

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PROBATE CAUSE NUMBER 149 OF 2013

BETWEEN:

MTISUNGE NSANJAMA

PLAINTIFF

AND

ELEVATE NSANJAMA

1st DEFENDANT

NOEL NSANJAMA

2nd DEFENDANT

MAI LILIAN NSANJAMA-MBELA

3rd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Tandwe, Counsel for the Plaintiff
Chidothe, Counsel for the 1st Defendant
Kamwendo, Counsel for the 2nd and 3rd Defendant
Mtegha, Official Court Interpreter

JUDGMENT

This is this Court's decision on the share of each beneficiary on the distribution of the deceased estate in this matter. This is the question that was reserved for determination by this Court when it determined other questions in this matter by its interim decision made on 19th June 2017.

The question of the share by which each beneficiary of the deceased estate is to benefit herein was reserved until the administrators filed accounts on how they managed the estate herein, the bulk of which comprises two schools located at Malosa and Mulanje respectively.

The plaintiff, 1st defendant and 3rd defendant filed their accounts as administrators of the deceased estate as ordered by this Court.

This Court also ordered the production of information by relevant banks on certain bank accounts in this matter so that it could appreciate the financial situation herein. Those accounts were produced. In one case, concerning the 1st defendant, a certain period crucial was not included in one of the bank accounts produced by one bank and a further order had to be made in that regard.

This Court then ordered the plaintiff, the 1st defendant and the 3rd defendant to file final submissions on the distribution of the estate in view of all the available information.

The plaintiff filed her submissions on 27th November 2017 and the 3rd defendant filed hers on 2nd January 2018. The 1st defendant has not done so. This Court has determined that, in view of the lapse of time, it must go ahead with its final determination in this matter.

It is the foregoing process, necessitated, among others things, by the acrimony and lack of cooperation amongst the administrators of the deceased estate, that caused this matter to take long to be concluded.

In order to put the matter in proper perspective, it is best that this Court indicate its findings made in its interim decision, dated 19th June, 2017. By the order of 19th June 2017 this Court made the following findings

1. That list of beneficiaries is as follows
 - a. Elevate Nsanjama-widow
 - b. Mtisunge Nsanjama-child
 - c. Chifundo Nsanjama-Child
 - d. Netty Nsanjama-child
 - e. Tupoche Nsanjama-child
 - f. Q (a minor)-child

- g. Victor Chimtengo-dependent
 - h. Mai Lilian Nsanjama-Mbela-dependent
2. That the estate of the deceased comprises the following
 - a. 70 per cent of the Mulanje Nsanjama school
 - b. 55 per cent of the Malosa Nsanjama school
 - c. Motor vehicles- pick-up MN454, Toyota Coaster CZ 2100, Minibus MJ 3707, 3-tonne lorry MJ 3363
 - d. Funds in bank accounts. The Bank account information ordered to be produced by the banks reveal that the 1st defendant transferred K20 000 000 from the deceased estate to a fixed deposit account in the name of Q. The transfer, which the 1st defendant denied at trial, was made on 3rd April, 2013.
 3. That the 1st defendant has a 25 per cent ownership in Mulanje Nsanjama school and 5 per cent of Malosa Nsanjama school as her matrimonial property.
 4. That the plaintiff's mother and former wife of the deceased, Julita Manda, has 5 per cent ownership of Mulanje Nsanjama school as her matrimonial property.
 5. That the 3rd defendant and her other children have 40 per cent ownership in Malosa Nsanjama School as partners with the deceased. And that they shall pay to the estate the remaining value of the partnership, namely, 55 per cent of the value of Malosa Nsanjama school.

This Court will set out the information disclosed by the accounts of the administrators and then consider the same later alongside the parties' submissions on the issue of distribution of the estate.

The accounts submitted by the plaintiff show as follows.

The first to be produced was a profit and loss account for the period ending 31st December 2014. It shows as follows.

That the assets value for Malosa Nsanjama school was K55 972 998 as at 31st December 2014. Further, that the revenue as at 31st December 2014 was K61 710 000. Operating expenses were put at K51 012 000. And administration expenses

were put at K16 650 752. Those expenses included school fees for Netty and Tupoche Nsanjama at K5 100 000 upkeep for Netty Nsanjama at K2 500 000. Operating profit was put at K10 698 000. The profit before tax was put at (5 952 752).

Then the next to be produced was an income and expenditure report for thirty months ending on 17th June 2017. It shows that as at 31st December 2015 there was no opening balance. And that the income was K73 625 000 and expenses were K66 088 200 leaving a surplus of K7 536 800 carried forward to period ending 31st December 2016.

The accounts then show that for the period ending 31st December 2016 the income was K82 756 800 and expenses were K77 880 900 leaving a surplus of K4 875 900 carried forward to the period ending June 2017.

Lastly, the accounts show that as at 17th June 2017, the income was K35 715 900 and expenses were 35 502 797 leaving a surplus of K213 103. It also shows that Ms Julita Manda was given a loan by the plaintiff in the sum of K4 000 000 during the period ending June 2017.

The accounts submitted by the 1st defendant with respect to the Mulanje Nsanjama school show as follows.

In her Director's report, the 1st defendant indicated that she withdrew K20 000 000 from the school account and deposited the same in trust for Q to save and raise enough money to carry out some planned construction projects at Mulanje Nsanjama school, namely, a guest house, 11 more toilets and finishes on three classrooms.

For the year ending 31st August 2014 the assets value was K120 892 021. The income was put at K148 232 000. The net profit for the year was put at K32 950 010 after deducting operating expenses. K18 000 000 is indicated to have been capital expenditure including K4 859 200 spent on finishing a hostel block at Malosa Nsanjama school.

The 1st defendant indicated that for this period she only received K2 500 000 from Malosa Nsanjama school bursar Mr Lucius Nsanjama in early May 2013. Thereafter the plaintiff took over management of Malosa Nsanjama school.

For the year ending 31st August 2015 the assets value was K127 343 087. The income was put at K117 052 000. The net profit for the year was put at K13 180 589 after deducting operating expenses.

For the year ending 31st August 2016 the assets value was K135 763 377. The income was put at K130 660 000. The net profit for the year was put at K531 291 after deducting operating expenses. Here the operating expenses greatly increased because of an item of legal fees put at K14 889 200.

For the year ending 30th June 2017, as this Court received the last accounts from the administrators around that time, the assets value was put at K164 761 838. The income was put at K157 770 000. The net profit for the year was put at K31 240 006 after deducting operating expenses.

The accounts submitted by the 3rd defendant show as follows.

These cover the period between March 2013 to December 2013. This spans two school terms, namely, term three of the 2012/2013 academic year and term one of the 2013/2014 academic year.

For term three, the income for Malosa Nsanjama school is indicated as K20 520 000. Expenses for the same period were K7 665 000 which includes an allowance paid to the 3rd defendant at K250 000 per month as was allegedly being paid by the deceased during his life.

During the same term three, it is indicated that a total of K7 850 000 was handed over to the 1st defendant by the school bursar at Malosa Nsanjama school over three occasions, namely, 12/14/13, 24/04/13 and 05/05/13.

The balance of K5 005 000 could not be accounted for and the 3rd defendant suggested that it is possible that this was used during the life of the deceased since construction work was on-going.

For term one, income was K21 848 800. Expenses are indicated at K11 635 462 which includes an allowance of K1 000 000 taken by the 3rd defendant. A surplus of K463 000 was also used by the 3rd defendant. And again, it is indicated K9 750 000 was handed over to the 1st defendant over three occasions, namely, 16/09/13, 8/10/13 and 21/10/13.

The amount handed to the 1st defendant is indicated as profit from Malosa Nsanjama school for the period covering the two terms in question.

In view of the foregoing accounts by the administrators of the deceased estate herein, the plaintiff's submissions on the distribution of the estate are as follows.

The plaintiff pointed out that her submissions are filed pursuant to the direction of this Court made on 17th September 2017 that parties file their submissions on two specific issues, firstly, on the financial reports submitted by the parties on their administration of the deceased estate so far and secondly, on the distribution of the shares or interests in the estate to the beneficiaries.

This direction followed the court's interim decision in this matter delivered on 19th June 2017 which determined the extent of the deceased estate and the number of the beneficiaries in the estate.

The plaintiff started with a discussion on the distribution of the deceased estate and later commented on the accounting reports submitted by the parties as administrators.

