



REPUBLIC OF MALAWI
 IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY
 FAMILY AND PROBATE DIVISION

PROBATE CAUSE NUMBER 195 OF 2022

(BEFORE JUSTICE J.R. KAYIRA)

IN THE MATTER OF THE DECEASED ESTATE (WILLS, INHERITANCE AND PROTECTION) ACT

AND

IN THE MATTER OF THE ESTATE OF EDWARD KHOROMANA (DECEASED)

BETWEEN:

LYNN JUMBE KHOROMANA (on her own behalf and on behalf of other beneficiaries of the estate of EDWARD KHOROMANA (Deceased)).....CLAIMANT

AND

ORPA KHOROMANA BARLUCCHI.....1ST DEFENDANT

MONICA KHOROMANA UNYOLO.....2ND DEFENDANT

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA

Counsel Chikabvumbwa of Counsel for the Claimant

Counsel Debwe of Counsel for the Defendants

Kazembe Court Clerk and Official Interpreter

Kayira J

RULING ON PRELIMINARY OBJECTIONS

BACKGROUND

The Claimant commenced the present matter as a widow to the late Edward Khoromana and she is also suing on behalf of her two children who are beneficiaries of the deceased estate of the said Edward Khoromana. The 1st Defendant Monica Khoromana Unyolo is being sued as the mother of the late Edward

Khoromana and also the Executrix of the will of the late Alford Pekete Khoromana who was a father to the late Edward Khoromana. In terms of the 2nd Defendant, she is being sued as a sister to the late Edward Khoromana. In the statement of case, the Claimant submits that the Defendants have between them control of the property which was bequeathed to Edward Khoromana (deceased) by his father, late Alford Pekete Khoromana. This amount or portion now forms part of the deceased estate of Edward Khoromana.

It is undisputed that late Alford Khoromana had two children with the Claimant. During the subsistence of the marriage, he was bequeathed a percentage of the deceased estate of his father through a Will of his father who died testate in 1997. The 1st Defendant was appointed an Executrix and Trustee of the Will of the late Alford Khoromana. It is also a fact that the late Edward Khoromana successfully pursued a lawsuit against the 1st Defendant under Civil Cause Number 172 of 2016. In that case, the 1st Defendant was ordered to distribute all properties of the late Alford Khoromana to their rightful beneficiaries. The Court also ordered that the 1st Defendant should give an account of the estate of the late Alford Khoromana. Since the death of Edward Khoromana, the Defendant has not been cooperating with the Claimant as regards assets which lawfully form part of the estate of Edward Khoromana.

Since the mandate of the 1st Defendant ended in 2010, the Claimant seeks the following orders; A declaration that upon true construction of Sections 3, 16, 17 and 63 of the Deceased Estate (Wills, Inheritance and Protection) Act (Institutional Money Rules) made under the Act, the Claimant is entitled to a share of the estate of the late Edward Khoromana who died intestate including money realised before and after the death of the deceased, from properties in which late Edward Khoromana had legal and beneficial interest. A declaration that the Defendants do not have any lawful right to exclude the Claimant herein in the collection and distribution of the assets making up the estate of the late Edward Khoromana. A declaration that at law the Claimant was a spouse of the late Edward Khoromana, hence the Claimant and her two children are entitled to be included as beneficiaries of the estate of late Edward Khoromana. An order that the Claimant and her two children be included as beneficiaries of the estate of late Edward Khoromana. An order that the Defendants account for the estate of late Edward Khoromana from his death to date of actual distribution of the estate.

An order that in light of Clause 18 of the Will of late Alford Khoromana the Claimant and her children are entitled to benefit from a part of the 22% shareholding settled for the late Edward Khoromana by his late father in a Trust. An order that in light of a declaration by the Court in Civil Cause Number 172 of 2016 that a Trust created under the Will of late Alford Khoromana no longer exists, the Claimant and her two children are now entitled to a part of the 22% shareholding in Nali Limited, a limited liability Company

registered in 1985 as a Company Number 2383 under the Companies Act, Nali Executive Lodge, Nali Executive Motel and Nali Farms situated in Luchenza. An order that the Defendants disclose all the properties that were part of the Trust initially created by the Will of late Alford Khoromana. An order of exemplary damages against the Defendants. Any order that the Court deems fit, just and proper and costs of the action.

