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IN THE HIGH COURT OF MALAWI PRINCIPAL REGISTRY

FAMILY AND PROBATE DIVISION

PROBATE CAUSE NUMBER 147 OF 2023

(BEFORE JUSTICE J.R. KAYIRA]

IN THE MATTER OF SECTION 43 OF THE DECEASED ESTATE (WILLS, INHERITANCE AND PROTECTION) ACT (CAP. 10:02) OF THE LAWS OF MALAWI

AND

IN THE MATTER OF THE ESTATE OF DOROTHY MATIMATI KUMKWAWA (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION BY DENNIS EMMANUEL KUMKWAWA AND ULEMU JANET KUMKWAWA MAJUMDER (HUSBAND AND DAUGHTER OF THE DECEASED (APPLICANTS)

CORAM: HONOURABLE JUSTICE JEAN ROSEMARY KAYIRA

Counsel Yusuf Prince James Osman of Counsel for the Applicants

Ms. Patricia Chiphwanya Court Clerk and Official Interpreter

ORDER FOR LIMITED GRANT OF LETTERS OF ADMINISTRATION

Kayira J

INTRODUCTION

On 28th June, 2023, the Applicants duly filed their application for Letters of Administration under Section 43 of the Deceased Estate (Wills, Inheritance and Protection) Act of 2011-DEWIPA. This application was supported by sworn statements of the Applicants under Order 18 rule 2 (1) of the Courts (High Court) (Civil Procedure) Rules of 2017-CPR; Oath of Administrators (Intestacy) under Rule 4 of the Probate Non-Contentious Rules; Administration Bond Under Rule 5 of the Probate Non-Contentious Rules; Estate Duty Affidavit and skeleton arguments. Apart from the depositions of the Applicants, Counsel swore a statement in support of oath of Administrators under Order 18 rule 2 (1) of the CPR. On 14th July, 2023, this Court made observations on a number of issues which required either corrections or rectification. As such, this Court directed that the Applicants rectify and resubmit the application.

On 19th July, 2023, the Court noted that there were no changes in the application and directed that the Applicants should come to Court for examination. On 18th August, 2023, the Court examined the 1st Applicant. He is a former employee of the University of Malawi, Chancellor College since he retired from service. The 1st Applicant was the husband to the deceased and a father to the 2nd Applicant. It was his firm evidence that he is the only one available in Malawi because all his three (3) daughters are resident in the United Kingdom-UK. The 1st Applicant confirmed signing on all the places where the names of the two Applicants appeared in the application except on the estate duty Affidavit. He was emphatic that his lawyer insisted that his daughter must be a co-Administrator as per the legal requirements. It was also his firm evidence that his Lawyer told him to sign on behalf of his daughter since she was unable to do so because that is the right thing to do in the circumstances.

Further, it was the evidence of the 1st Applicant that the money being applied for belonged to his cousin who is resident in the Republic of South Africa. He sent the funds whilst his wife was alive and they managed to withdraw a sum of K3, 500, 000 which they used to purchase a piece of land for him. Out of the money that he had sent, there was a balance of K2, 200, 000.00 which was meant to cater for other transactions. However, before the transactions were completed, his wife died. Due to the delay to access the money, the 1st Applicant failed to use the remaining sum of money for the intended purpose within the set time. As such, he wanted to access the same in order to refund the money to his cousin. The other funds constituting deceased estate was death gratuity since the deceased used to work at the Ministry of Gender. This part has not been processed yet because once funds are payable, they will be sent to the office of the Administrator General who will then do the needful. It is for this purpose that the list of beneficiaries was provided by the officer at Zomba District Council-Estates Department. In terms of the documents in support of the application, the 1st Applicant submitted that he signed the documents at Barnet and James offices and this was before the signature and stamp of the Commissioner of Oaths. He does not know the lawyer who commissioned his deposition.