The plaintiff correctly noted that, according to the decision of this Court, the following are the beneficiaries of the estate:

1. Elavate Nsanjama [1st defendant/widow]
2. Mtisunge Nsanjama [plaintiff/child]
3. Chifundo Nsanjama [child]
4. Netty Nsanjama [child]
5. Tupoche Nsanjama [child]
6. Q Nsanjama [child]
7. Victor Chimtengo [dependant]
8. Mai Lilian Nsanjama-Mbela [3rd defendant/mother]

Further, that this Court's decision also determined the extent of the deceased estate herein as follows.

1. 70 percent interest in the Mulanje school;
2. 55 percent interest in the Malosa school;

3. Motor vehicles: pick-up registration number MN 454, a Toyota Coaster registration number CZ 2100; a minibus registration number MJ 3707; and a 3-tonner lorry number MJ 3363;
4. Funds in bank accounts.

The plaintiff submitted that, it is imperative to remember, as the deceased estate is being distributed, that this Court has already held that the 1st defendant has a 25% stake in the Mulanje school and 5% stake in the Malosa school while the 3rd defendant has already been held to have a joint ownership of 40% in the Malosa school.

And that, with further respect to the 3rd defendant, it must also be noted that she in addition has over 30 houses which she rents out and collects enormous sums of money in rentals in any case a minimum MK240,000 monthly and also has a running maize mill which generates for her at least MK15,000 a day.

In view of the foregoing, the plaintiff submitted that, the 1st and 3rd defendants cannot therefore be said to be or cannot be in any sort of hardship compared to the other beneficiaries whose only asset [interest/benefit] is derived only under the deceased estate as determined by this court.

The plaintiff then submitted that section 3 of the Deceased Estate (Wills, Inheritance and Protection) Act defines “hardship” in relation to any person as meaning the deprivation of the ordinary necessities of life according to the way of living enjoyed by that person during the lifetime of the intestate, and in the case of a minor includes deprivation of the opportunities for education which he or she could reasonably have expected had the intestate continued to live.

The plaintiff added that, in short, hardship is the deprivation of the “ordinary necessities of life” and implies such necessities as food, clothing and shelter. She submitted that no one can successfully argue that the 1st and 3rd defendants have been deprived of such necessities as a result of the death of the deceased.

The plaintiff submitted further that, two persons on the list of dependants, namely Victor Chimtengo and Q Nsanjama, are in the direct custody and care of the 1st defendant. The plaintiff submits that the fact that the 1st defendant is not in any sort

of hardship would apply to these two named dependants. And that they cannot be said to have been deprived of the “ordinary necessities of life” as a result of the death of the deceased at a time when they are staying with the 1st defendant whose financial life is very stable and comfortable.

The plaintiff added that, in any case, Q Nsanjama has a bank account in his name in trust opened and operated by the 1st defendant with an opening balance of K20 000 000.

The plaintiff then submitted that, however, the same cannot be said of the plaintiff and her siblings. And that all they have or hope to get is the interest or share this Court has held they have in the deceased estate.

The plaintiff therefore submitted that this Court must make an order providing the plaintiff and her siblings protection from hardship as required by section 17 (1)(a) of the Deceased Estate (Wills, Inheritance and Protection) Act. And that in essence, this means provision of food, clothing and shelter. Further, that this also includes provision of school and tuition fees for those who are still in school, namely, Netty Nsanjama and Tupoche Nsanjama.

The plaintiff then correctly submitted that, regarding distribution of the deceased estate generally, the applicable law is found in section 17 of the Deceased Estate (Wills, Inheritance and Protection) Act which provides as follows

- (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 and the children 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 younger child being entitled to a greater share of the property than the older child unless the interests of the children require otherwise; and
- (f) in the absence of any spouse or child of the intestate the property described in paragraph (c) shall be distributed between the dependants of the intestate, if more than one in equal shares.”

Next, the plaintiff correctly submitted that the 1st defendant is according to law entitled to retain “household belongings” which belong to her household according to section 17 (1)(b) of the Deceased Estate (Wills, Inheritance and Protection) Act. And that section 3 of the Deceased Estate (Wills, Inheritance and Protection) Act defines “household belongings” as articles and effects of every description used in, and for the purpose, of maintaining and enjoying a home and family life.

The plaintiff submitted that the remaining property is supposed to be divided between the surviving spouse and the children of the intestate according to section 17 (1)(c) of the Deceased Estate (Wills, Inheritance and Protection) Act. She added that this does not include mere dependants. She added that for clarity therefore, the surviving spouse and children are: Elevate Nsanjama (Mrs) [the 1st defendant], Mtisunge Nsanjama [the plaintiff], Chifundo Nsanjama, Netty Nsanjama, Tupoché Nsanjama and Q Nsanjama.

The plaintiff added that, according to section 17 (1) (d) of the Deceased Estate (Wills, Inheritance and Protection) Act, the shares of the people in that list will be determined in accordance with all the special circumstances. She noted that some of

the special circumstances outlined in that provision are: any wishes expressed by the deceased in the presence of reliable witnesses. Such assistance rendered by the deceased to the spouse or any child during the lifetime of the deceased. 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 that in the absence of special circumstances the spouses and children shall be entitled to equal shares;

The plaintiff noted that, in the present case, there is no evidence of any wishes expressed by the deceased which would affect the distribution of the deceased estate under the provision under discussion.

Further, that the deceased rendered support to all the persons on the list of beneficiaries during his lifetime or at least there is no evidence to the contrary. And so that with respect to particular persons on the list, this does not amount to any special circumstance.

With respect to the surviving spouse's contribution to the value of the business or other property, the plaintiff pointed out that this Court found that the 1st defendant made some contribution to the development of the business of the school in Mulanje and to some extent to the school in Malosa.

And that however, that this Court has already given the 1st defendant a stake of 25% in the Mulanje school and 5% the Malosa school on the basis of her said contribution.

The plaintiff submitted that, the issue of the 1st defendant's contribution to the value of the business has already been provided for and taken care of by this Court and should not and cannot at this point be considered as a "special circumstance". And that, doing otherwise would mean the 1st defendant benefiting twice on the same ground and that would be against the spirit of the statute and would greatly disadvantage the other beneficiaries.

In light of the foregoing, the plaintiff submits that the spouse and children of the deceased herein be held to be entitled to equal shares. The plaintiff referred to *Tembo v. The Administrator General & Anor* [2014] MLR 407 and section 23 (1) of the Constitution.

The plaintiff added that this would therefore mean that with respect to the school at Mulanje each one of them be entitled to a stake of 11.67%, being 70% divided by 6.

The plaintiff added further that, for the Malosa school, each one of them would be entitled to a stake of 9.17% being 55% divided by 6.

The plaintiff submitted further that, with respect to money in the banks, they would each be entitled to a sixth of the amounts in the accounts.

The plaintiff next noted that the question would however be “how the said shares/interests in the schools should be managed or handled?”

The plaintiff submitted that in the circumstances of the present matter, it would be appropriate to get the deceased estate valued. And that the exercise of valuation must be undertaken by a qualified valuer/valuator.

The plaintiff added that getting a qualified and competent valuer would ensure that the outcome of the exercise is reliable and acceptable by all parties. The valuation would help in ensuring that the various beneficiaries upon being given their various percentages of interest have monetary figures representing their respective said percentages.

The plaintiff noted that a further question is how to handle the various interests that the court may give to the various beneficiaries.

The plaintiff's submission is that those beneficiaries with a majority interest in the schools should be given the first option to buy out the others. And that considering the sour relationships between the various beneficiaries herein, it would be very difficult for them to run the businesses together.

The plaintiff then submitted her observations on the accounting reports submitted by the 1st and 3rd defendants. The following are her observations.

The plaintiff noted that the 1st and 2nd defendants have submitted their accounts/reports on the administration of the deceased estate. And that, while the 3rd defendant has submitted one report, the 1st defendant has submitted four annual reports for 2014; 2015; 2016 and 2017.

The plaintiff then commented on the reports of both the 1st and 3rd defendant simultaneously.

The plaintiff first noted that in her Accounts Report for 2014, the 1st defendant has stated that she withdrew K20 000 000 from the School Account and deposited it into another account [a fixed deposit account] in the name of Q Nsanjama. And that this transaction is also reflected in the bank statements for the period March 2013 to December 2013.

The plaintiff observed that the 1st defendant denied in her oral testimony in court to have transferred the money.

