



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PROBATE CAUSE NO. 757 OF 2016**



**IN THE MATTER OF THE ESTATE OF CHARLES ENOS CHINKWENDE
(DECEASED)**

BETWEEN:

LETICIA CHINKWENDE 1ST PLAINTIFF

AUGUSTINE CHINKWENDE 2ND PLAINTIFF

AND

NANCY CHINKWENDE DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Chayekha, of Counsel, for the Plaintiffs

Mr. Mbeko, of Counsel, for the Defendant

Mr. O. Chitatu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

This matter is before this Court for distribution of the estate of the late Charles Chinkwende (Deceased) who died intestate on 10th October 2014. The 1st Plaintiff and 2nd Plaintiff are the widow and brother of the Deceased respectively. The Defendant is a daughter of the Deceased from his marriage with Clara Chinkwende (former wife) which marriage got dissolved in 2007.



The parties were on 18th December 2015 appointed administrators of the estate of the Deceased (the “estate”). The parties have been discussing over a period of over one year on how the estate should be distributed but the discussions have deadlocked, necessitating the commencement of this case by way of originating summons.

Jurisdiction

There is one very important question that has to be determined at the outset, namely, whether or not this Court has jurisdiction to distribute the estate. I am mindful of the decision in **Lizzie Banda v. Chakwawa Banda and Mrs. Banda, HC/Lilongwe District Registry Civil Cause No. 813 of 2007 (unreported)** wherein the Court was presented with a petition for distribution of the estate of the late Watson Penton Banda who had died intestate. The Court held as follows:

“It is clear to this Court that the application is misconceived because it is not the duty of the Court to distribute deceased estate property. The law vests such duty in the administrators of the estate so appointed”

No one could possibly cavil at the judgement in **Lizzie Banda v. Chakwawa Banda and Mrs. Banda**, supra, or wish to criticise it for it appears to have been properly decided on the law as it existed then in 2007. However, the law has since moved on: probate matters are now governed by a new legal regime, namely, the Deceased Estates (Wills, Inheritance and Protection) Act [hereinafter referred to as the “Act”]

Section 20(1), (2) and (6) and s. 73 of the Act are relevant in so far as the question of the jurisdiction of this Court is concerned. Section 20 (1), (2) and (6) of the Act is in the following terms:

“(1) Subject to this section, the High Court shall have jurisdiction in courts and all matters relating to the probate and the administration of estates of deceased persons, with power to grant probates of wills and letters of administration to the estates of deceased persons and to alter or revoke such grants.

(2) The High Court shall have jurisdiction to reseal grants of probate and letters of administration made by a court of probate in any country.

(6) The High Court may authorize the payment to a personal representative of remuneration for his services as such, to such extent as, in all circumstances, appears reasonable:

Provided that nothing in this subsection shall be construed so as to deprive an executor of remuneration to which he is entitled under the provisions of a will."

Section 73 of the Act deals with disputes and subsection (1) thereof reads:

"(1) On the application in the prescribed manner by an interested person, a court shall have jurisdiction, where there is a dispute, in relation to a deceased person's estate –

- (a) to decide whether a document purporting to be a will is a valid will and whether the deceased person died testate or intestate;*
- (b) to decide what is the property to which the deceased person was entitled at the date of his or her death;*
- (c) to decide if any person is or is not entitled as a beneficiary of the estate;*
- (d) to decide how the distribution of the property forming part of the deceased person's estate should be carried out;*
- (e) to order the sale or other disposition of property belonging to a deceased person's estate for the purpose of paying the debts of the deceased or for the purposes of distribution;*
- (f) to appoint a guardian in place of a guardian who has acted improperly;*
- (g) to decide whether an administrator or the person administering the property of a deceased person by agreement under section 61 has failed to carry out any of his or her duties and to order payment of compensation by such administrator or other person to a person who has suffered injury as a result of such failure; and*
- (h) to decide any other matter in dispute which the court considers to be competent for its jurisdiction." – Emphasis by underlining supplied*

