



IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL APPEAL NUMBER 159 OF 2014

BETWEEN:

ERICK BVUMBWE.....APPELLANT

-AND-

KEN BVUMBWE.....1<sup>ST</sup> RESPONDENT

&

ROSE BVUMBWE.....2<sup>ND</sup> RESPONDENT

**Coram:**Hon Justice Dr. C.J.Kachale, *Judge*

*Mataka*, of Counsel for the Appellant

*Chidothe*, of Counsel for the 2<sup>nd</sup> Respondent

*Jere*, Court Reporter

*Tembwe*, Court Interpreter

JUDGMENT

**Introduction**

Erick, Ken and Rose Bvumbwe are all children of one man by three different wives. In fact, they are three of twenty-one children left by the late Bvumbwe who had four polygamous unions and died intestate in September 2010. Erick sued his siblings before the First Grade Magistrate Court at Kasungu. His claim was described as property grabbing; he demanded that the defendants should hand over to him a shop left by their late dad which had allegedly been given to Erick prior to the demise.

In its decision the court observed that the number of properties were fewer than the intended beneficiaries; in that vein it purported to assign certain shops to family representatives who were ordered to administer the same for the benefit of their respective families i.e. each of the four mother's children were assigned

something based on the age of the children and their number. In effect, therefore, Erick never got the shop as he had prayed in his action. He has since appealed against that decision. In the first place, Erick contends that the magistrate exceeded his jurisdiction in purporting to distribute a deceased estate clearly falling outside of a small estate as defined in the Deceased Estates (Wills, Inheritance and Protection) Act. He has asked this court to set aside that decision and grant him the shop as originally claimed. In the alternative the court has been invited to give directions under section 20 (5) of the Act.

In his response Ken acknowledges that the magistrate's order was unlawful and has in fact created more injustice and confusion. In essence Ken does not oppose the appeal. For Rose it has been argued that the present appeal is untenable: to begin with since Erick lodged the complaint before the magistrate's court, he cannot question the competence of that forum to adjudicate the matter. It has further been argued that jurisdiction never having been an issue at first instance; it cannot be raised on appeal. Besides, it has been suggested that since the matters were about property grabbing the subordinate court had the requisite criminal jurisdiction to decide the issue. In the alternative this court on appeal has been invited to ratify the irregular orders made by the magistrate in order to serve the broader interests of justice. Various court decisions have been cited to advance these different lines of argument.

### **Court's reasoned determination of the appeal**

In the opinion of this court the question of jurisdiction is pivotal to the outcome of this appeal. Contrary to the contention of Rose Bvumbwe, the law is such that the question of jurisdiction may validly be raised for the first time on appeal. Indeed there can be no estoppel against raising the issue of lack of jurisdiction to invalidate a court decision, see **Bhima-v-Bhima** 7 MLR 163. This case further concluded that parties cannot by consent confer jurisdiction on a court which it otherwise lacked.

The firm view of this court is that jurisdiction is very fundamental to the administration of justice; we preside over courts of law. The mandate and function of each such court is strictly prescribed by law, see for example

**Kam'bwemba-v-Malawi Broadcasting Corporation** 8 MLR 359. There are practical and principled factors that inform the delineation of jurisdiction to various forums.

For example, some matters raise such complex and intricate questions of law (and even public policy) that persons without adequate legal training may lack the capacity to properly adjudicate over such issues. Other times jurisdiction is reserved to specialised courts with unique procedural rules and composition to address the peculiar needs and interests of the business assigned to such courts. To appreciate the constitutional imperative for recognising and confining oneself to prescribed jurisdiction see the case of **The Trustees of Malawi Against Physical Disabilities-v-The State and another** [2000-2001] MLR 391. In summary, jurisdictional matters are quite definitive of the legal basis for exercising the judicial function; absence of such legal mandate renders any proceedings incompetent, **Speaker of National Assembly-v-Nangwale** [2005] MLR 405.

According to section 3 of the Deceased Estate (Wills, Inheritance and Protection) Act '*court means the High Court or a court having jurisdiction as specified under section 20*'. This latter provision- i.e. section 20 (3)- grants jurisdiction to Resident Magistrates as well as First Grade Magistrates to grant probate and letters of administration for a small estate. A 'small estate' has been defined as one which consists of property which does not exceed K1, 000, 000. Thus except in that specific situation, the only competent forum to handle matters of deceased estates is the High Court. If the argument is that the proceedings were about property grabbing as an offence, then one is even more shocked to see the nature and substance of the final order issued by the magistrate-there is nothing criminal about the purported distribution of the deceased estate.

In his very elaborate judgment the magistrate was clearly aware of the volume of assets comprising the contested estate; there were vehicles as well as shops involved which he purported to distribute. In other words, without requiring specific evidence the court was not dealing with a small estate at all. Indeed one gets the impression that the detailed factual and legal analyses suggest that the magistrate is very well acquainted with the pertinent statute. For some

inexplicable reason he chose to distribute the property when the same was beyond his legal mandate. This court on appeal must set that aside; indeed according to **Bhima-v-Bhima** (above) such a judgment could have been set aside by mere summons i.e. without need for a full appeal.

### **Conclusion**

The decision of the magistrate court dated 17<sup>th</sup> July 2014 is hereby set aside for lack of jurisdiction. In terms of section 23 of the Act the court appoints The Administrator General as receiver of letters of administration in order to avoid further illegal dealings with the deceased estate. By this order all beneficiaries and interested persons are directed to submit accounts of their dealings with the deceased estate within thirty days of this order to the Administrator General who shall consolidate all such information and determine what course of action to pursue to ensure fair and equitable distribution of the same. In any event, the Administrator General may approach the court for all necessary legal remedies and grant of proper authority where that is deemed necessary.

Ordinarily costs follow the event; but for initiating the action in the wrong forum the court does not believe the appellant deserves to be awarded costs though his appeal has succeeded. Thus each party will bear own costs of the appeal.

**Made at Lilongwe this 28<sup>th</sup> day of August 2015 in open court.**

***C.J.Kachale, PhD***

**JUDGE**