

Family law - Mode of acquisition of interest in matrimonial property in light of the constitutional provisions which entitles every person IN THE HIGH COURT OF MALAWI to acquire property alone or in association with others.

PRINCIPAL REGISTRY

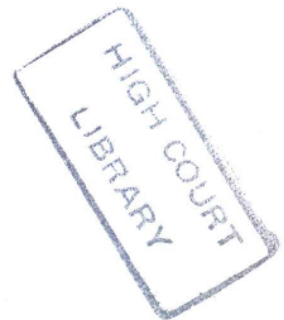
Succession - whether s 16(4) of WGA which provides CIVIL CAUSE NO. 1854 OF 2001 that <sup>only</sup> children of a deceased mother who died intestate **BETWEEN:** are entitled to her estate, is unconstitutional on grounds of discrimination  
**EZERINA MUNTHALI ..... PLAINTIFF**

- and -

**MICHAEL IAN MITAWA ..... DEFENDANT**

**CORAM: TEMBO, J.**

Kaluwa, of Counsel for the Plaintiff  
Ngwira, of Counsel for the Defendant  
Mankhanamba, Court Clerk



**RULING**

**TEMBO, J.:** This is an originating summons of Ezelina Munthali, plaintiff, against Michael Ian Mitawa, defendant, by which the plaintiff is seeking a number of declarations and orders to be made by the Court concerning, or relative to, the Estate of Rosemary Mitawa, deceased. The deceased was a daughter of the plaintiff and wife of the defendant. She died intestate on 15th September, 1995. There is an affidavit in support of, and in opposition to, the summons. Besides, both learned counsel have made oral submissions to the Court based on their respective written skeletal arguments.

By her summons, the plaintiff is seeking a number of Court orders, by which the Court should-

- (1) declare that the defendant is not a fit and proper persons to administer and manage the estate of the deceased;
- (2) declare that the defendant, having displayed a spirit of irresponsibility towards the maintenance and upbringing of the children born out of the deceased and the defendant, is not a fit and proper person to manage and administer the estate of the deceased;
- (3) declare that the defendant, having done nothing regarding the management and maintenance of property Title No. Chigumula 1/8 since the demise of the deceased, is not fit and proper person to manage that property;
- (4) declare that the plaintiff is a fit and proper person to manage and administer the Estate of the deceased in that: (a) the plaintiff is a beneficiary of the Estate of the deceased; (b) the plaintiff is a guardian of the children of the deceased; and (c) that the plaintiff has already demonstrated that she is capable of administering the Estate of the deceased in that since the demise of the deceased the plaintiff has properly looked after the children of the deceased and property Title No. Chigumula 1/8;
- (5) make an order of injunction restraining the defendant from interfering with or dealing with management of property Title No. Chigumula 1/8;
- (6) make an order revoking letters of administration granted to the defendant; and
- (7) make an order that the plaintiff should continue to administer and manage the Estate of the deceased.



On the other hand, and in accordance with his affidavit, the defendant is seeking orders of the Court by which the Court should- (a) declare that the plaintiff is not a fit and proper person to administer and manage the estate of the deceased; (b) declare that the defendant is co-owner of the house Title No. Chigumula 1/8; © declare that the defendant is a fit and proper person to administer and manage the Estate of the deceased; (d) make an order of the injunction restraining the plaintiff from dealing with the management of property Title No. Chigumula 1/8; and (e) make an order for a fair distribution of the Estate as per the Wills and Inheritance Act.

The following facts emerge from the affidavit evidence: that the plaintiff was the mother of the deceased and that the defendant was husband of the deceased. The defendant and the deceased had children of their family who are now under the custody, maintenance and care of the plaintiff. The deceased died on 5th September, 1995. Prior to and until her death the deceased had been in the employment of the Reserve Bank of Malawi whereas the defendant was a business person.

Consequent upon the death of the deceased, the defendant obtained a grant of letters of administration from this Court on 14th July, 1999 by which the defendant was and is authorised to administer the Estate of deceased according to law. Whilst in the employment of the Reserve Bank of Malawi, and prior to her death, the deceased had on 1st June 1994 purchased a house Title No. Chigumula 1/8 which is on plot No. 443/88 in the City of Blantyre. The deceased had bought that house under her employer's home ownership (Housing) Loan Scheme. By the date of her death, 5th September, 1995, the deceased still owed her employers a sum of K238,489.49 under that loan. No other person having taken over the repayment of the loan to the Reserve Bank and further no other person having obtained a grant of letters of administration for the administration of the deceased, the plaintiff on 16th June, 1996 made arrangements with the Reserve Bank regarding the repayment



of the loan amount then still outstanding.