On the basis of the aforementioned provisions of the Act, I am satisfied that this Court has jurisdiction to determine the present action. I am fortified in my view by the case of **Khunju (Nee Mapanga) v. Khunju and another [1998] MLR 131** wherein Ndovi, J., in exercise of the powers vested in the Court under section 73 of the Wills and Inheritance Act, declared Mrs Siliniya Khunju the undisputed owner of plot No. B126/1041/2: see also **Mwase v. Mwase and another [1995] 2MLR**

728 wherein Mbalame J ordered the defendants (the son and the brother of the deceased) to surrender the deceased's house and the entire household belongings to the plaintiff (the widow) within 21 days of the judgement.

Originating Summons

The Plaintiffs seek the following three declarations:

- (i) *A declaration that as widow of **CHARLES ENOS CHINKWENDE** (Deceased) who died intestate, she is entitled to 50% of the estate of the said Charles Enos Chinkwende.*
- (ii) *A declaration that the parents of the deceased are entitled to 10% each of the estate.*
- (iii) *A declaration that the children of the said Charles Enos Chinkwende are entitled to 15% and 10% respectively of the estate."*

Affidavit Evidence

The Originating Summons is supported by affidavit of Leticia Chinkwende [hereinafter referred to as the "Plaintiffs' Affidavit"]. The Defendant filed an affidavit in opposition to the Originating Summons, sworn by Mzati-Kidney Mbeko, [hereinafter referred to as the "Defendant's Affidavit"]. Thereafter, the Plaintiffs filed a reply to the Defendant's Affidavit, sworn by the 1st Plaintiff [hereinafter referred to as the "Affidavit in Reply"].

The Plaintiffs' Affidavit provides as follows:

4. ***THAT** before the demise of the late Charles Enos Chinkwende he had divorce with his first wife whom he had two children namely Nancy Chinkwende and Cyril Chinkwende and at the time of his death the children were aged 23 and 19 respectively.*
5. ***THAT** the marriage between the late Charles Enos Chinkwende was dissolved in Court in 2007 under Civil Cause No. 8 of 2006 and he died in 2014. I attach and exhibit a Certificate of divorce marked "LC2".*
6. ***THAT** when the marriage with the 1st wife ended the late Charles Enos Chinkwende left the children and their mother a house they were living in and I together with my husband started a new life.*

7. **THAT** in the process we managed to acquire a number of assets and my late husband acquired shares in DEC Investments Limited which is also a shareholder in Reunion Insurance Company Limited.
8. **THAT** pursuant to our being appointed administrators we inquired with the Chief Executive Officer of Reunion Insurance Company Limited to find out the value of the shares owned by the late Charles Enos Chinkwende and we have duly been advised that the share value of his shares in Reunion Insurance Company Limited is K105,987,740.85 representing 43.167% of DEC Investment’s shares in Reunion Insurance Company Limited.
9. **THAT** further to the shares above mentioned the late Charles Enos Chinkwende also left a sum of K4,598,419.00 at Old Mutual and K3,114,549.00 at Standard Bank of Malawi.
10. **THAT** further more the late Charles Enos Chinkwende while he was alive left a motor vehicle Toyota Corolla with his aging parents and the parents have always used the vehicle for their hospital transportation but the vehicle is in his name and in my view the same should be given to the parents for their continued medical attention.
11. **THAT** despite there being duly appointed administrators we have not been able to agree on the percentage of the distribution of the property.
12. **THAT** owing to the fact that my late husband died without a house I was left with no house so it was agreed by the two administrators namely Mr Augustine Chinkwende and myself that based on the late Charles Enos Chinkwende’s expressed intention of distribution of his terminal benefits the property be distributed as follows:-

<u>NAME</u>	<u>AGE</u>	<u>RELATIONSHIP</u>	<u>PERCENTAGE</u>
Leticia Chinkwende	52	Wife	50%
Enos Jordan Chinkwende	90	Father	12.5%
Merriam Chinkwende	85	Mother	12.5%
Cyril Chinkwende	19	Son	15%
Nancy Chinkwende	23	Daughter	10%

I attach and exhibit copy of his indication of distribution marked “LC3”.