The plaintiff submitted that the 1st defendant stated in her oral testimony in court that she never made transfers of money into another account in the name of Q Nsanjama. And that this court noted the 1st defendant's evidence on page 94 of the judgment of 19th June 2017 as follows: "She also said that there is no fixed deposit account for Q at National Bank with K19 000 000. She denied this allegation and told the court that the Bank did not give true information."

The plaintiff noted that, however, on page 3 of her financial statements for the year ended 31st August 2014, the 1st defendant states as follows: "In April 2013, I withdrew K20 000 000 from the school account and opened a fixed account in the name of Q Nsanjama to save and raise enough funds for the said [school] projects."

The plaintiff submitted that, one wonders why an account meant "to save and raise" funds for a school project was then opened in the name of Q Nsanjama. And that when one considers the 1st defendant's stout denial of the existence of the said account, one begins to entertain the real possibility of the 1st defendant trying to conceal funds for the estate from the other beneficiaries. And further, that the 1st defendant only came clean on the issue after this Court had ordered that banks submit accounts of the administrators.

The plaintiff pointed out that the 1st defendant therefore lied under oath and committed perjury. And that it is anybody's guess which other pieces of her evidence may have similarly been perjurious.

The plaintiff pointed out that she was co-administrator from 5th April, 2013. She noted that there is no relationship between the transfer of money from the School account to a personal fixed deposit account when it is a known fact that the plaintiff was made a co-administrator of the deceased estate on 5th April 2013 and in this case, she was supposed to be consulted on the decision. She pointed out further that, since the 1st defendant made the decision to open another account without consulting her co-administrator, we can only guess what her motive was.

The plaintiff also pointed out that the 1st defendant refused the plaintiff to be a signatory to the account. She noted that she stated in her testimony that the 1st defendant refused in the presence of an officer of National Bank Malawi–Mulanje to make the plaintiff a co-signatory to the account of the Mulanje school. She observed that this again implied that the 1st defendant wanted to control the account and use the money the way she wanted.

The plaintiff then commented on construction projects at the Mulanje school.

The plaintiff observed that during one of the hearings in this case that was held at the Mulanje school in 2015, an inspection of the school was undertaken by this Court. She observed further that at that time there was no evidence of new structures being built or of any visible renovation of buildings.

The plaintiff pointed out that it was only at the Malosa School where there was an unfinished structure of the school hall. She noted that this has been shown in the income and expenditure statement that it cost K4 859 200 to finish and make it useable.

The plaintiff then observed that that under note 12 on Capital Expenditure for the financial statements for the period ended 31st August 2014, it was stated by the 1st defendant that K5 380 350 was spent on the construction of three toilet blocks for pupils at the Mulanje school.

The plaintiff observed further that in the financial statements for the period ended 31st August 2015, the sum of K9 835 000 was allegedly spent by the 1st defendant on the construction of four toilet blocks for pupils. Further, that in the financial

statements for the period ended 30th June 2017, the sum of MK7 229 500 was spent on the construction of three toilet blocks.

The plaintiff concluded that this therefore means that the Mulanje school constructed a total of 10 blocks of toilets between 2014 and 2017. And, in the process, spent a total of K22 444 850. In other words, each toilet block cost K2 244 485.00.

The plaintiff made several observations on this. First, she believes 10 blocks of toilets is way too much for a school like the Mulanje school. She believes the number of toilet blocks constructed is exaggerated.

Secondly, the plaintiff notes that, as earlier stated, the Mulanje school campus was toured by the court and the parties. And that we saw some toilet blocks constructed at the school. They were very basic structures with no proper windows or sophisticated doors. The roofing too was basic with corrugated iron sheets. And that this was the design of the toilet blocks at the Mulanje school.

The plaintiff submitted that it would be stretching matters to suggest that such structures would each cost K2 244 485.00. The plaintiff believes this expenditure line has been heavily exaggerated and there is need for a steep downward adjustment.

The plaintiff then noted that in the financial statements for the periods ended 31st August 2014 and 31st August 2015 respectively, it is stated that the respective sums of K7 760 450 and MK8 050 000 constituting a total sum of K15 810 450, was spent on rebuilding the front and rear of the perimeter fence. The plaintiff observed that it must be understood that this was rebuilding and not building from scratch. And that therefore it could not cost all that money.

The plaintiff also noted that it is also reported in the 2017 under note 12 that the sum of K31 670 500.00 was used for the construction of an administration block. She wondered what kind of an administration block this is because the amount is way too high for a mere administration block. She was of the view that an administration block for a primary school would not cost that amount of money. She submitted that this figure too calls for a huge downward adjustment.

She added that, also calling for adjustment is the line under note 12 of the 2015 financial statements, that the sum of K9 115 000 was spent on finishing construction of a two-classroom block. And that this figure is also excessive for the “finishing construction of a two-classroom block”.

Lastly, the plaintiff noted that according to page 3 of the 1st defendant’s income and expenditure statements for the period ended 30th June 2017, the 1st defendant obtained a loan from OIBM amounting to MK20 million in September 2016 “to co-finance the construction and finishing works on the new administration block at the school in Mulanje”. The plaintiff indicated that, notwithstanding her reservation on the purported expenditure on the said administration block, when one considers the 1st defendant’s income and expenditure statements for the whole period 2013 to 2017, one gets a clear view that the Mulanje school’s finances were in a very solid shape. She added that this therefore begs the question “why the 1st defendant would take out such a loan when the cashflow of the business was so healthy?”

The plaintiff then submitted on deposits from Malosa Nsanjama school.

The plaintiff noted that accounts from the Malosa school show that funds amounting to K17 000 000 were sent to Mulanje for banking purposes. This amount needs to be followed up because it is not appearing anywhere in the 1st defendant’s accounts. And that, curiously, the 1st defendant admits receiving only K2 500 000 from the Malosa school on page 3 of the Income and expenditure statements for the period ended 31st August 2014.

The plaintiff next submitted on teacher salaries.

The plaintiff observed that the entries on the costs for salaries are surprising. She submitted that the teachers and support staff salary structure between Mulanje and Zomba-Malosa were comparable. Further, that it is therefore very surprising that the Mulanje accounts show an expenditure of K16 582 846 for teachers and K7 887 420 for support staff in 2014.

The plaintiff added that if you observe the salaries of Zomba Malosa and Mulanje the disparity is very big. She noted that these teachers would be transferred from one school to the other at any time when the deceased was alive, because of the similarity of the salary structure.

The plaintiff supports the figures for teachers and support staff that were showing an expenditure of K5 536 000 for teachers and K2 486 000 support staff for a period of six months at Malosa in contrast to K16 582 846 and K7 887 420.00 for teachers and support staff respectively in Mulanje.

The plaintiff pointed out that it has not been shown that there were any major changes in teachers and support staff salaries after the death of the deceased herein.

The plaintiff then submitted that the 1st defendant's expenditure on meals has been exaggerated.

The plaintiff observed that the cost of meals has been exaggerated by the 1st defendant. The breakdown on the expenditure on meals is as follows: 2014- K65 743 337, 2015- K60 155185, 2016 - K69 311 022 and 2017 - K70 262 274.

The plaintiff submitted that although the actual figures of boarders have not been actually mentioned, one can calculate using the 1st defendant's income and expenditure statements that they were as follows: 479 in 2013/14; 517 in 2014/15; 534 in 2015/16; and 672 in 2016/17. She added that you find the numbers of boarders by dividing the total annual revenue from boarders by three [being the number of terms in a year] and divide the result further by K42 000 which was the fee for each boarder per term.

The plaintiff noted that these figures are comparable to the enrolment at the Malosa School where for example the number of boarders was 462 in the year 2012/13 and 469 in the year 2013/14 as per the 3rd defendant's accounting report.

The plaintiff noted that, however, it will be noted that the 3rd defendant spent K6 545 462.00 in one term on what has been termed "miscellaneous goods and services" which among other things includes meals which have no separate entry in Table 7 [School Expenditure details – September – December 2013] of the 3rd defendant's

report. While in her report for the period ended 31st December 2014, the plaintiff reports that she spent K29 250 000 on food purchases.

The plaintiff submitted that reports by herself and the 3rd defendant therefore show that the reported expenditures on meals by the 1st defendant were highly exaggerated.

The plaintiff submitted that no depreciation is required in these accounts by the administrators.

