



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
PROBATE CAUSE NUMBER 7506 OF 2018**

**IN THE MATTER OF SECTION 43(2) OF THE DECEASED ESTATES
(WILLS, INHERITANCE AND PROTECTION) ACT**

AND

**IN THE MATTER OF THE ESTATE OF LONE WILSON S. BILIMA
(DECEASED)**

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. D. K. Itai, Court Clerk

ORDER

Kenyatta Nyirenda, J.

There is before this Court an ex-parte summons by Flora Catherine J. Bilima and Nozgenji Bilima (Applicants) for a limited grant of letters of administration in respect of the estate of the late Lone Wilson S. Bilima (Deceased Person) who died on 16th December 2017.

The ex-parte summons was filed with the Court on 11th December 2018. For reasons soon to be appreciated, the ex-parte summons will be set out in full:

“EX-PARTE SUMMONS FOR LIMITED LETTERS OF ADMINISTRATION

(Deceased Estates (Wills, Inheritance and Protection) Act of 2011 and in compliance with Rule 7(2) of the Probate (Non-contentious Rules)

*LET THE APPLICANTS appear before the Honorable Judge in Chambers on the day of 2018 at O'clock in the noon on the hearing of an application for an order that **FLORA CATHERINE J. BILIMA (WIDOW) and NOZGENJI BILIMA (DAUGHTER)** be appointed joint Administrators of the estate of (deceased).*

*The sworn statements of **FLORA CATHERINE J. BILIMA** and **NOZGENJI BILIMA** as stated through the Oath of Intestacy attached hereto shall be read in support of this application.*

Dated this 11th December 2018

REGISTRAR

*Filed by the Applicants Whose Address is The Post Office Box 30315, Lilongwe” –
Emphasis by underlining supplied*

According to the sworn statement by the Applicants in support of the application, the Deceased Person was working for Ministry of Education as a Head Teacher at Namikasi Secondary School in Blantyre District. The Deceased Person is survived by his wife, namely, Flora Bilima (aged 50 years), and six children, namely, Dumisani Bilima (son aged 20 years), Watipaso Bilima (son aged 23 years), Stewart Bilima (Son aged 25 years), Hendrix Bilima (Son aged 29 years), Nozgenji Bilima (daughter aged 29 years) and Emily Bilima (Daughter aged 28 years).

The sworn statement concludes as follows:

- “8. *THAT the deceased person also left Gratuity which amounts up to MK 46, 687,516.67 and Currently being held under the authority of the Administrator General’s office in Lilongwe. Attached hereto is the copy of Payment Voucher herein marked as ‘FN2’?*
9. *THAT the office of the Administrator General has advised us to obtain Letters of Administration solely for the purposes of obtaining the said Death Gratuity.*

WHEREFORE, our humble joint prayer is for an Order that Letters of Administration be granted to us limited to the administration of Gratuity amounting up to a MK46, 687, 516.67 and no more.” – Emphasis by underlining supplied

I momentarily pause to consider why the office of the Administrator General gave the advice that it did. The application pertains to death gratuity. An estate of a deceased person does not include death gratuity by reason of section 5(2) of the Estate Duty Act which provides as follows:

- “(2) *The estate of the deceased shall not be deemed to include-*
- (a) *property held by the deceased as trustee for another under a disposition not made by the deceased or under a disposition made by the deceased more than three years before his death;*
 - (b) *any gratuity paid by the Government to the personal representatives, heirs or dependents of a deceased public officer after his death under-*
 - (i) *section 16 of the European Officers’ Pension Ordinance; or*

(ii) the Malawi Public Service Regulations.” – Emphasis by underlining supplied

It seems to me, in my not-so-fanciful thinking, that the office of the Administrator General takes the view that gratuity has to be given separate treatment from the other items of intestate property. We will revert to this issue shortly.

The Application is accompanied by three other documents, namely, Oath of Administration (Intestacy), Administration Bond and Letters of Administration (draft). The relevant parts of each of these documents will be quoted in full:

“OATH OF ADMINISTRATION (INTESTACY)

.....