The Defendants were duly served with the summons and they filed and served their defence on 10th August, 2022. In paragraph 1, the defence states that the deceased was married under statute to Michelle Khoromana and that he never divorced the said wife. Further, in paragraph 2 the defence states that the 2nd Defendant is the mother to the late Edward Khoromana and she was one of the two administrators to the estate of Alford Pekete Khoromana. In paragraph 4, the defence states that the Claimant is not the right person to commence the matter because she has no *locus standi* since she did not obtain any letters of administration for the estate of Edward Khoromana (deceased). That the Claimant was not appointed as a representative for the deceased estate of Edward Khoromana by the family hence she has no legal standing to pursue this case. The defence further states that the 1st Defendant paid a sum of K58, 000, 000 to rescue the house in Mpingwe which was used as collateral by the deceased who obtained a bank loan and this money was never repaid to her. It is also in the defence that Nali Limited pays school fees for the two children that the Claimant had with the deceased and pays a monthly allowance of K300, 000 to the Claimant for the upkeep of the children.

After closure of pleadings, the matter went for mediation before Honorable Justice Mambulasa where mediation was terminated. The matter came before this Court for scheduling conference and date of trial was set. Prior to the date of hearing, the Defendants applied to be removed as a party to the proceedings and to dismiss and/or strike out action for being an abuse of the court process under Order 6 rule 8 of the Courts (High Court) (Civil Procedure) Rules of 2017-CPR. The application is supported by a sworn statement from the 1st Defendant and skeleton arguments. These two documents were duly adopted by Counsel during the hearing of this application.

It was Counsel's submission that the current proceedings are based on the fact that the father of late Edward Khoromana bequeathed properties to the said Edward Khoromana. However, there are no exhibits attached to show that the Defendants are in control of the said properties. Actually, Counsel submitted that the Claimant has not shown the nature of control that the Defendants have over the estate. Counsel went further to bring to the attention of this Court the fact that the judgment of Justice Kenyatta Nyirenda ordered that the properties under the Will of Alford Khoromana should be distributed. This being the case, the Defendants already transferred the said properties to the late Edward Khoromana and the

1st Defendant in equal shares. It is for this reason that late Edward Khoromana never went back to Court that he was deprived of his inheritance. Therefore, there is no evidence that the Defendants are in control of the properties. In terms of the **Triza Seyani (On her own behalf and on behalf of P, a minor) v. Stella Seyani**, being Civil Cause Number 373 of 2016 case, Counsel in that case argued that there was no evidence that the second wife was being deprived of an inheritance. Similarly, in this case, there is no evidence that the Defendants are excluding the Claimant from the estate of late Edward Khoromana. Counsel for the Defendants argued that the property being referred to is rented by NALI limited and they pay monthly rentals to both the Claimant and the Defendants. The Claimant receives her portion and she cannot then change and argue that she is not receiving the rentals and that the Defendants have control over the property.

On the second issue, the Defendants argued that they will have hardship to account on how they have used the estate of the late Edward Khoromana because they are not executors of that estate. They are personal representatives of the family and cannot be directed to provide the reliefs being sought by the Claimant. In other words, the claims and reliefs being sought by the Claimant cannot be enforced against the Defendants. The Defendants have difficulties to add to the list of beneficiaries for the deceased estate of Edward Khoromana because they are not executors and they are not executors de son tort which is also a position with specific laws guiding the conduct of such executors. Since the Defendants are not executors de son tort, then they are praying that they should be removed from the present cause of action

On the second application, the Defendants argue that the Claimant has no locus standi to bring the action. In her statement of claim she avers that she sued as a wife to the late Edward Khoromana. According to Section 17 of the Deceased Estate (Wills, Inheritance and Protection) Act-DEWIPA, beneficiaries are members of the immediate family which is defined in Section 3 of DEWIPA as spouse, children and dependents. The Defendants contend that there was no legally recognized marriage between the deceased and the Claimant. In 2015, the applicable law in terms of marriage was the Marriage Act and in Section 12 marriages contracted outside Malawi are valid. In the present case, the deceased contracted a marriage in the UK with similar status to a statutory marriage in Malawi. According to Section 36 of the Marriage Act any marriage after a statute marriage is invalid. The customary marriage between the deceased and the Claimant was therefore invalid by operation of the law. She is not a wife as per the law and has no letters of administration as required under Section 1 (a) of the Statute Law Miscellaneous Provision Act. Further as per Section 50 of DEWIPA, in terms of the effect of obtaining letters of administration was explained in the case of **Chimange (Suing on his behalf and on behalf of all the**

