



**IN THE HIGH COURT OF MALAWI
ZOMBA DISTRICT REGISTRY
PROBATE CAUSE NO. 23 OF 2020**

IN THE ESTATE OF THE LATE REUBEN LIWONDE

MAGGIE LIWONDE... 1ST CLAIMANT

WELLINGTON LIWONDE... 2ND CLAIMANT

LEMANI LIWONDE... 3RD CLAIMANT

VS

ENET KALUA... 1ST RESPONDENT

ERINA KALUA... 2ND RESPONDENT

CORAM: HON. JUSTICE R.E. KAPINDU

: Claimants, Present, unrepresented

: Respondents, Present, unrepresented

: Ms. Chinomba; Mr. D. Banda, Mr. I Mkhula, Official Interpreters

: Mrs. Mboga, Court Reporter

JUDGMENT

KAPINDU, J

1. This matter came to me by way of referral from the Hon. Assistant Registrar. There is a dispute relating to a Will that the late Reuben Liwonde is purported to have made on 3rd November, 2010.
2. The Respondents question its authenticity, and they also take the view that even if it were authentic, it was grossly unfair to the immediate family. They state that they doubt its authenticity because of the circumstances in which it was revealed, the circumstances under which it was allegedly made, and also because the way they knew the deceased, they believe that he could not have made such an unfair provision.
3. On their part, the Claimants demand that the Will of the late Reuben Liwonde should be given effect and implemented as a reflection of the true wishes of the deceased. They have therefore asked this Court to confirm its authenticity and to grant letters of probate so that the Will might be implemented. They were of course silent on who the proposed Executor of the Will is. The purported Will did not specify who the Executor of the Will should be.
4. Upon the demise of the late Reuben Liwonde, it would appear that the parties herein went to the District Commissioner's Office in order to address issues related to the distribution of the estate.
5. As events unfolded, it was revealed that the deceased left a document that purported to be late Reuben Liwonde's last will and testament, wherein he purportedly devised and bequeathed a number of his properties to various relations including his mother, who is now also deceased, some of his brothers, sisters and children.
6. The purported Will left out the Widow, Mrs. Enet Kalua Liwonde on allegations that she had evinced an intention to unjustly grab land at Liwonde. As such,

the purported Will only bequeathed some inconsequential household items for the Widow.

7. During the hearing, a lot of issues were discussed during testimony by the parties to this matter. For the reasons that will soon follow, after carefully considering all the evidence, I find it otiose to outline such evidence in the present decision as largely, it is a decision that should be decided upon a point or points of law.
8. There are two main questions, as I see them, for this Court's decision:
 - (a) Whether the Widow, Madam Enet Kalua, the 1st Respondent herein, was the deceased person's wife at the time of his decease; and
 - (b) Whether the late Reuben Liwonde left behind a valid Will.
9. On the question as to whether the marriage between the deceased and the Widow herein was still subsisting at the time of his decease in January last year; there were different narratives on both sides. The deceased's relatives, the Claimants herein, stated that the marriage dissolved in or about 2011 and that there is a certificate of divorce to this effect. A copy of the said divorce certificate, from the First Grade Magistrate Court at Zomba, in Civil Case No. 38 of 2011, was produced before this Court.
10. The Claimants proceeded to acknowledge that the deceased and the Widow came back together in the year 2014. However, they insisted that the two never remarried as no customary rites were followed. As such, it is their contention that Madam Enet Kalua should not be treated as a Widow of the late Reuben Liwonde for purposes of the present proceedings, or at all.
11. On her part, Madam Enet Kalua, the 1st Respondent, stated that she was surprised when she was served with the divorce certificate by a Court Marshal from Zomba in 2011. According to her, she never knew anything about the divorce proceedings. This is a fact which the deceased's family, in particular the 2nd Claimant Mr. Wellington Liwonde, strongly disputed.

12. Be that as it may, that was the 1st Respondent's claim. She stated that her late husband told her that the reason he did what he did, that is to process divorce papers at Court, and why he decided to send her back home, was because his relatives were insisting that he should do so, and that it was never his intention to do so.
13. She stated that this is why he called her back and why they came back together in 2014, and they remained a married couple until the moment of his death.
14. Having considered this issue, that is to say whether the deceased and the widow were indeed husband and wife at the time of the deceased person's decease, there are two things the Court would like to point out. First, there is no dispute that there was a decree of divorce and that there is a divorce certificate that was issued by the First Grade Magistrate Court at Zomba in 2011. The decision of the Court was never contested. Even if the widow's contestations of the same might perhaps be valid in fact, it remains that this is a standing decision of the Zomba First Grade Magistrate Court. It was not and has not been set aside.
15. I therefore determine that the marriage between the deceased and the widow was indeed dissolved in 2011. Even if the said decision could have been irregular, which position this Court has not concluded either way, the fact remains that the decision of the Court was made and it was and has not been set aside or reversed.
16. The second issue is whether the coming back together of the parties in 2014 constituted a valid marriage.
17. According to section 86 of the Marriage, Divorce and Family Relations Act, 2015 (MDFRA), it is lawful for parties to a marriage which has been dissolved to marry again as if the prior marriage had been dissolved by death. In any event, even if such a provision did not exist, it goes without saying, pursuant to section 32 of the Constitution that guarantees freedom of association, that such parties had freedom of association which entitled them to remarry at

any given point if they so wished. Indeed, such decision would also be consistent with their right to get married pursuant to the provisions of section 22 of the Constitution.