The plaintiff submitted that depreciation is not an operational cost as shown in the 1st defendant's reports. She noted that the parties were requested to draw an income and expenditure account which would have shown total money collected and expended. She observed that however, the depreciation has been included in operation costs in the 1st defendant's reports as follows: K6 939 925 in 2014; K7 787 475 in 2015; K 6 387 475 in 2016; and K8 957 525 in 2017 which figures together amount to K30 072 400.00.

The plaintiff therefore submits that the figure of K30,072,400.00 should appear as profit made during the period in review.

The plaintiff then submitted on the valuation of the estate included in the 1st defendant's account.

The plaintiff noted that the 1st defendant's report attempted to determine the value of the infrastructure at the school as of August 2017-page 10 of 2017 Accounts. The attempt gives a value of K115, 856,875 for buildings, K4, 900,000 for vehicles K325 for equipment and K6, 138,400 for furniture.

The plaintiff submitted that the 1st defendant undervalued the Mulanje school as follows:

- 2014: K66, 853,075
- 2015: K87, 015,600
- 2016: K96 953 125
- 2017: K161, 311,383

The plaintiff believes this is an incorrect opinion on the value of the school at Mulanje. She observed that there was another report made in 2013/14 which gave the Mulanje school a valuation close to K170 000 000 with Malosa School having a lower value of close to K120 000 000.

And that yet the same 1st defendant's report shows that there was a construction of an administration block where she spent K31 670 500 and toilets which cost K7 229 000.

The plaintiff submitted that with the additional administration block, new toilets and regular maintenance as presented in the report, she expected the value of the infrastructure to appreciate and not otherwise as shown in this report.

The plaintiff also submitted that the value of more than 6 vehicles (Prado, Nadia, 3 tonner, 2 coasters, a pick up) at the school again cannot be K4 900 000.

The plaintiff feels that the value which is put at K161 311 383 as of August 2017 is a gross misrepresentation of the value of the school. The plaintiff therefore requests that an independent valuer determines the value of both Mulanje and Malosa schools to aid the process of distribution of the estate.

The plaintiff next commented on legal fees cost expenditure that is put at K21 139 000.

The plaintiff observed that the 1st defendant's account report shows that she spent K21 139 200 on legal fees from the deceased estate account as follows

- 2014 K2 250 000
 - 2016 K14 889 200
 - 2016 K4 000 000
- Total K21 139 000.

The plaintiff admits that in 2016, the lawyers for the three parties herein were paid a total sum of K12 000 000 out of the account held at Mulanje Branch of the National Bank of Malawi. This was through a Consent Order issued by the court which the parties executed.

The plaintiff however notes that the 1st defendant paid out a total of K21 139 000 on “legal fees” which means she spent K9 139 000.00 more on legal fees. The plaintiff supposes that the said amount was paid to the 1st defendant’s lawyers over and above the sum of K4 000 000 which her lawyers were paid together with the other two parties’ lawyers involved in the matter. the plaintiff submitted that that amount of K9 139 000 should therefore be deducted from her share of the deceased estate.

In conclusion, the plaintiff moved this Court to take into account her submissions both on the distribution of the deceased estate and on the financial statements submitted.

The plaintiff’s submission on distribution of the deceased estate briefly being that the estate be equally divided among the 1st defendant and the children of the deceased following the principle that equality is equity.

On the financial statements, the plaintiff has submitted that there is need to adjust certain figures taking into account the nature of the activities on which the said figures were spent on.

She also submitted that costs of this action ought to be fully borne by the deceased estate.

The 3rd defendant’s submissions on the distribution of the deceased estate are as follows.

The 3rd defendant correctly noted that Charles Donald Nsanjama, her son, husband of the 1st defendant and father of the plaintiff died intestate, leaving several items of property, the main ones being the school at Mulanje and the school at Malosa in Zomba District.

The 3rd defendant further noted that this Court in its judgment, identified the deceased estate and the beneficiaries thereof. And that this Court is required to make the final distribution of the property making up the deceased estate.

The 3rd defendant noted that all the three administrators in this matter were required to give an account of how they managed the respective parts of the deceased estate since the death of the deceased up to the time of the judgment and this Court ordered

the production of all relevant documents including bank statements from all the banks which had accounts for money belonging to or connected to the deceased estate.

The 3rd defendant correctly pointed out that the following issues are for determination. How should money in the banks be treated or distributed among the beneficiaries of the deceased estate. How all the other movable items of property should be treated and shared among the beneficiaries of the deceased estate. How should the Malosa school be treated to cater for the interests of all the beneficiaries of the estate. And, how should the Mulanje school be treated to cater for the interests of all the beneficiaries of the deceased estate.

The 3rd defendant stated her position as follows.

She noted that she has been found to be one of the beneficiaries of the deceased estate although she has a 40% stake in the school at Malosa.

She noted that, apart from the benefits she was getting as a 'share holder' in the school at Malosa, and any income she was getting from the houses for rent and the maize mill, the deceased, who as the evidence shows was well off, used to financially and materially support her. She added that this is also shown in evidence that the plaintiff used to buy groceries and other necessities for the 3rd defendant.

The 3rd defendant indicated that this shows that she cannot be excluded from benefiting from the estate of her deceased son. And that, therefore, she is entitled to the share of what has been found to be the deceased estate including cash in the banks and the other movable items of property.

The 3rd defendant pointed out that the relationship between the plaintiff and herself is such that they cannot work together running the school at Malosa. And that this is shown by the failure of the parties to work together as co-administrators of the deceased estate.

Therefore, the 3rd defendant's position is that the 3rd defendant and members of her family should be allowed to continue running the school at Malosa whilst keeping

proper records and accounts which should be audited each term or year to determine the profits or losses which should be distributed among all the beneficiaries of the deceased estate.

The 3rd defendant added that if this arrangement fails, then she and members of her family should be allowed to buy the interests of all the other beneficiaries of the deceased estate in the school at Malosa so that they continue running the school as their family property and business as originally planned.

The 3rd defendant then submitted on the law as follows.

The 3rd defendant referred to section 17 of the Deceased Estates (Wills and Inheritance Protection) Act which provides as follows

(1) Upon intestacy the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants 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 and the children 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; and

(f) in the absence of any spouse or child of the intestate the property described in paragraph (c) shall be distributed between the dependants of the intestate, if more than one, in equal shares.

(2) If the intestate left more than one female spouse surviving him each living in a different locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate in their locality in accordance with this section; but such spouse and children shall have no claim to any share of the property of the intestate in the locality where another spouse lives:

Provided that this subsection shall not apply to the property of the intestate of a value exceeding a small estate or institutional money or private land.

(3) If the intestate left more than one female spouse surviving him all living in the same locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate proportionate to their contribution.

(4) Re-marriage shall not deprive a surviving spouse of property inherited under intestacy except in the case of property on customary land where title in that property shall devolve to the children of the spouse by the intestate upon the re-marriage of the surviving spouse.

The 3rd defendant also referred to section 18 of the Deceased Estates (Wills and Inheritance Protection) Act which provides as follows

In the absence of the beneficiaries to the estate of an intestate referred to under section 17, the whole of such property comprising the estate of the intestate shall be distributed as follows –

(a) the grandchildren of the intestate shall, if they survive the intestate, be entitled in equal shares;

(b) if none of the persons referred to in paragraph (a) survive the intestate, the brothers and sisters of the whole blood of the intestate shall, if they survive the intestate, be entitled in equal shares and failing any surviving brothers and sisters of the whole blood of the intestate, the brothers and sisters of the half blood of the intestate shall, if they survive the intestate, be entitled in equal shares;

- (c) if none of the persons referred to in paragraphs (a) and (b) survive the intestate, the grandparents of the intestate shall, if they survive the intestate, be entitled in equal shares;
- (d) if none of the persons referred to in paragraphs (a), (b) and (c) survive the intestate, the uncles, aunts, nephews and nieces of the intestate shall be entitled in equal shares;
- (e) if none of the persons referred to in paragraphs (a), (b), (c) and (d) survive the intestate, other relatives who are in the nearest degree of consanguinity shall, if they survive the intestate, be entitled in equal shares; or
- (f) if none of the persons referred to in paragraphs (a), (b), (c) and (d) survive the intestate, the Government shall be entitled to take title in the property comprising the estate of the intestate.

The 3rd defendant also referred to section 25 of the Land Act which provides that all customary land is hereby declared to be the lawful and undoubted property of the people of Malawi and is vested in perpetuity in the president for the purposes of this Act.