dependents of Lazarus Chimange (Deceased) vs. Raiply Malawi Limited and General Insurance Company Limited Personal Injury Cause Number 894 of 2020. A closer look at the Claimant's statement of claim shows that he is enforcing the rights of the deceased that he inherited deceased estate of his father and that the Defendants are meddling with that estate. It is their argument that the Claimant was supposed to obtain letters of administration to commence this case. Now that she has no letters of administration, then she cannot proceed with the case and that the case should be dismissed.

The second argument is that the case is *res judicata* because in the judgment of Justice Kenyatta Nyirenda in 2016, the Court already held that although the Will said that there is a Trust to be created, the Trust never existed. In the application, the Claimant seeks that the Defendants should disclose the property under the Trust and this is asking the Court to redetermine the issue. As the Court will notice, the 2nd Defendant who is an Executrix of Alfred Khoromana already distributed the estate. Therefore, it does not make sense to come back to Court and ask that the property which was already distributed be redistributed. Therefore, the Court should hold that this is an act of *res judicata* and dismiss the case on that basis.

In the statement of case, the Claimant is asking the Court to determine if she and her children are entitled to NALI farm limited, NALI lodge, NALI Company and NALI Motels. However, the Will of Alford Khoromana did not bequeath any of these companies to late Edward Khoromana. Therefore, by asking the question to determine what properties were bequeathed to late Edward Khoromana, that question was already determined in the judgment of Nyirenda J. It was the Defendants' humble prayer that the issues raised were already determined and that this Court should not have a second bite. In short, the proceedings here are an abuse of the Court process. Counsel then submitted that all the issues raised here relate to the judgment of Nyirenda J and therefore resuming them now is an abuse of the Court process. As such, the proceedings herein should be struck out for being an abuse of the Court process.

In response, Counsel for the Claimant adopted the sworn statement in opposition to the application and skeleton arguments. He argued that these preliminary issues cannot be handled at this stage because they tilt towards the substantive issues in this matter. The issues raised by the Defendants are relating to private international law and the Court needs to have evidence of this fact in paragraphs 13 and 14 of the sworn statement in support of the present applications. As such, the issues raised by the Defendants should not be raised now. The Court should dismiss the issues with costs.

In his final submissions, Counsel for the Defendants argued that the issues being raised should not be handled at trial but now because they were raised by the Defendants from the very initial stage in their defence. According to Order 1 rule 5 of the CPR, this Court is mandated to actively manage cases and

under paragraph 5 (c)(d) of the CPR, the Court has to decide promptly which issues need to go for determination at trial or which ones can be summarily resolved. Counsel argued that the Court does not need trial in order to determine whether the Defendants are proper parties or not or that the Claimant has no letters of administration or not. The Defendants' position is that this matter does not need to go for trial but that the Court should summarily deal with the preliminary issues raised in this application. The Court can for instance find that the Defendants are not the right parties to the case and the matter will end there. Counsel further submitted that the Claimant has not exhibited any letters of administration which is clear indication that they do not have such documents. On the argument that the case is raising issues of international law, he argued that he does not see the need for evidence as argued by Counsel for the Claimant. He argued that the law is clear that a marriage under the Marriage Act, once one has contracted a marriage under that Act, he or she cannot have another valid marriage under custom. Therefore, they are submitting that this is a proper application for the Court to dismiss the action. It was his firm view that the lack of response from the Claimant to an extent that it is her Counsel who deposed the sworn statement in opposition should be taken into account by this Court when making its determination. He then prayed that the present case should be dismissed.