13. **THAT** the above suggested percentages are designed to ensure that the wife can either purchase or build a house, the parents can continue to access medical attention, Cyril can continue with his education and Nancy can support herself as she is employed and basically independent.

14. **THAT** however the children have in my view selfishly protested this proposed distribution hence the parties agreed to seek the Court's assistance.

WHEREFORE I humbly pray that the Court endorses the proposed percentages."

Having quoted the Plaintiffs' Affidavit in full, it is only fair that I should also reproduce the substantive part of the Defendant's Affidavit hereunder:

- "5. **THAT** the Respondent disputes paragraphs 6, 7, 10, 12 and puts the Plaintiffs to strict proof thereof;
6. **THAT** 1st plaintiff was married to the late Charles Enos Chinkwende for a period of less than 5 years and there was no issue of the said marriage;
7. **THAT** paragraph 7 of the plaintiffs' affidavit is a misrepresentation of facts, the truth of the matter is that Charles Chinkwende invested in DEC while he was still with the mother of the Respondent (Mrs. Clara Chinkwende) and that he used the family house being Chichiri 340, which was jointly owned by the deceased and Mrs. Clara Chinkwende as collateral to secure a loan with National Bank of Malawi to invest in DEC. I attach and exhibit the following;
- i. Letter from National Bank marked "NC 1";
 - ii. Letter from Clara Chinkwende to National Bank stopping further charges on the property "Chichiri 340 marked "NC2".
 - iii. Letter from National Bank to Re-Union Insurance on discharge of charges marked "NC3".
 - iv. Letter from Re-Union Insurance to Mrs. Clara Chinkwende informing her of the discharge of charges with National Bank marked "NC4".
8. **THAT** the Respondent and her brother deserve a fair share of the Estate of their late father considering that the Respondent and her brother have not finished school and they are the youngest of all the beneficiaries but also for the fact that the bulk of the Estate under dispute was acquired with the contribution and assistance of the Respondent's mother and not the 1st plaintiff;
9. **THAT** the proposed percentages as per paragraph 12 of the Plaintiffs Affidavit do not represent a fair distribution to the Respondent and her brother and it is a blatant attempt by the plaintiffs to disinherit the only children of the late Charles Enos Chinkwende;
10. **THAT** in the alternative the Respondent proposes that the distribution to be as follows;
- i. Leticia Chinkwende 30%
 - ii. Enos Jordan Chinkwende 5%

iii.	<i>Merrium Chinkwende</i>	5%
iv.	<i>Cyril Chinkwende</i>	30%
v.	<i>Nancy Chinkwende</i>	30%

WHEREFORE *I pray to this Honourable Court to dismiss the plaintiff's request and endorse the Respondent's proposed percentages."*

The Affidavit in Reply seeks, in the main, to deal with the claim by the Defendant that the former wife had made a significant contribution to the estate (see paragraph 7 of the Defendant's Affidavit) and it reads as follows:

- "2. **THAT** *I depose to matters of fact as lay within my knowledge and as given to me by Mrs Dorothy Chapeyama, one of the director of DEC Investments Limited and Mr Charles Nsaliwa, my late husband's closest friend, and I verily believe the same to be true.*
3. **THAT** *I have read the affidavit of **MZATI-KIDNEY MBEKO** and I wish to respond as follows:-*
- (i) *Indeed DEC Investments Limited was incorporated in May 2005 with a share capital of MK10,000.00. I attach and exhibit the Articles and memorandum of Association marked "LC4".*
 - (ii) *The Defendant's mother and father filed for divorce in 2006 clearly meaning that at the time DEC Investment Limited was incorporated the marriage was troubled.*
 - (iii) *Indeed the late Charles Enos Chinkwende used the matrimonial house as security to get a loan from the bank but this house he had built it using loans and other sources of finances with the Defendant's mother contributing very little as part of the funds to invest in DEC Investments Limited but he also got some money from his brother Louis Chinkwende who stays in the United Kingdom and he also got K500,000.00 from Mr Charles Nsaliwa which loan he repaid by giving Mr Nsaliwa motor vehicle Toyota Corolla Registration Number NU2992 and also from Mr Harold Jiya towards the said investment. I attach and exhibit letters to and from the Late Charles Chinkwende's lawyers detailing the issues about the house marked "LC5", "LC6" and "LC7".*
 - (iv) *As would be seen from the correspondence the house in question was largely built with the late Charles Chinkwende's resources and the use thereof for security to obtain the loan to get finances for DEC Investments Limited should in no way be deemed as the Defendant's mother's contribution to the bulk of the estate.*
 - (v) *Further as would be seen from exhibits "NC2", "NC1" and "NC3 the defendant's mother blocked the late Charles Enos Chinkwende from*

