sup>1</sup> We were urged to allow the appeal.

## **6.0 ARGUMENTS IN OPPOSITION**

- 6.1 In response to ground one, the Respondent began by giving a recap of the law on review. It was submitted that, when one applies for review of judgment, the main issues to be considered by the court are (i) fresh evidence discovered which has reasonably not been available during the proceedings and (ii) to correct mistakes, errors and omissions. That in the present case, no such circumstances were present. In aid,

Counsel cited the cases of **Robert Lawrence Roy v Chitakata Ranching Company Limited<sup>2</sup>** and **Jamas Milling Company Ltd v Imex International (PYT) Ltd.<sup>3</sup>**

- 6.2 It was submitted that, the lower court was on firm ground when it declined to grant the Appellant's application for special leave as there was no fresh evidence presented before the lower court for it to review its ruling. That the issues raised by the Appellant were beyond what this Court had directed, which was merely for the administrators to render an account of the estate. That therefore, ground one is devoid of merit
- 6.3 Coming to ground two, it was argued that the lower court has no authority to interfere with a Judgment of this Court, which was delivered on 27<sup>th</sup> February, 2019. That by that Judgment, the lower court was instructed to have the administrator render an account and that is the only jurisdiction the lower court had. That, upon the account being rendered, the court became **functus officio**. In support thereof, Counsel referred us to the case of **Zambia Revenue Authority v The Post Newspaper Limited<sup>4</sup>**

6.4 It was further submitted that, if indeed the Appellants were aggrieved by the decision of the Court of Appeal, they ought to have moved the court by way of applying for leave to appeal to the Supreme Court. That the Appellant is merely attempting to re-open issues that have already been determined. That the case is **res judicata** and re-litigating the same issue before this Court is an abuse of court process. Counsel relied on the case of **BP Zambia Plc v Interland Motors Limited.**<sup>5</sup> We were urged to dismiss the appeal.

## 7.0 DECISION OF THE COURT

- 7.1 We have considered the evidence on record, the submissions by both parties and the impugned Ruling.
- 7.2 The two grounds of appeal attack the refusal by the Judge to grant special leave to review ruling. In refusing the application, the Judge noted that the issues raised by the Appellant in the affidavit in support were beyond the scope for which this court referred the matter to the High Court.
- 7.3 We, therefore, find it necessary to revisit our Judgment of 27<sup>th</sup> February, 2019 and in the circumstances of this case, it is

imperative that we reproduce what we stated in our Judgment, at page J10:

*“We, therefore, take the position that had the court below made an order to account under Section 19(c)(ii) it would have gotten a clearer picture of how the estate was distributed and whether or not both surviving administrators, the Appellant inclusive, made themselves beneficiaries of the estate contrary to Section 34(1) of the Act which prohibits an administrator from deriving pecuniary benefit from his office.*

*The order revoking the letters of administration for the Appellant and the other surviving administrators is hereby set aside. We instead order that the Appellant and the surviving co-administrator render an account of how they administered the estate. The account will be rendered to the court below in a manner and at a time as shall be determined by the said court.*

*In view of our order to render an account, the order by the court below referring the matter to the Administrator*

*General is equally set aside. The court below will however, be at liberty to issue a fresh order in that respect if after considering the account, it still holds the view that it is necessary to appoint the Administrator General to take charge of the estate or to make any other order under Section 29 of the Act."*

7.4 From a reading of the above portion of our Judgment, it is clear as day that, what was referred to the High Court by this Court was solely the rendering of an account by the administrator of how he had administered the estate and nothing more.

It appears that, the Appellant through the application for special leave to review Ruling sought to bring in issues touching on the jurisdiction of the Lower court and the 2003 distribution of the estate. However, these matters were clearly not referred to the High Court for determination nor were they subject of determination by the High Court culminating in its ruling of 11<sup>th</sup> May, 2020.

7.5 As we see it, the issues raised by the Appellant were merely an attempt at concealing his failure to administer the estate effectively and lawfully. The 2003 distribution, as we stated in our Judgment of 27<sup>th</sup> February, 2019, was endorsed by the court and in essence it became that of the court. Therefore, the non - compliance with Section 5 of **The Intestate Succession Act**<sup>1</sup> was cured.

We, therefore, agree with the position taken by the lower court that the issues raised by the Appellant were beyond the scope for which the matter was referred to the High Court.

7.6 That, notwithstanding, even in the event that the Appellant's application was properly before the lower court, Order 39 of **The High Court Rules (HCR)**<sup>1</sup> on review is not an obligatory provision nor is review a statutory right of a party. Conversely, Order 39 is worded in such a manner that it confers on the court discretionary power to review any judgment or decision given by it upon sufficient grounds. Further, in the case of **Zambia Telecommunications Company Limited (Zamtel) v**

**Aaron Mweene Mulwanda and Paul Ngandwe,<sup>6</sup>** the Supreme Court stated as follows:

*"(1) ... For review under Order 39, rule 2 of the High Court Rules to be available, the party seeking it must show that he has discovered fresh material evidence, which would have material effect upon the decision of the Court, and has been discovered since the decision but could not with reasonable diligence, have been discovered before.*

*(2) There was no fresh material evidence discovered since the judgment, and which would have material effect on the judgment. Review was clearly not available to the respondents.*

*(3) Review under Order 39, Rule 1 of the High Court Rules has very limited scope. Therefore, the trial judge erred in law when she reviewed her judgment ..."*

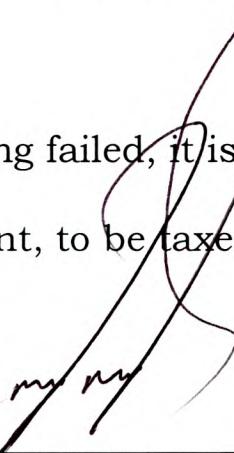
7.7 Based on the above authority, it is clear that for one to rely on Order 39 **HCR**, there must be sufficient fresh evidence which must have been in existence at the time the decision was made. In the present case, there was no fresh material

evidence presented before the lower court that would warrant a review of the Ruling. The issues raised by the Appellant do not constitute sufficient fresh evidence likely to have a material effect on the lower court's Ruling of 11<sup>th</sup> May, 2020.

7.8 In light of the foregoing, we are inclined to agree with the Respondent's argument that the only way to address the Appellant's grievances, would have been for the Appellant to appeal to the Supreme Court challenging our decision of 27<sup>th</sup> February, 2019 which upheld the 2003 distribution agreement. It is for the foregoing that we find this appeal devoid of merit. Grounds one and two fail.

## **8.0 CONCLUSION**

8.1 The appeal having failed, it is accordingly dismissed with costs to the Respondent, to be taxed in default of agreement.



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J. CHASHI

COURT OF APPEAL JUDGE



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F. M. CHISHIMBA  
COURT OF APPEAL JUDGE



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P.C.M. NGULUBE  
COURT OF APPEAL JUDGE