The 3rd defendant further referred to section 26 of the same Land Act which provides that a Chief may, subject to the general or special directions of the Minister, authorise the use and occupation of any customary land within his area, in accordance with customary law.

The 3rd defendant submitted that the effect of these sections is that, in allocating land, the chief now acts as a delegate of the President and the community is not now the village or the tribe but the whole people of Malawi. And that allocating land to an outsider by the chief would involve acceptance into the village community.

The 3rd defendant added that customary land means all land which is held, occupied and used under customary law, but does not include any public land. see section 2 of the land Act.

The 3rd defendant submitted that in *Kuwali v Kanyashu*, Civil Cause number 109 of 2010 (High Court) (unreported), it was stated that the position of the law on customary land is that chiefs have been given the mandate to authorise the use and

occupation of customary land within their area. And that customary land is for communal use and inhabitants /people of Malawi must use and occupy the said land as directed by chiefs. And further, that ownership of customary land is therefore alien to our law.

The 3rd defendant also referred to the case of *Chirwa v Karim and Pwelenje* Civil Cause number 9 of 2009 (High Court) (unreported) where Chikopa J., as he then was, said that

.....the land in issue is customary land. It does not belong to individuals. Individuals only have the usage and occupation as sanctioned by chiefs, meaning that it is only a chief who can grant a licence to use or occupy customary land.

The 3rd defendant submitted that in *Kuwali v Kanyashu* it was further stated that family members cannot deal with land in a manner that is inconsistent with their own custom which is in the custody of the local chiefs.

The 3rd defendant then commented on the accounting reports made by the three administrators herein.

The 3rd defendant observes that there has been abuse of cash by the plaintiff and the 1st defendant.

The 3rd defendant observed that the reports of the plaintiff and the 1st defendant show a substantial collection of funds in forms of school fees during the time the said parties were managing the schools after the death of the deceased.

She added that, however, unreasonable expenses were incurred, unnecessary projects were undertaken and other accounts aimed at diverting funds from the deceased estate were opened by the plaintiff and the 1st defendant.

And that, for example, the 3rd defendant pointed out that from the report by the plaintiff, too much money was spent on siblings of the plaintiff who are said to be studying abroad. The 3rd defendant's view is that these siblings of the plaintiff are supposed to be adults now and the issue of their education started way back even before the death of the deceased. She added that their continued drawing of money from the deceased estate especially from the funds collected from the Malosa school shows possibilities of an extravagant life by the said children of the deceased who

are living abroad or even a smoke screen for the extravagant life of the plaintiff when she was running the school at Malosa.

The 3rd defendant asked this Court to take into account this show of extravagance by the plaintiff and her siblings and that the distribution of the deceased estate should not support the said extravagant life but should help them to live a reasonable life as adults.

In relation to the 1st defendant, the 3rd defendant submitted that, the fact that the 1st defendant denied during the hearing of the case that she transferred money out of the school account soon after the death of the deceased and opened another account only to have the same supported by the bank statements makes it difficult for the parties and even this Court to believe her statement of account.

The 3rd defendant asked this Court to consider that there are other unrecorded transactions which facilitated the dissipation of the funds from the deceased estate for the benefit of the 1st defendant and her children to the exclusion of the plaintiff and her siblings and to the exclusion of the 3rd defendant.

The 3rd defendant submitted that, again the 1st defendant has mentioned the construction works at the school at Mulanje. The 3rd defendant pointed out that these have not been justified and again were supposed to be done in consultation with all the co-administrators of the deceased estate including the plaintiff and the 3rd defendant.

The 3rd defendant submitted that the fact that the construction projects at Mulanje school were done to the exclusion of the other co-administrators and the fact that they were made when there was a dispute over the estate, shows that there was a deliberate move by the 1st defendant to either over spend to take away money from the deceased estate or the 'projects' are just used as a smoke screen to cover up the abuse of funds which are part of the deceased estate.

The 3rd defendant then submitted on the K17 600 000.00 handed to the 1st defendant from Malosa school.

She submitted that this money was indeed taken to Mulanje for banking by the 1st defendant by one Lucious Nsanjama who was a cashier during the time the 3rd defendant was managing the school at Malosa. The 3rd defendant submitted that the

1st defendant can deny the same now that she knows this is to be taken into account when this Court is making a final distribution of the deceased estate and that each of the parties now wants to increase their share.

The 3rd defendant then made her proposal on distribution of the deceased estate herein. She started with cash and movable property.

The 3rd defendant submitted that this should be shared equally among the adult beneficiaries of the deceased estate under the principle of equality is equity. The only exception should be the minor beneficiaries whose share should be bigger according to Section 17 (e) of the Deceased Estate (Wills, Inheritance & Protection) Act.

The 3rd defendant submitted that the plaintiff's siblings have over stayed in school abroad if at all they are still in school and so they should be treated as adults on the same footing with the plaintiff, the 1st and 3rd defendants.

The 3rd defendant then submitted with regard to the schools.

She noted that this Court found that the deceased estate owns 70% of the interest in the school at Mulanje and 55 % of the interest in the school at Malosa. She stated that the running of the Mulanje School was given to the 1st defendant and the running of the Malosa school was given to the 3rd defendant.

She then observed that it is in evidence that the three parties herein cannot run the schools together as shown by their failure to work together as co-administrators of the school.

She added that the school at Malosa has been found to be on customary land belonging to the 3rd defendant and her family which included the deceased and his siblings and was taken as family property and business for the said persons.

She then submitted that to order a sale of the Malosa school would be killing the dreams of the Nsanjama family of Malosa.

She noted that the relationship between the Nsanjamas of Malosa and the plaintiff has not been good enough since the death of the deceased.

The 3rd defendant's proposal is that the 3rd defendant and members of her family should be allowed to continue running the school at Malosa, taking into account the interests of the other beneficiaries including the plaintiff and her siblings. And that this Court should appoint external auditors, to audit the school at the end of each term to audit the accounts of the school and determine the profits which should be shared among all the beneficiaries of the deceased estate.

The 3rd defendant proposes that the same should happen to the Mulanje School whereby the 1st defendant should continue running the school fully taking into account the interests of the other beneficiaries including the plaintiff and her siblings.

And that at the end of each term, external auditors appointed by this Court should audit the accounts and determine the profit or loss which is to be shared among the beneficiaries. Further, that if a term is too short a period, this Court can order the audit to take place at the end of every school year and share the profits among all the beneficiaries of the deceased estate.

The 3rd defendant suggested that this Court should give stringent conditions to the running and management of the schools and the proper keeping of records and accounts and the cooperation with auditors to ensure transparency and accountability for the benefit of all the beneficiaries. However, that if this arrangement fails, this Court should consider selling interests in the schools so that all the beneficiaries take their share.

Another option suggested by the 3rd defendant is to allow the 3rd defendant and her children buy the interests of the plaintiff and her siblings so that the school is left entirely for the 3rd defendant and her children as originally intended.

The 3rd defendant concluded that all the identified beneficiaries of the deceased estate should be treated equally and hence they should receive equal shares of the cash part of the deceased estate. And that the actual cash belonging to the deceased estate should include the cash not properly accounted for or whose expenditure has been exaggerated and cannot be supported by the party responsible and the said amounts should be taken into account in determining the share of each party and all the related beneficiaries.

And that the treatment of the schools should be that the 3rd defendant should be allowed to continue running the school at Malosa and the 1st defendant should continue running the school at Mulanje. However, that this Court should appoint reputable external auditors to be auditing the accounts of the schools at the end of each term or school year and determine the profits or losses made and determine what should be shared among the beneficiaries of the deceased estate.

Further, that if this arrangement fails, then this court should order that the 1st defendant should buy the interest of the plaintiff and her siblings from the school at Mulanje and that the 3rd defendant and her family should buy the interests of the plaintiff and her siblings in the Malosa school and continue running the school.

The 3rd defendant submitted that the costs for the legal practitioners in this matter, which involves distribution of the deceased estate should be borne by the deceased estate and they are among the expenses to be deducted from the deceased estate before distribution of the estate among the beneficiaries. Further, that the legal practitioners should therefore be allowed to agree on the final costs payable taking into account two sets of interim costs already received by legal practitioners of the parties herein.

This Court wishes to start by finding that the 1st defendant is entitled to all the household belongings she shared with the deceased during his life herein.