We will administer according to law all the estate which the said deceased left and will exhibit a true and perfect inventory of the said estate and render a first and true account thereof whenever required by law so to do and that the whole of the said estate amounts in value of MK 46, 687, 516.67 (Forty-Eight Million Six Hundred Eighty Seven Thousand Five hundred and Sixteen, Sixty Seven Tambala only) and no more to be of our knowledge and belief.” – Emphasis by underlining supplied

“ADMINISTRATION BOND

.....

*The condition of this obligation is such that if the above named **FLORA CATHERINE J. BILIMA (WIDOW)** and **NOZGENJI BILIMA (DAUGHTER)** the wife and daughter respectively of **LONE WILSON S. BILIMA (DECEASED)** who died on 16th December, 2017 at Mlambe Mission Hospital in Blantyre District and the intended administrators of all the estate which by law devolves to and vests in the personal representatives of the deceased do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of the said estate of the said deceased in Malawi which has or shall come into the hands, possession or knowledge of the said intended administrators and do exhibit the said inventory or cause it to be exhibited in the High Court of Malawi whenever required by law so to do; and do well and truly administer the said estate according to law; and further do make or cause to be made a true and just account of the administration of the said estate wherever required render and deliver up the letters of administration in the High Court if it shall hereafter appear that any Will was made by the said deceased which is exhibited in the said Court with a request that it be allowed and approved accordingly; then this obligation shall be void and of no effect; but otherwise shall remain in full force and effect.*”

“LETTERS OF ADMINISTRATION

*This is to certify that **FLORA CATHERINE J. BILIMA (WIDOW)** and **NOZGENJI BILIMA (DAUGHTER)** both of Mazibuko Village, T/A Chisemphere in Kasungu District in the Republic of Malawi, have been duly appointed the administrators of the estate of **LONE WILSON S. BILIMA WHO DIED ON 16th December, 2017** at Mlambe Mission Hospital, domiciled in the Republic of Malawi and intestate and is hereby authorized to administer the said estate according to law”*

The application came before me on 17th December 2018 but it was returned to the Applicants on the same day unprocessed because there was no proof of compliance with section 34 of the Deceased Estate (Wills, Inheritance and Protection) Act [Hereinafter referred to as the “Act”]. Section 34 of the Act provides as follows:

“Every application for a grant of probate or letters of administration shall be accompanied by a copy of the estate duty affidavit and by a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act.”- Emphasis by underlining supplied

Shortly thereafter (on the same day, that is, 17th December 2018), it would appear the Applicants managed to have an Estate Duty Affidavit completed and sworn at Lilongwe before Oliver Kabogodo Gondwe, a Commissioner for Oaths and Legal Practitioner. The Affidavit is dated 17th December 2018 and the material part states:

*“We, **FLORA CATHERINE J. BILIMA (WIDOW)** and **NOZGENJI BILIMA (DAUGHTER)** make oath and say that the above-deceased of Do solemnly and sincerely affirm that*

*This account annexed hereto is a full and true account of the particulars and value at the date of the deceased’s death, so far We have been able to ascertain the same, of all the estate of the deceased in possession or reversion and the gross value thereof at the date of deceased’s death was **MK46, 687, 516.67** death and funeral expenses as shown in the accounts annexed hereto were K The said debt were created by the deceased for full consideration in money or money’s worth wholly for deceased’s own use and benefit and are not subject to reimbursement by any other person or out of any other property.”*

The accounts annexed to the Affidavit concludes by stating as follows:

“

*TOTAL PROPERTY IN MALAWI **MK46,687,516.67***

....

*TOTAL AMOUNT OF ESTATE DUTY PAYABLE **NIL**”*

I have carefully examined the application and it is my considered view that it has to fail on two principal grounds. Firstly, the requirements of section 34 of the Act have not been fully met in that the documents in support of the application do not include a certificate of the Secretary to the Estate Duty Commissioners. There is no mistaking the peremptory language used in section 34 of the Act: *“Every application for a grant of probate or letters of administration shall be accompanied by a copy of the estate duty affidavit and by a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act”*.