REASONED ANALYSIS OF THE COURT

The first ground of the application is whether the Defendants are the right parties to the present case. In the present case, the genesis relates to the deceased estate of Alford Khoromana who left a Will and bequeathed properties to his beneficiaries and late Edward Khoromana was also a beneficiary. It is undisputed that late Alford Khoromana was a husband to the 2nd Defendant. In his Will and Codicil, he appointed the 2nd Defendant and Samuel Sinkhani as co-Executors and Trustees of the Will. On 28th May, 1998, the two obtained Probate under Probate Cause Number 138 of 1998. As noted by Justice Nyirenda in the case of **Edward Khoromana and Monica Khoromana (As Executrix of the Will of Late Alford Pekete Khoromana) and Orpa Khoromana** being Civil Cause Number 172 of 2016, the co-executor renounced his appointment in 2011 and the 2nd Defendant became the sole executrix of the estate. In terms of the Trust, the 2nd Defendant was a Trustee until 2010.

Apart from the 1st Defendant herein, the late Alford Khoromana also bequeathed properties through the same Will to the late Edward Khoromana. These are, 50% share in plot Number LE 244-Title Number Limbe East 143; premises known as L9 which are situated at Luchenza Township; shares in Export Company Limited and 22% benefit in a Trust. By virtue of a Court order, the 2nd Defendant distributed the estate of Alford Khoromana. Subsequently, there was a transfer of land for Plot Number LE 244-Title Number Limbe East 143 to the 1st Defendant and late Edward Khoromana. This is confirmed by a Land

Certificate attached to the sworn statement of the 1st Defendant and marked as OKB3 (a) and OKB3(b) respectively.

Order 6 rule 8 of the CPR provides in this manner

'The Court may, on an application by a party, order that a party in a proceeding is no longer a party where

(a) the person's presence is not necessary to enable the Court to make a decision fairly and effectively in the proceeding; or

(b) there is no good and sufficient reason for the person to continue being a party.

I have had time to appreciate why the Defendants do not consider themselves as right parties to the present cause of action. I am at pains to agree with them because the assets being referred to by the Claimant emanate from the deceased estate of late Alford Khoromana whose Executrix is the 2nd Defendant herein. As such, any issues that directly relate to that estate cannot be determined without her involvement. It would therefore be absurd and unreasonable to proceed with the present case without the 2nd Defendant. As for the 1st Defendant, she was bequeathed some properties jointly with the late Edward Khoromana. In other words, she has a pecuniary interest in the property. This means that any determination towards such estate affects her. In my considered view, since she has some interest in such properties, prudence would demand that she should be part and parcel of the proceedings. Actually, her deposition provides very critical and material information which only confirms that fair resolution of issues surrounding the estate of late Edward Khoromana requires the inclusion of then 1st Defendant. Thus far, the Court holds that the Defendants are right parties to the present cause of action.

The second issue is whether or not the Claimant has the necessary *locus standi* to commence these proceedings as a beneficiary of the deceased estate of late Edward Khoromana. The third issue is whether or not the Claimant has a legal capacity to commence these proceedings without Letters of administration. I consider these two issues are interlinked and interrelated hence will endeavour to determine them together. This is a case involving deceased of Edward Khoromana. It is imperative that issues raised by the Defendants should be considered from that angle. To begin with, the Court finds that there is no Will disposing of deceased estate by the late Edward Khoromana. This means that the claim here falls under intestacy. Section 16 of DEWIPA is very relevant in that regard. The said provision states as follows:

'If a person dies without having left a will valid under section 6, there shall be an intestacy in respect of the property to which he or she was entitled at the date of his or her death: Provided

that if the deceased person left a will which does not dispose of all his or her property there shall be an intestacy in respect of the property which is not disposed of by will.'

Now that it is settled that the estate under consideration here is intestate, it is imperative to state that any action towards that estate must comply with the legal requirements. One fundamental legal requirement is that whoever is to officially administer the estate for the beneficiaries must obtain Letters of Administration. This is a formal document issued by a court appointing a person to manage the assets and liabilities of a deceased person. Section 43 of DEWIPA is very instructive at this juncture:

'(1) Where the deceased has died intestate, letters of administration of his or her estate may be granted to any person who, under section 17 or 18, would be entitled to the whole or any part of such deceased's estate. (2) Where more than one person applies for letters of administration, it shall be in the discretion of the court to make a grant to any one or more of them, and in the exercise of its discretion the court shall take into account greater and immediate interests in the deceased's estate in priority to lesser or more remote interests. (3) Where no person as mentioned in subsection (1) applies for letters of administration, letters of administration may be granted to a creditor of the deceased. (4) Where it appears to the court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who under ordinary circumstances would be entitled to a grant of letters of administration, the court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator; and in every such case letters of administration may be limited or not as the court thinks fit.'