This is in view of what the plaintiff correctly submitted, that the 1st defendant is according to law entitled to retain household belongings which belong to her household according to section 17 (1)(b) of the Deceased Estate (Wills, Inheritance and Protection) Act. Section 3 of the Deceased Estate (Wills, Inheritance and Protection) Act defines “household belongings” as articles and effects of every description used in, and for the purpose, of maintaining and enjoying a home and family life. Those are for the 1st defendant herein.

This Court next agrees with the submissions of both the plaintiff and the 3rd defendant, that the applicable law on distribution of deceased estates is contained in section 17 of the Deceased Estate (Wills, Inheritance and Protection) Act. Section 18 of the Deceased Estate (Wills, Inheritance and Protection) Act does not apply since there are in existence beneficiaries of the deceased under section 17 of the same Act.

As correctly pointed out by the plaintiff and the 3rd defendant, section 17 of the Deceased Estate (Wills, Inheritance and Protection) Act provides as follows

(1) Upon intestacy the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants 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 and the children 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; and

(f) in the absence of any spouse or child of the intestate the property described in paragraph (c) shall be distributed between the dependants of the intestate, if more than one, in equal shares.

(2) If the intestate left more than one female spouse surviving him each living in a different locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate in their locality in accordance with this section; but such spouse and children shall have no claim to any share of the property of the intestate in the locality where another spouse lives:

Provided that this subsection shall not apply to the property of the intestate of a value exceeding a small estate or institutional money or private land.

(3) If the intestate left more than one female spouse surviving him all living in the same locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate proportionate to their contribution.

(4) Re-marriage shall not deprive a surviving spouse of property inherited under intestacy except in the case of property on customary land where title in that property shall devolve to the children of the spouse by the intestate upon the re-marriage of the surviving spouse.

This Court agrees with the parties herein that, upon intestacy, the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants of the intestate herein and their shares shall be ascertained upon the principles of fair distribution contained in section 17 of the Deceased Estate (Wills, Inheritance and Protection) Act in a certain order indicated under that section.

As correctly submitted by the plaintiff and the 3rd defendant, with regard to the shares of the beneficiaries, the first matter to be considered under the principles of fair distribution of an intestate is to cater for averting hardship on the part of the said beneficiaries. This is according to section 17 (1)(a) of the Deceased Estate (Wills, Inheritance and Protection) Act.

This hardship is defined in section 3 of the Deceased Estate (Wills, Inheritance and Protection) Act in relation to any person as meaning the deprivation of the ordinary necessities of life according to the way of living enjoyed by that person during the lifetime of the intestate, and in the case of a minor includes deprivation of the opportunities for education which he or she could reasonably have expected had the intestate continued to live.

This Court has already held that the household belongings that the 1st defendant had shared with deceased are her entitlement. This is the second aspect under the principles of fair distribution of the deceased intestate estate as per section 17 (1)(b) of the Deceased Estate (Wills, Inheritance and Protection) Act. This Court notes that there will still property in this matter in view of the approximate size of the estate.

As further correctly submitted by the plaintiff and 3rd defendant, the third aspect to be considered under the principles of fair distribution of the deceased intestate

estate with regard to the shares of the beneficiaries is to distribute the remaining property amongst the spouse and children of the deceased, after covering hardship and the spouse's household belongings.

This distribution amongst the spouse and children of the deceased is done in line with section 17 (1) (c) of the Deceased Estate (Wills, Inheritance and Protection) Act on the basis of what is laid out in section 17 (1)(d) and (e) of the Deceased Estate (Wills, Inheritance and Protection) Act.

Section 17 (1)(d) of the Deceased Estate (Wills, Inheritance and Protection) Act provides that 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;

Further, section 17 (1) (e) of the Deceased Estate (Wills, Inheritance and Protection) Act provides that 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.

Since there are children and a spouse of the deceased, this Court will not have to comply with section 17 (1)(f) of the Deceased Estate (Wills, Inheritance and Protection) Act which provides that in the absence of any spouse or child of the intestate the property described in section 17 (1) (c) of the Deceased Estate (Wills, Inheritance and Protection) Act shall be distributed between the dependants of the intestate, if more than one, in equal shares.

This Court will therefore consider the first aspect of averting hardship with regard to the beneficiaries herein as per section 17 (1)(a) of the Deceased Estate (Wills, Inheritance and Protection) Act. This will be done in the context of the approximate size of the estate as glanced from the reports of the administrators herein.

This first aspect is aimed at averting the deprivation of the ordinary necessities of life according to the way of living enjoyed by each beneficiary during the lifetime of the intestate, and in the case of a minor beneficiary includes deprivation of the opportunities for education which he or she could reasonably have expected had the intestate continued to live.

The 3rd defendant's submission that all the beneficiaries should get an equal share in the estate herein if the same is liquidated, considering that equity is equality, is not in line with the provisions on intestate succession in section 17 of the 17 (1)(a) of the Deceased Estate (Wills, Inheritance and Protection) Act.

On this aspect the plaintiff submitted that it is only her and her siblings who will suffer hardship and need to be provided for in that regard. She added that the 1st defendant will not suffer hardship as she is part owner of the schools herein. Equally that her son Q and Victor Chimtengo who is a dependent herein will not suffer hardship as a result.

The plaintiff also contended that the 3rd defendant has a lot of property that brings her earnings and that she will not suffer hardship if not provided for in that regard.

This Court notes that contrary to the assertion by the plaintiff, it is bound to provide for the spouse and children of the deceased as well as the dependents to protect them from hardship and thereafter if property still remains then the same is to be distributed between the spouse and children of the deceased.

If the arguments of the plaintiff were accepted, what it entails is that the 3rd defendant and Victor Chimtengo will not get any share from the deceased estate since their only share of the estate comes under the principle of fair distribution aimed at protecting them as dependants from hardship as per section 17 (1)(a) of the Deceased Estate (Wills, Inheritance and Protection) Act. That will in principle

be contrary to the spirit of the 17 (1)(a) of the Deceased Estate (Wills, Inheritance and Protection) Act.

The 3rd defendant and Victor Chimtengo depended on the deceased during his life and need protection from hardship from his estate.

With regard to the 3rd defendant, she was being given groceries by the deceased during his life. It was in evidence that the deceased used to pay for the 3rd defendant's farming activities such as garden workers. The record also shows that the 3rd defendant was given a motor vehicle by the deceased.

The 3rd defendant is aging and may need medical attention which does not come cheap these days if she seeks private medical attention.

Consequently, with regard to the 3rd defendant, this Court orders that she gets a lump sum of K20 000 000 as her share of the deceased estate to protect her from hardship.

The record shows that Victor Chimtengo's education as being supported by the deceased herein. If he is not provided for he may suffer hardship in that regard. He must have attending secondary school as he was 17 years at the time of the deceased's death. And must be in need support for post-secondary education.

In that regard, considering the public universities costs Victor Chimtengo shall get a lump sum of K5 000 000 as a share of the deceased estate.

With regard to the 1st defendant although she is a part owner of the schools she still needs to be protected from hardship as the school is a business that is up for distribution as part of the deceased estate herein. The fact that she owns part of the school business and will realize proceeds from that ownership does not entail that she does not need to be protected from hardship under section 17 (1)(a) of the Deceased Estate (Wills, Inheritance and Protection) Act.

The record shows that the 1st defendant has parental responsibility with regard to her own children. The school business proceeds herein may go towards that responsibility. She needs provision for herself as well in terms of upkeep and medical care.

In the circumstances, this Court orders that the 1st defendant shall get K25 000 000 as her share to protect her from hardship. That is a lump sum that if invested should give a return that will sustain her basic necessities on a monthly basis.

This takes us to the children of the deceased starting with Q Nsanjama who will be 13 years old this year. He was in standard 4 at the time of the trial. He has to go through to standard eight and later secondary school. He will have to be provided for upkeep and education through those stages and at least up to first degree level. Considering all these factors his share of the estate to protect him from hardship shall be K40 000 000.

With regard to the plaintiff and her siblings, the evidence on record shows that they are adults and were in the custody of their mother the former spouse of the deceased herein for almost all the time the deceased lived with the 1st defendant herein after her marriage to the plaintiff's mother ended.

This year the plaintiff will be 33 years old. Her sibling Chifundo Nsanjama will be 32 years old. Netty Nsanjama will be 29 years old and Tupoche Nsanjama will be 23 years old.

This Court was informed that Netty Nsanjama and Tupoche Nsanjama are in school outside this country. There was however no evidence to substantiate the fact that they are indeed enrolled in school as correctly pointed out by the 3rd defendant in her submissions on sums of money taken by the plaintiff out of the Malosa school and sent to the two outside the country.