18. In the present case, the question is whether the parties herein remarried according to the available evidence.
19. This Court has no hesitation in concluding that they did. The family of the deceased claims that there was no marriage because customary marriage rites were not followed. However, there is no doubt that during the life of the deceased up to the point of his death, the same relations of the deceased, the Claimant's herein, were treating the 1st Respondent, Madam Enet Kalua, as the deceased's wife to all intents and purposes. They accuse her of having abandoned the deceased when he was ill, stating that she chose to travel to South Africa to attend to some undisclosed relative who was expectant. However, I keenly observed that as they advanced this accusation, they were explicit that they were constantly updating her about the illness of the deceased, consulting her on some key decisions that needed to be taken in relation to his illness, and that they were insisting that she should come back home as soon as possible. For me, whilst the conduct of the 1st Respondent in leaving her husband ill in hospital and opting instead to attend to an expectant relative in South Africa was most likely an unfortunate instance of marital misjudgment, this evidence tends to show that the Claimants were in fact treating the 1st Respondent as the deceased's wife until he died.
20. It is only after his death that it now suits them to play the customary law card in order to essentially exclude her from her inheritance rights in the estate of the deceased. In my considered view, this kind of selfish and unbridled demonstration of unwarranted patrimony and unfortunate patriarchy in inheritance matters, that seeks to marginalize, exclude and victimize widows, is the exact reason why, in their profound wisdom, the framers of the Constitution of the Republic of Malawi, decided to recognize, in section 22(5) of the Constitution, marriages at law, custom and marriages by repute or by

permanent cohabitation. The Court's emphasis here is on marriages by repute or by permanent cohabitation.

21. According to section 13 of the MDFRA, a marriage by repute or permanent cohabitation shall only be recognized under the Act, upon a finding of a court of competent jurisdiction, where such a court considers –

- (a) the length of the relationship, which, in any event, shall not be less than five (5) years;
- (b) the fact of cohabitation;
- (c) the existence of a conjugal relationship;
- (d) the degree of financial dependence or interdependence and any agreement for financial support between the parties;
- (e) ownership, use and acquisition of property;
- (f) the degree of mutual commitment to a shared life; (g) whether the parties mutually have, care for, or support, children;
- (h) the reputation of the parties in the community as being married and the public display of aspects of their shared relation; and
- (i) any other factors that the court considers fit.

22. When I consider these factors, I have no doubt that the parties herein had a relationship that had lasted for more than five years. The fact of their cohabitation is not in dispute. Proof of the existence of a conjugal relationship is frequently circumstantial, more so in an event where one of the parties is deceased as in the present case. In the instant case, I find as a fact that the parties were cohabiting. They were living as husband and wife. There is nothing to negative the existence of a conjugal relationship. In the circumstances of the cohabitation herein, there was more than plenty opportunity for such conjugal relations such that I presume the same as a fact.

23. They also had mutual care and support for their children. I should simply wrap up this point by saying that upon considering all the factors outlined in section 13 of the MDFRA, and the general circumstances of the present matter, I have no doubt that there was a marriage between the deceased and the widow herein which qualified both as a marriage by permanent cohabitation as well as a marriage by repute.
24. To give concreteness to the definitive nature of the marriage, it is this Court's decision that this was a marriage by repute under section 22(5) of the Constitution as read with section 13 of the MDRFA.
25. The next key question to consider is whether the late Reuben Liwonde left behind a valid Will. To Answer this question, we need to look at some of the salient formalities that underlie the making of a valid Will.
26. According to section 6(1) of the Deceased Estates (Wills, Inheritance and Protection) Act, 2011 (DEWIPA):

“Every will shall be made in writing and shall be signed by the testator in the presence of at least two competent witnesses who shall also sign the will in the presence of the testator and in the presence of each other as witnesses to the signature of the testator.”

27. In the present case, there were two Witnesses to the signature of the purported Will by the testator, namely his brother Mr. Wellington Liwonde, the 2nd Claimant herein, and purportedly, Village headman Chidzalo of T/A Chikowi in Zomba District. However, it would appear that Village Headman Chidzalo signed the Will on 2nd November, 2010, a day before the testator himself, the late Reuben Chidzalo, signed it on 3rd November 2010. This therefore raises very significant doubt that the testator Signed the Will in the presence of Village Headman Chidzalo, or that Village headman Chidzalo and Mr. Wellington Liwonde signed the Will in the presence of each other and in the presence of the testator. On a balance of probabilities, it is my finding

that on the basis of the discrepancy as to dates, it is unsafe to uphold the validity of the purported Will herein. I therefore hold that the purported Will was invalid. Simply put, the deceased died without leaving a valid Will. In legal parlance, he died intestate and, therefore, the rules of intestacy are to apply in the distribution of his estate.