By those arrangements, among other things, the Reserve Bank had to put the house on lease and use the rentals for reduction of the outstanding balance on the loan. The Reserve Bank, thereafter, did just that and the loan balance was accordingly reduced to an amount of K106,319.49 by 17th November 1998. By that date, the plaintiff cleared that outstanding amount through a single payment made by her to the Reserve Bank, as evidenced by a paid cheque No. 415958 drawn on National Bank of Malawi, Henderson Street.

Consequently, on 17th December, 1998, the Reserve Bank sent to the plaintiff the unregistered title documents for property Title No. Chigumula 1/8 with the advice that the plaintiff should have those title documents registered with Land Registry in Blantyre.

The plaintiff obtained a grant of letters of administration in respect of the estate of the deceased on 17th May, 2000; by which she was given authority to administer the estate of the deceased according to law. The plaintiff thereafter proceeded to do just that.

However, on his part, the defendant armed with the grant of letters of administration issued to him on 14th July, 1999, went ahead to register, with the Land Registry in Blantyre, the property Title No. 1/8 Chigumula in his own name as owner thereof. Besides, and consequent thereupon, the defendant sought to stop the plaintiff from managing and administering that property. The defendant has hitherto not taken any share or any form of benefit from the estate of the deceased. In the defendant's view, the plaintiff has distributed the estate to the complete exclusion of the defendant in that regard.

The foregoing has led to the commencement of the instant action whereby the parties are seeking conflicting orders, as clearly set out above, to be made by the Court.



To begin with, the Court should first determine the prayer of the defendant for an order declaring that the defendant is a co-owner of the house Title No. Chigumula 1/8. Section 24 (1) (ii) of the Constitution makes provision that women have the right to full and equal protection by the law and have the right not to be discriminated against on the basis of their gender or marital status. Such constitutional right includes the right to acquire and maintain rights in property, independently or in association with others, regardless of their marital status. Such a right ought to be understood in the light of the provision under Section 28 (1) of the Constitution to the effect that every person shall be able to acquire property alone or in association with others.

The foregoing constitutional provisions on the rights of married women respecting the acquisition and maintenance of rights in property entail, among other things, that a married woman may acquire and maintain rights in property to the exclusion of her husband. So long as the circumstances may indicate that such was the case, a married woman may own property of any kind, including real property, independently of her husband. In such a situation, a husband who claims any interest in the property in question ought to offer proof of the interest he claims to have, to the satisfaction of the court on a balance of probabilities, that indeed he has such interest in the property, as a co-owner. If a husband is unable to provide such proof, the court will dismiss his claim and make an order thereby declaring the married woman to in fact be the sole and absolute owner of the property in question, notwithstanding the fact that the married woman acquired her interest in such property during the subsistence of their marriage.

Case authorities abound to the effect that a similar position obtains in respect of a husband who acquires property during the subsistence of a marriage. A married woman who seeks to claim any interest in such a property ought to offer proof of her interest in



the property in question. This is so, even if the manner in which a married woman may acquire or in fact acquires such interest ought not necessarily to be by way of financial contributions. Where a married woman does not offer such a proof her claim would likewise be dismissed.

In either case, that is concerning a claim being made by a husband or that by a married woman, the court will regard such proof as having been given by a party on whom the onus to offer the proof rests if the court, at the end of the day, would have the impression that the husband and wife in a particular case had by their joint efforts acquired the property in question. Further, that in doing so a husband and a wife had intended the property, such as matrimonial home or the furniture in it to be a continuing provision for both of them. Some of the case authorities in question, to cite a few, include the following: **Pettitt vs Pettitt**, (1969) 2 ALL ER 385; **Nixon vs Nixon**, (1969) 3 ALL ER 1133; **Burns vs Burns**, (1984) 1 ALL ER 244; **Smith and another vs Baker**, (1970) 2 ALL ER 826; **Sinalo vs Sinaphyanga and Others**, Civil Cause No. 544 of 1995 (unreported); and **Ulaya vs Ulaya**, Civil Appeal No. 26 of 1996 (unreported).