In this case, the Claimant who claims an interest in deceased estate of late Edward Khoromana must have first obtained letters of administration before she commenced this case. It is those letters of administration which would empower her to enforce the rights of the beneficiaries because under Section 50 of DEWIPA letters of administration shall entitle the administrator to all rights belonging to the deceased. The Claimant's failure to do obtain letters of administration prior to this action means that she has no legal basis for pursuing the present cause of action against the Defendants.

It would be fair in my view to discuss the issue of obtaining Letters of Administration under DEWIPA. Sections 17 and 18 of DEWIPA provides that the one who can obtain letters of administrations is a member of the immediate family. Section 3 of DEWIPA defines immediate family in relation to a person as that person's spouse and children. Under Section 3 of DEWIPA a "spouse" means a person's husband or wife in relation to a marriage recognized under section 22 (5) of the Constitution. The said Section 22

(5) of the Constitution recognizes marriages at law, custom and marriages by repute or by permanent cohabitation. Despite recognizing these different types of marriage, it is expected that the dictates of each type of marriage must be complied with before such a marriage is recognized at law. A marriage by repute will only exist if so declared by a court.

One striking argument from the Defendants relates to the validity of the union between the Claimant and the late Edward Khoromana. The 1st Defendant deposes that the late Edward Khoromana was married under statute in the UK to Michelle Khoromana. The two did not formally divorce but the late Edward Khoromana went further to contract a marriage with the Claimant under custom. The 1st Defendant attached a Marriage Certificate before the Registrar's office confirming that the two were married on 13th July, 1995. This Court is alive to the fact that Section 12 of the Marriage Act recognizes marriages celebrated in the UK. According to Section 35 of the Marriage Act all marriages celebrated under that Act shall be good and valid in law to all intents and purposes. In this particular case, the supplementary sworn statement shows pictures of a customary marriage ceremony between the Claimant and the late Edward Khoromana. This fact has not been disputed by the parties. What is disputed though is the validity of that customary union in light of the fact that the initial marriage between the late Edward Khoromana and Michelle Khoromana was under statute and is in that regard recognizable under the Marriage Act in Malawi. It is abundantly clear that there is no documentary evidence attached to the sworn statement in opposition to the present application demonstrating that the marriage contracted in the UK was formally dissolved. As such, Section 36 of the Marriage Act comes into play. Under that provision, any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of such marriage, of contracting a valid marriage under any customary law, but save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner apply to marriages so contracted. Premised on the totality of the depositions in this Court, it is only right and proper to hold that the union between the late Edward Khoromana and the Claimant under custom was not valid under the law.

DIRECTIONS:

Considering the circumstances in this case, Section 23 (1) of the Constitution has exercised my mind. It provides that all children, **regardless of the circumstances of their birth**, are entitled to equal treatment before the law, and the best interests and welfare of children shall be a primary consideration in all decisions affecting them. I have observed that there are two children for the late Edward Khoromana who were benefiting in terms of school fees. The Defendants have not disputed that they were children for the late Edward Khoromana. Section 3 of DEWIPA defines a child as a child of the deceased person,

regardless of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother. Section 2 of the Statute Law (Miscellaneous Provisions) Act states as follows:

'(1) In this Part, except where the context otherwise requires— "child" means a son, a daughter, a grandson, a granddaughter, a stepson and a stepdaughter; "parent" means a father, a mother, a grandfather, a grandmother, a stepfather and a stepmother. (2) For the purposes of this section, a person shall be deemed to be the child or parent of the deceased person notwithstanding that he was only related to him illegitimately or in consequence of adoption; and accordingly in deducing any relationship which under this section is included within the meaning of the expression "child" and "parent", any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.

In short, the law recognizes the two children of the late Edward Khoromana. As such, they fall within the definition of immediate family. This being the case, the Court is supposed to ensure that they should not endure any form of hardship simply because of the death of their father. Section 3 of DEWIPA defines hardship in relation to any person means 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 Claimant should undertake all processes to be appointed guardian for the children and that their interests in terms of their education should be protected.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 16th MAY, 2023@7:30AM

HONORABLE (MRS.) JEAN ROSEMARY KAYIRA

JUDGE