



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PROBATE CAUSE NUMBER 78 OF 2018**

**BETWEEN:**

**ROSEMARY NYAUDE-SIMBEYE  
SHEILA MTIYESA KALANJE**

**1<sup>st</sup> CLAIMANT  
2<sup>nd</sup> CLAIMANT**

**AND**

**ISABEL NYAUDE  
ENOCK NYAUDE**

**1<sup>st</sup> DEFENDANT  
2<sup>nd</sup> DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Kamwendo, Counsel for the Claimants  
Jumbe, Counsel for the Defendants  
Mankhambera, Official Court Interpreter

**ORDER**

This is this Court's order on the defendants' application for an order striking out the claimants' summons for distribution of the deceased estate for being frivolous, vexatious and an abuse of the Court process.

The application is made under the inherent jurisdiction of this Court.

The defendants' application is made in opposition to the claimants' summons to distribute the deceased estate.

The background of this application is as follows. When this matter was commenced, there was initially the 1<sup>st</sup> defendant only.

The facts show that the 1<sup>st</sup> defendant was the wife of the deceased in this matter.

The claimants contended that the 1<sup>st</sup> defendant was holding the whole of the deceased estate and wanted to take part in the administration of the said estate and also to benefit from the said estate.

The 1<sup>st</sup> claimant asserted that she represents the family of the deceased in this matter. The 2<sup>nd</sup> claimant alleged that she was married to the deceased at customary law.

The 1<sup>st</sup> defendant opposed the claimants' disputing that they were eligible to benefit from the estate.

The matter progressed to mediation. The defendant did not attend at the time this matter was set for mediation and the 1<sup>st</sup> defendant's defence was struck out for the non-attendance. And then, judgment was accordingly entered for the claimants to the effect that they are beneficiaries of the deceased estate.

The claimants then took out a summons requesting this Court to distribute the deceased estate herein.

The 2<sup>nd</sup> defendant joined this matter just prior to the hearing of the summons to distribute the deceased estate. He and the 1<sup>st</sup> defendant now seek that the summons to distribute the deceased estate should be struck for the reason that it is frivolous, vexatious and an abuse of this Court's process.

The defendants contend that, despite there being a binding default judgment to the effect that the claimants are beneficiaries on account of their claims herein, there is evidence to show that the claimants are not entitled to benefit from the deceased estate.

The evidence was spelt out by the defendants, namely, that the 1<sup>st</sup> claimant is not part of the immediate family of the deceased or his dependent as defined in the relevant law on intestacy.

And that with regard to the 2<sup>nd</sup> claimant she could not be legally married to the deceased at customary law considering that the deceased was married under the Marriage Act to the 1<sup>st</sup> defendant in a monogamous marriage.

The claimants insisted that the instant application is inept because there is a binding default judgment pronouncing their right to benefit from the deceased estate pursuant to which they took out the summons asking this Court to distribute the deceased estate herein.

This Court observes that the defendants have created a procedural conundrum.

On the one hand, the defendants raise vital points of law which if established and upheld would really throw the claimants' claims herein off balance. But on the other hand, the claimants are proceeding to seek distribution of the deceased estate and to benefit from the same on the basis of a default judgment that is binding and settles the rights of the parties unless set aside.

The point is that, as correctly submitted by the claimants, it is not possible to say in the face of the default judgment that the claimants' summons is frivolous, vexatious and an abuse of the court process. This is because the summons is based on the claimants' rights as established by the judgment entered after the defence case was struck out for non-attendance at mediation.

Where a party has a defence, as is being demonstrated by the defendants herein, and its defence was struck out for non-attendance at a scheduled mediation session that party may apply to this Court to have its case in the defence restored and ultimately to have the judgment set aside. See Order 13 rule 6 (2) Courts (High Court) (Civil Procedure) Rules.

The defendants' application therefore fails and they must consider proceeding to apply for restoration of their defence case under the relevant Rules governing mediation.

Costs on this application are for the claimants.

Made in chambers at Blantyre this 22<sup>nd</sup> March 2019.



M.A. Tembo

**JUDGE**