19/5. D.F. Nkhoma Mulu

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 218 OF 1992

BETWEEN:

ALUFE MLEME.....1ST APPLICANT

- and -

DOROTHY MLEME.....2ND APPLICANT

- and -

GLORIA MLEME.....3RD APPLICANT

- and -

JOHN MLEME.....1ST RESPONDENT

- and -

MERTON MLEME.....2ND RESPONDENT

- and -

HENDERSON MLEME.....3RD RESPONDENT

CORAM: **MSOSA (MRS), J.**
Nyimba, of Counsel, for the Applicants
Kaliwo, of Counsel, for the Respondents
Kadyakale, Law Clerk

R U L I N G

This is an application by way of Originating Notice of Motion taken out by three children of one, Aramson Beaston Mleme, who died intestate on the 13th day of October 1986. The applicants are seeking for the following reliefs:

(1) That the Court should order a proper sharing of the intestate property among all the beneficiaries;

(2) That the respondents should account for all sums received and paid as either personal representatives or administrators of the intestate estate; and

(3) That the respondents should pay into Court all sums received or paid and balance due on the taking of such accounts.

The application against the 3rd respondent, a brother of the deceased, was discontinued. The application, therefore, proceeded against the 1st and 2nd respondents, who are both children of the deceased.

The applicants, Alufe Mleme, Dorothy Mleme and Gloria Mleme, are daughters of the deceased, born on 31st October 1947, 18th February 1961, and 13th August 1968 respectively. They are all legitimate children of the deceased, but born from different mothers. The deceased is not survived by any widows.

The deceased died intestate on 13th October 1986 survived by 7 children, including the applicants and the respondents, 3 brothers and his mothers. The names of the other children are Elsie and Macfarlene. The respondents were granted letters of administration on the 4th day of May 1984.

I allowed oral evidence to be given in addition to that contained in the respondents' and applicants' affidavits. At the time of the deceased's death, Elsie, Macfarlene, Merton, the 2nd respondent and Gloria, the 3rd applicant, were minors, but as of now, they are all adults. However, Elsie and Macfarlene are still at school, one being at a technical college.

The deceased's intestate property included a leasehold property with a residential house built thereon. The deceased was residing in that house with John, Merton, Elsie and Macfarlene. These children continued to reside in the house after the death of their father. The house was later leased to tenants from 31st July 1988 to 29th February 1992, during which period a net sum of K30,912.50 was received by the respondents in the form of rental. The property was later sold at a price of K140,000.00. The respondents stated in their affidavit that at the time the deceased died, the property was mortgaged to the New Building Society and they used part of the income received to pay for the mortgage instalments, city rates and land rent. The respondents also allege that in addition to these expenses, they also paid legal fees, commission charges, valuation charges, and other expenses on behalf of the estate.

The deceased was a member of the Associated Pension Trust Limited and after his death there was due K40,375.48 to Messrs John Mleme and Henderson Beaston Mleme, the beneficiaries whom the deceased had appointed prior to his death. The money was shared equally between these two beneficiaries. I find that these death benefits did not form part of the deceased's estate. Therefore, the benefits were rightly paid to the two beneficiaries. The respondents stated that the dependants of the deceased were maintained out of the proceeds of these death benefits. It is, however, clear that the only children who benefitted from these benefits were the defendants themselves, Elsie and Macfarlene.

The deceased died intestate. Therefore, his estate was supposed to be distributed in accordance with the provisions of the Wills and Inheritance Act, which provide the principles to be followed in distributing the intestate property. During the hearing of this matter, it became clear that the money is mainly available for distribution to the children.