This Court will still provide for them to avert hardship. This is considering that the deceased is said to have been assisting the plaintiff financially. It is likely he would have been on hand to help his children in time of need.

At their ages the plaintiff and her siblings must have each done their first degrees if school progressed normally.

In the circumstances, this Court orders that the plaintiff and each of her siblings get the following as a share of the deceased estate to protect them from hardship, namely, K20 000 000 for Tupoche Nsanjama, K18 000 000 for Netty Nsanjama and K15 000 000 each for Chifundo Nsanjama and the plaintiff.

Having provided for protection of the deceased's spouse, children and dependants from hardship, this Court will now consider the distribution of the deceased estate as between the 1st defendant as spouse of the deceased and the deceased's children under section 17 (1)(c) of the Deceased Estate (Wills, Inheritance and Protection) Act.

As correctly submitted by the plaintiff, under this principle on fair distribution, 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.

That is according to section 17 (1) (d) of the Deceased Estate (Wills, Inheritance and Protection) Act.

Additionally, 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. That is according to section 17 (1)(e) of the Deceased Estate (Wills, Inheritance and Protection) Act.

As correctly submitted by the plaintiff, there is no express wish on the part of the deceased as to the shares in which the surviving spouse or children are to benefit.

There also appears to be no special circumstances in this matter.

The plaintiff correctly observed that the 1st defendant as spouse of the deceased already was adjudged to own a certain interest in the schools herein by reason of her effort in relation to the same. As such it will be unfair to the other beneficiaries to consider the same effort at this stage.

The only matter for consideration is that this Court must consider the age of the children with regard to the share of the estate with the youngest children getting a bigger share than the older ones.

The shares by which the 1st defendant as widow of the deceased will get as well as the share that each child will get is to apply on the remainder of the estate after the costs of administration are paid and after the sums for protection from hardship are taken out in that order. In the circumstances, the said share, that each of the immediate family of the deceased shall get shall be as follows

1. Elavate Nsanjama, widow, 16 %
2. Mtisunge Nsanjama, 33 year old, 13 %
3. Chifundo Nsanjama, 32 year child, 13 %
4. Netty Nsanjama, 29 year old child, 15 %
5. Tupoche Nsanjama, 23 year old child, 16 %
6. Q Nsanjama, 13 year old child, 23 %

In the foregoing circumstances, and for the reasons indicated, this Court has not agreed with the plaintiff's and 3rd defendant's submission that the beneficiaries should share the deceased estate in equal shares.

Having decided the shares, this Court will now give directions on how the schools and other property will be dealt with. But before that is done, this Court will have to look into how the various administrators accounted for how they dealt with the estate.

This Court will start with the 3rd defendant as she managed the school at Malosa for the period between the demise of the deceased and the take-over by the plaintiff notwithstanding that the 3rd defendant was also an administrator.

It is clear that the 3rd defendant transferred cash to the 1st defendant who was in charge of the school accounts herein. The total sum remitted to the 1st defendant is K17 600 000. This aspect has not been satisfactorily contradicted by the 1st defendant. In fact, given the 1st defendant's lack of candor on financial management in this matter, as will be seen later, this Court believes that the 1st

defendant got the said remittance of K17 600 000. This is contrary to her claim that she only received K2 500 000.

It appears to this Court that the 3rd defendant has satisfactorily accounted for how she managed the Malosa school as an administrator in this matter.

The accounts by the plaintiff and the 1st defendant are the ones that are problematic. This Court will examine those accounts and make consequential orders. This Court will start with the plaintiff's accounts.

During her testimony the plaintiff indicated that she used proceeds from Malosa school as follows.

The accounts by the plaintiff given after the interim decision of this Court show that she spent K5 100 000 on school fees for Netty Nsanjama and Tupochile Nsanjama. It will be assumed that either one got half of the amount since the exact figure for each is not given.

Further, the plaintiff spent K2 500 000 as upkeep for Netty Nsanjama. These expenditures are reflected in the accounts for the year ending December 2014.

The plaintiff's accounts also show that, between 2015 and 2017, she had spent K8 050 000 as school fees for Tupochile Nsanjama. And a further K6 500 000 for upkeep and accommodation for Tupochile Nsanjama. All totaling K14 550 000.

The plaintiff's accounts show that she gave a loan to her mother, Julita Manda, in the sum of K4 000 000 in 2017.

She however sent K16 000 000 to Netty Nsanjama over a two-year period according to her evidence at trial. This aspect is not reflected in her accounts given after the interim judgment of this Court.

These sums shall be treated as advance of the shares that each one of the plaintiff's siblings shall get. That is K21 050 000 with respect to Netty Nsanjama. And K17 100 000 with respect to Tupochile Nsanjama.

Lastly, K4 000 000 shall be deducted from the proceeds of the plaintiff's mother stake in the Mulanje school.

This Court will now deal with the accounts of the 1st defendant.

First of all, this Court agrees with both the plaintiff and the 3rd defendant that the 1st defendant is lack candor in the manner of her management of the estate as an administrator.

She clearly lied under oath when questioned about the existence of an account in the name of Q Nsanjama. She insisted that no account existed in the name of Q Nsanjama.

This Court ordered the Bank in question to provide a statement of the account for the period after the demise of the deceased up to the date of the interim decision of this Court. The Bank produced a statement for Nsanjama Private School that omitted the period between March and December 2013 during which the account in the name of Q was opened. This Court had to make another order for the Bank to produce the statement in question. It is likely the failure of the Bank was instigated by conniving with the 1st defendant.

When the statement in question was finally produced it clearly showed that K20 000 000 was taken out on 3rd April 2013 by a cheque made out in the name of the 1st defendant in trust for Q. The Bank also tried to mask the amount of K20 000 000 by not indicating the same and replacing the amount with ##### in the bank statement produced following a second order of this Court. However, what clearly shows the position is the change in the bank balance by K20 000 000 after the cheque was made out.

It is after the 1st defendant realized that this Court was going to get information anyway, that she stated in her account as an administrator that she had in fact, contrary to her earlier denials, taken out K20 000 000 and put it in an account in trust for Q. Her stated reason for doing that was to earn interest and use the same for building works at Mulanje school.

This Court agrees with the plaintiff and the 3rd defendant that the 1st defendant cannot be trusted with her explanation in the circumstances where she seems to have admitted the fact of the existence of the account for Q only because this Court discovered the account and the sum in question after compelling the Bank to give a statement. The 1st defendant's explanation for the K20 000 000 is merely an afterthought.

The sum of K20 000 000 shall be treated as an advance on the share of Q as a beneficiary herein.

In order to verify the administrator's probity in this matter, this Court also ordered bank statements for all of them to be produced by the relevant Banks.

With regard to the 1st defendant, her Bank produced another bank account in her name which shows that it was used to receive school fees for the Mulanje school from December 2013 to the date of the order of this Court in June 2017. This happened when during the same period the Mulanje Nsanjama school account also was used for receiving school fees for students at Mulanje Nsanjama school.

That bank account statement in the 1st defendant's name shows that on 2nd May 2014 there was a cash deposit of K26 000 000 into the account. And a crediting of the account with a repayment of K24 800 000 on 6th May 2014. Then there was a new debit to the account in the sum of K50 800 000 on 6th May 2014 described as 'new deposit' leaving a balance of K50 688 in the account. On 8th July 2014 the account was credited with a repayment of K50 800 000. Then, on 14th July 2014 the sum of K26 997 656.31 was withdrawn in cash. Next, on 22nd September 2014 the sum of K24 750 000 was withdrawn in cash leaving a balance of K50 000.

In effect K51 747 656 cash was withdrawn by the 1st defendant between July and September 2014.

This is against a background, pointed correctly out by the plaintiff, that Malosa Secondary school gave cash to the 1st defendant for banking between March and December 2013 in the sum of K17 600 000 of which the 1st defendant only acknowledges receiving K2 500 000 in early May 2013.

As correctly submitted by the 3rd defendant, the 1st defendant might have ventured on alleged construction projects as a smoke screen to take money out of the estate given that she was working alone administering the Mulanje school herein. She may be justified in constructing toilets and the perimeter fence. These may be essential. However, given that the estate is in contention it is surprising that the 1st defendant decided to embark on construction of such things like a school administration block which are not essential herein.