On 21st August, 2023, this Court examined the Lawyer for the Applicants. He confirmed that the Applicant was seeking Letters of Administration to access money in the bank account of his deceased wife. He admitted advising the 1st Applicant to apply for Letters of Administration together with one of his daughters as required by the law. He also instructed the 1st Applicant to sign against the names of the two Applicants since his daughter was not available in Malawi. His understanding was that the 1st Applicant is signing as a representative of the 2nd Applicant which was fine. Counsel then admitted that he has never seen any Affidavit signed on behalf of the deponent in the jurat.

In terms of the signatures on the Estate Duty Affidavit form, Counsel has no idea who pended them because he only prepared the documents and gave them to a process server within his law firm with an instruction that he has to finalize the same before filing it with the Registrar General for assessment purposes and thereafter for use in Court. In that regard, Counsel recalls that one specific instruction to the process server was for him to take the documents to the Applicants for their signatures. Counsel Osman admits that he never followed up if this happened. It is for this reason that he accepts that the mistakes in the documents were his and that the Court should exercise leniency by disposing of the application justly. He then applied for the Court to invoke Order 2 rule 1 of the CPR and disregard the parts relating to the 2nd Applicant and proceed to grant the Letters of Administration to the 1st Applicant.

Considering that the mistakes in the application were not by the 1st Applicant, I made an order relating to the sum of money in the bank account of the deceased person and reserved my order for detailed analysis on other issues.

REASONED ANALYSIS OF THE COURT

JURISDICTION

This Court is seized of this matter by virtue of Section 6A(d) of the Courts (Amendment) Act of 2022 which establishes the Family and Probate Division whose mandate is to hear any family or probate matter. The definition of a "family matter" is provided in section 2 of the same Act which states that it is "a civil matter which concerns the entry, subsistence and exit from a marriage, and incidental matters thereto". Section 2 also defines a "probate matter" as "a civil matter which concerns succession to or inheritance of property and incidental matters".

Section 3 (1) of the Deceased Estate Wills, Inheritance and Protection Act of 2011-DEWIPA defines a Court as the High Court or a court having jurisdiction as specified under section 20. The said Section 20 (1) provides as follows;

> "Subject to this section, the High Court **shall** have jurisdiction in all matters relating to the probate and the administration of estates of deceased persons, with power to grant probates of wills and letters of administration to the estates of deceased persons and to alter or revoke such grants."

The provision on jurisdiction is clear. The High Court has mandatory jurisdiction to deal with probates and letters of administration of estates of all persons either dying domiciled, or leaving property within the country. It is a fact that jurisdiction for probate or letters of administration has been shared to the lower court (Resident Magistrate and First Grade Magistrate courts) on small estates. This is deceased

estate to the maximum sum of K1, 000, 000.00 (one million kwacha only) under Section 20 (3) of DEWIPA.

> "A court of a resident magistrate or a court of a magistrate of the first grade shall exercise jurisdiction relating to the estate of a deceased person which is a small estate to grant probate and letters of administration in relation thereto."

In the present case, the deceased did not leave any valid Will disposing of her estate. As such, she died intestate. The value of the deceased estate being applied for is beyond K1, 000, 000.00. which means that the application is rightly brought before this Court.

NUMBER OF ADMINISTRATORS

One of the issues reserved by this Court related to the number of Applicants in this case. The 1st Applicant firmly submitted under oath that he had insisted to apply for Letters of Administration without his daughter because he is the only one physically present and available in Malawi since all his three daughters are resident in the United Kingdom. However, Counsel insisted that the application must be made by two people. He then insisted that one of the daughters be added as an Applicant. This has exercised the mind of the Court.

Section 31 of DEWIPA is very relevant at this point and this Court will reproduce it for proper understanding.

> "(1) Probate or letters of administration **shall** not be granted to **more than four persons in respect of the same property**. (2) In the case of a **minority or life interest** under a will or on intestacy, probate or letters of administration **shall, subject to the maximum number specified in subsection (1), be granted to not less than two persons** and a court shall appoint another person to act as a an executor or an administrator in such cases if there is one person acting as such at any time."