getting further loans to refinance the business when the same was greatly needed as it had been demanded by the Reserve Bank of Malawi and as a result thereof late Charles Enos Chinkwende had to source the money from other means. I attach letters from the Reserve Bank of Malawi and Reunion Insurance Company Limited marked “LC8” and “LC9”.

- (vi) As would be seen from the exhibits herein it is clear that DEC Investments Limited was incorporated when the marriage between the Defendant’s mother and the late Charles Chinkwende was on the rocks, the loans which were obtained through using the matrimonial house were repaid after the marriage had ended and the house in question was left with the defendant’s mother for the benefit of the children and their mother and late Charles Chinkwende moved on with his life.*
- (vii) Further it should be seen that the loans were being repaid after the marriage between the Defendant’s mother and the late Charles Chinkwende had ended and he had now married me signifying my contribution to the estate herein.*
- (viii) May I repeat that the house in question was only used to get a loan and the loan was repaid while I was married to late Charles Chinkwende and the house was given back to the Defendant’s mother for the benefit of the children herein hence they already benefitted from the estate unlike me and the other beneficiaries.*
- (ix) Additionally may I request the Court not to loose sight of the late Charles Chinkwende’s expressed wish of distribution of his terminal benefits which I believe should have an indication of how he generally wished his estate would be distributed.”*

WHEREFORE *I further humbly pray to the Court to distribute the estate as suggested in my affidavit in support of the application. ”*

There was no cross-examination of the deponents.

Submissions

The Plaintiffs have proposed that the estate should be distributed in the following ratios:

Leticia Chinkwende	50%
Nancy Chinkwende	10%
Cyril Chinkwende	15%
Enos Jordan Chinkwende	12.5%
Merriam Chinkwende	12.5%

Counsel Chayekha advanced the following arguments in support of the proposal that the 1st Plaintiff should get 50% of the net estate:

- “4.3 *The 1st Plaintiff is the widow of the intestate. She has been married to the deceased for seven years. It is this time when the deceased was able to acquire the estate under consideration. As already stated, the Defendant and her brother were staying with their mother with whom the deceased already left a house. Your Worship, it is our submission that, without splitting hairs, it is clear that the 1st Plaintiff, unlike the Defendant and her brother, made greater contribution to the value of the business and property hence deserving more.*
- 4.4 *In addition subsection 17(1)(d)(i) enjoins the Court to consider the wishes expressed by the intestate. While exhibit “LC 3” does not relate to the whole estate it shows how the intestate desired his estate to be distributed. It will be easy to see that from that document the deceased wished the 1st Plaintiff to receive more...*
- 4.5 *The 1st Plaintiff herein has no house of her own despite the contribution she made to the value of the estate. She needs protection by at least ensuring that she acquires a house hence the distribution of the estate must take this into account.”*

Exhibit “LC3” sets out the terminal benefits of the Deceased and the distributable amount thereof was allocated as follows:

Leticia Chinkwende	Wife	25%	K9.630,375.72
Margaret Mtonyo	Sister	10%	K3.852,150.29
Lewis Chinkwende	Brother	25%	K9.630,375.72
Enos Jordan Chinkwende	Father	5%	K1.926,075.14
Merriam Chinkwende	Mother	5%	K1.926,075.14
Nancy Chinkwende	Daughter	8%	K3,081,720.23
Cyril Chinkwende	Son	8%	K3,081,720.23
Augustine Chinkwende	Brother	7%	K2,296,505.20
Maynard Chinkwende	Brother	7%	K2,296,505.20

Regarding the Deceased’s parents, Counsel Chayekha submitted that each parent deserves to be allotted 12.5 % of the estate because they are sickly and need money to access medical attention.

Turning to the children, the reasoning behind the proposal for them to get 10% and 15% of the net estate was put thus by Counsel Chayekha:

“Lastly, the Defendant is employed and is not a minor. She is independent. She is able to take care of herself. In addition she already has a house which was left by the deceased when the marriage ended. There is no contribution she made to the value of the estate hence her share should reflect this. As for the brother, since she is school going, we submit that a higher percentage as proposed would be adequate to cater for his school needs. Otherwise he also falls squarely in the shoes of her sister.”

Counsel Mbeko submitted that the distribution proposed by the Plaintiffs is not a fair one in that it does not give due weight to five important points, that is, (a) the 1st Plaintiff had no children with the Deceased, (b) the Deceased died within five years of marrying the 1st Plaintiff, (c) the children have not yet finished school, (d) the children are the youngest of all the beneficiaries of the estate and (e) the bulk of the estate was acquired with the contribution and assistance of the former wife and not the 1st Plaintiff.

Counsel Mbeko also drew the Court’s attention to s. 17 of the Act which, in subsection (1)(d)(iv), provides that children and a surviving spouse are entitled to equal shares unless there are special circumstances. Counsel Mbeko submitted that the Plaintiffs have failed to establish any special circumstances. He specifically mentioned that there is no evidence to show that the 1st Plaintiff contributed to raising capital in DEC Investment Limited which forms the bulk of the estate. Counsel Mbeko also invited the Court to note that the Defendant and her brother are aged 19 years and 20 years respectively and they are in school.

As regards Exhibit “LC3”, Counsel Mbeko argued that it does not follow that the way the Deceased intended his terminal benefits to be distributed is the way he wished his entire estate to be shared.

In concluding his submissions, Counsel Mbeko prayed that the Court should dismiss the percentages proposed by the Plaintiffs and endorse the percentages proposed by the Defendant, that is, 30% for the 1st Plaintiff (Leticia Chinkwende), 5% for Enos Jordan Chinkwende, 5% for Merrium Chinkwende, 30% for Cyril Chinkwende and 30% for Nancy Chinkwende.

In his reply, Counsel Chayekha dwelt on four issues. His first point has to do with s.17 of the Act. Counsel Chayekha submitted that this provision requires that the

first priority should be to ensure that members of the immediate family are accorded due protection from hardship. The argument run thus:

“The 1st Plaintiff is a member of the immediate family. She is left without a house but her late husband had an estate worthy K100,000,000.00. While he lived, the 1st Plaintiff also enjoyed good life. This suggests that they lived in a good house. Special protection would mean that the Court should give her as much as possible so as not to change her status in life as a result of the death of her husband. Good house are not cheap in Malawi. In protecting this lady, she must be given a good house. K50,000,000.00 is not enough”- Emphasis by underlining supplied

The second issue pertains to the Defendant. Counsel Chayekha submitted that, unlike Cyril Chinkwende, the Defendant does not mention the school she goes to. Counsel Chayekha also contended that the Defendant does not deny that she is employed and that she does not pay rentals since she resides at her mother’s place. He also argued that the fact that she still stays with her mother does not mean she is not independent. It was thus submitted that K11,000,000.00 would be enough as her share.

The third issue relates to the alleged respective contributions by the former wife and the 1st Plaintiff to the estate. Counsel Chayekha reiterated that the shares in the DEC Investment Limited were purchased when the marriage between the Deceased and the former wife was on the rocks such that the former wife was bent on frustrating the business of the Deceased as exemplified by the exhibits to the Defendant’s Affidavit. Counsel Chayekha argued that contrary to the assertion by the Defendant that her mother (former wife) contributed to the estate, the exhibits show that the former wife blocked the growth of DEC Investment Limited. It was further argued that the house which was used as a security for the loan should not be considered as contribution by the former wife because it was actually given back to the former wife as part of the divorce proceedings.

Analysis

I have carefully read the Originating Summons, the affidavit evidence, including the exhibits to the affidavits and the oral and written submissions of Counsel. The estate, so far as at present ascertained, is a large one, its value being a little over K113,700,000.00.

The parties are agreed that the persons entitled to inherit the estate are the widow, children and parents of the Deceased, namely, the 1st Plaintiff, the Defendant, Cyril Chinkwende, Enos Jordan Chinkwende and Merrium Chinkwende. The parties are, however, not agreed on the share each beneficiary should get.

The inheritance of intestate property is governed by ss. 17 and 18 of the Act. Section 17 of the Act is relevant for purposes of this case. The section sets out principles of fair distribution of intestate property to immediate family and dependants and the pertinent part thereof is worded as follows:

“(1) Upon intestacy, the persons entitled to inherit the intestate property shall be the member of the immediate family and dependents of the intestate, and their shares shall be ascertained upon the following principles of fair distribution-

- (a) Protection shall be provided for members of the immediate family and dependants from hardship so far as the property available for distribution can provide such protection;*
- (b) Every spouse of the intestate shall be entitled to retain all the household belongings which belong to his or her household;*
- (c) If any property shall remain after paragraphs (a) and (b) have been complied with, the remaining property shall be divided between the surviving spouse or spouses, the children, and the parents of the intestate;*
- (d) As between the surviving spouse or spouses and the children of the intestate, their shares shall be determined 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 other basic necessities any of the spouses or children may have received from the intestate during his or her lifetime; and*
 - (iii) any contribution made by the spouse or child of the intestate to the value of any business or other property forming part of the estate of the intestate, and in this regard the surviving spouse shall be considered to have contributed to the business unless proof to the contrary is shown by or on behalf of the child, but in the absence of special circumstances the spouses and children shall, subject to subsection (3) be entitled to equal shares;*
- (e) As among the children of the intestate, the age of each child shall be taken into account with the younger child being entitled to a greater share of the property than the older child unless the interests of the children require otherwise;”*

I will now draw together the facts and the law so described so as to answer the question whether or not special circumstances have been proved in the present case

to justify departure from the default position, embedded in s. 17(1) (d) of the Act, that the spouse and the children should be entitled to equal shares.

The grounds advanced by the Plaintiffs for the 1st Plaintiff's claim to 50% of the estate are that (a) she is the widow of the Deceased, (b) she had been married to the Deceased for seven years and it is during this time that the Deceased was able to acquire the estate, and (c) unlike the children of the Deceased who are residing with their mother in a house provided by the Deceased, the 1st Plaintiff was left with no house of her own and (d) looking at how the Deceased had wished his terminal benefits to be distributed, the Deceased desired the 1st Plaintiff to get a substantial share of the estate.

I have considered the given reasons and I am not persuaded by them. Firstly, I do not think that the mere fact that the 1st Plaintiff is the widow of the Deceased entitles her to a greater share than the children. Such an argument flies in the face of the default position in s. 17(1)(d) of the Act.

Secondly, the affidavit evidence is devoid of the acts that the 1st Plaintiff undertook by way of contributing to the growth of the estate. I am mindful, of course, that s. 17(1) (d) (iii) of the Act would appear to implicitly raise a presumption in favour of a spouse having contributed to the business of the intestate but here is the rub. How is the Court to determine the extent of the value of the spouse's contribution when there is no evidence before the Court regarding the nature and scope of his or her alleged contribution?