Applying the foregoing to the instant case, the position is as follows: the house in question was acquired by the deceased through the home ownership loan scheme at her place of work. A glance at the affidavit evidence by which the defendant seeks to furnish proof to the court that he has an interest in the house in question, that is to say, by way of his financial contributions palpably falls short of satisfying the court, on a balance of probabilities, that such was in fact the case. To the contrary his affidavit evidence, in that regard, expressly and clearly shows that the defendant had not done so at or after the time the deceased had acquired the real property in question. After the death of the deceased, the defendant did nothing by way of taking measures to clear the outstanding amount on the loan. As is evident from the foregoing affidavit



evidence, such amount had been paid off by way of arrangements which had been put in place between the plaintiff and the Reserve Bank, and further through a direct payment made to the Reserve Bank by the plaintiff.

In the circumstances the prayer of the defendant that the court should declare that he was, and is, a co-owner of the house in question must fail and it is dismissed accordingly.

Reverting to the prayers made by the plaintiff, the court has this to say: to begin with it is clear that upon the death of the deceased the defendant did not take any measures for the management and administration of the deceased estate. This meant that the loan amount outstanding continued to grow unabated. Besides, the defendant did not take measures for the proper maintenance and care of his children. He was away from the country for a considerable period of time, after the death of the deceased, without making provision for the care and maintenance of his children and also the repayment of the house loan. The plaintiff did all what she did, that is, the settlement of the loan amount and the maintenance and care of the children of the defendant without any assistance whatsoever from the defendant. In the view of the court, counsel for the plaintiff was right, and the plaintiff is right, in maintaining the view that by doing what he did the defendant had displayed a spirit of irresponsibility towards the maintenance and upbringing of his children and that the defendant in not having made provision for the settlement of the loan amount then outstanding was not, and is not, a proper person to manage and administer the estate of the deceased.

In the circumstances, the court would make an order granting all the prayers for the declarations and orders sought by the plaintiff. It is so decided.

Before resting, let me deal with some two other prayers made by and for the defendant. The defendant claims a share under fair distribution of the estate of the deceased in accordance with the Wills and Inheritance Act. In the view of the court the applicable provision ought to be, and is, section 16(4) of the Act in question. That section makes provision for inheritance in certain cases, including where a woman dies intestate leaving children, as follows-

*"In the case of a deceased man who left no wife, issue or dependant surviving him and in the case of a deceased woman the persons entitled to the property to which this section applies shall be ascertained in accordance with customary law: Provided that where a woman dies leaving children, such children shall be solely entitled and section 17(2)(a) relating to the meaning of the word 'child' shall apply to this proviso."*



It the view of the court, given the fact that in the instant case the deceased at the time of her death had left two children of her marriage with the defendant, those children are solely entitled to share in the estate of the deceased. Thus neither the plaintiff nor the defendant would have a claim to any share in the estate of the deceased. The law expressly and solely makes provision for the plight and welfare of the children of a deceased mother in that regard. That being the position, the prayer of the defendant for a share in the estate of the deceased in accordance with fair distribution under the Wills and Inheritance Act must be dismissed. It is so ordered.

Finally, counsel for the defendant invited the court to hold section 16(4), in particular the proviso thereto which the court has herein considered and applied, to be invalid in that it is inconsistent with the provisions of the Constitution against discrimination. The



point in issue being that section 16(4), in that regard, makes provision in favour of the children only and against a husband in a marriage, where a woman who has died intestate leaves children. The prayer of counsel, in that regard, ought to be viewed in the light of sections 5, 20(1), 23(4), and 44 of the Constitution. Bearing in mind the provisions of the foregoing sections, section 44(2) of the Constitution makes provision for derogation. Thus, where derogation or limitation is permissible, the same would only be made subject to the following requirement: thus no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open democratic society.

The onus to prove the foregoing rests upon the party who invites the court to declare that any legislation is inconsistent with the Constitution. In the instant case, the defendant bears that burden. The position is that there is a legislation which makes provision for the plight and welfare of the children whose mother dies intestate. For the court to be moved to in fact declare that that legislation is inconsistent with the provisions of the Constitution against discrimination, the defendant must therefore prove to the satisfaction of the court that the provision is unreasonable, not recognized by international human rights standards and that it is not or would not be necessary in an open democratic society. To say the least, the defendant has not measured up to his challenge in that regard. On its part, the court would not characterize the legislation in question as being one which is inconsistent with the Constitution. Thus, a law which makes provision for the plight and welfare of the children of a married woman who dies intestate cannot be said to be unreasonable. The defendant, therefore, has failed to prove to the court that the legislation in question is inconsistent with the Constitution. His prayer in that regard must fail and it is dismissed accordingly. Costs are for the plaintiff.

**MADE** in chambers this 21<sup>st</sup> day of June 2002 at Blantyre.



A.K. TEMBO  
**JUDGE**