From the above provision, it is abundantly clear that the maximum number of Applicants in an application for either probate or letters of administration is four (4). In the event that the beneficiaries include minors or that there is a life interest, then the Court has to ensure that the minimum number of Applicants who are later appointed to officially administer the deceased estate is two (2). The reason for such a threshold is to protect children who are vulnerable and susceptible to abuse and/or arbitrary deprivation.

Apart from the depositions of the Applicants, Counsel swore a statement in support of oath of Administrators under Order 18 rule 2 (1) of the CPR. In paragraph 3, he states that the Applicants are

our clients and I personally interviewed them and I am satisfied that they are entitled and fit to administer the estate of late Dorothy Matimati Kumkwawa who died on 15th September, 2022 at Zomba District Hospital intestate. In paragraph 4 he deposes that the Applicants are the widower and daughter of the deceased and **upon my investigation I did not find any minority interest** equally entitled to the deceased estate of Dorothy Matimati Kumkwawa (emphasis supplied). In exercise of his duties, Counsel was right to determine the basis on which Applicants can pursue the present application. He was also right to establish the ages of the possible beneficiaries in the estate.

In the present case, the deceased did not leave any valid Will disposing of her estate. As such, she died intestate and the applicable laws should be those relating to intestacy. Section 43 (1) of DEWIPA states that where the deceased has died intestate, letters of administration of his or her estate **may be granted to any person** who, under sections 17 or 18, would be entitled to the whole or any part of such deceased's estate. It is striking to note that this provision mentions that letters of administration may be granted to any person. In my considered view, the use of these words does not create a mandatory threshold of two Applicants/administrator for a deceased estate whose beneficiaries are adults. It means that applicants who are beneficiaries by virtue of Sections 17 and 18 of DEWIPA can choose to either apply single-handedly or in conjunction with each other. In other words, a minimum of one Applicant/Administrator is acceptable under the law.

The law is clear that once the application for letters of administration has been duly filed in Court, it is up to the Court to determine if the single Applicant/administrator will serve the interest of justice in administering the deceased estate depending on circumstances. Section 43 (2) of DEWIPA concisely provides for the discretion of the Court as to whether to appoint one or two or more Administrators. It states that 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. Considering the prevailing circumstances in this case, where the immediate family consists the 1st Applicant and his three (3) adult and independent daughters outside of the jurisdiction, it logically follows that there was no need to have two Applicants in this case because the beneficiaries are not minors.

Section 29 (1) of the Legal Education and Legal Practitioner's Act, 2017 requires that a legal practitioner undertakes to uphold the Constitution of the Republic of Malawi, the interest of his client and maintain the integrity of the legal profession. Chapter 10 of the Malawi Law Society Code of Ethics provides an

overall principle that a lawyer has a duty to provide informed, independent and competent advice and to obtain and implement the client's proper instructions. It is clear from the above analysis that Counsel did not ascertain the applicable law to the facts as presented by his client thereby misleading him on the number of Administrators. Thus far, this Court finds that Counsel wrongly advised his client on the number of Applicants in this case.

DEPOSITIONS

The law explicitly indicates those who can make and who can commission a deposition. This is in full consideration of the value and authority that a deposition has. Therefore, the law is deliberate so that it safeguards the authenticity and integrity of both the sworn statement (s) and the court process when used in a proceeding. It is for this reason that Order 18 (2)(6) of the CPR provides in mandatory terms those who can sign sworn statements in this manner;

a. "The sworn statement shall be signed by–

(i) in the case of a claim, a defence or an application–the party or litigation friend; or

(ii) the legal practitioner on behalf of the party or litigation friend; and

(iii) in the case of a witness statement, the maker of the statement."

It is abundantly clear that the one making a deposition must sign owning the contents therein because it is possible that they have to explain the same in Court whenever required. This is why all sworn statements have a statement undertaking that the deposition is true and that if found to be false, then the deponent is likely to suffer consequences of perjury if found to be in the wrong. Rule 4 (1) of Probate Non-Contentious Rules is also very instructive on this point. It provides that every application for a grant shall be supported by an oath in the form applicable to the circumstances of the case which shall be contained in an affidavit sworn by the applicant and by such other papers as these Rules or the Judge may require. This rule is self-explanatory and there is no need to make further analysis by the Court.