The deceased is not survived by any widows, having divorced all his wives prior to his death. The beneficiaries of the deceased are entitled to the intestate property upon fair distribution as provided in section 17 of the Wills and Inheritance Act, which provides, inter alia, as follows:

> "17-(1) The persons entitled upon a fair distribution shall be the wife, issue and dependants of the intestate whose shares shall be ascertained upon the following principles -
>
> (a) protection shall be provided for the dependants of the intestate from hardship so far as the property available for distribution can provide such protection;
>
> (d) as between the widows and the children of the intestate, their shares shall be decided in accordance with all the special circumstances including -
>
> (i) any wishes expressed by the intestate in the presence of reliable witnesses;
>
> (ii) such assistance by way of education or property or otherwise as any of the widows or children may have received from the intestate during his lifetime;
>
> (iv) whether any daughter of the deceased is married or unmarried,
>
> but in the absence of special circumstances the widows and children shall...be entitled to equal shares;"

The respondents, as administrators of the deceased estate, were supposed to distribute the intestate property in accordance with the Wills and Inheritance Act and in

particular upon fair distribution. The deceased died on the 13th day of October 1986. At that time the intestate property comprised K1,591.92 cash, household effects, a motor vehicle and leasehold property with a house thereon.

I have already made a finding that the sum of K40,335.48, the death benefits of a Pension Scheme that were paid to the 1st and 3rd respondents, did not form part of the deceased estate. The death benefits were properly paid to the beneficiaries, nominated by the deceased. The defendants, however, stated in their affidavit that the dependents of the deceased were maintained out of the proceeds of these death benefits. In fact, some of the documents exhibited in this Court confirm that the trustees of the Pension Scheme were maintaining the dependants, Macfarlene and Elsie before paying out the balance to the nominated beneficiaries in March 1988.

The respondents further stated that they have so far advanced some money to some of the beneficiaries of the deceased and that the balance that remains to be distributed is K59,436.44. This means that the respondents had a total sum of K123,031.44 available for distribution. In the absence of any special circumstances, the children were supposed to get equal shares after providing for the other dependants such as the mother of the deceased, and paying the debts of the deceased.

The deceased is survived by 7 children, his mother and brothers. The respondents tried to challenge the fact that Gloria, the 3rd applicant, was one of the children of the deceased. I, however, find that there was abundant evidence that the deceased was the father of Gloria and that he used to maintain her as one of his children.

There is evidence that the money which was in the bank was already distributed. I will, therefore, concentrate on the proceeds of the house, as these form the substantial part of the deceased's estate. The respondents in their capacity as administrators of the deceased's estate, were requested to account as to how some of the money has been used. John Mleme, the 1st respondent and the most active administrator, paid himself the largest share of K33,133.70, followed by the 2nd respondent, who got K14,959.80 and then Elsie got K8,120.00, whilst Macfarlene got K3,931.50. The other dependants got a total sum of K4,450.00.

I have carefully considered all the facts available in this case. I am of the view that the respondents should have distributed the intestate as soon as they received all the money which formed the intestate property. They were at liberty to open trustee accounts for the minors. It was not right for them to hold on to the funds which they should have distributed to the adult beneficiaries.

I believe justice in this matter will be achieved by distributing the whole intestate as it was before some of the beneficiaries were advanced some money and by treating whatever was advanced to them as advance payment of their entitlement. I will deduct the sum of K12,000.00 which the respondents allege that they used for building a house for their accommodation after selling the deceased's house in which they were residing. I will also deduct the amount of K4,376.11 which is owing to the Inspector of Taxes and Landed Property Agents. Therefore, the sum of K106,655.33. was available for distribution.

The facts show that the deceased used to support all his children even after they got married. His generosity went as far as supporting his grandchildren. Taking all the circumstances of this matter into consideration, I am of the view that the intestate which is valued at K106,655.33 should be distributed as follows:

Macfarlene Mleme	**15%**	=	**K15,998.03**
Elsie Mleme	**15%**	=	**K15,998.03**
Merton Mleme	**12%**	=	**K12,798.06**
John Mleme	**12%**	=	**K12,798.06**
Alufe Mleme	**12%**	=	**K12,798.06**
Gloria Mleme	**12%**	=	**K12,798.06**
Dorothy Mleme	**12%**	=	**K12,798.06**
Doris Mleme	**10%**	=	**K10,665.73**
	Total		**K106,655.33**

As I said earlier on, what was already paid out will be treated as advance payment. I note that the respondents allege that they got some advance payments for Elsie and Macfarlene in their names. They should know the exact amounts which they used on these beneficiaries. Each party will pay his own costs for these proceedings.

MADE in Chambers this 8th day of April 1993, at Blantyre.

A S E Msosa (Mrs)
JUDGE