This Court therefore finds that given the failure of the 1st defendant to explain herself on the accounts and the facts as alleged by the 3rd defendant with regard to the K17 6 000 000 it must find that the said sum be an advance against her share of the deceased estate.

Further, the 1st defendant took out K50 800 000 from the Mulanje school accounts in 2014 and that is not explained at all. That shall also to be treated as an advance against her share in the deceased estate.

For the sake of clarity, all advances with regard to a beneficiary shall be deducted from that beneficiary's share in the deceased estate.

The plaintiff asked this Court to reduce the sums the 1st defendant indicated were used for construction of the brick wall fence and the block of toilets. However, this Court is unable to do so given that it is not proved by the plaintiff that the cost of a toilet would be less than what is indicated. The same applies to the cost of finishing a two-classroom block.

However, this Court agrees with the plaintiff that with regard to construction of the administration block on which K31 670 500 is said to have been spent, which this Court is prepared to accept, it is unacceptable that the 1st defendant decided to get a loan of K20 000 000 in order to 'co-finance the finishing of the said administration block'. This was an extravagant expense in view of the fact that the estate is in contention. The sum of K20 000 000 loan shall therefore be treated as an advance of the 1st defendant's share of the estate.

The plaintiff pointed out that the meal expenses and the teachers' salaries have been exaggerated by the 1st defendant in her accounts. This Court is unable to agree with that submission given that the plaintiff's comparison of the two schools meal and teachers' expenses which were essentially under two administrators acting singularly over different periods cannot be properly made to arrive at the conclusions of exaggeration drawn by the plaintiff.

The plaintiff raised the issue that the 1st defendant spent K9 139 000 more on legal fees in this matter beyond the K12 000 000 fees that were paid out with the approval of this Court divided equally amongst the lawyers of the administrators.

She contended that this must be treated as an advance against the 1st defendant's share of the estate.

This Court notes that the plaintiff also indicated some expense of legal fees in her accounts amounting to K1 600 000 paid in 2015 and 2016. The same argument could be made by the other parties in this matter.

As such, this Court orders that the legal costs to be paid on final distribution of the estate must be paid only on approval by this Court and shall take into account what has been paid out to each legal house from the estate. No legal costs shall be paid from the date of this order unless first presented before this Court with detailed basis for the same and then approved by this Court.

The plaintiff also observed that the 1st defendant undervalued the motor vehicles herein. This Court agrees and will order a revaluation of the same before they are dealt with as part of the estate.

The final item on accounts relates to the 1st defendant's inclusion of depreciation as an operating cost resulting in a sum of K30 072 400 being treated as an operating cost. The plaintiff submitted that such should not be the case. And that the K30 072 400 should be treated as a profit for the Malosa school.

This Court agrees with the plaintiff's submission on the treatment of the depreciation. The sum of K30 072 400 shall therefore be treated as an advance of the 1st defendant's share as she sought to wrongly represent it as an expense, thereby reducing the income, when in fact it should not be as this Court really asked for income and expenditure accounts from the administrators herein.

Having decided the shares of the beneficiaries in the deceased estate after taking into consideration the accounts of the administrators, this Court gives direction on how the assets will be dealt with, namely the two schools and the vehicles at the Mulanje school.

First, directions are given with respect to the Malosa school.

As correctly submitted by the 3rd defendant that school was found to involve a partnership between the 3rd defendant and her children including the deceased. The

1st defendant has been found to have an interest in the same beside having a share as a beneficiary.

Only 55 per cent of Malosa school comprises part of the deceased estate. That excludes the land on which the school stands as it is customary law in possession of the 3rd defendant and her children.

In that regard, this Court agrees with the 3rd defendant's submission that the school buildings and property should not be sold. Rather that the school at Malosa be valued by the Government valuer in Ministry of Lands whose cost shall be paid from the estate.

Thereafter, the 3rd defendant and her other partners, excluding the 1st defendant, shall pay out 55 per cent of the value of the Malosa school to the estate for distribution amongst the beneficiaries in terms of the shares ordered by this Court in this decision. The 1st defendant may ask to be paid out her five per cent stake in the partnership if she is so minded thereafter or may carry on trading in the partnership.

The valuation of the Malosa school shall be done within 14 days and payment by the partners at Malosa shall be made within three months unless otherwise extended with the agreement of the administrators of the estate.

The next directions relate to the Mulanje school. The school shall be valued together with all the property there including the vehicles.

It appears the school is on customary land but that should not matter. The right to use and possess the same belongs to those with property interests in the same namely, the deceased, the 1st defendant and Ms Julita Manda who also have the right to dispose such rights by sale with the approval of the Chief of course as per the Land Act. See on discussion of the right to property, namely, possession and use, in customary land in *Lufani v Crown Agro Industries Limited* civil cause number 478 of 2013 (High Court) (unreported).

Section 4 of the Deceased Estates (Wills, Inheritance Protection) Act provides that

Except as provided for in this Act, no person shall be entitled under customary law or any other written law to take by inheritance any of the property to which the deceased was entitled at the time of his or her death.

Further, section 17 (4) of the Deceased Estates (Wills, Inheritance Protection) Act provides that

Re-marriage shall not deprive a surviving spouse of property inherited under intestacy except in the case of property on customary land where title in that property shall devolve to the children of the spouse by the intestate upon the re-marriage of the surviving spouse.

As this Court observed in *Alumando v Alumando* Probate cause number 5420 of 2017 (High Court) (unreported), the foregoing two sections entail that the Deceased Estates (Wills, Inheritance and Protection) Act applies to inheritance of all property whether it is on customary land or otherwise.

The school at Mulanje shall similarly be valued by the Government valuer and costs of valuation shall be borne by the estate. The valuation shall be done within 14 days.

Once the valuation is done, the school and all the assets like vehicles shall be sold by a reputable estate agent. The estate agent shall be appointed on agreement by the administrators within seven days failing which the administrators must notify this Court to appoint such an agent. The cost of sale shall be borne from the proceeds of sale.

The proceeds of sale shall first be applied to the expenses of selling the school and next to a stake owned by the 1st defendant and Ms Julita Manda. Thereafter, to the shares of the beneficiaries as ordered by this Court.

This Court has noted that the 1st defendant has sidelined the plaintiff in the management of the Mulanje school and orders that with immediate effect the plaintiff shall be a co-signatory of the accounts at Mulanje school. Only one account in the name of Nsanjama Private School at Mulanje National Bank shall be used for transactions of the school until the estate is liquidated. This order shall suffice to change the signatories.

The 1st defendant and the 3rd defendant, who are running the two schools, shall file and serve on the plaintiff and each other income and expenditure accounts for the Mulanje and Malosa school respectively for the period since they last filed such accounts in 2017 to date. That shall be done within the next seven days and that information shall be taken into account in the final distribution of the estate.

This Court is mindful of the fact that it has power to remove an administrator for various reasons. See *Alumando v Alumando* Probate cause number 5420 of 2017 (High Court)(unreported) applying section 55 of the Deceased Estate (Wills, Inheritance and Protection) Act.

In the present case, section 55 (1)(e) of the Deceased Estate (Wills, Inheritance and Protection) Act would be the relevant provision.

The 1st defendant concealed a material fact concerning the bank account in trust for Q that she maintains and in which there was K20 000 000. She made up the allegation that she wanted to use interest from the same for building. That concealment is ground on which this Court could exercise its discretion to remove the 1st defendant as an administrator in this matter.

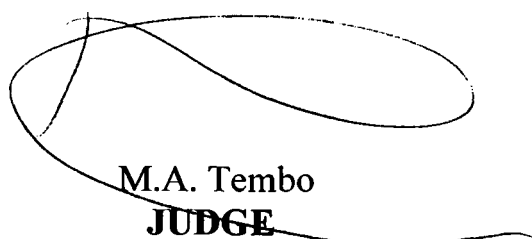
The same applies to the plaintiff who did not properly reflect certain expenditures herein such as the K16 000 000 spent on Netty Nsanjama.

This Court has however decided not to exercise that discretion at this point as that has not been asked for and the administrators must be given a chance to liquidate the estate.

Should the plaintiff and the 1st defendant fail to work together in running the Mulanje school while liquidating it, then this must be brought to the attention of this Court within the next ~~seven~~ 14 days and the consequence will be that they will be removed as administrators and the Administrator General may be appointed instead.

Costs shall be borne by the estate.

Made in open court at Blantyre this 8th June 2018.



M.A. Tembo
JUDGE