It is noted from the record that apart from Counsel insisting on two Applicants, he then instructed the 1st Applicant to sign against the name of his daughter. When asked Counsel admitted these and in his understanding, the 1st Applicant was signing as a representative of the 2nd Applicant. It is for this reason that on both occasions the sworn statements filed in this Court in support of the application for letters of administration were signed by the 1st Applicant for both Applicants. When asked why he made such an instruction, Counsel was of the view that signing PP and his signature was not wrong as happens in letters. The signatures on the Estate Duty Affidavit were disowned by the Applicants and Counsel could

not satisfactorily explain as to who signed for the deposition at the Commissioner of Estate Duty in order for the assessment of the deceased estate to be done.

A simple and cardinal principle is that a lawyer must be guided by the law. Counsel was at pains to cite the law which allows for a person to sign a deposition on behalf of another person in their absence. The signatures on the Estate Duty Affidavit were disowned by the Applicants and Counsel could not satisfactorily explain as to who signed for the deposition at the Commissioner of Estate Duty in order for the assessment of the deceased estate to be done. His submission was that a process server was instructed and he never followed what happened. Rule 17.3 of the Malawi Law Society Code of Ethics states that a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. In my considered view, having issued the instruction to a non-lawyer in this case a process server, Counsel was obliged to follow up as to whether the instructions were properly executed. The failure to do so is what leads us to having two different signatures whose owners are not known yet the documents on which the signatures were pended have a bearing on a judicial proceeding.

Section 2 (1) (a) of the Oaths, Affirmations and Declarations Act states that Oaths and affirmations **shall** be made for the purposes of judicial proceedings by all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties' authority to examine such persons or receive evidence. In this case, the two Applicants are beneficiaries of the deceased estate for late Dorothy Matimati Kumkwawa by virtue of being the immediate family. They were therefore supposed to make depositions which should support their applications in this Court of law.

In this case, the estate duty affidavit is the basis under which assessment of estate duty is assessed. This is why the deponent has to provide full account of the deceased estate. Similarly, sworn statements in court proceedings have serious effects hence the legal requirements in terms of how they must be done. There is no such option as signing as a representative of the other applicant in the law. This means that Counsel misled the Applicant and this has effects in terms of credibility of the application.

Having noted the above mistakes which in my view are serious, this Court was compelled to appreciate the time that Counsel has practiced. It is clear that Counsel Yusuf was admitted to the Bar on 16th November, 2022 while the application was filed in this Court on 28th June, 2023. One thing is clear, he is in his formative period as Counsel and needs honest and precise supervision from senior Counsel.

Counsel Wesley Ishmael who commissioned the sworn statements in the absence of the deponents thereby misleading the Court on the authors of the same was admitted to the Bar on 22nd July, 2022. He has practiced for a year. He also needs supervision in terms of how he is practicing the law.

The legal profession is a noble profession and its nobility and pride rest on professional discharge of duties by Legal Practitioners. Professional performance is attained through both practice and supervision. It is therefore important that Counsel should be intentional at training, monitoring and evaluating the performance of newly admitted Counsel until when they are satisfied that they are able to stand on their own feet. Surely, that cannot be said to have been done within a period of seven (7) months.

I bear in mind the duties of a supervisor in a law firm as per Chapter 17 of the Malawi Law Society Code of Ethics. Of relevance is rule 2 which demands that a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In this case, it is clear that Counsel for the Applicants was not supervised as required by the Code of Ethics because these mistakes could have been detected and corrected before filing the application. It is for this reason that this Court firmly reminds the Malawi Law Society to make efforts that guarantee quality assurance to clients by junior Counsel. This is only attainable if such junior Counsel is properly assisted in order not to make avoidable mistakes in Court because cases are serious business and they must be handled as such.

It is so ordered.

PRONOUNCED IN CHAMBERS ON 25th AUGUST, 2023@ 8AM

HONORABLE (MRS.) JEAN ROSEMARY KAYIRA

JUDGE