Section 33 of the Estate Duty Act is couched in the following terms:

“(1) No grant of representation to the deceased shall be made unless a certificate of the Commissioners is produced to the effect that a proper estate duty affidavit as to the estate of the deceased has been made and delivered to the Commissioners, or, where the executor or other person accountable for duty does not know the value of any property and undertakes to the satisfaction of the Commissioners to pay all estate duty in any manner arising in respect thereof, or for any other reason, the Commissioners permit the grant to be made.

(2) And the Commissioners may, if they think fit, refuse to give such a certificate until the estate duty has been paid or security for the payment thereof has been given to the satisfaction of the Commissioners.

(3) Every grant of representation after the commencement of this Act shall state that the certificate required by this section has been produced and shall give its date and such other particulars as to the certificate or the estate of the deceased as may be prescribed.

(4) The foregoing provisions of this section shall not apply where a fixed duty is paid and accepted in lieu of estate duty, or where the estate appears to the Court or the authority granting representation to be exempt from estate duty.

(5) Particulars of any fixed duty accepted in lieu of estate duty or that the estate appears to be exempt from estate duty shall be stated in the grant of representation.” – Emphasis by underlining supplied

It is clear from section 33 of the Estate Duty Act that a certificate of the Commissioners has to be produced in all cases except where a matter falls within subsection (4) of the said section, namely, for purposes of these proceedings, *“where the estate appears to the Court to be exempt from estate duty”*. It is noteworthy that what has to appear to be exempt from estate duty is the estate of the deceased. It is not enough that a part of the estate of the deceased (death gratuity, as an example) appears to be exempt.

In the present case, it is not in dispute that the estate of the Deceased Person does not just consist of death gratuity in the sum of K46, 687,516.67. The Deceased

Person left other properties which fall within his estate, per the provisions of section 5(1) of the Estate Duty Act which reads:

“(1) The estate of the deceased shall include:

- (a) property which vests in the executor of the deceased;*
- (b) property of which the deceased was at his death competent to dispose;*
- (c) property which the deceased or any other person had an interest ceasing on the death of the deceased....*
- (d) money payable to the deceased’s estate under any policy of insurance;*
- (e) property taken as a donatio mortis causa made by the deceased;*
- (f) property which belonged to the deceased or of which the deceased was competent to dispose at any time within three years before his death, and of which the deceased had disposed in any manner other than for full consideration in money or money’s worth:*

*Provided that this provision shall not apply to gifts which are made in consideration of marriage, or which are proved to the satisfaction of the Commissioners to have been part of the normal expenditure of the deceased, and to have been reasonable, having regard to the amount of his income or to the circumstances, or which, in the case of any done, do not exceed in the aggregate **GBP** 100 in value or amount;*

- (g) personal property not within the limits of Malawi ...*
- (h) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.”*

In terms of the Schedule to the Estate Duty Act, the rates per centum of estate duty payable are as follows:

<i>“Where the principal value of the estate</i>	<i>Rates per cent</i>
<i>does not exceed K30,000</i>	<i>Nil</i>
<i>exceed K30,000 but does not exceed K40,000</i>	<i>5</i>
<i>exceed K40,000 but does not exceed K80,000</i>	<i>6</i>
<i>exceed K80,000 but does not exceed K140,000</i>	<i>7</i>
<i>exceed K140,000 but does not exceed K200,000</i>	<i>8</i>
<i>exceed K200,000 but does not exceed K400,000</i>	<i>9</i>

exceed K400,000 but does not exceed K600,000

10

exceed K600,000

11”

I have read and re-read the application, including the supporting documents, and I have found nothing therein to show that the principal value of the estate of the Deceased Person does not exceed K30,000.00. In the premises, I am not satisfied that duty is not payable in respect of the estate of the Deceased Person.