Thirdly, there is a fundamental evidential problem with the claim that the 1st Plaintiff was left with no house of her own. In his submissions, Counsel Chayekha argued that as the Deceased enjoyed good life "*This suggests that they lived in a good house*". Unfortunately, the suggestion is not premised on evidence filed with the Court. I have read and re-read the affidavit evidence before the Court and I find nothing therein relating to the 1st Plaintiff's housing (residence) pre and post the death of the Deceased. Nor is there any evidence of the 1st Plaintiff's financial position (for example, income of her own, derived from property she might have acquired in the 45 years prior to her getting married to the Deceased) apart from the incidental mention of her share of the terminal benefits, that is, the sum of K9.630,375.72. In the absence of such evidence, it would be very difficult to determine whether or not there is hardship from which 1st Plaintiff has to be protected: see s. 17(1)(a) of the Act.

Further, it is very important that the Court should not fall into the error of treating distribution of property under s. 17 of the Act as though it is disposition of matrimonial property on the dissolution of marriage. The latter is governed by different considerations: see **Anna Kagwira v. Henderson Kagwira, HC/PC Civil Appeal 24 of 2012 (unreported)** and **Sinalo v. Sinapyanga & Others [1997] 1 MLR 261**.

Fourthly, I do not subscribe to the view espoused by the Plaintiffs that the manner in which the terminal benefits were distributed is indicative of how the Deceased would have wanted the net of the estate to be shared. The first point to note is that the terminal benefits were shared even to the Deceased's brothers and sister, persons not entitled to a share of the estate under s. 17 of the Act. It also seems to me that having distributed the terminal benefits in the manner he did, the Deceased might have been minded to see that those who received a lesser share of terminal benefits should get a bigger share of the net estate. In any case, to prevent the Court delving into speculations, s. 17(1)(d)(i) of the Act requires the Court to act on the basis of "*wishes expressed by the intestate in the presence of reliable witnesses*". This requirement has not been met in the present case.

Fifthly, it is important that the interests of the 1st Plaintiff should not be looked at in isolation from those of the other beneficiaries, namely, the Defendant, Cyril Chinkwende, Enos Jordan Chinkwende and Merrium Chinkwende. The Defendant and Cyril Chinkwende are still young and may fairly be regarded as being at the death of the Deceased wholly dependent upon him. Further, as between the Defendant and Cyril Chinkwende, s.17(1)(e) of the Act is relevant. Cyril Chinkwende, being 4 years younger than the Defendant and there being no factors for ordering otherwise, is entitled to a greater share of the property than the Defendant. To my mind, considering all circumstances of this case, a difference by 3% of the net estate would represent a reasonable provision for purposes of s.17(1)(e) of the Act.

As regards the parents, the evidence before the Court is that they are fairly aged and require constant medical attention and it is specifically for this reason that the Deceased made available to them a motor vehicle for their use. Unfortunately, there is lack of evidence regarding the cost of medical attention to help the Court determine how much money must be given to the parents for their continued medical attention.

Having given due weight to every consideration in this case, I do not think that it would be legally right in the circumstances of the present case to grant the declarations being sought by the Plaintiffs. In my judgement, respective shares to

The 1st Plaintiff and the Deceased's parents of 50% and 12.5% of the net estate would be way too much.

Conclusion


The jurisdiction of the High Court to distribute intestate property under the Act is one which is, admittedly, extremely difficult to administer and one which, in my view, the High Court must be slow to exercise. Be that as it may, the fact remains that the High Court is mandated by the Act to exercise such jurisdiction in appropriate cases and the High Court should not shirk from discharging this responsibility in deserving cases such as in the present case where the administrators of the estate are indeed deadlocked. The Court's intervention herein is indeed warranted.

In this case, after a very deliberate and dispassionate consideration of the affidavit evidence, s. 17 of the Act and the relevant case law, I have come to the conclusion that:

- (a) The 1st Plaintiff is entitled to 29% of the net estate;
- (b) The Defendant is entitled to 29% of the net estate;
- (c) Cyril Chinkwende is entitled to 32% of the net estate;
- (d) Enos Jordan Chinkwende is entitled to 5% of the net estate; and
- (e) Merrium Chinkwende is entitled to 5% of the estate.

With regard to the issue of costs the Court would, in view of the special nature of the facts of this case, exercise its discretion by ordering each party to bear his or her own costs.

Pronounced in Court this 15th day of March 2017 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE