

IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 687 OF 2006

BETWEEN

DOREEN MUMBA (on her own behalf.....PLAINTIFF
and on behalf of Jerry Mumba (a minor))

-AND-

OCCUR MUMBA.....1ST DEFENDANT

ALL THE PERSONAL REPRESENTATIVES.....2ND DEFENDANTS
OF MR. HARDLY MUMBA (DECEASED)

CORAM: MANDA, **SENIOR DEPUTY REGISTRAR**

Nankhuni for the Plaintiff

Mussa for the defendant

RULING

This is the plaintiff's application for Summary Judgment taken out under Order 14 of the Rules of the Supreme Court. The plaintiff was asking the court for a determination on two issues, namely, whether the plaintiff was a wife of the late Hardly Mumba and whether Jerry Chakuchanya Mumba is an issue of the said marriage. Should these questions be determined in the positive, the plaintiff further asked the court to determine whether she and her son would be entitled to a share of the late Hardly Mumba's estate. If so, whether the defendants, (who are the personal representatives of the late Hardly Mumba and have been administering the estate thus far), should account as to how they have been administering the said estate.

The brief facts of this case are that the deceased, Hardly Mumba died intestate on the 31st day of May 2005. At the time of his demise, the plaintiff claims that there had been a marriage subsisting with the deceased. However, on his demise the plaintiffs stated that the defendants took control of all the matrimonial property of the deceased and are in control of the estate to the exclusion of the plaintiff and her son Jerry. It is therefore on this basis that the plaintiff claimed for a fair share of the estate. This apparently can only be determined after there

has been an account of all the monies and properties of the estate by the defendants in respect of the period that they have been in control of the same and made good of any losses.

Looking at the facts of this case, the initial observation is that whilst the ultimate claim is for a share in the distribution of a deceased estate, the claim can only be successful upon the determination of issues, which touch on points of law. In particular, is the question of whether there was a legitimate marriage between the plaintiff and the deceased, be it under custom or by cohabitation as recognized by the Constitution. In this regard, I thought that the matter should have been commenced by originating summons. Of course, I did recognize the fact that there is a factual dispute as to whether there was a marriage and that the ultimate claim might be monetary and thus I thought that perhaps the action was rightly commenced by a writ. In any case, the defence never took issue with the matter so I will likewise let it rest for now. Suffice to say that this poses an interesting predicament as to the mode of commencement of the claim, which is worth considering at a future date.

For purposes of this application, however, we shall proceed on the basis that this matter was procedurally begun by writ and that it is a proper matter for summary judgment. The reason for stating this is that once it is determined that there was indeed a marriage of some sort between the plaintiff and the deceased, then it will go without saying that the plaintiff and her son would be entitled to a share of the deceased estate.

First, let me consider the technical issues that were raised by Mr. Nankhuni regarding the affidavit in opposition sworn by Mr. Mussa, representing the defendants. In that regard, I do agree with Mr. Nankhuni's observations that the affidavit does not state who Smith Mumba is and what interest he has in the matter. Of course, I should state that much as he is not named in the suit, the suit only identifies the second defendants as "***all personal representatives of the late Hardly Mumba***" so my guess will be that Mr. Smith Mumba could fall in this category. More importantly though, the affidavit was not sworn by the defendant and that it was never commissioned by a commissioner for oaths. On these grounds, alone I ought to disregard the affidavit in opposition and enter judgment for the plaintiff. Nevertheless, I elected to consider whether there was an arguable defence disclosed in the affidavit in opposition.

In considering the affidavit in opposition, I did agree with Mr. Nankhuni, that whilst denying that there was no marriage at custom, in the form of a "***Chinkhoswe***," the affidavit does state that the plaintiff and the deceased were involved in an informal relationship but that they had on

divers occasions stayed in the same house. This to me does amount to a clear admission that there was cohabitation between the parties. The fact that there were letters allegedly written by the plaintiff to the deceased does not mean that there was no relationship. In fact reading the letters, they do show that there was a relationship between the parties, which had gone sour, and that the plaintiff had reached a point of despair, it does not mean however that there was no marriage between the parties. Indeed, in the letters (which were exhibited by the defendants), the plaintiff does refer to the deceased as her husband. Thus basing on these observations, it is the finding of this court that there was a legitimate marriage between the plaintiff and the late Hardly Mumba. Having found that a marriage had subsisted between the plaintiff and the late Hardly Mumba, it is also the finding of this court that Jerry Chakuchanya Mumba is the issue of the said marriage. There is a clear admission that was cohabitation which evidence of an association that could lead to sexual intercourse and lack of association with others (See ***Khoza v Mulenga*** 11 MLR 57). Apart from that, the affidavit in opposition does not state that the plaintiff had other associations with other men apart from the deceased, prior to the time when Jerry was born. Finally there are the Peter Pan Play School fees receipts, which show that the late Hardly Mumba was paying school fees for Jerry, which receipts have not been disputed by the affidavit in opposition. This I believe does show, on a balance of probabilities that Jerry was the late Hardly Mumba's son (***Kaleya v Kwangwani*** (1977), 8 MLR 293 (followed)).

Having found that there was a marriage between the plaintiff and the late Hardly Mumba and that Jerry is an issue of the marriage, it goes without saying then that the plaintiff and her son are entitled to a fair share of the deceased's estate. That what is a fair share of the estate can only be determined after the personal representatives of the deceased should account as to how they have so far administered the deceased estate. I therefore order that the defendants do give an account as to how they have so far administered the estate.

Overall, I do uphold the plaintiff's application for summary judgment in its entirety and do accordingly pronounce judgment in the plaintiff's favour. The plaintiff is also awarded costs of this action.

Made in Chambers this.....day of.....2007

K.T. MANDA
SENIOR DEPUTY REGISTRAR