28. There is one more cardinal consideration in point of law. Under section 10 of the DEWIPA, the law prescribes the following:

(1) A will shall be revoked by the marriage after the making of the will by the testator unless the will was made in contemplation of marriage with the person who becomes the spouse of the testator as the case may be. (2) Upon the end of a marriage of a testator by reason of divorce, unless the will provides otherwise-

- (a) any gift made in a will in existence at the time the marriage ends by the testator to the spouse; or
(b) any appointment of the spouse as an executor, trustee, advisory trustee or guardian made by the will, shall be revoked.

29. Two important things emerge from this provision. The evidence herein shows that the purported Will was made before the parties divorced in 2011. It was purportedly made on 3rd November, 2010. In this regard, according to section 10(2) of DEWIPA, since there is nothing in the purported Will to suggest that the testator intended it to apply even after divorce, the same was revoked by operation of the law at the moment of divorce. On this basis as well, had the Will satisfied the necessary formalities for making a Will under section 6 of the DEWIPA, the same would still have fallen to be declared ineffectual by reason of revocation by operation of law in terms of section 10(2) of DEWIPA.

30. Furthermore, even if the Will had survived the abovesaid revocation by operation of law; the same would still have been declared as revoked by

operation of law under section 10(1) of the DEWIPA by reason of the parties (the deceased and the widow) having remarried in or around 2014, which was subsequent to the making of the Will in 2010.

31. All in all, this Court finds as a fact that the deceased herein died without leaving a valid Will.
32. The Court vividly recalls that during the hearing, every time the Widow and the deceased's eldest daughter Eleanor, the Respondents herein, asked the deceased's relations, the Claimant's, to be open and simply tell the Court what their real interest in the estate was, the latter were unanimous, almost stating by rote, that their only wish was that the Will which the deceased person left behind had to be implemented according to its precise terms. They were also very clear and unequivocal in stating that had there been no Will, they would have left the entire estate of the deceased to the children of the deceased. As it is, it now turns out that there was in fact no Will.
33. In the result, when I consider the law, their alternative wish, which was to leave the entire estate to the deceased's immediate family, actually now materializes – not so much because of their collective wishes, but more so because the law says so. They must leave the estate to those who are legally entitled under Section 17(1) of DEWIPA. That section provides that:

“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...principles of fair distribution”

34. Members of the immediate family and dependants of the intestate are defined under section 3 of DEWIPA as follows:

““immediate family”, in relation to any person, means that person's spouse and children;” whilst ““dependant” in relation to a deceased person means a person, other than a member of the immediate family, who was maintained

by that deceased person immediately prior to his or her death and who was-

(a) his or her parent; or

(b) a minor whose education was being provided for by that deceased person, who is not capable, wholly or in part, of maintaining himself or herself.”

35. From this definition, none of the relatives of the deceased who appeared before this Court and thought they were otherwise entitled to benefit from the estate of the deceased stand to benefit from the estate.

36. It is clear from the foregoing that there are beneficiaries of the estate falling under section 17(1) of the Act, thus excluding those under Section 18(1) thereof, such as the abovesaid relatives.

37. I therefore direct that the estate of the late Reuben Liwonde shall be distributed as an intestate estate under section 17 of the DEWIPA.

38. It is therefore appropriate that an appropriate beneficiary or any other legally competent person in terms of section 43 of the DEWIPA applies promptly for letters of administration in accordance with the Act. Members of the immediate family of the late Reuben Liwonde might wish to approach the Court, if they so wish with the assistance of the Legal Aid Bureau, with a proper application for Letters of Administration for the estate of Reuben Liwonde, deceased.

39. Before I end, I wish to emphasise the need for the parties to the present case, and indeed any other interested third parties, on the need for this decision to be complied with. In addition to the prospect of a penalty for contempt of Court, according to section 84(1) of DEWIPA:

Any person not being entitled thereto under a will or upon any intestacy who, in contravention of the will or of this Act, takes possession of, grabs, seizes, diverts or in any manner

deals in, or disposes of, any property forming part of the estate of a deceased person, or does anything, in relation to such property, which occasions or causes or is likely to occasion or cause deprivation or any form of hardship to a person who is entitled thereto under the will or upon the intestacy, shall be guilty of an offence and liable to a fine of K1,000,000 and to imprisonment for ten years and in addition to such sentence, the court shall make an order directing that-

- (a) the property or the monetary value thereof be immediately restored to the person or persons lawfully entitled thereto or to the estate of the deceased person; and
- (b) the whole, or such part as the court shall specify in the order, of the fine imposed be paid to the person or persons entitled or into the estate of the deceased person.

40. Put simply, it is prohibited and it constitutes criminal conduct, punishable by up to 10 years imprisonment, for any person to deal with the estate of the late Reuben Liwonde in a manner that might cause deprivation or hardship to those who are lawfully entitled as beneficiaries under section 17(1) of DEWIPA.

41. It is so ordered.

Delivered in open Court at Zomba this 29th Day of January, 2021.

R.E. Kapindu, PhD

JUDGE