Secondly, it appears to me that this application is an ingenious attempt by the Applicants to administer all of the estate of the Deceased through the back door. Much as the Applicants seek to give the impression that they are only interested in the death gratuity and not all of the estate, the documents paint a totally different story as evidenced by “*We will administer according to law all the estate*” (OATH OF ADMINISTRATION (INTESTACY)), “*and the intended administrators of all the estate which by law devolves to and vests in the personal representatives of the deceased*” (ADMINISTRATION BOND) and “*and is hereby authorized to administer the said estate according to law*” (LETTERS OF ADMINISTRATION).

The Court will not allow the Applicants to blow hot and cold in the same breath (application). They have to choose between limiting themselves to administering the death gratuity only or to administering all the estate. Whatever choice they make, either going for letters of administration with limited grant or full letters of administration, they have to ensure that the application and all the supporting documents relate to the chosen option. They cannot have it both ways.

Before resting I wish to register my sympathy with the Applicants on a number of fronts. Firstly, it will be recalled that the precursor to the Act is the Wills and Inheritance Act which was enacted in 1967 (1967 Act). Although the 1967 Act was repealed, subsidiary legislation made thereunder was saved under section 89(2) of the Act. Unfortunately, a good deal of the said subsidiary legislation is not consistent with the provisions of the Act: see **In the Estate of Christopher Barrow, HC/PR Administration Cause No. 531 of 2013 unreported**. It is common place that the Act was enacted in 2011. It will also be remembered that the Special Law Commission on the Review of the Wills and Inheritance Act (the Law Commission) already developed draft subsidiary legislation in support of the Act. It, therefore, comes to me with a great sense of shock that more than six years have now elapsed without the said draft subsidiary legislation being promulgated. The Law Officers may wish to give this matter the urgent attention it deserves.

Secondly, as has aptly been observed under the Democratic Governance Programme (STE Mission 11 – Training on Deceased Estates Management) at pages 36 and 37, the Estate Duty Act poses three serious problems:

“The first is that the process of assessment takes time and a substantial amount of money because the property has to be valued. Secondly, the duty is required to be paid at a time when the estate is most unlikely to have money to pay, bank accounts at this point being inaccessible to intended administrators.

Lastly, considering the fact that the threshold that is duty free is only K30,000 and no property is exempt from duty, the amount payable by way of estate can be considerable part of the estate. Indeed the amounts payable are so big that those that are not very kind think that government, through estate duty, has now become the biggest property-grabber.”

That said, Courts and all concerned persons have to ensure that the provisions of the Act are enforced to the letter. Except where a statutory provision is unconstitutional (and has been declared as such), courts are duty bound to give full effect to the provision as enacted by Parliament. This applies even though the court disagrees with Parliament. It even applies where the court considers the result unjust, provided that it is satisfied that Parliament really did intend that result. In the apt observation by Lord Scarman in **Duport Steads Ltd v. Sirs [1980] 1 WLR 142, 168:**

“... in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactment. In this field, Parliament makes and unmakes laws [and] the judge’s duty is to interpret and apply the law, not to change it to meet the judge’s idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgement best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute” – Emphasis by underlining supplied

If I may be allowed to say so, the observations by Lord Scarman are very much in agreement with the provisions of section 9 of the Constitution which enjoin courts determine all cases *“in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law”*.

I have considered the Act and it is clear beyond all possibility of controversy that the legislative intention was that every (repeat “every”) application for a grant of probate or letters of administration has to be accompanied by a copy of the estate duty affidavit and by a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act. I am fortified in my view by the legislative history behind section 34 of the Act. The requirements set out in section 34 of the Act were not in the 1967 Act but in the subsidiary legislation made thereunder, namely, rule 8 of the Probate (Non-contentious) Rules.

In considering rule 8 of the Probate(Non-Contentious) Rules, the Law Commission took the view that the requirement for attaching a copy of the estate duty affidavit and a certificate of the Estate Duty Commissioners issued under section 33 of the Estate Duty Act to every application for a grant of probate and letters of administration was substantive in nature and should, more appropriately, be dealt with in the Act itself rather than in subsidiary legislation: see the Report of the Law Commission at page 53.

By way of conclusion, the application is dismissed on the two grounds discussed hereinbefore.

Pronounced in Chambers this 21st day of December 2018 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE